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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

SERVED AUG 12 1992

In the matter of	
OHIO EDISON COMPANY	
(Perry Nuclear Power Plant, Unit 1)	Docket Nos. 50-440-A 50-346-A
CLEVELAND ELECTRIC ILLUMINATING COMPANY and	
TOLEDO EDISON COMPANY	
(Perry Nuclear Power Plant, Unit 1; Davis-Besse Nuclear Power Station, Unit 1)	(Applications to Suspend Antitrust Conditions)

MEMORANDUM AND ORDER

CLI-92-11

I. INTRODUCTION

The Atomic Safety and Licensing Board (Licensing Board) granted hearing petitions of Ohio Edison Company, Cleveland Electric Illuminating Company, and Toledo Edison Company (applicants) in a Prehearing Conference Order dated October 7, 1991. LBP-91-38, 34 NRC 229. The City of Cleveland (Cleveland), an intervenor in the instant dockets, appealed this order on the grounds that this proceeding lacks a legal basis. Cleveland also

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of denial of the applicants' amendment requests. After receiving the requests for a hearing, petitions for intervention and Cleveland's opposition to a hearing, the Secretary referred the requests and petitions to the Licensing Board for appropriate action.[1]

The Licensing Board ruled on the requests for hearing and petitions for intervention and other threshold procedural matters in its Prehearing Conference Order, LBP-91-38. Pursuant to 10 C.F.R. § 2.714a, Cleveland filed an appeal of LBP-91-38. The applicants and staff opposed the appeal. Additionally, on December 19, 1991, Cleveland filed a motion, opposed by staff and applicants, for Commission referral of the hearing petitions to the Licensing Board. Commission adoption of NRC staff's [illegible] denying the applicants' amendment [illegible]

III. THE LICENSING [illegible]

In determining whether to grant [illegible] requests, the Licensing Board addressed objections to entertaining such a [illegible] were not "person[s] whose interest may be affected by this proceeding such that they are entitled to a hearing pursuant to [illegible] of the Atomic Energy Act (AEA),[2] 2) [illegible]

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[1] See Memorandum from S. J. Ch[illegible] Cotter, Jr., Chief Administrative [illegible] Licensing Board Panel (June 7, 199[illegible]

[2] 42 U.S.C. § 2239(a)(1) (198[illegible]

[illegible] secretary [illegible] notice

sought revocation of the Commission's referral of the hearing requests to the Licensing Board. For the reasons stated below, we deny Cleveland's appeal and deny the motion to revoke the referral.

The effect of our order is simply to allow the Board and parties to proceed to resolve the question of whether applicants were properly denied suspension of antitrust conditions attached to their licenses. However, as we explain below, the basis for our decision involves intricate considerations relating to our regulatory authority.

II. BACKGROUND

This matter began when Ohio Edison Company filed an application in September 1987 for an amendment to suspend the antitrust conditions in the operating license for the Perry Nuclear Power Plant. In May 1988, Toledo Edison Company and Cleveland Electric Illuminating Company filed a joint application also requesting relief from the Perry antitrust conditions and additionally seeking suspension of the antitrust conditions in the Davis-Besse nuclear plant licenses. After considering public comments and advice from the Department of Justice's Antitrust Division, the Nuclear Regulatory Commission (NRC) staff in April 1991 denied the applicants' requests. 56 Fed. Reg. 20,057 (May 1, 1991). The applicants petitioned for a hearing on the staff's denial of the requested amendment. The applicants' hearing petitions were filed with the Office of the Secretary (Secretary) of the Commis . in accordance with staff's notice

of denial of the applicants' amendment requests. After receiving the requests for a hearing, petitions for intervention and Cleveland's opposition to a hearing, the Secretary referred the requests and petitions to the Licensing Board for appropriate action.[1]

The Licensing Board ruled on the requests for hearing and petitions for intervention and other threshold procedural matters in its Prehearing Conference Order, LBP-91-38. Pursuant to 10 C.F.R. § 2.714a, Cleveland filed its appeal of LBP-91-38. The applicants and staff opposed the appeal. Additionally, on December 19, 1991, Cleveland filed a motion, also opposed by staff and applicants, for Commission revocation of the referral of the hearing petitions to the Licensing Board and also for Commission adoption of NRC staff's April 24, 1991 decision denying the applicants' amendment requests.

