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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-92-19

ATOMIC SAFETY AND LICENSING BOARD '92 AUG -6 AM 1:38

Before Administrative Judges:

Marshall E. Miller, Chairman
Charles Bechhoefer
G. Paul Bollwerk, III

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

SERVED AUG - 6 1992

In the Matter of

OHIO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1, Facility Operating
License No. NPF-58)

THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY
THE TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1, Facility Operating
License No. NPF-58)
(Davis-Besse Nuclear Power
Station, Unit 1, Facility
Operating License No. NPF-3)

Docket Nos. 50-440-A
50-346-A

(Suspension of
Antitrust Conditions)

ASLBP No. 91-644-01-A

August 6, 1992

MEMORANDUM AND ORDER
(Granting City of Brook Park
Motion for Late Intervention)

For the second time in this proceeding involving the requested suspension of the antitrust conditions in the operating licenses for the Perry Nuclear Power Plant, Unit 1, and the Davis-Besse Nuclear Power Station, Unit 1, we have before us a petition from the City of Brook Park, Ohio (Brook Park), asking permission to intervene out of time. We denied Brook Park's previous request principally for its failure to demonstrate an "injury in fact" sufficient to establish its standing to intervene. See LBP-91-38, 34 NRC

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229, 251-52 (1991). Brook Park now claims it has cured the standing deficiency identified by the Board and, based on a balancing of the five factors governing late intervention set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), should be afforded party status. We agree on both counts and, accordingly, grant Brook Park's petition.

I.

In a May 1, 1991 Federal Register notice, the NRC staff declared that any interested person desiring a hearing on its denial of the requests of applicants Ohio Edison Company (OE), Cleveland Electric Illuminating Company (CEI), and Toledo Edison Company (TE) for suspension of the antitrust conditions in the Perry and Davis-Besse licenses must file a petition by May 31, 1991. See 56 Fed. Reg. 20,057 (1991). On August 8, 1991, Brook Park filed a petition to intervene out of time. Both the applicants and the staff opposed Brook Park's petition as insufficient to establish its standing and as failing to meet the section 2.714(a) standards governing late intervention.

In our October 7, 1991 prehearing conference order, we recognized Brook Park's assertion that it wished to participate in this proceeding to protect its interest in interconnection access, wholesale power sale, and wheeling services not available under the antitrust conditions in the

Perry license. We also noted Brook Park's admission that, despite various feasibility studies, it had not yet reached a decision to institute a municipal electrical system. Referring to counsel's statement during the prehearing conference that the citizens of Brook Park would vote in the near future on amending the city charter to establish a municipal electrical system, we declared:

If they do so, Brook Park's stake in this proceeding then will cease to be provisional and it will become subject to the same concrete injury in fact that could accrue to [intervenor City of] Cleveland or [American Municipal Power-Ohio, Inc.] as a result of a determination in this proceeding in favor of licensees. At present, however, the abstract, hypothetical nature of the injury to Brook Park is insufficient to establish its standing to intervene in this proceeding.

LBP-91-38, 34 NRC at 252 (footnote omitted). This, we concluded, was dispositive of its intervention request.¹

Thereafter, the parties to this proceeding submitted summary disposition motions addressing what has been

¹ In addition, we observed that Brook Park's request was lacking under a balancing of the five late intervention factors specified in section 2.714(a)(1). We made particular note of its failure to make a showing about the legal or technical experience it might bring to the proceeding, thereby demonstrating its compliance with late intervention factor three -- the extent to which its participation will assist in developing a sound record. See LBP-91-38, 34 NRC at 252. Moreover, citing the reasons already expressed for denying its request for intervention as of right, we concluded that discretionary intervention was not appropriate for Brook Park. See *id.* at 252 n.73.

identified as the "bedrock legal" issue,² a process that culminated in a June 10, 1992 oral argument on the pending motions. At the conclusion of that argument, counsel for Brook Park came forward and advised the Board that the city had recently enacted an ordinance establishing a municipal electrical system; as a consequence, Brook Park again intended to seek late intervention. See Tr. 446-47. Subsequently, on June 15, 1992, Brook Park filed an "amended" late intervention petition in which it seeks either "of right" or discretionary intervention. See Amended Petition of [Brook Park] for Leave to Intervene Out of Time (June 15, 1992) [hereinafter Brook Park Amended

² As framed by the parties in a November 7, 1991 letter to the Board, the "bedrock" legal issue is as follows:

Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain the antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared.

