APR 2 1982

Robert C. Goodwin, Jr., Esq.
Thompson, Hine and Flory
1920 N Street, NW
Washington, DC 20036

In the Matter of
Cincinnati Gas & Electric Co., et al.
(Zimmer Nuclear Power Station, Unit 1)
Docket No. 50-358A

Dear Mr. Goodwin:

This refers to your request for a reevaluation of my Finding of No Significant Antitrust Changes that was published in the Federal Register on August 6, 1981 (46 Fed. Reg. 40112) in the captioned matter. For the reasons set forth in the attached analysis, I have determined not to change the Finding I have made.

Sincerely,

original Signed by
H. R. Denton

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

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REEVALUATION AND AFFIRMATION OF NO SIGNIFICANT CHANCES FINDING PURSUANT TO ZIMMER NUCLEAR UNIT 1 OPERATING LICENSE ANTITRUST REVIEW

By letter of October 5, 1981, Thompson, Hine and Flory, Counsel for Buckeye Power, Inc. (Buckeye) requested reevaluation of my finding of No Significant Antitrust Changes that was published in the Federal Register on August 6, 1981 (46 Fed. Reg. 40112) in the captioned matter. For the reasons set forth below I have determined not to change the Finding I have made.

BACKGROUND

The Applicants to the Zimmer Construction Permit underwent an extensive antitrust review by the Staff and Department of Justice pursuant to Section 105(c) of the Atomic Energy Act of 1954, as amended. The result of the review was that the Construction Permit was issued without any antitrust license conditions. The Operating License (OL) antitrust review for Zimmer was conducted by the Staff in 1977 and concluded on November 28, 1977. The review was conducted by the Staff for the purpose of determining whether there had been "significant changes" since the CP review. Included in this review were the Dayton Power and Light Company (DPL), the Columbus and Southern Ohio Electric Company (CSOE) and the Cincinnati Gas & Electric Company. Upon completion of the Zimmer OL antitrust review the Staff concluded that no "significant changes" had occurred in the activities of the licensees

since the CP review. Thus, the OL antitrust review for these licensees was concluded on November 28, 1977.

The Federal Register Notice, 46 Fed. Reg. 40112, upon which the request for reevaluation is based, concerns the antitrust review of the acquisition of CSOE by the American Electric Power Company (AEP). This limited subsequent antitrust review of the CSOE acquisition was prompted because AEP's acquisition of CSOE involved changes which might have had competitive implications within the context of NRC's responsibilities. On the basis of the Staff's analysis I found that an OL antitrust review regarding the acquisition of CSOE with respect to the Zimmer unit was not required. The activities of the other participants were not considered in this limited OL antitrust review.

Buckeye's request does not concern the AEP acquisition of CSOE, which was the subject of my finding of No Significant Antitrust Changes published August 6, 1981, but deals exclusively with the activities of the Dayton Power and Light Company and its contractual obligations with Buckeye Power Inc. Buckeye is a non-profit generation and transmission cooperative that provides wholesale electric service to its twenty-nine electric cooperative members in the State of Ohio. Buckeye, DPL and five other electric utility companies in Ohio are signatories to a Power Delivery Agreement dated January 1, 1968. This agreement is both a contract and a rate schedule on file with the Federal Energy Regulatory Commission (FERC). Under the Power Delivery Agreement the electric utilities that are signatories to it, including DPL, are required to make available or provide, inter alia, transmission service to additional delivery points designated by Buckeye to any location within the state of

Ohio to meet the needs of its Buckeye members. The utility that is in the best position to perform the requested service is required by Section 4.3 of the Agreement to establish the new delivery point as "promptly as may be practical."

The request for reevaluation relates the efforts of Buckeye to establish a number of new delivery points with DPL, and particularly details its negotiations over a Honda delivery point for its member, Union REC. According to the information furnished, Buckeye requested this delivery point on February 19, 1981 and after considerable negotiations, including a hearing before the Ohio Public Utilities Commission, DPL granted this request on September 4, 1981. Buckeye also refers to a delivery point dispute with the Cincinnati Gas and Electric Company, but indicates that the matter is now in negotiation. Buckeye alleges that DPL's dilatory tactics over the establishment of the Honda delivery point is not only contrary to the terms of the Power Delivery Agreement, but constitutes harassment, anticompetitive conduct and abuse of monopoly power. Thus, the thrust of Buckeye's allegations is that DPL is not living up to the terms and provisions of its contract with Buckeye under the Power Delivery Agreement and by failing to abide by its contractual obligations DPL is acting in an anticompetitive manner.

In view of the above, Buckeye believes a significant change has taken place with regard to DPL and requests that I reevaluate my Finding of No Significant Changes concerning this applicant. In conclusion, Buckeye submits that in addition to whatever relief the NRC may deem appropriate to remedy this situation it should also require DPL to

fulfill its obligations under the Power Delivery Agreement in a complete and timely manner.

DISCUSSION

Although Buckeye requests that I reconsider my finding of No Significant Antitrust Changes, published August 6, 1981 (46 Fed. Reg. 40112), its request does not concern the AEP acquisition of CSOE which was the subject of my finding. With respect to Buckeye's allegations of anticompetitive activity by Dayton, Buckeye's request was submitted nearly five years after the OL review for DPL was completed. Nevertheless, we have given consideration to Buckeye's request and have determined, for the following reasons, that it should be denied.

