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June 18, 1991

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Atomic Safety and Licensing Board Panel
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Spruce Creek Fly-In
Daytona Beach, Florida 32124

Charles Bechhoefer
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John M. Frye, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: The Cleveland Electric Illuminating Co. and
The Toledo Edison Co. Request for Hearing
(Docket Nos. 50-440A and 50-346A)
(TAC Nos. 66288, 68313 and 68880)

Gentlemen:

As requested, enclosed please find The Cleveland Electric Company and The Toledo Edison Company's Application to Amend the Perry and Davis-Besse Operating Licenses to Suspend the Antitrust Conditions.

Very truly yours,

James P. Murphy/ms

James P. Murphy

JPM:ms
Enclosure

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Nick Matovich
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, NUCLEAR REACTOR REGULATION

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	
	)	
and	)	Docket Nos. 50-440A and 50-346A
	)	
THE TOLEDO EDISON COMPANY	)	
	)	
(Perry Nuclear Power Plant, Unit 1, and Davis-Besse Nuclear Power Station, Unit 1)	)	

APPLICATION TO AMEND THE PERRY AND DAVIS-BESSE OPERATING LICENSES TO SUSPEND THE ANTITRUST CONDITIONS

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May 2, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, NUCLEAR REACTOR REGULATION

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APPLICATION TO AMEND THE PERRY AND DAVIS-BESSE OPERATING LICENSES TO SUSPEND THE ANTITRUST CONDITIONS

I. INTRODUCTION

The Toledo Edison Company ("TE") and the Cleveland Electric Illuminating Company ("CEI") (together referred to herein as "Applicants"), pursuant to 10 C.F.R. §§ 50.90 and 2.101 (1987), hereby request the Director of Nuclear Reactor Regulation to amend the Perry and Davis-Besse operating licenses by suspending the antitrust conditions imposed therein. Applicants are wholly owned subsidiaries of Centerior Energy Corporation, a public utility holding company.[1] Both are co-owners of the

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1/ On April 29, 1986, CEI and TE became affiliated by virtue of Centerior's acquisition of their outstanding common stock. This acquisition was approved by order of the Securities and Exchange Commission issued the same date. Centerior has since qualified for exemption from regulation as a public utility holding company under Section 3 of the Public Utilities Holding Company Act of 1935.

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Davis-Besse Nuclear Power Station and, together with Ohio Edison Company, Pennsylvania Power Company and Duquesne Light Company, are joint owners of the Perry Nuclear Power Plant.

The specific license conditions requested to be suspended were imposed by order of an Atomic Safety and Licensing Board of the Nuclear Regulatory Commission ("NRC") issued on January 6, 1977,[2] as affirmed and modified by order of the Atomic Safety and Licensing Appeal Board issued on September 6, 1979.[3] The portion of the Appeal Board order setting forth the license conditions is reprinted at Appendix A hereto; the procedural history surrounding their imposition is comprehensively reviewed in the application filed by Ohio Edison on September 18, 1987, to suspend the antitrust license conditions insofar as they apply to Ohio Edison.[4] By the instant application, TE and CEI seek to suspend these antitrust conditions insofar as they relate to the NRC's licensing of TE's and CEI's interests in Perry and Davis-Besse.[5]

2/ LBP-77-1, 5 NRC 133 (1977) (hereinafter the "Licensing Board Order").

3/ ALAB-560, 10 NRC 265 (1979) (hereinafter the "Appeal Board Order").

4/ CEI and TE incorporate by reference the procedural history set forth in that application, which for convenience will be referred to as the "OE Application."

5/ On March 15, 1974, the Board consolidated for hearing antitrust issues raised with respect to the Perry plant with issues raised earlier as to the Davis-Besse plant, for which an application to construct and operate also had been filed. See Licensing Board Order, 5 NRC at 138-39.

The OE Application makes a compelling case for suspension of the antitrust license conditions. In particular, Ohio Edison's arguments concerning the difference between the anticipated and actual cost of nuclear generation, the economic impact of those costs on Ohio Edison's competitiveness, and the fundamental changes in operation of the CAPCO power pool,[6] cogently show why the statutory purpose behind the imposition of the license conditions no longer is being served by their perpetuation. Although Ohio Edison's arguments apply with equal force to CEI and TE, we do not intend merely to repeat them. Instead, after discussing how high nuclear costs defeat the statutory basis for the imposition or continuation of license conditions, we also will concentrate on how the competitive environment within the geographic areas served by TE and CEI has changed since the license conditions were imposed. These fundamental changes, which are both factual and legal in nature, occurring in the years since the imposition of the license conditions eliminate any basis for their perpetuation and compel the conclusion that unconditional licenses would not "create or maintain a situation inconsistent with the antitrust laws."[7]

6/ CAPCO is an acronym for the Central Area Power Coordination Group, a group of electric utilities including TE, CEI and Ohio Edison.

7/ Section 105(c)(6) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2135(c)(6) (the "Act").

II. REASONS WHY THE ANTITRUST CONDITIONS SHOULD BE SUSPENDED AS TO TOLEDO EDISON AND CEI.

CEI and TE advance two independent grounds for suspension. First, the critical premise supporting the imposition of antitrust conditions in these licenses has turned out to be wrong. Nuclear power is not the low-cost power source it was universally and reasonably projected to be when the antitrust conditions were imposed. Consequently, CEI's and TE's interests in Perry and Davis-Besse do not give rise to the decisive competitive advantage perceived to flow from access to nuclear power. This perceived competitive advantage infused both Congress' thinking in enacting the 1970 amendments to the Atomic Energy Act and the NRC's narrow analysis of the Applicants' activities under the subject licenses. The high-cost fact of nuclear power negates the advantage and defeats the statutory basis for the continuation of license conditions.