That issue, along with the question of whether the doctrines of res judicata, collateral estoppel, laches, or law of the case bar the applicants' antitrust license condition suspension requests, is currently under consideration by the Board. If we decide, as the applicants' assert, that the Commission has no authority in such an instance, then the Board would proceed in a second phase of the proceeding to consider, among other things, the question of exactly what are the actual costs of electricity for the applicants' facilities and alternative sources.

Petition]. In their joint response, the applicants oppose any grant of party status to Brook Park. See Applicants' Answer in Opposition to the Amended Petition of [Brook Park] for Leave to Intervene Out of Time (June 30, 1992) [hereinafter Applicants' Answer]. In contrast, the staff has declared that it does not contest the grant of Brook Park's most recent petition.³ See NRC Staff's Answer to Amended Petition of [Brook Park] for Leave to Intervene Out of Time (July 6, 1992) [hereinafter Staff's Answer].

II.

A. We begin our review of Brook Park's renewed intervention request with the issue that played a cardinal role in derailing its initial attempt to become a party -- its standing to intervene in this proceeding in accordance with 10 C.F.R. § 2.714(d). In its most recent intervention petition, Brook Park states that, in accordance with section XVIII of the Ohio Constitution, it has now decided to establish and operate a municipal electrical system, which will be in the service area of applicant CEI. See Brook Park Amended Petition at 8-9. According to Brook Park, on November 7, 1991, local citizens by a more than three-to-one margin approved a ballot referendum permitting the city

³ None of the other intervening parties has taken any position regarding the propriety of Brook Park's request.

to establish a municipal electrical system. Thereafter, following additional review and analysis of the means necessary to establish such a system, on April 21, 1992, Brook Park's City Council unanimously passed Ordinance No. 7711-1992 establishing a municipal utility in accordance with requirements of the Ohio Constitution, Art. XVIII, §§ 4-5. Brook Park also states that, in accordance with section 5 of Article XVIII, this ordinance did not become effective until May 22, 1992.

In our prehearing order, we suggested that action by Brook Park authorizing establishment of a municipal power system would make its interest sufficiently tangible to fulfill the requisite "injury in fact" element of the well-recognized judicial test for standing that governs NRC adjudicatory proceedings. See LBP-91-38, 34 NRC at 249 & n.60. The staff agrees with this assessment. See Staff's Answer at 5. The applicants, however, intimate that our observation was premature. They maintain that the favorable citizen action on the referendum, followed by the passage of the ordinance, does not make Brook Park's interest sufficiently concrete for standing purposes because Brook Park has not shown it has taken any steps, such as arranging financing, that will result in the actual development of a municipal electrical system. See Applicants' Answer at 4 n.8.

The terms of the ordinance passed by the Brook Park City Council to implement the citizen referendum belie this objection. That enactment, entitled "An Ordinance Declaring It Necessary to Establish, Acquire, and Operate a Municipal Electric System," states in its preamble that based upon the prior feasibility studies, the city council determined "it is in the public interest to establish a municipal electric utility owned and operated by" Brook Park. Brook Park Amended Petition, exh. A at 1 (Brook Park, Oh., Ordinance No. 7711-1992, preamble (Apr. 21, 1992)). Thereafter, in section 1 the legislation ordains that Brook Park "shall proceed to acquire, construct, own, lease, and operate . . . a public electric utility" Id. (Brook Park, Oh., Ordinance No. 7711-1992, § 1). Further, under the ordinance the Mayor of Brook Park is "authorized and directed" to perform the "activities necessary" to implement section 1, including developing plans for the establishment, operation, and maintenance of a municipal power system. Id. at 1-2 (Brook Park, Oh., Ordinance No. 7711-1992, § 3). In addition, the ordinance states that "funding for acquisition, construction and improvement" the power system "shall be obtained" by issuing, to the maximum extent possible, "self-supporting obligations" of the city and that, prior to issuance of such obligations, city "moneys in its general fund or other available funds" may be used to

"pay any costs of acquiring, constructing, equipping and operating" the municipal power system. Id. at 2 (Brook Park, Oh., Ordinance No. 7711-1992, §§ 4-5).