When licensing the construction or operation of a nuclear power plant the antitrust review conducted by this Commission is, by statute, limited to determining whether the licensee's activities under the license will create or maintain a situation inconsistent with the antitrust laws. At the OL stage the Commission must first determine whether there have been significant changes in the licensee's activities since the previous review by the Attorney General and the Commission. (See Section 105c(2) and (5) of the Atomic Energy Act of 1954, as amended). If it is determined that significant changes have ocurred, the ultimate issue at the OL stage review is the same as for the construction permit review, i.e., would the activities under the contemplated license create or maintain a situation inconsistent with the antitrust laws. South Carolina Electric and Gas Company, et al, (Summer Nuclear Station, Unit 1). Docket No. 50 395A, CLI-80-28, 11 NRC 817 at 824 (1980).

In commenting on the limits of the NRC's antitrust jurisdiction and the need for a connection or nexus between a licensee's activities under the license and the alleged situations inconsistent with the antitrust laws the Atomic Safety and Licensing Appeal Board in Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 756-57 (1978), stated:

> [T]he Commission's writ to enforce the antitrust laws does not run to the electric utility industry generally. Neither does it reach all actions by utilities that generate electricity with nuclear-powered facilities. Rather, Congress authorized this Commission to condition nuclear power plant licenses on antitrust grounds only where necessary to insure that the activities so licensed would neither create nor maintain situations inconsistent with the antitrust laws. The reason for the grant, as the Commission has explained, was "a basic Congressional concern over access to power produced by nuclear facilities," because the industry was nurtured by public funds and the legislature was anxious that nuclear power "not be permitted to develop into a private monopoly via the [NRC] licensing process." Put another way, the preservation and encouragement of competition in the electric power industry through "fair access to nuclear power" is the principal motivating consideration underlying Section 105c of the Atomic Energy Act [footnotes omitted].

The Commission pointed out the requirement of a nexus between the activities under the nuclear license and the alleged anticompetitive conduct in: Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7, 6 AEC at 621 (1973):

> In our view, it is the existence of that tie which is critical to antitrust proceedings under the Atomic Energy Act. If activities relating to a facility have no substantial connection with alleged anticompetitive practices, there is no need for a hearing as to such practices or proposed forms of relief from them. In short, an intervenor must plead and prove a meaningful nexus between the activities under the nuclear license and the "situations" alleged to be inconsistent with the antitrust laws.

* * *

> The hearing issues cannot and should not be divorced from the overriding requirement that there be a reasonable nexus between the alleged anticompetitive practices and the activities under the particular nuclear license. This is a primary and predominant question which must pervade the proceeding [footnote omitted].

In addition to the nexus requirement it must be pointed out that the Commission's antitrust jurisdiction is not plenary. It is restricted to the scheme of prelicensing antitrust review established by Section 105c of the Atomic Energy Act, as amended. That section requires all applications for class 103 Construction Permits to undergo an antitrust review. It calls for a more limited antitrust review at the OL stage only if in the interim significant changes have occurred in the licensee's activities. See Houston Lighting & Power Company, et al. (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977). In addition, the significant change or changes in a licensee's activities must have, inter alia, antitrust implications for which this Commission has an available remedy. South Carolina Electric & Gas Company (Summer Nuclear Station, Unit No. 1), CLI-81-14, 13 NRC 862 (1981).

As noted earlier the thrust of Buckeye's allegations is that DPL is not abiding by the terms of its contract with Buckeye under the Power Delivery Agreement. What Buckeye fails to establish is how the licensing and operation of the Zimmer nuclear unit will maintain or exacerbate this contractual situation. There is no explanation by Buckeye of how Zimmer will influence or have an anticompetitive impact on the situation that exists under the Power Delivery Agreement. Put another way, Buckeye's claims of anticompetitive conduct and abuse of monopoly power by DPL

under the Power Delivery agreement are not shown to have a significant nexus to the operation of Zimmer and thus to the limited antitrust review jurisdiction of this Commission. Because DPL's alleged anticompetitive conduct and abuse of monopoly power has no nexus with the operation of the Zimmer nuclear unit, Buckeye's request for reevaluation should be denied.

The Commission's antitrust authority is limited to those antitrust concerns which will be created or maintained by the activity under the Zimmer license. It does not have general jurisdiction to oversee DPL's conduct under the Power Delivery Agreement and to require compliance thereto whenever nonconformance with the Agreement's terms is alleged. Thus, the NRC does not have an adequate remedy for the situation alleged by Buckeye. Therefore, consistent with the Commission's Summer opinion, supra, Buckeye's request for reevaluation should be denied.

My rejection of Buckeye's reevaluation request does not leave it without a forum to pursue its claims. Its relationship with DPL under the Power Delivery Agreement is, of necessity, a continuous and ongoing business relationship. I note from the information submitted that DPL and Buckeye appeared before the Public Utilities Commission of Ohio concerning the Honda delivery point and that Buckeye was sucessful in its negotiations with DPL in obtaining the Honda delivery point. The Power Delivery Agreement is also on file at the FERC. I believe that the Ohio PUC and the FERC have a more direct interest in the implementation of the terms and provisions of the Power Delivery Agreement and questions concerning that agreement should be brought to the appropriate agency's attention. Finally, Buckeye and DPL are signatories to a multi-party

contract and problems dealing with specific performance under the contract's terms can be brought to the attention of the courts.

In denying Buckeye's request for reevaluation I must point out that nothing in this decision should be construed as expressing an opinion, favorably or unfavorably, on the merits of Buckeye's claims of anticompetitive conduct and abuse of monopoly power by DPL under the Power Delivery Agreement. All this decision does is deny Buckeye's reevaluation request for the reasons set forth above.

On the basis of all of the above I have determined to deny the request that I change my Finding of No Significant Changes in this matter.

Harold R. Denton, Director
Office of Nuclear Reactor
Regulation