Second, even if the NRC were to accord no statutory significance to the irrefutable fact that nuclear power has not lived up to its low-cost promise, the competitive environment in which TE and CEI operate has substantially and materially changed in the years since the antitrust conditions were imposed. The NRC's decision to impose such conditions explicitly was based on its consideration of the effects of granting the licenses on the competitive environment within which the Applicants operate, a consideration essential to the finding of a requisite nexus between the Applicants' prior activities and their activities

under the licenses. The material and substantial changes in competitive environment occurring since the antitrust conditions were imposed obviate that nexus and compel the suspension of the antitrust conditions.

A. THE HIGH COST OF NUCLEAR POWER DEFEATS THE NRC'S STATUTORY BASIS FOR IMPOSING LICENSE CONDITIONS.

The central thrust of CEI's and TE's application -- that nuclear power has not turned out to be the low-cost power it was reasonably assumed to be when the NRC imposed antitrust conditions with respect to the Perry and Davis-Besse plants -- can scarcely be debated. Nor can it be questioned that the presumed economic superiority of nuclear plants was pivotal to both the Licensing and Appeals Boards' decisions to impose conditions on the Perry and Davis-Besse operating licenses.

The relevant Licensing Board and Appeal Board Orders are brimming with statements concerning the economic benefits of nuclear generation. In the synopsis of its order, the Licensing Board accepted without question the view that the nuclear plants:

> will produce economies of scale and will provide for long term generation costs well under system average costs which could be obtained either compared to the cost of operating their present generating equipment or in comparison to new generation relying upon fossil fueled units.

5 NRC at 143. The Licensing Board's Order also quoted extensively from the testimony of the NRC's own expert witness,

Dr. Hughes, as to the economic superiority of nuclear generation. In concluding that the nuclear units "will contribute to the effectiveness of the applicants bulk power supply systems and enhance the economic advantage these systems enjoy over alternative sources . . . ," 5 NRC at 155, Dr. Hughes, too, assumed that nuclear generation was the economically superior choice for expanding base-load capacity. 5 NRC at 241, n.156.

The assumed economic superiority of nuclear generation was pivotal to the NRC's decision to impose antitrust conditions with respect to the Perry and Davis-Besse licenses for two reasons. First, it established the requisite nexus under Section 105(c) of the Act between the Applicants' "activities under the licenses" and the "maintenance of a situation inconsistent with antitrust laws." The Applicants' access to low-cost nuclear power was viewed to increase their market dominance and, consequently, to exacerbate a situation found to be inconsistent with antitrust laws.[8] Second, and perhaps more fundamentally, the assumed economic superiority of nuclear power made the NRC's imposition of antitrust conditions under Section 105(c) consistent with Congress' intent in enacting that statute. Absent economic superiority, the imposition of license conditions

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8/ For purposes of this application, CEI and TE accept the NRC's antitrust findings concerning their prior activities. CEI and TE do not here seek to modify or in any way disturb those findings.

would have been inconsistent with both the letter and spirit of the Act.

1. A Decisive Competitive Advantage Arising from Ownership of a Nuclear Plant Is Essential Both to the Existence of Section 105(c) and the NRC's Imposition or Continuation of License Conditions in Reliance Upon that Section.

In 1970, Congress added Section 105(c) to the Atomic Energy Act to address antitrust concerns arising from the construction and operation of large-scale nuclear power plants. The definitive analysis of the legislative history of Section 105(c) of the Act set forth in the OE Application[9] demonstrates that the assumed low cost of nuclear power was the critical factor giving rise to the perceived need for an antitrust provision in the Act. As emerging from the testimony of various witnesses before the Joint Committee on Atomic Energy, the connection between the low cost of nuclear power and antitrust concerns was simple and straightforward: because of its low cost, nuclear power was believed to create a decisive competitive advantage for those utilities fortunate enough to have access to it. Otherwise, according to witnesses who appeared before the Joint Committee, there was no distinction between nuclear-fueled and coal- or oil-fired generating plants.[10]

9/ Rather than repeat it, CEI and TE incorporate by reference the discussion and authorities cited at pp. 7-12 of the OE Application.

10/ Prelicensing Antitrust Review of Nuclear Powerplants, Hearings Before the Joint Comm. on Atomic Energy, Part I.

(Footnote 10 continued on next page

The Joint Committee heard uncontradicted testimony that access to low-cost nuclear power would create decisive competitive advantages. Although all witnesses assumed that access to nuclear power would bestow a competitive advantage, a key antitrust policy witness appearing before the Joint Committee explicitly recognized that the threshold question was whether such a competitive advantage existed. In the words of Roland W. Donnem, the Director of Policy Planning of the Antitrust Division of the Justice Department:

> With regard to the establishment of a large-scale nuclear power plant, it is necessary to first determine the extent to which such plants might afford the participants therein decisive competitive advantage over their competitors.[11]

Mr. Donnem went on to observe that the substantial economies of scale associated with large nuclear plants may make access to this low-cost power decisive in any competitive race between electric utilities.

In sum, Section 105(c) owes its very existence to Congress' belief that nuclear power plants, because of their low operating costs, might afford their owners a decisive competitive advantage. It is not surprising, then, for the presumed economic

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(Footnote 10 continued from previous page
91st Cong., 1st Sess. 75-77 (1970) (hereinafter "Joint Committee I").

11/ Joint Committee I at 9.

superiority of nuclear generation to have infused the Licensing and Appeals Board's decision to impose license conditions with respect to the Perry and Davis-Besse plants. At the same time, however, it must be recognized that Congress' beliefs about the economic superiority of nuclear plants -- as well as the NRC's -- actually related to the threshold question to which Section 105(c) is addressed: the extent to which nuclear plants afford their owners a decisive competitive advantage.

Viewed against the background of its legislative history, Section 105(c) plainly requires as a prerequisite to the imposition of antitrust license conditions the threshold determination that nuclear plants afford their owners a decisive competitive advantage. In 1977, such a determination flowed naturally from the universally held belief that nuclear power was economically superior to conventional forms of power. As the world has since learned, however, nuclear power plants do not afford their owners a decisive competitive advantage. Rather, because of their unforeseeably high investment and operating costs, nuclear power plants today place their owners at a distinct competitive <u>disadvantage</u> vis-a-vis other electric utility companies.