There undoubtedly is much to be done before Brook Park has a fully operational municipal electrical system. Nonetheless, in light of the ordinance, it is reasonable to conclude that Brook Park has made a firm commitment to develop a municipal electrical system. The applicants' suggestions to the contrary notwithstanding, the ordinance makes provisions for all elements essential to carrying out the construction, operation, and maintenance of that system. We thus have no difficulty concluding that Brook Park's interest in this proceeding as a customer and competitor of applicant CEI now is sufficiently tangible to afford it standing. Additionally, while the electrical system presently is in an incipient stage, Brook Park has indicated it ultimately may wish to invoke the protections afforded by the existing antitrust conditions in the Perry and Davis-Besse licenses imposed pursuant to section 105 of the Atomic Energy Act (AEA), 42 U.S.C. § 2135. This makes its expressed interest in preserving those provisions one that falls within the "zone of interests" created by AEA section 105. Accordingly, with its municipal electrical system program now firmly in place, Brook Park is able to fulfill

both prongs of the recognized judicial standard and establish its standing to intervene in this proceeding.

B. Of course, at this point in the proceeding, having standing is not enough to gain party status for Brook Park. As Brook Park recognizes, because its request comes after the deadline for filing intervention petitions, it must establish its right to intervene under a balancing of the additional factors set forth in section 2.714(a)(1) to govern late-filed intervention. We review those factors seriatim.

1. Good Cause for Late Filing. To establish its case for late intervention under the first factor -- whether good cause exists for the petitioner's failure to file on time -- Brook Park argues that good cause for its failure to file within the time specified in the May 1992 notice of opportunity for hearing lies in its lack of standing to attain party status, a deficiency that was only recently rectified. See Brook Park Amended Petition at 13-14. The staff disagrees. Referencing the Appeal Board's observation in Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979), that "[i]f newly acquired standing (or organizational existence) were sufficient of itself to justify permitting belated intervention, the necessary consequence would be that parties to the proceeding would never be determined with

certainty until the final curtain fell," the staff declares that the recent creation of Brook Park's electrical system may not be "good cause" for its failure to file on time. See Staff's Answer at 5-6. (Ultimately, however, the staff finds this not critical by concluding that a balancing of the other four factors supports intervention.) The applicants likewise assert that Brook Park lacks "good cause" for filing late, although for a different reason. They contend that Brook Park relinquished any "good cause" argument by waiting two months after the adoption of Ordinance No. 7711-1992 before filing its intervention petition. See Applicants' Answer at 4-6.

As we observed in our prehearing conference order, this first factor is important because, in the absence of "good cause" there generally must be a compelling showing regarding the other four factors. See LBP-91-38, 34 NRC at 246 & n.53. Nonetheless, in the circumstances here, any lack of "good cause" for the late filing adds only marginally to the showing that must be made under the other four factors.

Bearing in mind the Appeal Board's observation about the general unsuitability of "newly acquired" standing as a basis for "good cause," we nonetheless find that admonition is tempered here by the fact that the occurrence that created Brook Park's standing, i.e., the citizen referendum

and the passage of the ordinance, had no direct relationship to the prosecution of this proceeding by Brook Park. This is not, for instance, a case in which the petitioner seeks to justify its untimeliness based on its inability to finish chartering the organization created solely to serve as the vehicle for intervention. See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), LBP-74-63, 8 AEC 330, 331-32, 335-36, aff'd, ALAB-238, 8 AEC 656 (1974). Rather, the city's legislative authorization of a municipal electrical system is an act of independent utility that, only consequentially, has the effect of affording it standing in this proceeding. Thus, even if staff is correct that Brook Park's justification for its delay is insufficient to establish "good cause," its excuse is not so unmeritorious as to permit intervention only upon a substantially enhanced showing on the other late intervention factors.

The same is true regarding the applicants' complaint about the length of the delay between the April 21, 1992 passage of the Brook Park ordinance and the June 15, 1992 filing of its petition. Assuming arguendo that this is actually the period of delay,⁴ as the Appeal Board has

⁴ The Ohio Constitution, Art. XVIII, § 5, provides a 30-day period within which local citizens can seek a referendum on an ordinance creating a municipal public utility, thereby staying its effectiveness. See Brook Park Amended Petition, exh. A at 3 (Brook Park, Oh., Ordinance No. 7711-1992, § 9). Brook Park indicates that with this

(continued...)

