

13487

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

92 DEC 24 A7 57

In the Matter of )

OHIO EDISON COMPANY )

(Perry Nuclear Power Plant,  
Unit 1)

and )

THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY )  
THE TOLEDO EDISON COMPANY )

(Perry Nuclear Power Plant,  
Unit 1, and Davis-Besse  
Nuclear Power Station, Unit 1)

Docket Nos. 50-346A  
50-440A

(Suspension of Antitrust  
Conditions)

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NRC STAFF'S ANSWER IN RESPONSE TO PETITIONS FOR REVIEW  
FILED BY OHIO EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY, THE TOLEDO  
EDISON COMPANY, AND CITY OF CLEVELAND

---

Steven R. Hom  
Counsel for NRC Staff

December 23, 1992

9212280054 921223  
PDR ADOCK 05000346  
M PDR

DS06

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Steven R. Horn  
Counsel to NRC Staff

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(Perry Nuclear Power Plant, Unit 1,	)	
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Station, Unit 1)	)	

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FILED BY OHIO EDISON COMPANY,  
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,  
THE TOLEDO EDISON COMPANY, AND CITY OF CLEVELAND

Pursuant to 10 C.F.R. § 2.786(b)(3), the NRC Staff (Staff) hereby files its answer in response to (a) the Petitions for Review filed by Ohio Edison Company (Ohio Edison), The Cleveland Electric Illuminating Company (CEI), The Toledo Edison Company (Toledo Edison) (hereafter sometimes referred to collectively as "Applicants"), and (b) the Limited Petition for Review filed by intervenor City of Cleveland, Ohio (Cleveland).<sup>1</sup> In sum, while the Licensing Board's decision was fully in accordance with legal precedent, because the "bedrock" legal issue is a substantial and important issue of

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<sup>1</sup> See also *Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1)* (Dec. 10, 1992) (Commission order requiring, *inter alia*, a party to file a single pleading in answer to any or all petitions for review).

law, the Staff does not oppose Commission review with respect to the "bedrock" legal issue; the Staff does oppose review to the extent sought by Cleveland.

### BACKGROUND

In 1987 Ohio Edison, and in 1988 CEI and Toledo Edison submitted applications to suspend the antitrust license conditions contained in the operating licenses for the Perry Unit 1 and Davis-Besse Unit 1 facilities. Generally, the basis for the applications was the allegation that the cost of electricity from the nuclear facilities had become higher than the cost of electricity from alternative sources; therefore, there allegedly is now no basis to conclude that their "high cost" nuclear facilities could create or maintain a situation inconsistent with the antitrust laws, and thus there is no statutory basis for the existing antitrust license conditions.

In April 1991, the Staff denied the applications on the ground that they lacked legal merit. The Applicants then requested a hearing with respect to the denial, which hearing requests were granted in October 1991, by the Atomic Safety and Licensing Board (Board) designated to preside over this matter.<sup>2</sup>

The parties agreed that whether the Applicants could obtain the relief they sought on the basis of their applications depended upon the outcome of a decision on a "bedrock" legal issue, which was jointly formulated by the parties 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

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<sup>2</sup> See *Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1)*, LBP-91-38, 34 NRC 229 (1991).

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?

The parties further agreed that this "bedrock" legal issue could be briefed by the parties and disposed of by the Board on summary disposition. It was understood by the Board and the parties that if the "bedrock" legal issue was decided adversely to the Applicants, i.e., in the negative, an evidentiary hearing on the issue of costs would not be necessary. The parties also agreed upon a second issue proffered by the City of Cleveland that could be briefed and disposed of on summary disposition:

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?

Ohio Edison also proposed a contention asserting Staff bias in denying the original applications for suspension of the antitrust license conditions due to improper Congressional influence. Although the Board admitted this contention, the Commission later directed the Board to suspend its consideration.<sup>3</sup>

On November 18, 1992, after the parties filed motions and cross-motions for summary disposition and responses thereto, the Board issued its decision adverse to the Applicants and in favor of the Staff and intervenors on the "bedrock" legal issue. The Board found that the "plain meaning" of Section 105 of the Atomic Energy Act did not support the Applicants' view that the cost of electricity from a nuclear facility alone determines whether the Commission has the authority to retain antitrust license

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<sup>3</sup> See *Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1)*, CLI-91-15, 34 NRC 269, 271 (1991).