This competitive disadvantage lies at the heart of the arguments raised by Ohio Edison, CEI and TE in support of the suspension of the Perry and Davis-Besse antitrust conditions. If, prior to imposing antitrust conditions in a nuclear license,

Section 105(c) requires the NRC to make a threshold determination that the plant in question would afford its owners a decisive competitive advantage, the logical corollary is that the NRC has no statutory basis for imposing such conditions where a nuclear plant does not afford its owners a decisive competitive advantage. Absent a competitive advantage, the antitrust concerns to which Congress addressed Section 105(c) simply do not exist.

If the NRC has no statutory basis for imposing license conditions anew in such circumstances, it has no basis for perpetuating them where it can be shown that the competitive advantage forming the basis for their earlier imposition no longer exists. Within the scope of its plenary jurisdiction over nuclear licensees, the NRC has ample regulatory authority to amend, suspend or modify license conditions on the basis of changed circumstances.

2. Notwithstanding its Limited Antitrust Role, The NRC's Plenary Jurisdiction Over Nuclear Licensees Empowers it to Amend, Modify or Suspend Any License Condition, Antitrust or Otherwise.

In its response to Ohio Edison's application, the City of Cleveland ("Cleveland") has argued that the NRC lacks jurisdiction to grant an application to suspend antitrust conditions imposed by the agency in construction or operating license proceedings. Cleveland's arguments are based on a distorted interpretation of the 1970 amendments to the Act and the nature

of the relief sought initially by Ohio Edison and now by CEI and TE as well. From the fact that Congress carved out a limited antitrust role for the NRC when enacting sec[illegible]105(c), as evidenced by the narrowly circumscribed procedures for antitrust review set forth therein, Cleveland infers that the NRC is powerless to alter antitrust conditions it imposes in nuclear licenses.

No one disputes that Congress carved out for the NRC a limited antitrust role in the nuclear construction and licensing process. However, Cleveland conveniently ignores the fact that Congress limited the NRC's antitrust role in order to protect utilities from the risk of continuing antitrust review Houston Power & Lighting Co., et al., CLI-77-13, 5 NRC 1303, 1317 (1977) (hereinafter "South Texas"). That continuing risk would have had a decidedly chilling effect on nuclear construction, and thus would have been at odds with the purpose of the Act.[12] Moreover, the Congressional desire to protect utilities is fully consistent with statutory limitations that Congress placed on the

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12/ Section 3 of the Act provides, in pertinent part:

> It is the purpose of this Act to effectuate the policies set forth above by providing for-
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> * * *
>
> d. a program to encourage widespread participation in and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public.

NRC's ability to add antitrust conditions under Section 105(a), after a judicial determination of antitrust violations" in the conduct of licensed activities."

In short, while the "particularized regime"[13] and legislative history of Section 105(c) support the conclusion that the NRC's authority to impose antitrust conditions is limited, they do not support an equally narrow view of the NRC's authority to amend, modify or suspend antitrust conditions previously imposed. The NRC's suspension of antitrust conditions previously imposed involves an entirely different set of legal and policy considerations. Cleveland's attempt to transpose the procedures and policies limiting the NRC's ability to impose antitrust conditions to an application to suspend antitrust conditions strains both logic and law.

Moreover, as we understand it, the application filed by Ohio Edison, like the instant application, expressly does not seek a plenary antitrust review of the applicants' activities since the license conditions were imposed. To the contrary, for purposes of these applications, each of the applicants accepts the NRC's prior determination concerning activities inconsistent with antitrust laws. In express recognition of the NRC's limited antitrust role, and without disturbing the NRC's previous

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13/ The NRC in South Texas employed this phrase to characterize the complex statutory scheme established by Section 105(c) for the consideration and accommodation of possible antitrust concerns arising in connection with the licensing of nuclear power plants. 5 NRC at 1309.

antitrust findings, CEI and TE are asking the NRC to determine that, as a threshold matter, there is no statutory basis for continuing the antitrust conditions where the high cost of nuclear power obviates any competitive advantage perceived to arise from ownership of these nuclear plants. CEI and TE make the further argument that the antitrust conditions no longer are appropriate or necessary to address a situation found to be inconsistent with antitrust laws in view of the substantial and material changes in the competitive environment within which CEI and TE now operate.

In this regard, both the instant application and Ohio Edison's are easily distinguishable from those underlying the NRC's decisions in South Texas and Florida Power & Light, LBP-82-21, 15 NRC 639 (1982), decisions which Cleveland asserts bar the relief sought. In South Texas, an intervenor initially sought an antitrust hearing and the imposition of antitrust conditions long after a construction permit had been issued without request for or conduct of an antitrust hearing. Consistent with the narrow antitrust role carved out in Section 105(c), the NRC declined to conduct the requested antitrust review.[14] The NRC's decision in Florida Power & Light,

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14/ Significantly, the NRC's comprehensive review of the legislative history included a lengthy quote from Chairman Holifield of the Joint Committee, who expressed concern about the inequity to an electric utility that had invested large sums in a nuclear plant resulting from separate antitrust reviews at both the construction permit and operating license stages. 5 NRC 1315-16.

in which certain cities sought to intervene and petitioned for an antitrust hearing almost three years after operating licenses had been issued, is to the same effect.

Given the fact that Congress limited the NRC's antitrust review in order to protect nuclear licensees from the risk of continuing antitrust review, the difference between imposing and suspending antitrust conditions is as obvious as it is fatal to Cleveland's reliance upon South Texas and Florida Power & Light. Cleveland attempts to surmount this logical Mt. Everest by imputing to the drafters of Section 105(c) an intent to limit antitrust review so as to protect the "competitive positions of beneficiaries of the license conditions." (Cleveland Response at 42.) Of course, it cites not so much as a word of legislative history to support this assertion, because that support cannot be gleaned from the legislative history. The legislative history of Section 105(c) unequivocally demonstrates that the limitations placed on antitrust review were intended to protect the utilities that had committed huge sums to the construction of a nuclear plant.