previously observed, the significance to be placed on the amount of a delay "will generally hinge upon the posture of the proceeding at the time the petition surfaces." See Washington Public Power Supply Sys. (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983). Here, as the applicants themselves point out, see Applicants' Answer at 5-6, if Brook Park had sought to intervene in April shortly after passage of the ordinance, it would be too late to participate in the existing parties' briefing of the "bedrock" legal issue without impeding the established schedule. Further, as we describe in more detail in section II.B.5. infra, in acknowledging that it must take this proceeding as it finds it at the time it files its petition -- with the "bedrock" legal issue fully briefed, argued, and submitted for determination -- Brook Park eviscerates any negative impact that otherwise might arise from the claimed two-month delay about which the applicants object. Thus, this delay also is insufficient (either alone or in conjunction with the standing justification discussed supra) to warrant any enhancement in the showing Brook Park must make on the other four late intervention factors.

⁴(...continued)

provision, it felt its interest was not sufficiently concrete to warrant moving ahead with intervention until May 22, 1992, the date Ordinance No. 7711-1992 actually became effective. See id. at 13-14. This position is not unreasonable and, if accepted, would reduce the period of delay to a little more than three weeks.

2. Availability of Other Means to Protect

Petitioner's Interests. The staff notes that the second late intervention factor -- the availability of other means to protect petitioner's interests -- is not addressed in Brook Park's petition. Nonetheless, citing the burdensome nature of undertaking a civil action under the antitrust laws, the staff concludes that the second factor supports Brook Park's intervention. See Staff's Answer at 7.

Although asserting that Brook Park fails to fulfill this late intervention factor, see Applicants' Answer at 7 & n.14, the applicants make no specific argument as to why factor two does not support intervention, see id. at 7-10.

Analyzing the impact of this factor on the late intervention request of American Municipal Power-Ohio, Inc. (AMP-Ohio), in our prehearing conference order we found "the distinctive nature of the Commission's authority to consider and address the validity of the antitrust conditions it imposed leads us to agree with AMP-Ohio that no other forum or means now available can provide equivalent protection for its interest in seeing that the existing license conditions are maintained." LBP-91-38, 34 NRC at 247. The applicants provide no justification for a contrary result here. Consequently, we conclude that factor two supports Brook Park's late intervention.

3. Petitioner's Assistance in Developing a Sound Record. In addressing the third factor -- the extent to which petitioner's participation in the proceeding will assist in developing a sound record -- Brook Park provides an extensive exposition of its counsels' expertise and experience in the creation and development of municipal electrical systems, in the staff's administrative review process on the applicants' license condition suspension requests while representing the City of Clyde, Ohio, and in the application of antitrust principles to the utility industry through representation of various intervenors in Federal Energy Regulatory Commission proceedings. See Brook Park Amended Petition at 18-20. This, it asserts, establishes that Brook Park is in a sound position to make a contribution to the record of this proceeding.

For their part, the applicants contend that Brook Park's ability to contribute to the record of this proceeding is negligible. According to the applicants, the type of knowledge and expertise attributed to Brook Park's counsel is irrelevant because neither Brook Park nor its counsel purport to have any knowledge about the antitrust provisions of the Atomic Energy Act, the focal point of the first portion of this proceeding, nor do they demonstrate any knowledge about the relative cost of nuclear power generation at the applicants' facilities, the central

subject of the proceeding's second phase. See supra note 2. The applicants also declare irrelevant Brook Park's professed interest in maintaining the existing antitrust conditions because this likewise has nothing to do with the issues in this proceeding. See Applicants' Answer at 10-13.

The staff also maintains that Brook Park's showing on this factor is wanting, asserting that its discussion of counsel's legal ability -- as opposed to Brook Park's ability to contribute sound evidence -- is irrelevant. See Staff's Answer at 6 & n.6 (citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 513 n.14 (1982)). The staff nevertheless concludes that this element supports intervention because of Brook Park's apparent ability, as an entirely new market entrant, to provide firsthand evidence concerning the difficulties in overcoming barriers to entry and the advantages that will be lost by suspension of the license conditions.