conditions. Rather, the Board opined that Section 105 incorporates "the established antitrust regulatory scheme," which focuses on market power and the use or misuse thereof, by which it is determined whether licensed activities will create or maintain a situation inconsistent with the antitrust laws, and accordingly whether the Commission has the authority to impose or retain antitrust license conditions.<sup>4</sup>

In addition, the Board found that the legislative history of Section 105 reflected no "'clearly expressed legislative intention to the contrary' necessary to override" the clear language of Section 105.<sup>5</sup> Further, the Board essentially held that consistent with its interpretation of the scope of Section 105 as not necessarily being limited to low cost facilities, and given the rational basis underlying the congressional determination to afford a distinctive antitrust treatment to nuclear utilities, the Applicants were not being denied equal protection or substantive due process.<sup>6</sup>

The Board also decided the "subsidiary" repose issues raised by Cleveland in favor of the Applicants and Staff and adverse to Cleveland. Cleveland, relying on the existence of the Licensing Board and Appeal Board decisions under which the subject antitrust license conditions were first imposed, had argued that various doctrines of repose precluded the Board from redeciding or reaching the merits of the "bedrock" legal issue. In deciding against Cleveland, the Board relied upon, *inter alia*, its conclusions

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<sup>4</sup> See *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-32, slip op. at 46 (Nov. 18, 1992).

<sup>5</sup> See *id.* at 61.

<sup>6</sup> See *id.* at 61-65.

(a) that the proceeding before it was not the same proceeding by which the antitrust license conditions were first imposed, thus rendering the doctrine of "law of the case" inapplicable;<sup>7</sup> (b) that the "bedrock" legal issue was never litigated, or should have been litigated, at the operating license stage for these facilities, thus rendering the doctrines of *res judicata* and collateral estoppel inapplicable;<sup>8</sup> and (c) that there was no unreasonable delay in the filing of the application regarding the Perry facility, thus supporting a decision to decline to invoke the doctrine of "laches."<sup>9</sup>

Finally, the Board dismissed Ohio Edison's contention of Staff bias without further consideration, explicitly stating that its decision on this issue was not based on the merits. The Board reasoned that since it resolved the "bedrock" legal issue as a matter of law on the basis of its "independent review of the legal principles involved," claims of Staff bias were "immaterial to [the] disposition of the merits of [the] proceeding."<sup>10</sup>

### DISCUSSION

The granting of a petition for review is within the discretion of the Commission. Under 10 C.F.R. § 2.786, the following considerations bear on a decision whether to grant review:

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<sup>7</sup> See *id.* at 14.

<sup>8</sup> See *id.* at 16.

<sup>9</sup> See *id.* at 20.

<sup>10</sup> See *id.* at 67-68.

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4).

It was assumed *arguendo* by the parties that for a decision on summary disposition, the relevant facts are "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." Also, in this regard, it was assumed that "the situation is unchanged from the mid-1970s," and that the Licensing and Appeal Board factual findings made when the antitrust license conditions were first imposed were and are still correct.<sup>11</sup> All of the principal issues addressed by the Board in its decision were matters of law not dependent upon any actual findings of fact.

The Applicants argue that the Board's legal conclusion on the "bedrock" issue is based on "the faulty [or fallacious] position that the addition of a high cost facility may

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<sup>11</sup> See NRC Staff's Answer in Opposition to Applicants' Motion for Summary Disposition and NRC Staff's Cross-Motion for Summary Disposition at 4-5.

be competitively advantageous to an operator."<sup>12</sup> No legal precedent or established law is cited by the Applicants to demonstrate that such a "position" contravenes established legal precedent. Rather the Applicants have argued throughout this proceeding that the Staff and the Board's position is a departure from "logic."<sup>13</sup> To the contrary, it is clear that the established body of antitrust law, plainly incorporated by reference into Section 105 of the Atomic Energy Act, supports the Board's view that an analysis of competition required under Section 105 focuses on market power and the use or misuse of such power for anticompetitive purposes or with an anticompetitive effect, and a determination of whether the licensed facility will create or maintain an anticompetitive situation depends upon such analysis of market power, not simply cost.<sup>14</sup>

While the Applicants broadly state that the Board's ultimate decision is contrary to legal precedent, the "precedents" they cite consist only of several isolated references to "cost" in a few Commission decisions and Department of Justice advice letters. Significantly, the Applicants have cited no holding or other definitive statement in any decided case that is contrary to the Board's decision on the "bedrock" legal issue.