Lacking support in the legislative history, Cleveland resorts to the argument that, because Cleveland Public Power has come to rely upon CEI's wheeling of "inexpensive hydroelectric power" under the conditions,[15] suspension of the antitrust

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15/ "Wheeling" is defined to mean the transmission of electric energy by a utility over its lines for another utility, including the receipt from and delivery to another utility system of like amounts of energy.

conditions would have a "disruptive impact" similar to that which Congress, by limiting antitrust review, intended to avoid. Cleveland Public Power's reliance upon the antitrust conditions to obtain access to cheap non-nuclear power proves nothing with respect to legislative intent and purpose. It does, however, prove the truth of CEI's and TE's contentions concerning the abuse and distortion to which the antitrust conditions presently lend themselves. The antitrust conditions are not being relied upon to facilitate access to nuclear power, as Congress plainly intended. Instead, they are being relied upon by municipal utilities serving small, discrete segments of the population to avoid the cost burdens of nuclear power, to the detriment of the broader populations served by the owners of nuclear plants.

Although the suspension of the antitrust conditions will have no impact on existing transmission and interchange services that may, in fact, be contrary to the underlying purpose of Section 105(c),[16] suspension will ensure that the antitrust conditions are not further abused or distorted. However, suspension of the antitrust conditions assuredly does not mean that Cleveland and other municipalities will be left without protection against anticompetitive conduct or without access to wheeling services. Rather, absent the conditions, to the extent that Cleveland wishes to assert a right under antitrust law to

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16/ CEI and TE will continue to provide such services under the terms of existing service agreements even if the antitrust conditions are suspended.

wheeling or interchange services, it may pursue appropriate relief under the Sherman and Clayton Acts. To the extent that Cleveland wishes to compel wheeling services outside of the antitrust remedial context, it may petition for such relief under Federal Power Act, as amended by the Public Utility Regulatory Policies Act of 1978. Suspending the antitrust conditions means only that, in the future, Cleveland will not be able to rely upon them to avoid the cost burdens of nuclear power, for such reliance can neither be reconciled with the underlying purpose of Section 105(c) nor used as a basis for precluding suspension of antitrust license conditions the NRC has previously imposed.

In sum, nothing in Section 105(c) or its legislative history derogates from the broad authority Congress delegated to the NRC under Chapter 14 of the Act to take such acts as it deems necessary and appropriate to carry out the purposes of the Act. Nor does Section 105(c) or its legislative history derogate from the NRC's specific authority to amend licenses under Sections 187 and 189 of the Act, 42 U.S.C. §§ 2237 and 2239.[17] The Appeal Board not only recognized this principle, it actually relied upon it to conclude that it was unnecessary to "'vest the Licensing Board with continuing jurisdiction' to relieve the Applicants from conditions that might prove an extreme hardship. . . ."

17/ In applying Section 187 to license amendments effected by generic rule, the NRC has taken for granted its authority under Section 189 to effect license amendments by case-specific adjudication. See Armed Forces Radiobiology Research Institute, LBP-82-24, 15 NRC 652 (1982).

Appeal Board Order, 10 NRC at 294. Cleveland's characterization of this principle as "mere dicta" does not detract from its soundness or correctness.[18] Where, as here, the unforeseeably high cost of nuclear power not only eliminates any competitive advantage afforded to the plant owners but actually places them at a distinct competitive disadvantage, there is no legitimate basis under Section 105(c) for the perpetuation of antitrust conditions. In the circumstances, the NRC has both the legal authority and obligation to suspend the antitrust conditions.

B. MATERIAL AND SUBSTANTIAL CHANGES IN THE CIRCUMSTANCES GIVING RISE TO THE IMPOSITION OF ANTITRUST CONDITIONS COMPEL SUSPENSION OF THE ANTITRUST CONDITIONS.

In imposing conditions to the operating licenses issued for the Perry and Davis-Besse nuclear plants, the Licensing Board discussed the nature of the NRC's narrow interest under Section 105(c) of the Act. That interest, said the Licensing Board:

> is focused not upon a regulatory mandate to investigate all market activities of Applicants but only to consider the effects of

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18/ Besides, that characterization is wrong. The NRC's ability to monitor and, if necessary, modify the license conditions was a matter of considerable importance to Mr. Sharfman. The Appeal Board majority obviously respected Mr. Sharfman's concerns, believing that they could be readily accommodated under the NRC's existing statutory authority delegated to the Director of Nuclear Reactor Regulation. See 10 CFR § 2.206(a)(1988)("Any person may file a request for the Director of Nuclear Reactor Regulation . . . to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper.")

granting a nuclear license on the competitive environment in which Applicants operate.

5 NRC 237 (emphasis added). Indeed, the Licensing Board's decision not only devoted considerable attention to the impact of the nuclear plant on the competitive environment, but also keyed its "nexus" analysis to findings pertaining to that environment. Those findings fell into two broad areas: (1) the structure of the electric industry within the geographic area served by the CAPCO companies; and (2) the restraints on the disposition or use of power to be generated by the nuclear plants. The Licensing Board relied upon both findings, "jointly and alternatively," to support its determination that a nexus exists between the proscribed antitrust situation and license activities. 5 NRC at 238.

As a separate and independent basis for suspension from that set forth in Section II. A, above, CEI and TE assert that substantial and material changes have occurred in the competitive environment within which CEI and TE operate. By virtue of these changes, the circumstances giving rise to the imposition of antitrust conditions no longer exist, and the antitrust conditions therefore should be suspended. CEI and TE emphasize that the NRC need not reach this independent basis for suspension unless it rejects Applicants' primary position that the high cost of nuclear power--although itself a materially and substantially changed circumstance--defeats the statutory basis for

continuation of the license conditions under Section 105(c) because of the absence of competitive advantage arising from nuclear plant ownership.