III. THE LICENSING BOARD'S DECISION

In determining whether to grant the applicants' hearing requests, the Licensing Board addressed Cleveland's four main objections to entertaining such a hearing: 1) the applicants were not "person[s] whose interest may be affected" by this proceeding such that they are entitled to a hearing under section 189a(1) of the Atomic Energy Act (AEA);[2] 2) section 189a(1) does not

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[1] See Memorandum from S. J. Chilk, Secretary, to B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel (June 7, 1991).

[2] 42 U.S.C. § 2239(a)(1) (1988).

enumerate the subject matter of this proceeding as being subject to a hearing, i.e., the denial of a request for suspension of antitrust conditions; 3) applicants have already had their hearing before staff; and 4) the Commission lacks the authority to grant the relief requested.[3]

In LBP-91-38, the Licensing Board easily dismissed Cleveland's first three arguments. The Licensing Board concluded that applicants are considered "persons" within the meaning of the AEA and that their "interests" are affected by the outcome of this proceeding because it is their amendment request which was denied.[4] Although the Licensing Board conceded that a "suspension" is not typically considered an amendment, the Licensing Board nevertheless concluded that the word suspension is used in the instant applications to characterize applicants' request to have the antitrust conditions nullified, and as such is "by any reasonable interpretation" a request for an "amendment" of the existing operating licenses.[5] Furthermore, the Licensing Board found staff's review was not an adjudicatory determination regarding the merits of the application to which applicants are entitled under section 189a. Although an administrative denial by staff regarding a amendment application may be dispositive, the statute requires a hearing if the applicants request one.

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[3] LBP-91-38, 34 NRC 229, 237 (1991).

[4] Id. at 238.

[5] Id. at 238-239.

The Licensing Board found more problemati Cleveland's fourth argument regarding whether the Commission has the authority to suspend antitrust conditions after the issuance of the operating license. Recognizing the Commission's limited antitrust jurisdiction under section 105 of the AEA,[6] the Licensing Board nevertheless determined that the Commission has the statutory authority to amend antitrust conditions under the general provisions contained in section 189a of the AEA and implemented in 10 C.F.R. § 50.90 providing for amendments to licenses at the licensees' request.

IV. ARGUMENTS BEFORE THE COMMISSION

On appeal, Cleveland argues that the Licensing Board erred in relying on section 189a of the AEA for authority to conduct the antitrust review sought by applicants.[7] Cleveland argues that section 189a is purely procedural in nature and does not grant a substantive right to amend the operating license. In addition, according to Cleveland, section 189 confers hearing rights on the public only, not on the applicants. Cleveland further maintains that the Licensing Board misinterpreted the statute and its implementing regulations (specifically, 10 C.F.R. § 50.90) regarding the authority of the Commission to conduct postlicensing antitrust review. Cleveland interprets prior

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[6] 42 U.S.C. § 2135 (1988).

[7] See Brief of City of Cleveland, Ohio in Support of Notice of Appeal of Prehearing Conference Order Granting Request for Hearing, at 36-37 (Oct. 23, 1991) (Cleveland's Brief).

Commission decisions, namely, Houston Lighting & Power Co. (South Texas Project, Units Nos. 1 and 2), CLI-77-13, 5 NRC 1303 (1977) (South Texas) and Florida Power & Light Co. (St. Lucie Plant, Unit 1, and Turkey Point Plant, Units 3 and 4), ALAB-428, 6 NRC 221 (1977) (Florida Power & Light) to hold that any postlicensing antitrust review is prohibited. In addition, Cleveland argues that the Commission's authority to enforce antitrust license conditions does not include the authority to delete or modify those same conditions.