In further arguing the "bedrock" legal issue, the Applicants asserted during the proceeding before the Board that their equal protection rights guaranteed by the due process clause of the U. S. Constitution are violated under the Staff's interpretation of

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<sup>12</sup> See Ohio Edison Petition for Review at 5; CEI/Toledo Edison Petition for Review at 4.

<sup>13</sup> See LBP-92-32 at 25.

<sup>14</sup> See generally *id.* at 5-12.

Section 105. The Applicants claimed that such interpretation failed the constitutional law "rational basis test" on the theory that it was overinclusive -- *i.e.*, that it reached "high cost" facilities that could not create or maintain a situation inconsistent with the antitrust laws -- as well as underinclusive -- *i.e.*, that it did not apply equally to non-nuclear facilities. Given that the Board's decision has not been shown to depart from established law or legal precedent, but indeed is based on, and is consistent with, the plain meaning of Section 105 of the Atomic Energy Act, the legislative history, and decisions of the Commission, its adjudicatory boards, and the courts, the Applicants' equal protection claims as to overinclusiveness fail. This is because such claims rely wholly upon the Applicants' "logic" that only "low cost" facilities can impart competitive harm and thus be subject to the Commission's authority to impose antitrust license conditions under Section 105. This "logic" was properly rejected by the Board as discussed above. Thus, there is a "rational basis" for Section 105 interpreted as authorizing the Commission to impose or retain antitrust license conditions with respect to a "high cost" nuclear facility. Further, with respect to the Applicants' "underinclusive" equal protection arguments, because nuclear technology was largely government-developed and financed, in contrast to other forms of energy technology, the Board's decision that there is a rational basis for Section 105 interpreted as subjecting only nuclear facilities to the Commission's antitrust authority was eminently sound and does not constitute a departure from established law.

Further, the Board's non-merits dismissal of Ohio Edison's "Staff bias" contention was not a prejudicial procedural error that weighs in favor of Commission review, as is

now argued by Ohio Edison. Ohio Edison claims that it was denied the opportunity to "discover and present the facts" concerning alleged congressional interference and agency bias, and twice has been given no notice or opportunity to address the tabling and ultimate dismissal of the contention.<sup>15</sup> However, even assuming *arguendo* that Ohio Edison could show that the Staff was influenced by Congressional pressure in its review of the original applications, Ohio Edison fails to explain how that would have had or could have any impact on the Licensing Board's independent resolution of the "bedrock" issue, a purely legal matter. The Board itself was not subject to any claim of having been inappropriately influenced. Therefore, there are no circumstances where it may be argued, even assuming the Staff was biased in its own determination on the applications, that Ohio Edison was prejudiced during the proceeding before the Board. Thus, the Board's conduct of the proceeding cannot be said to have involved a prejudicial procedural error.

The Applicants finally argue that the Commission should exercise its power to review the Board's decision because the "bedrock" legal issue "raises an important question of law and policy."<sup>16</sup> While the Staff believes that the Board correctly decided the "bedrock" legal issue, the Staff acknowledges that the "bedrock" legal issue is a substantial and important question of law, which may impact many facilities now subject

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<sup>15</sup> See Ohio Edison Petition for Review at 7-8.

<sup>16</sup> See Ohio Edison Petition for Review at 8; CEI/Toledo Edison Petition for Review at 7.

to antitrust license conditions. Accordingly, the Staff would not oppose Commission review with respect to this issue.<sup>17</sup>

Pegardin<sup>18</sup> Cleveland's Limited Petition for Review in which Cleveland argues that the Board should have decided this matter on the basis of its arguments of "legal repose," the Staff notes at the outset that the Board's decision on the ultimate "bedrock" legal issue was favorable to Cleveland. Therefore, Cleveland's purpose in participating in the proceeding, to ensure that the subject antitrust license conditions remain in place, has been fully satisfied. Under such circumstances, Cleveland normally would have no right to appeal the Board's decision. *See, e.g., Rochester Gas and Electric Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 n.21 (1978); *Duke Power Co.* (Cherokee Nuclear Station, Units 1, 2, & 3), ALAB-482, 7 NRC 979, 980 (1978). While in general, if another party appeals a decision, the party in whose favor the decision resulted may then urge any ground in defending the result, including grounds rejected by the decision-maker, this is not the situation here. *See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station), ALAB-264, 1 NRC 347, 357 (1975). The issue before the Commission is whether to undertake review of the Board's decision; an "appeal" has not yet been granted. Since the Board's decision was favorable to Cleveland on the ultimate "bedrock" legal issue, Cleveland's Limited Petition should not be granted.