1. Doctrines Barring Relitigation of Issues Do Not Bar Agency Reconsideration of Prior Action on the Basis of Changed Circumstances.

In response to Ohio Edison's application, Cleveland devotes many pages to an argument that the suspension of the license conditions is barred by the doctrines of res judicata and/or collateral estoppel. Despite its bulk and complexity, however, that argument reduces to the proposition that these "preclusion" doctrines apply to administrative proceedings except where changed factual or legal circumstances are involved. (Cleveland Response at 56). The NRC itself has recognized this proposition. See Alabama Power Co., ALAB-182, 7 AEC 210, 215 (1974), rev'd on other grounds, CLI-74-12, 7 AEC 203 (1974).

CEI and TE have predicated their requests for relief in part on material and substantial changes in circumstances giving rise to the imposition of the antitrust conditions. Thus, the "preclusion" doctrine laboriously discussed by Cleveland has no practical significance to the issue at hand. Forcing the changed circumstance analysis to be made against the background of res judicata, as Cleveland does, may permit Cleveland to make some hypertechnical arguments on the basis that Ohio Edison's application to suspend was filed in the "same proceeding" as the consolidated construction permit and operating license

proceedings and that some of the facts averred by Ohio Edison were known before the operating license stage of the proceedings had been concluded. However, in the end, two incontrovertible facts remain: (1) the antitrust conditions were imposed nearly ten years ago; and (2) in the intervening ten years, there have been substantial and material changes in the circumstances giving rise to their imposition.

2. The Changes Occurring in the Competitive Environment in Which CEI and TE Operate in Years Since the Antitrust Conditions Were Imposed Are So Substantial and Material as to Warrant Suspension of the Conditions.

Of course, there remains the open question of what constitutes a change substantial and material enough to warrant suspension of the antitrust conditions. The standards applied with respect to a "significant changes" determination under Section 105(c)(2) of the Act are inapplicable because the NRC's antitrust review procedures under that section are inapplicable to the instant application. Again, Applicants herein do not seek further review of their past activities under antitrust law. Instead, CEI's and TE's allegations concerning changed circumstances are directed toward the second prong of the requisite nexus determination: whether, under today's circumstances, the suspension of the Perry and Davis-Besse license conditions would "create or maintain" a situation inconsistent with antitrust laws.

One way to construct legal standards in this area is by analogy to other administrative orders containing antitrust conditions. The Federal Trade Commission frequently issues such orders under the Federal Trade Commission Act, 15 U.S.C. § 41, et seq. (Supp. 1988) (hereinafter "FTCA"). Section 5(b) of the FTCA states the relevant standard governing FTC review of petitions to reopen and vacate orders. In interpreting this standard, the FTC has stated:

> A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition.

In re Union Carbide Corp., Docket No. C-2902 (Slip Order Modifying Consent Order, Nov. 14, 1986, at 3 (citation omitted)). With respect to changes of fact sufficient to justify modification of an order, the FTC noted:

> Changed factual circumstances justify modification of an order only when the changed circumstances (1) were unforeseeable when the order was entered and result in severe competitive hardship, and (2) virtually eliminate the dangers the order sought to remedy.

Id. at 6 (citations omitted).

To be sure, the NRC is not bound by the FTCA's legal standard or the FTC's interpretation of it. Nonetheless, the FTC's interpretation articulates quite well the principles that are likely to control the question of changed circumstances regardless of the words chosen to express them. If applied to this application, these principles would compel suspension of the antitrust conditions for a reason that bears directly on the NRC's own analysis: the competitive environment existing today within the areas served by TE and CEI bears little resemblance to the environment surveyed by the Licensing Board more than ten years ago. More particularly:

° The electric industry within the combined CAPCO service territories has been completely restructured. The "one-system" concept (used to describe the coordinated planning, development and operation of the CAPCO companies) effectively has been abandoned;

° The assumed enhancement of monopoly power arising from nuclear baseload generation has been totally refuted by the passage of time. Nuclear generation has proven to be vastly more costly than anyone did foresee or could have foreseen ten years ago. Far from being the dominant positive force in power production planning the NRC and all involved parties assumed it would be, nuclear generation has had a pronounced negative effect on the overall economies of generation and transmission within the CAPCO services territories;

° The emergence of a major independent power supplier within CEI's and TE's service territories has created competitive power supply opportunities that did not exist ten years ago. Indeed, the wheeling rights afforded under the license conditions have led to an exquisite irony: instead of utilizing those rights to gain access to nuclear power, consistent with Congress' intent in granting remedial authority under Section 105(c) of the Act, CEI's and TE's municipal customers increasingly are utilizing or contemplating utilizing those rights to avoid the cost burdens of nuclear power. This will lead to an erosion of CEI's and TE's municipal sales markets, the effects of which will be exacerbated as CEI's and TE's capital investments in Perry and Davis-Besse are reflected in their respective rate bases.