Finally, Cleveland maintains that section 105 of the AEA provides the only authority for the Commission to conduct antitrust review, and because that section does not provide authority to conduct postlicensing review, a licensee cannot confer this jurisdiction simply because it volunteers to undergo the amendment process.[8]

The NRC staff maintains that the Licensing Board was correct in determining that the Commission has authority to conduct a hearing regarding the amendment or modification of license

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[8] Cleveland has moved for leave to file a reply to the applicants' and staff's briefs opposing Cleveland's appeal. Cleveland's reply was attached to the motion. NRC staff opposes this motion, and has requested that, if the motion is granted, staff should be permitted to respond to Cleveland's reply. See NRC Staff's Answer in Opposition to the Motion of the City of Cleveland, Ohio for Leave to File a Reply Brief at 2 (Dec. 26, 1991). We find that the reply adds nothing of substance to Cleveland's position. It essentially provides additional comments regarding the same arguments which were addressed in Cleveland's original brief. For these reasons, Cleveland's motion for leave to file a reply to its brief in support of its appeal of LBP-91-38 is denied.

conditions, including antitrust conditions.[9] According to staff, section 105 of the AEA limits the Commission's authority to initiate antitrust review. However, staff contends that section 105 does not specifically address license amendments sought by licensees and thus cannot be interpreted as limiting the Commission's general authority to amend licenses which it issues. Staff argues that South Texas and Florida Power & Light address only whether the NRC can impose new restrictions due to alleged anticompetitive behavior by a licensee, but do not specifically address license amendments sought by licensees. Moreover, the staff contends that the Commission's broad statutory power to impose conditions in a license includes the power to relax such conditions if circumstances warrant.

The applicants' arguments are essentially the same as those of NRC staff.[10] However, in addition, applicants emphasize that their requests here should not entail a traditional "antitrust review" under section 105. More specifically, the applicants argue that the purpose of a traditional section 105 antitrust review is to determine whether licensees are or were acting anticompetitively in order to determine whether new antitrust conditions are warranted on a license. Applicants agree that this type of antitrust review is limited under section 105. In

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[9] NRC Staff's Brief in Opposition to the City of Cleveland's Appeal of Prehearing Conference Order Granting Request for Hearing (Nov. 21, 1991).

[10] Applicants' Brief in Opposition to the Appeal of the City of Cleveland, Ohio of the Licensing Board's Prehearing Conference Order (Nov. 21, 1991).

this proceeding, applicants argue that a traditional "antitrust review" is not required to resolve the questions raised, but rather that statutory interpretation of section 105 of the AEA is necessary.[11] In support of their argument applicants note that a threshold question now before the Licensing Board, as agreed to by all the parties, is whether the Commission has the general authority to retain antitrust license conditions under certain circumstances.[12] Therefore, according to applicants, the limitations on postlicensing "antitrust review" do not apply in this case.

V. ANALYSIS

A. The Commission's General Authority Over Licenses

It is clear that the Commission can amend licenses. Amendments to licenses are contemplated under both the AEA and

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[11] Id. at 5-8.

[12] The parties informed the Licensing Board that they all agreed upon the following as the "bedrock" legal issue in this proceeding:

> Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain 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 the electricity from alternative sources, all as appropriately measured and compared?

and the parties further agreed to address the following issue:

> Are the applicants' requests for suspension of the antitrust license conditions barred by res judicata, or collateral estoppel, or laches, or the law of the case?

See Letter from R. Goldberg and C. Strother, Jr., Counsel for the City of Cleveland, to Judges Miller, Bechhoefer, and Bollwerk (Nov. 7, 1991).

the Commission's implementing regulations.[13] Although, as Cleveland points out, section 189 does not provide the substantive standard by which the proposed amendment should be judged, section 189a does provide a right to a hearing and prescribes procedural requirements attaching to certain specified NRC actions, including proceedings to amend licenses.

Contrary to Cleveland's assertions, the hearing rights provided in section 189 may be invoked not only by interested members of the public but also by license applicants or licensees. Section 189a(1) provides in its pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award of royalties under sections 153, 157, 186c, or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.[14]

Apparently Cleveland concedes that applicants are "persons" within the meaning of AEA section 11, 42 U.S.C. § 2014 (1988), and have an interest affected by this proceeding. However, Cleveland maintains that the language contained in section 189a(1), which states that a person whose interest is affected by a proceeding shall be admitted as a party to the

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[13] See AEA §§ 161, 182, 183, 187, 189, 42 U.S.C. §§ 2201, 2232, 2233, 2237, 2239 (1988); 10 C.F.R. §§ 50.90, 50.92 (1992).