Accepting arguendo the applicants' assertion that the focus of the second portion of this proceeding will be the relative costs of nuclear power as compared to other alternative sources, at this juncture we have little difficulty in concluding that Brook Park can assist in developing a sound record. As Brook Park declares, it "is

an emerging municipal system, engaged in the process of exploring and acquiring power supply" Brook Park Amended Petition at 17. Further, as its petition makes clear, Brook Park already has done studies intended to demonstrate the feasibility and prudence of establishing a municipal electrical system, which undoubtedly included consideration of the relative costs of different electrical supply sources. Moreover, as it moves forward to obtain a power supply for the electrical distribution system it has decided to create, the relative costs of different sources no doubt are important to Brook Park, thereby mandating that it will have on hand, and can provide, useful comparative information. And, to the degree that any second phase to this proceeding involves the issue of barriers to market entry, and whether there has been attenuation of those barriers sufficient to suspend the Perry and Davis-Besse antitrust conditions, the staff is correct that as a new market entrant Brook Park is in a unique position to provide evidence relative to that question. We conclude, therefore, that factor three weighs in favor of permitting the late intervention of Brook Park.

4. Representation of Petitioner's Interests by Existing Parties. Brook Park contends with respect to the fourth factor -- the extent to which petitioner's interests will be represented by existing parties -- that no other

party now represents its interests. Its status as a nascent municipal electrical system is, according to Brook Park, a pivotal factor differentiating its interests from those now represented by the other intervening utilities.

This is especially so, Brook Park asserts, for the City of Cleveland, Ohio (Cleveland), because, as a large and well-established utility, it does not face the same competitive challenges as Brook Park. Brook Park also maintains that Cleveland is at least a potential competitor for the supply of a portion of Brook Park's power and energy requirements. See Brook Park Amended Petition at 17.

Concerning intervenor AMP-Ohio, which represents numerous Ohio municipal electric companies in acting as a wholesale power supplier, Brook Park notes that it is not an AMP-Ohio member. In addition, Brook Park contends that its interests are not represented by AMP-Ohio because as a wholesale power supplier, AMP-Ohio does not compete in the retail electric market with any applicant, as will Brook Park. See id. at 16-17.

Brook Park also declares inapposite the interests of Alabama Electric Cooperative (AEC), which we admitted to this proceeding as a discretionary intervenor. See LBP-91-38, 34 NRC at 248-51. According to Brook Park, AEC is not a competitor in the relevant product and geographic markets previously established in the Commission's antitrust

proceeding relative to the Perry and Davis-Besse facilities. See Brook Park Amended Petition at 17-18.

Finally, Brook Park declares that its interests as a particular beneficiary of the existing antitrust provisions clearly are different from those represented by the staff and the Department of Justice in carrying out their broad, public interest responsibilities. See id. at 18. Compare LBP-91-38, 34 NRC at 253.

The applicants vigorously challenge Brook Park's analysis of its interests vis-a-vis those of the other parties to this proceeding. See Applicants' Answer at 7-10. They contend that the status of Cleveland as a "potential competitor" is irrelevant because it does nothing to differentiate Cleveland from Brook Park relative to the prosecution, in either phase one or phase two of this proceeding, of their identical, central position that the existing Perry and Davis-Besse antitrust conditions should be retained. Indeed, the applicants assert that the staff and the other intervening parties to the proceeding all champion this same central position and Brook Park has failed to show how its legal or factual positions diverge from theirs. The staff, on the other hand, maintains that Brook Park has shown it will not occupy the same distribution level as AMP-Ohio, and may be a customer of AMP-Ohio and Cleveland, thereby establishing a basis for

concluding that its interests may not be adequately represented by the existing parties. See Staff's Answer at 6-7.

As it seeks to equate the duplication of substantive issues with a similarity of participants' interests, the applicants' challenge is misdirected. See Duke Power Company (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 (1979). Rather, the question is, given the matters at issue, will the existing parties effectively represent Brook Park's interests relative to those matters.

In this instance, even when addressing the same matters as existing intervenors, Brook Park's singular status as an emerging municipal power system, in conjunction with its position as a possible customer or competitor of AMP-Ohio and Cleveland, translates into a difference in perspective, and approach, relative to those matters.⁵ Moreover, because Brook Park must take this proceeding as it finds it, see section II.B.5 infra, the problem suggested by the

⁵ Although the applicants imply that Brook Park's interests can be adequately represented by existing parties because the city's witnesses would be available to those parties, see Applicants' Answer at 7 n.16, it has previously been recognized that such an argument fails to afford proper recognition to the value of the participational rights enjoyed by parties, including conducting cross-examination. See Duke Power Co., ALAB-528, 9 NRC at 150 & n.7.

applicants, i.e., numerous intervenors addressing the same matters, really exists only for phase two of this proceeding and may invite the cure of party consolidation, a remedy we can take up if and when we reach that point. At present, however, that concern does not merit assigning factor four a negative weight in the late-intervention balance.