These changes were unforeseeable when the antitrust conditions were imposed. Moreover, in view of these changes, the perpetuation of the antitrust conditions would lead to results at odds with the underlying purpose of Section 105(c) of the Act, would be inequitable to CEI and TE, and would result in severe competitive hardship.

a. The High Cost of Nuclear Generation

Contrary to the universal assumptions about nuclear power ten years ago, nuclear power has had a substantial adverse effect on TE's and CEI's generation costs and their competitive positions within the Ohio electric power industry. This results not only from unforeseen and unavoidable increases in nuclear

capital investment costs attributable primarily to federal regulatory initiatives, legislative initiatives, and high inflation,[19] but also from unforeseen and unavoidable increases in nonfuel operating costs. While the rapid escalation in the costs of constructing a nuclear plant is a well-studied phenomenon, the substantial escalation in real (inflation-adjusted) nonfuel operating costs is now beginning to be systematically quantified and analyzed. Indeed, a recently released report by the Department of Energy[20] concludes that the

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19/ In January 1988, the Public Utilities Commission of Ohio ("PUCO") effectively disallowed from inclusion in Ohio Edison's, TE's and CEI's rate base a relatively small portion of the total construction costs for the Perry plant incurred prior to the date of fuel loading. Of the $4.15 billion in construction costs considered, the PUCO disallowed approximately $298 million as attributable to management imprudence and an additional $329 million as "unreasonable" or as a result of allegedly inadequate performance by contractors for which the plant owners were held responsible. Even if the construction costs found to have been imprudently incurred--amounting to about 7.2% of total construction costs--are disregarded, the fact remains that CEI's and TE's capital investment reflects substantial and unavoidable cost increases despite what the PUCO described as CEI's "aggressive and effective" management of the project. See In the Matter of the Investigation into the Perry Nuclear Power Station, Case No. 85-521-EL-COI. (January 12, 1988). Moreover, the PUCO's order is pending review by the Ohio Supreme Court (Docket No. 88-605), and all aspects of that order are subject to judicial modification or reversal.

20/ "An Analysis of Nuclear Power Plant Operating Costs," Energy Information Administration, Office of Coal, Nuclear, Electric and Alternate Fuels, DOE/EIA-0511 (released March 16, 1988)(hereinafter the "DOE Report"). The DOE Report is based on a sample consisting of all large-scale (400 megawatts or larger) commercial light-water reactors that were in commercial operation by the end of 1984, including Davis-Besse.

"continued escalation in operating costs could erode any cost advantage that operating nuclear plants may now have."[21]

The cost trend data compiled by DOE show that, between 1974 and 1984, routine operating and maintenance ("O&M") expenses, measured in 1982 dollars, have increased from $17 to $53 per kilowatt-electric (kWe). This translates into an average increase of about 12 percent per year. "Postoperational capital costs," defined by DOE as consisting of large maintenance expenditures needed to keep the plant operational and to make plant modifications (backfits) required by the NRC, also have increased substantially, at an average annual rate of 17% over the past ten years. Overall, the DOE Report finds that total nonfuel operating costs (including both real O&M costs and capital additions) nearly quadrupled between 1974 and 1984, increasing from $26 per kWe to about $95 per kWe.[22] This increase is illustrated in the table below, reproduced from the DOE Report:

21/ DOE Report at vii.

22/ DOE Report at 5.

Table 1. Average Annual Nonfuel Operating Costs, 1974-1984
(1982 Dollars per Kilowatt of Plant Capacity)

Year of Observation	Routine Operating Costs	Routine Maintenance Costs	Total Operating and Maintenance Costs	Post Operational Capital Expenditures	Total Non-Fuel Operating Expenditures
1974	9.77	7.51	17.28	8.51	25.79
1975	11.11	8.61	19.72	7.04	26.76
1976	11.44	8.99	20.44	11.32	31.75
1977	12.23	9.34	21.57	17.15	38.72
1978	13.00	10.50	23.50	13.51	37.00
1979	15.31	12.00	27.31	15.29	42.60
1980	19.77	15.37	35.14	23.48	58.62
1981	23.10	14.44	37.54	30.83	68.37
1982	27.21	17.50	44.71	27.68	72.39
1983	27.26	18.61	45.86	31.27	77.13
1984	31.07	21.94	53.01	41.98	94.99

Note: Rows may not add because of differences in samples. Sample consists of all commercial light-water nuclear power plants with a capacity of over 400 megawatts.
Sources: FERC Form 1, Form EIA-412, and predecessor survey forms.

Significantly, the DOE Report also casts doubt on the common belief that the nuclear power plants that entered commercial operation in the 1960's and 1970's were economical relative to coal-fired plants. "This may not be the case if operating costs continue to escalate," says the DOE Report.[23] In fact, the DOE Report notes that O&M costs per kilowatthour for coal-fired plants "currently are more than 3 times less than nuclear O&M costs."[24] The increases in both nuclear investment and nonfuel operating costs may be brought into sharp focus by a comparison over time of the relative costs of two generating

23/ DOE Report at 1.

24/ Id.

plants, one nuclear and the other coal-fired, of the same approximate capacity:

In 1971, some two years after CEI and TE filed their joint application for a license to construct and operate the Davis-Besse plant, capital investment in a 880 MW nuclear plant and a 880 MW coal-fired generating plant was estimated to be $330 per kWe and $269 per kWe, respectively. Total O&M costs (including fuel) were estimated to be 2.30 mills per kWh and 4.48 mills per kWh, respectively.

In 1977, an internal CEI analysis concluded that a nuclear plant would provide substantially cheaper energy than a comparably sized coal-fired plant when both were completed. Capital costs were estimated to be $646 per kWe and $468 per kWe, respectively. Total O&M costs were expected to be 3.9 mills per kWh and 13.0 mills per kWh, respectively. In the same year, a CAPCO Planning Committee Report on the relative economics for coal and nuclear plants showed a 15% cost disadvantage for coal for the first year and a 27% disadvantage on a levelized basis over ten years.

In 1986, however, an Electric Power Research Institute study showed that plant investment in a 1100 MW nuclear plant had jumped to $2871 per kWe versus $1268 per kWe for a comparable coal-fired plant. Total O&M costs including fuel jumped to 14.2 mills per kWh for the nuclear plant versus 22.4 mills per kWh for the coal-fired plant. This 1986 study shows that, with respect

to O&M costs, nuclear-generated power has proportionally lost ground to power generated from coal. More decisively, the study shows that the capital costs of nuclear plants as of 1985 exceeded those of coal-fired plants by 126%; in 1977, the capital costs of nuclear plants exceeded coal-fired plants by only 38%.