[14] 42 U.S.C. § 2239(a)(1) (1988).

proceeding, cannot be referring to the applicants here because only persons other than the applicants are required to establish standing and must be admitted as parties.[15] Cleveland's interpretation misses the purpose behind section 189, which is to provide an opportunity for hearing upon the request of any person whose interest may be affected by a proceeding enumerated in that section. Although a license applicant or licensee may have a right to a hearing under section 189 if its interest is adversely affected (e.g., if a license or amendment application is denied or a license is suspended or revoked), a hearing must still be requested.[16] Cleveland seems to assume that the Commission will always automatically hold a hearing upon a staff denial of an amendment application.[17] This is incorrect. In general, and in particular regard to an amendment proceeding, a hearing must be requested; otherwise staff's decision is final.[18] Although we agree with Cleveland that applicants in this case do not have to

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[15] Cleveland's Brief at 38-41.

[16] See, e.g., 10 C.F.R. §§ 2.105(d)(1), 2.202(a)(3) (1992).

[17] In further support of its argument that section 189a(1) only confers hearing rights on parties other than applicants, Cleveland points out that in a proceeding involving a construction permit an applicant need not request a hearing; a hearing is automatically provided for under the AEA. Therefore, according to Cleveland, it would not make sense for section 189a(1) to apply to applicants for construction permits, because they would be required to request a hearing which already must be conducted. Cleveland's Brief at 40-41. However, the mandatory hearing for construction permits is the exception, not the rule, under section 189.

[18] See 10 C.F.R. §§ 2.103(b), 2.105(d), 2.108(b), 2.1205 (1992).

file intervention petitions under 10 C.F.R. § 2.714 to establish standing, the applicants nevertheless had to and did file a timely demand for a hearing. In this respect, it was necessary for the Licensing Board to review the applicants' demand for hearing and it was not until their hearing petitions were granted that the applicants were "admitted" as parties.

Cleveland contends that the lack of Commission case law establishing applicants' and licensees' rights under section 189, together with the cases that hold that section 189 confers hearing rights on the public,[19] support the argument that section 189 does not confer rights on the applicants here. However, the cases cited by Cleveland do not state that section 189 confers hearing rights on the public only. In fact, one case upon which Cleveland relies, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983), assumes in the context of defining the rights of other persons in enforcement proceedings that licensees have a right to a hearing.[20] The dearth of case law regarding a

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[19] Cleveland cites several cases which address public participation in certain NRC proceedings under section 189a(1). Cleveland's Brief at 39-40, citing Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985); Bellotti v. NRC, 725 F.2d 1380, 1383, 1386 (D.C. Cir. 1983); Sholly v. NRC, 651 F.2d 780, 791 (D.C. Cir. 1980) (per curiam), vacated as moot and remanded, 459 U.S. 1194 (1983).

[20] In Bellotti, the dissenting opinion criticizes the majority for making third party hearing rights dependent on the licensee requesting a hearing. This argument necessarily assumes the right of the licensee to request a hearing, and the dispute was whether others' hearing rights should depend on whether licensee asserted this right. 725 F.2d at 1386 (Wright, J., dissenting).

licensee' or an applicant's right to a hearing under section 189a(1) is a reflection of long-standing, unchallenged Commission interpretation that the Commission must provide the opportunity for a hearing to a licensee or applicant in certain circumstances.[21] Cleveland has not persuaded us that we should employ any other interpretation of section 189.

B. The Commission's Authority to Amend Antitrust License Conditions

Although the Commission has the authority to amend conditions of licenses it issues, the more difficult question raised by Cleveland is whether this general authority is applicable when a license condition involves antitrust matters, or whether any postlicensing amendment to an antitrust condition would be inconsistent with limitations in section 105c of the AEA. This specific question is not addressed directly by Congress in the AEA or its legislative history, and it has not been squarely addressed in any other Commission decision. Cleveland argues that amendments to antitrust conditions are not permitted because they are not enumerated in section 105, which is the only section in the AEA which contains express language regarding antitrust authority.

As Cleveland points out, the South Texas and Florida Power & Light decisions address the limits of the NRC's authority to

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[21] Such interpretation reaches back to the earliest days of the regulatory program established under the AEA of 1954 and is reflected in the early procedural regulations of the Atomic Energy Commission, our predecessor agency. See 21 Fed. Reg. 804 (1956).

conduct antitrust review. We agree that these cases stand for the principle that, in accord with the underlying policy of section 105c, the NRC cannot initiate antitrust review to impose new antitrust conditions after the operating license has been issued, except under limited circumstances, not applicable here. However, as we will explain in more detail below, these cases do not squarely resolve the issue at hand; i.e, whether the Commission has the authority to suspend or modify the antitrust conditions already in a license, at the request of a licensee, pursuant to the Commission's general authority to amend conditions in licenses that it issues.

