UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	NRC Docket No. 50-346A
	)	
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	

SUPPLEMENTAL MEMORANDUM OF THE DEPARTMENT OF JUSTICE

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Department of Justice

March 24, 1976

INTRODUCTION

In the course of oral argument on March 11, 1976 on the applicability of "grandfathering" to the above-captioned proceeding, the Board asked the Department to square the general scheme of prelicensing antitrust review with section 105c(6) of the Atomic Energy Act which, in the words of Member Salzman, says that "even if adverse antitrust consequences will result, the Commission has the authority to allow the plant to operate anyway." (Tr. at 56)

The Department was asked if its reading of the Atomic Energy Act does not lead to an "absurd result" (Tr. at 60). On the one hand, it was noted an unconditioned license might issue after extended antitrust proceedings (during which a plant might sit "idle," Tr. at 58), despite a finding of adverse antitrust consequences. On the other hand, with the exception of two clear instances set forth by Congress, even if all other phases of the licensing process were completed, a license could not issue in advance of the antitrust finding being made. The Board further asked whether such an "absurd result," does not suggest that Congress did not really intend for antitrust review to predate the issuance of construction and operating licenses, despite the otherwise clear requirements of the statute. The Board asked, in the words of Member Farrar, "We have flexibility at the end of a hearing. Why do we not have flexibility earlier

in the hearing before the Applicant has been found guilty." (Tr. at 60) The Board suggested that it might have the obligation to make "harmonious" those "two results." (Tr. at 60)

These specific questions were not among those which the Board in its Order of January 8, 1976, asked the parties to address. Regretably, therefore, we did not at the argument cite precedents which we think are dispositive of the questions. In this memorandum, we show that a requirement of prelicensing antitrust review, even when the Commission has final discretion (as one of a number of possible remedial options) to grant an unconditioned construction or operating license after findings of adverse antitrust consequences, is not absurd; indeed, such a result is totally consistent with analogous statutory requirements that Government agencies consider fully, in advance of final action, the impact of the proposed action on certain fundamental national values.

Section 105(c)(6) of the Atomic Energy Act is Consistent With Other Federal Legislation in Which Congress Has Required That Federal Agencies Consider, Before Acting the Consequences of Their Prepared Action.

The requirement that antitrust review take place before issuance of operating and construction permits represents a legislation which similarly requires that federal agencies consider certain specified factors before taking final action. The Courts have refused to allow agencies to dispense with the procedural requirements of such legislation despite attempts to create exceptions to those requirements.

The most important example of such legislation is the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. § 4321, et seq. NEPA established a national policy requiring federal agencies to give full consideration to environmental effects in planning their programs. NEPA, as this Commission well knows, is a procedural requirement. At the end of its analysis, an agency may determine that the environmental costs of the contemplated action are outweighed by other benefits, and may proceed accordingly. Nevertheless, the agency is required to make this analysis in advance of action. Calvert Cliffs' Coord. Com. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). See also, Scientists' Inst. for Pub. Info. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973), United States v. SCRAP, 412 U.S. 669, 693, 695 (1972), Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1974).

In the Calvert Cliffs case, procedural prelicensing environmental review was tested against the same arguments which were raised by this Board during the oral argument on March 11, 1976. The
Atomic Energy Commission argued that Congress could not have intended that procedural requirements should interfere with or create "unreasonable delays in the construction and operation of [urgently needed] nuclear power plants . . . ." 449 F.2d at 1119. The Court of Appeals for the District of Columbia emphatically dismissed this argument. Making clear that the

requirements of NEPA are procedural, the Court nevertheless stated that the Act mandates strict compliance; "considerations of administrative difficulty, delay or economic cost will not suffice . . ." to allow an agency to forego this review. 449 F.2d at 1115.

NEPA's procedural requirements are prerequisites and cannot be disregarded, even when weighed against other serious substantive concerns of the agency. In Calvert Cliffs, the Commission further argued that the procedural requirements of NEPA were vague and left room for discretion and should be disregarded when compared to the Commission's perceived mandate to provide solutions to the "pressing national power crisis." The Court of Appeals recognized that consideration of environmental issues may in some cases delay the licensing of some power plants; nevertheless, it pointed out:

> Whether or not the spectre of a national power crisis is as real as the Commission apparently believes, it must not be used to create a blackout of environmental consideration in the agency review process. 449 F.2d at 1122.

In sum, numerous Courts have found that a procedural requirement that agencies consider the environmental consequences of their activities is not rendered a nullity or an absurdity by the decision of Congress to require an agency to review in advance all factors, and thereafter to authorize the agency to

allow values other than environmental impact to predominate. */ Courts have refused to carve into the Act exceptions which might facilitate the realization at an earlier stage of other, albeit important, national policies.

The procedural requirements discussed above are fully consistent with other legislative requirements that agency decision making must observe statutory procedures and take into account those factors which Congress has said must be considered, even though having done so, the agency may decide to take final action which advances only one of a number of considered factors. See, e.g., Moss v. C.A.B., 430 F.2d 891 (D.C. Cir. 1970), McLean Trucking Co. v. United States, 321 U.S. 67 (1942), Schaffer Transp. Co. v. United States, 355 U.S. 83 (1957).

Similarly, in the Atomic Energy Act, Congress has required that this Commission consider in its decision making the impact of plant licensing on the fundamental values embodied in the antitrust laws. That the Commission is left some room ultimately to determine that, in some cases, other values should be

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*/ In Calvert Cliffs, there is an even more striking parallel to the arguments made before this Board. The Commission there argued that even if pre-action environmental review was held to be a general obligation of the agency, special exceptions should be recognized for a class of nuclear facilities in which "full NEPA consideration of alternatives and independent action would cause too much delay at the pre-operating license stage." 449 F.2d at 1127. This class was defined as "those for which construction permits were granted without consideration of environmental issues, but for which operating licenses have yet to be issued." 449 F.2d at 1127. This exception, too, was rejected.

given precedence, cannot be employed to undermine the basic requirements of the statute. Indeed, in the case of antitrust review, the requirements of 105c go beyond the procedural. The Commission must not only weigh the competitive effects, but must also make findings. And, it is only in the most "extraordinary" of circumstances that it may accept consequences inconsistent with the antitrust laws in order to promote some other countervailing value. H. Rept. No. 91-1470 by the Joint Committee on Atomic Energy at 31 (September 24, 1970).

Respectfully submitted,

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March 24, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that copies of MOTION FOR PERMISSION TO FILE AN OTHERWISE UNAUTHORIZED PLEADING and SUPPLEMENTAL MEMORANDUM OF THE DEPARTMENT OF JUSTICE have been served upon the following parties by either hand delivery or deposit in the United States mail, first class, as below indicated, this 24th day of March, 1976:

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