Ohio Edison's application contains a thorough discussion of the events causing nuclear costs to increase dramatically since 1977. The DOE Report, which uses a statistical regression analysis to isolate the factors contributing to the escalation in total nonfuel operating costs, is remarkably consistent with that discussion. Although some may attach more or less significance to these events, the fact remains that today, nuclear power is more expensive than power from coal-fired plants. While in some cases the real O&M costs of a nuclear plant may be less than those for a coal-fired plant, the revenue needed by a utility to recoup its capital investment now more than offsets any savings associated with lower O&M costs.

This unforeseeable turnaround in costs over the intervening years demonstrates two things. First, nuclear power is not the superior economic alternative it was reasonably projected to be when the license conditions were imposed. Second, the higher costs of nuclear power do not confer upon those utilities responsible for nuclear investments and O&M expenses, including CEI and TE, any competitive advantage. As discussed below, these economic realities have been the driving

force behind extraordinary recent developments in the Ohio electric power industry.

b. The Emergence of Competitive Independent Power Suppliers and the Erosion of Municipal Markets

Since 1977, the Ohio electric power industry has been transformed by the emergence of competitive independent power suppliers. Perhaps the best example is American Municipal Power-Ohio ("AMP-O"), a non-profit corporation that acts as a trade association and wholesale power supplier for municipally owned electric systems. When the Perry license proceedings began, AMP-O was, by its own characterization, "a fledgling association with little actual participation in the Ohio electric power industry."[25] Today, however, AMP-O serves 75 of Ohio's 84 municipal electric utilities -- 34 of which on a full requirements basis -- and has signed an agreement to purchase a 70% interest in a 200-megawatt coal fired generating facility in southeastern Ohio. AMP-O's president recently explained the significance of this agreement:

> AMP-Ohio's purchase of the steam plant will allow Ohio's municipal electric systems to gain greater control over their future power

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25/ Motion of American Municipal Power-Ohio for Leave to Intervene, etc., January 29, 1988, at 2 (hereinafter referred to as the "AMP-O Intervention"). AMP-O initially intervened in the Perry license proceedings but later withdrew its intervention, with the Licensing Board's approval, apparently in view of its then-limited activities. See 5 NRC 274-75.

> supplies, providing an economical long-term source that they will control . . . . It will help keep electric rates affordable for consumers of Ohio's public power systems into the next century.[26]

AMP-O's newly acquired ability to sell self-generated power -- as opposed to selling power purchased from other utilities -- is clear evidence of increased competitiveness within the Ohio electric power industry. Indeed, by its own account, AMP-O is now a "major player" in the Ohio electric utility industry, coordinating and developing power supply and interchange arrangements, purchasing electric power and energy, and selling wholesale power and energy to its members.[27] In the past five years alone, AMP-O has seen electricity sales to its member rise from $24 million to $91.4 million.[28] That AMP-O saw fit to purchase a conventional generating plant in pursuit of a least-cost energy strategy on behalf of its member municipalities also underscores the fact that conventional alternatives to nuclear power are now recognized to be more economical than nuclear power itself. In today's competitive environment, CEI's and TE's interests in the Perry and Davis-Besse plants do not "hinder the ability of lesser entities to compete" with them. 5 NRC 144. To the contrary, the high costs arising from these

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26/ Edgerton [Ohio] Earth, January 7, 1988.

27/ AMP-O Intervention at 2.

28/ AMP-O Intervention at 3.

interests render CEI and TE less competitive with "lesser entities' who are taking advantage of non-nuclear power supply alternatives to lower their costs.

This topsy-turvy state of economic affairs raises a fundamental problem with continuing the license conditions in today's competitive environment: the conditions threaten to exacerbate the erosion of CEI's and TE's municipal markets. AMP-O's emergence as a major independent power supplier within CEI's and TE's service territory is just one element of today's changed competitive environment. An equally important element is the growing trend among municipals served by CEI and TE to shed their historic purchase arrangements in favor of alternative arrangements. This trend is illustrated by recent developments involving the City of Clyde, Ohio. Clyde has been a TE retail customer since 1965. In a November 1987 referendum, Clyde voters approved a plan to displace TE with a municipally owned distribution system. As a result of that vote, the Clyde City Council has been proceeding with plans to build new transmission facilities linking Clyde with, among others, the Ohio Power Company. Clyde's strategy also is being actively considered by as many as eight other municipal customers, including the Cities of Defiance, Parma, Youngstown and Medina, Ohio, as well as the Village of Archbold, Ohio.[29] The Ohio Public Interest Campaign, a

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29/ "Study: TE Buy-Out Would Be Costly," The Crescent News (Defiance, Ohio), January 13, 1988, at 1; "Public Power Debated," The Plain Dealer (Cleveland, Ohio), March 7, 1988,
(Footnote 29 continued on next page

self-styled consumer advocacy group, reportedly is urging all 56 Cuyahoga County municipalities to switch to "public power."

Underlying Clyde's determination to municipalize its electric system and displace TE as a retail electric supplier -- and undoubtedly influencing other municipalities as well -- are reports showing an increase in TE's long-term retail rates as a direct result of TE's investment in nuclear power. Once again, nuclear power proves itself to be a bane to TE's present competitiveness, not the boon to competitiveness presumed ten years ago. Clyde presents the extreme case demonstrating that a municipality without its own electric utility system may believe it to be economic to create one solely to avoid the cost burdens of nuclear energy. The Clyde situation also demonstrates that municipalities are able to construct their own transmission lines

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(Footnote 29 continued from previous page
at B-1; "High-voltage idea demands close study," Youngstown Vindicator, February 8, 1988; "Thinking big: trash plant, city power," Medina County Gazette, March 5, 1988, at A-3; "Archbold council considering having village developing its own municipal power source," Fulton County Expositor, March 24, 1988, at 16.