The specific question before the Commission in South Texas was at what point may an antitrust proceeding under section 105c be ordered subsequent to the issuance of the construction permit but prior to the issuance of the operating license. The proceeding was initiated after one of the joint holders of a construction permit petitioned for antitrust review because of alleged anticompetitive behavior by Houston Lighting and Power Company (HL&P), a co-holder of the construction permit. HL&P moved the Commission to waive the requirement that initiation of operating license antitrust review procedures await submission of the final safety analysis report that accompanies the operating license application.[22] The Commission's decision in that proceeding did not address just this narrow question, but also discussed the Commission's overall antitrust responsibilities.

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[22] 5 NRC at 1303.

In South Texas, the Commission reviewed the legislative history regarding the 1970 amendments to section 105c.[23] The 1970 amendments to section 105c subjected all applicants for a section 103 facility license to a mandatory initial antitrust review by the Attorney General and, in the case of any contested adverse antitrust aspects, an adjudicatory hearing before the Commission at the construction permit stage.[24] In addition, if significant changes have occurred after the earlier antitrust review, an adjudicatory hearing would be conducted at the operating license stage to determine any adverse implications of these changes.[25] In light of this significant hurdle placed in the licensing process, Congress constructed section 105c in such a way that it essentially prohibited postlicensing antitrust review undertaken to determine adverse antitrust aspects of a license. This prohibition was intended to eliminate the uncertainty of further antitrust review after the licensee had already invested considerable resources.[26]

In light of these restrictions on postlicensing antitrust review, the Commission concluded in South Texas that the NRC does not have broad antitrust policing powers independent of licensing

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[23] Id. at 1312-1316.

[24] Section 105c, 42 U.S.C. § 2135(c) (1988).

[25] Section 105c(2), 42 U.S.C. § 2135(c)(2) (1988).

[26] See Prelicensing Antitrust Review of Nuclear Power Plants: Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. 37-38 (1969) (remarks of Rep. Holifield, JCAE Chairman).

which could be relied upon as authority for postlicensing antitrust review undertaken to place new conditions in a license.[27] In general, "the Commission's antitrust authority is defined not by the broad powers in Section 186, but by the more limited scheme set forth in Section 105."[28] This conclusion was based not only on the statutory language and its legislative history, but also was found to be consistent with the Commission's overall responsibilities.[29] As the Commission observed in South Texas, the Commission is in a unique position prior to the issuance of the initial operating license to identify and correct incipient anticompetitive influences that may flow from access to nuclear power. Therefore, at the prelicensing stage, section 105c provides for Department of Justice and Commission involvement and public participation. However, at the postlicensing stage the Commission is not so uniquely situated; the Department of Justice's Antitrust Division, the Federal Trade Commission, and the Federal courts provide antitrust enforcement alternatives.

Cleveland argues, in essence, that it would be inconsistent with our South Texas decision to find that the Commission's general authority to amend licenses is not limited by section 105 even though the policing power is so limited. Cleveland construes the holding in South Texas too broadly. Although we

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[27] 5 NRC at 1317.

[28] Id.

[29] Id. at 1316-1317.

held that the Commission does not have broad antitrust policing power to add new antitrust conditions to the license, the Commission indicated that the policing power under section 186 of the AEA remains to ensure compliance with antitrust conditions attached to the license pursuant to section 105c review.[30] Although the power to enforce the conditions may not necessarily contemplate the power to relieve licensees of previously-imposed conditions, the Commission's assertion of that power supports the view that provisions other than section 105c may be relied upon to address antitrust issues raised by conditions in NRC licenses.[31] Moreover, Congressional deliberation on the 1970 amendments to section 105c did not include any discussion regarding when or whether a licensee could request the NRC to suspend or modify antitrust license conditions. Therefore, the legislative history cannot be interpreted as prohibiting the suspension of antitrust conditions as requested in this case.