5. Petitioner's Participation As Broadening or Delaying the Proceeding. As has often been noted, late-comers to this agency's adjudicatory process generally must take the proceeding as they find it. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). Nonetheless, the addition of a late-comer brings the possibility that its participation will broaden the issues or otherwise slow the proceeding. This prospect is assessed in the fifth late-filed factor, which quite properly has been denominated as "of immense importance in the overall balancing process." Id.

Brook Park contends that its participation will have no appreciable impact on this proceeding's completion. Declaring that it accepts the proceeding as it finds it, with regard to the first phase on the "bedrock" legal issue Brook Park asks only that, to preserve any appellate rights, it be permitted to file a formal statement specifying those portions of the arguments already advanced by the existing parties that it wishes to adopt. Brook Park further

declares that if it becomes necessary to advance to phase two, its evidentiary presentation will not involve more than two or three witnesses. See Brook Park Amended Petition at 21-22. The applicants counter by asserting that Brook Park's proposed phase one submittal is either worthless, as a mere repetition of the other parties' positions, or will involve the formulation of new arguments that, by requiring time for responses, will delay the resolution of the pending summary disposition motion and, therefore, the proceeding. Further, given Brook Park's expressed intent to demonstrate how the removal of the existing antitrust conditions would harm its competitive position, the applicants characterize Brook Park's participation in phase two as either irrelevant to the appropriate subject matter or as broadening the scope of phase two extraordinarily. See Applicants' Answer at 13-14. The staff concludes that Brook Park's willingness to accept the existing briefing schedules means that this factor weighs in favor of late intervention. See Staff's Answer at 7.

To accept the applicants' argument regarding delay arising from Brook Park's participation in phase one would, as a practical matter, stand this factor on its head. We perceive no basis for penalizing Brook Park for structuring its participation in such a way as essentially to eliminate any delay in the resolution of the pending motions. As for

the applicants' concerns about phase two, we are unable to accept its characterization of the burden imposed by Brook Park's participation because, pending the resolution of the "bedrock" legal issue, the final parameters of the issues to be litigated during that hearing have not yet been specified. This significant factor, therefore, supports late intervention by Brook Park.

6. Conclusion. As we have outlined above, even assuming that Brook Park did not have "good cause" for its late-filed petition, in this instance there is no reason for that factor to take on any particular weight relative to the other four factors. As to the other four, each one, including the important "delay" factor, supports permitting late intervention by petitioner. As a consequence, we conclude that the balance of the section 2.714(a)(1) late intervention factors (in conjunction with its showing regarding its standing to intervene) now supports Brook Park's admission as a party.

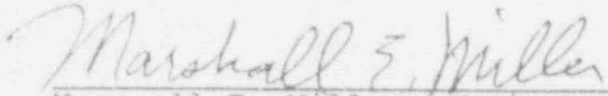
For the foregoing reasons, it is this sixth day of August 1992 ORDERED that:


1. The June 15, 1992 amended late-filed intervention petition of Brook Park is granted and it is admitted as a party to this proceeding.

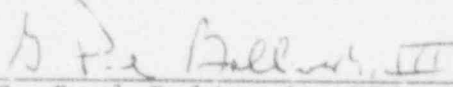
2. On or before Monday, August 17, 1992, Brook Park may file a pleading indicating, by reference to the particular pages, the specific portions of the summary disposition filings of the existing parties it agrees with and wishes to adopt. This pleading is not to include any additional analysis or argument by Brook Park. No responses to this pleading will be entertained.

3. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules upon an intervention petition, this order may be appealed to the Commission within ten days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD


Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE


Charles Bechhoefer
ADMINISTRATIVE JUDGE


G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland

August 6, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

OHIO EDISON CO., CLEVELAND ELECTRIC
ILLUMINATING CO. & TOLEDO EDISON CO
(Perry Nuclear Power Plant and
Davis-Besse Nuclear Power Station)

Docket No.(s) 50-440/346-A

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-92-19) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-440/346-A
LB MEMO & ORDER (LBP-92-19)

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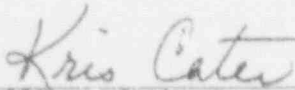
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Dated at Rockville, Md. this
6 day of August 1992


Office of the Secretary of the Commission