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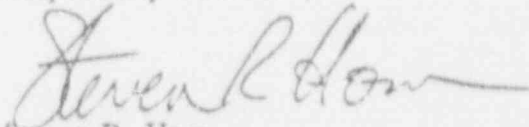
<sup>17</sup> See 10 C.F.R. § 2.786(b)(4)(iii).



CONCLUSION

The Applicants have failed to demonstrate that the legal conclusions underlying the Board's decision are contrary to established law or were without governing precedent. To the contrary, the Board dismissed the proffered "logic" arguments of the Applicants and relied instead upon the well-established body of antitrust law and the plain language of Section 105, legislative history, and Commission precedents to reach its conclusions. The "bedrock" issue, however, is a substantial and important question of law. Accordingly, the Staff does not oppose Commission review of the "bedrock" issue. Finally, because the Board's decision was favorable to Cleveland, Cleveland's Limited Petition should not be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Steven R. Hom", with a long horizontal flourish extending to the right.

Steven R. Hom  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 23rd day of December, 1992



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Docket Nos. 50-346A

50-440A

(Suspension of Antitrust  
Conditions)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER IN RESPONSE TO PETITIONS FOR REVIEW FILED BY OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, THE TOLEDO EDISON COMPANY, AND CITY OF CLEVELAND" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 23rd day of December, 1992:

Marshall E. Miller, Chairman  
Atomic Safety and Licensing Board  
1920 South Creek Boulevard  
Spruce Creek Fly-In  
Daytona Beach, FL 32124

Charles Bechhoefer\*  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop: EW-439  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

G. Paul Bollwerk, III\*  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop: EW-439  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Gerald Charnoff, Esq.  
Deborah B. Charnoff, Esq.  
Margaret S. Spencer, Esq.  
Shaw, Pittman, Potts & Trowbridge  
2300 N Street, N.W.  
Washington, D.C. 20037

James P. Murphy, Esq.  
Squire, Sanders & Dempsey  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

D. Biard MacGuineas, Esq.  
Volpe, Boske and Lyons  
918 16th Street, N.W.  
Suite 602  
Washington, D.C. 20006

Janet Urban, Esq.  
U.S. Department of Justice  
Antitrust Division  
555 4th Street, N.W.  
Washington, D.C. 20001

Reuben Goldberg, Esq.  
Channing D. Strother, Jr., Esq.  
Goldberg, Fieldman & Letham, P.C.  
1100 Fifteenth Street, N.W.  
Washington, D.C. 20005

David R. Straus, Esq.  
Spiegel & McDiarmid  
1350 New York Avenue, N.W.  
Suite 1100  
Washington, D.C. 20005-4798

Philip N. Overholt  
Office of Nuclear Plant Performance  
Office of Nuclear Energy  
U.S. Department of Energy, NE-44  
Washington, D.C. 20585

John Bentine, Esq.  
Chester, Hoffman, Willcox  
& Saxbe  
17 S. High Street  
Columbus, Ohio 43215

Anthony J. Alexander, Esq.  
Vice President and General Counsel  
Ohio Edison Company  
76 South Main Street  
Akron, Ohio 44305

Gregg D. Ottinger, Esq.  
John P. Coyle  
Duncan & Allen  
Suite 300  
1575 Eye Street, N.W.  
Washington, DC 20005-1175

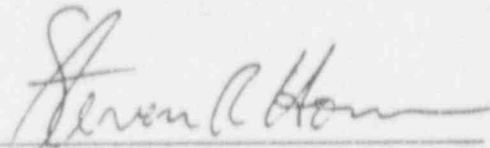
David A. Lambros, Esq.  
Law Director  
City of Brook Park  
6161 Engle Road  
Brook Park, Ohio 44142

Office of the Commission Appellate  
Adjudication\*  
Mail Stop: 16-G-15 OWFN  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Adjudicatory File (2)\*  
Atomic Safety and Licensing Board  
Mail Stop: EW-439  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Office of the Secretary\* (16)  
ATTN: Docketing and Service  
Mail Stop: 16-G-15 OWFN  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Atomic Safety and Licensing Board  
Panel\*  
Mail Stop: EW-439  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555



Steven R. Hom  
Counsel for NRC Staff