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[30] Interpreting dictum from Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir. 1969), the Commission noted that it does have "continuing police power over the conditions properly placed on licenses, after section 105(c) antitrust review." 5 NRC at 1317.

[31] As the Licensing Board pointed out in LBP-91-38, "the Commission's recognition of the 'policing power' was in the context of its authority to enforce existing conditions, a circumstance that may not encompass these licensees' requests to be relieved of previously imposed conditions." 34 NRC at 244 n.42. However, if the Commission has the power to enforce conditions it seems that it could also suspend their effect. The Commission could simply choose not to enforce a condition and achieve the same result with less opportunity for the beneficiaries of the antitrust conditions to be heard. See Union of Concerned Scientists v. NRC, 711 F.2d 370, 382-83 (D.C. Cir. 1983).

Florida Power & Light,[32] the other decision upon which Cleveland relies, also offers little guidance regarding whether the NRC can consider suspension of antitrust conditions at the request of a licensee. That case involved the question of whether the Commission has authority to conduct antitrust review if significant changes occurred after a license had been issued. The petitioners sought both leave to intervene out of time and an antitrust hearing concerning three operating plants. The plants had been previously licensed without antitrust review as research and development facilities under section 104b. In petitioners' view, the plants were really commercial generating facilities which should be subject to section 103 requirements, including antitrust review.[33] Relying on section 186a of the AEA, the petitioners argued that under the Commission's broad powers to revoke a license the Commission has the authority to order antitrust review after the operating license has been issued.[34] The Atomic and Safety and Licensing Appeal Board rejected these arguments. The Appeal Board found that after South Texas it was clear that "the NRC's supervisory antitrust jurisdiction over a nuclear reactor licensee does not extend over the full 40-year term of the operating license but ends at its inception," except

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[32] 6 NRC 221 (1977). The Commission declined review of the Appeal Board's decision. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1, and Turkey Point Plant, Units 3 & 4), CLI-77-26, 6 NRC 538 (1977).

[33] 6 NRC at 224.

[34] Id. at 225

as necessary to enforce the terms of the license, to revoke one fraudulently obtained, or to issue a new license if a plant is sold or is significantly modified.[35]

The applicants' request here does not fall within one of the exceptions enumerated in Florida Power & Light which would provide for postlicensing antitrust review. However, that decision again did not address the issue at hand, whether the Commission may act on a request to suspend the effect of existing antitrust conditions. Therefore, although Florida Power & Light does not provide authority to suspend antitrust conditions at a licensee's request, neither does it preclude it. The conclusion that Florida Power & Light was not entirely determinative on the issue of the Commission's authority to review antitrust matters is further supported by the decision of the U.S. Court of Appeals for the District of Columbia Circuit on review.[36] The Court of Appeals indicated that the question of whether section 105 is the Commission's exclusive grant of antitrust authority was beyond the scope of that proceeding and, thus, the question was left open.

Our conclusion that neither Florida Power & Light nor South Texas prohibit suspension of antitrust conditions at a licensee's request is further supported by dicta in Toledo Edison, a later Appeal Board decision involving the same applicants as in the

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[35] Id. at 227.

[36] Fort Pierce Util. Auth. v. United States, 606 F.2d 986, 1001 n.17 (D.C. Cir.), cert. denied, 444 U.S. 842 (1979).

present proceeding.[37] In Toledo Edison, the Appeal Board indicated that antitrust license conditions may be removed or modified after the issuance of the operating license. The Appeal Board suggested that if antitrust license conditions, which seemed fair at the time they were imposed, prove to be inequitable in the future, the Director of Nuclear Reactor Regulation has the authority to modify license conditions.[38]

In addition to its arguments that suspension of the antitrust conditions in this license would be inconsistent with section 105c and Commission precedent, Cleveland argues that the Licensing Board ignored the effect that removal of the antitrust conditions would have on the beneficiaries of the conditions. According to Cleveland, to adopt a rule that would limit its ability to seek relief from anticompetitive behavior through imposition of new license conditions, but allow the licensee to change existing conditions at any time, would adversely affect Cleveland's ability to provide an affordable, reliable power supply to those served by its municipal system. Thus, Cleveland maintains, the beneficiary of a antitrust license condition would

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[37] Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3, et al.), ALAB-560, 10 NRC 265 (1979).

[38] Id. at 294. The Appeal Board indicated that the requests for modification of license conditions would be handled by the Director of Nuclear Reactor Regulation under 10 C.F.R. §§ 2.200-2.204 and 2.206. While those sections of Part 2 are typically used in enforcement proceedings and applicants' requested suspension in this case is more properly categorized as a license amendment rather than a request for enforcement action, the principle that the Commission has the authority to modify antitrust conditions at a licensee's request remains intact.

be placed in the difficult position of having to defend the appropriateness of existing conditions from attack by the licensee, but would not be afforded the corresponding opportunity of being able to seek imposition of new conditions in a license.[39] Moreover, according to Cleveland, review of applicants' request in this case and others in the future would threaten to involve the Commission unendingly in antitrust matters.[40]

We recognize that under applicants' and staff's theory of antitrust jurisdiction a party such as Cleveland may not come to the Commission for relief from a licensee's anticompetitive behavior unless that behavior is proscribed by existing antitrust conditions. However, an aggrieved party is not left without a remedy. As indicated in South Texas, the Department of Justice's Antitrust Division can provide assistance in obtaining relief from anticompetitive behavior, and the Federal Trade Commission

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[39] The question whether parties may request that additional antitrust conditions be placed in the license if a licensee, in effect, restores NRC antitrust jurisdiction by seeking suspension of antitrust conditions, was raised by American Municipal Power-Ohio, Inc. (an intervenor) at the prehearing conference held on September 19, 1991, in this proceeding. See Prehearing Conference Transcript at 186-187. The Licensing Board did not squarely address this question in LBP-91-38. Nor need we decide it at this time. However, such an approach may not be inconsistent with the underlying philosophy of section 105c and could be sound policy. Congress placed a limitation on postlicensing antitrust review to provide certainty to the licensee that it would not be drawn into continuing antitrust proceedings before the Commission. When the licensee initiates a proceeding to suspend or modify the antitrust conditions, the policy of insulating the licensee from continuing antitrust proceedings may not hold the same, if any, force.

[40] Cleveland's Brief at 32-33.

as well as the Federal courts provide antitrust enforcement forums.[41]

We conclude that the Commission does have jurisdiction under sections 103, 161, and 189 of the AEA to entertain applicants' request on its merits. As the agency empowered to issue nuclear plant licenses, only the Commission can grant the relief -- if it is warranted -- requested by the applicants in this proceeding. If we were to determine that the NRC lacks the authority to suspend the antitrust license conditions (and if this determination were upheld), then the conditions would remain frozen in place for the life of the license no matter how unsuitable. Although Congress could have limited the NRC's authority in this manner, neither the statutory language nor the legislative history of section 105 suggests that Congress intended such a result. We do not accept the proposition that antitrust license conditions are immutable, irrespective of whether the conditions have become unjust over time.[42]

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[41] 5 NRC at 1316.

[42] Furthermore, judicial precedent suggests the same conclusion that the Commission has authority to modify license conditions which prove to be unjust after time, due to changes in law or facts. A court can modify terms of an injunctive decree involving antitrust restrictions if the reasons for imposing the restrictions are no longer present or if the conditions have become unfairly burdensome. "The Court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.'" System Federation v. Wright, 364 U.S. 642, 647 (1961) (quoting United States v. Swift & Co., 286 U.S. 106, 114-115 (1932)). This principle applies to the quasi-judicial role of the Commission as well. "An agency, like a court can undo what is wrongfully done by

(continued...)

We should emphasize that our decision today goes no further than to determine that the Commission has authority to amend a license at the request of the licensee to suspend the effect of antitrust conditions. Any such suspension by its very nature may be rescinded, and the conditions would then, once again, have full force.[43]

C. Cleveland's Motion for Revocation

Having decided that the NRC has authority to suspend the effect of antitrust conditions in a license at the licensee's request, we must address Cleveland's motion for revocation of the referral of the applicants' hearing requests to the Licensing Board. We deny Cleveland's motion for two reasons. First, staff's administrative review was not a substitute for the adjudicatory hearing to which applicants are entitled in that the decision rendered by staff was a denial of a request for a license amendment. Second, due to the complexity of the issues raised in this proceeding, further development by the Licensing Board prior to any final Commission decision is appropriate.

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[42](...continued)
virtue of its order." United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 229 (1965); see also Gun South, Inc. v. Brady, 877 F.2d 858, 862-63 (11th Cir. 1989).

[43] See San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1314 (D.C. Cir. 1984)("The lifting of a suspension does nothing to alter the original terms of a license; indeed, it removes a significant impediment to the enforcement of those terms.")(emphasis in original), aff'd en banc, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986).

Cleveland's arguments that staff's denial is a final Commission decision pursuant to 10 C.F.R. § 2.101 are unavailing.[44] Section 2.101 is only applicable in this proceeding insofar as it sets out procedural requirements for information to be included in a license. The procedural requirements in section 2.101 regarding the disposition of antitrust matters are not applicable. The review under section 2.101(e) is limited to whether significant changes have occurred and is conducted in proceedings involving applications for operating licenses, not in amendment proceedings such as this.[45]

Moreover, contrary to Cleveland's suggestions,[46] staff's consideration of applicants' amendment request was not a "hearing" that satisfies section 189. Staff's decision is administrative in nature and does not suffice as an adjudicatory review of the application request. As the Licensing Board pointed out in LBP-91-38, NRC process requires after staff denial of an amendment application that an applicant be informed of the

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[44] See Motion of City of Cleveland, Ohio, for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission Decision at 2-3 (Dec. 19, 1991) (Cleveland's motion).

[45] However, under 10 C.F.R. § 2.101(e), a significant changes review is undertaken if an amendment request involves the transfer of control of the operating license from the original owner(s) of a facility to another entity. Although that circumstance does not involve the issuance of a new license, a review of any adverse antitrust implications raised by the new ownership has never been undertaken. See, e.g., the Director of Nuclear Reactor Regulation's Reevaluation and Affirmation of No Significant Change Finding Pursuant to Seabrook Nuclear Station, Unit 1 Antitrust Post-Operating License Review (Apr. 9, 1992).

[46] Cleveland's motion at 3-4.

denial and its opportunity for a hearing, and if a hearing is requested it must be conducted by an adjudicatory tribunal.[47]

While the Commission could elect to consider the matter in the first instance,[48] review by the Licensing Board at this time is more suitable. The Board's development of a detailed record and analysis of the complex issues raised in this proceeding will aid the Commission in any review that may be undertaken. In addition, if the applicants win on the "bedrock" issue an evidentiary hearing may be required to determine the actual cost of Perry/Davis-Besse power. Such a hearing would be appropriately conducted by the Licensing Board.[49] Accordingly, we see no good reason to adopt Cleveland's suggestion that we remove all further proceedings from the Licensing Board.[50]

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[47] LBP-91-38, 34 NRC at 239. See generally Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980)(determination of hearing request in show cause proceeding did not rest with staff but with Commission or its delegated adjudicatory tribunal); see also 10 C.F.R. §§ 2.105(d), 2.1205 (1992).

[48] See Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1129 (D.C. Cir. 1969); see also Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

[49] See supra note 12.

[50] In light of our decision to deny Cleveland's motion for revocation, applicants' motion for additional time to file a reply to Cleveland's motion is denied. See Applicants' Answer to "Motion of City of Cleveland, Ohio, for Commission Revocation of the Referral to ASLB and for Adoption of the April 24, 1991 Decision as the Commission's Decision" (Dec. 24, 1991). In addition, Cleveland's motion for leave to file a reply to applicants' answer is also denied because the reply raises no new substantive issues that require a response.

VI. CONCLUSION

For the above reasons Cleveland's appeal of LBP-91-38 is denied, and LBP-91-38 is affirmed insofar as it granted applicants' hearing petitions. In addition, for the aforementioned reasons, Cleveland's motion for revocation of the Secretary's referral to the Licensing Board of applicants' hearing requests and for adoption of staff's April 24, 1991 decision as a Commission decision is also denied.

It is so ORDERED.

For the Commission[51]

Samuel J. Chilk
Secretary of the Commission

Dated at Rockville, Maryland,
this 12 day of August 1992.

[51] Commissioners Rogers and Curtiss were not present for the affirmation of this order. If they had been present, they would have affirmed it.

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 COMM M&O (CLI-92-11) - 8/12/92 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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Dated at Rockville, Md. this
12 day of August 1992

Kris Cater
Office of the Secretary of the Commission