30/ An AMP-Ohio publication entitled "An Alternative to High Utility Rates: The Public Power System Fact Book," contains a statement illustrating how the rate impact of nuclear investment costs is being used to promote municipalization:

> For some investor-owned utilities in Ohio, such as [Ohio Edison, TE and CEI], meeting that profit margin has meant continuous rate increases to cover the cost of ill-advised and expensive nuclear plant construction. * * * And, there is no end in sight to the rate increases expected from [Ohio Edison, TE and CEI].

to access power supplies. However, the construction of new transmission facilities is but one method by which Ohio municipalities may seek to avoid the cost burdens of nuclear power. Municipalities operating existing electric utility systems may achieve the same end by arranging for electric energy to be wheeled over TE and CEI transmission lines without regard to the fact that such arrangements ultimately will drive up electric rates to CEI's and TE's remaining customers.[31]

Despite the NRC's focus upon providing access to power from the Perry and Davis-Besse nuclear units by way of the license conditions "in a manner which it allows it to be used without restraint and with the availability of necessary bulk power service alternatives," 5 NRC at 256, the bulk power service alternatives provided for under the conditions -- including wheeling services -- have become the means to an end which does not contemplate access to licensed nuclear plants. Indeed, access to nuclear power is the last thing Clyde and other municipalities within CEI's and TE's service territories want.

31/ See "Brown Says Muni Plans Threaten Energy Policy," Clyde Enterprise, January 27, 1988 at 6, quoting the remarks of Commissioner Ashley Brown of the Public Utilities Commission of Ohio ("If there is a sudden spurt in the number of muni systems then the impact will lead to spreading investor-owned utility costs over a smaller base, which might in turn trigger more municipalization, creating a deathspiral effect. . . .")

c. The Dissolution of CAPCO

In evaluating the activities of the license applicants from the standpoint of the competitive environment, both the Licensing and Appeal Board orders devote considerable attention to the CAPCO power pool. The benefits derived from the CAPCO members' coordinated planning, development and operation -- labelled the "one-system" concept -- were critical to the findings of "nexus" between the activities to be licensed and the situation inconsistent with antitrust laws. See 11 NRC at 281. In the words of the Licensing Board,

> utilizing nuclear generation for base load power will have such a pronounced effect on the overall economies of generation and transmission within the CCCT as to make the generation of these nuclear power plants an extremely substantial, if not the dominant, force in power production planning.

5 NRC 239-40.

Ten years after the fact, however, the market structure relied upon to impose the license conditions no longer exists: the "one-system" concept was formally abandoned on September 1, 1980, with the termination of the 1967 CAPCO Memorandum of Understanding. As noted in Ohio Edison's application, each CAPCO member now is individually responsible for future capacity planning, construction of generating units, and establishment of reserve margins. Other significant changes affecting the CAPCO structure flow from amendments to the CAPCO Basic Operating

Agreement that have been entered into since 1979.[32] The effect of these changes is to undercut the Licensing Board's findings concerning the coordination advantages obtained by the CAPCO in connection with the power pool. Since those coordination advantages no longer exist as a result of the amendments described above,[33] there is no basis for the Licensing Board's finding an intent on the part of CAPCO's members to limit membership in order to deprive competing public power systems of those advantages. Consequently, there is no basis for perpetuating relief imposed in explicit reliance upon such a finding.

d. The Enactment of PURPA

As originally enacted, and as it existed when the antitrust conditions were imposed, the Federal Power Act ("FPA")[34] did not permit the Federal Energy Regulatory Commission ("FERC") to compel wheeling. However, with the passage of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601, et seq.,("PURPA"), Congress granted FERC certain additional powers,

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32/ The OE Application details the more significant changes at pages 74-75.

33/ The Licensing Board considered the Applicants' own opinions concerning the superiority of nuclear baseload generation to be dispositive of any question as to the economic merits of nuclear generation. See 5 NRC at 143. By the same reasoning, CAPCO's abandonment of the "one-system" concept should be dispositive of the fact that the coordination advantages perceived to flow from it ten years ago obviously do not exist today.

34/ 16 U.S.C. § 821 et seq.

including the power to compel wheeling. Under new FPA sections 211 and 212, FERC may require an electric utility to provide transmission service to any other electric utility, provided that certain procedural and substantive conditions are met.

The enactment of PURPA subsequent to the imposition of the antitrust conditions is significant for several reasons:

First, the power to compel wheeling was intended to serve as a tool for enhancing competition by facilitating bulk purchases of power. See New York State Electric & Gas Co. v. FERC, 638 F.2d 388, 402 (2d Cir. 1980). The enhancement of competition within the bulk power purchase market -- a "relevant market" under the Licensing Board's analysis -- through intervening legislative initiatives obviously and materially affects the competitive environment within which CEI and TE operate. Moreover, FERC's new power to compel wheeling upon application of any electric utility or marketing agency creates the opportunity for access to transmission services whether or not the antitrust conditions exist. In fact, had Congress itself set out to create a remedy for the specific conduct on the part of the Applicants found by the Licensing and Appeal Boards to be inconsistent with antitrust law, it probably could not have devised better procedures than those set forth in FPA §§ 211 and 212. To be sure, those procedures reflect Congress' desire to ensure a

balanced consideration of a wheeling request.[35] But the balanced consideration Congress required of FERC recognizes that there are legitimate competing interests to be weighed with respect to every wheeling request. The absence of any procedure for balancing or weighing competing interests is a distinctive feature of the antitrust wheeling condition. The perpetuation of that condition means that CEI and TE not only must bear the competitive disadvantage of high cost nuclear power, but also must permit other utilities access to lower-cost power supplies regardless of the burdens placed upon CEI or TE or the economic consequences to their remaining customers.

Second, apart from the statutory amendments relating to wheeling service, PURPA adopted measures to "encourage the efficient use of utility facilities and resources." PURPA § 201 (whose changes are incorporated into the FPA's definitions) designated certain small power production and cogeneration facilities as "qualifying facilities" eligible for various benefits. These benefits actually have stimulated the addition of significant non-utility generating capacity since 1980 and have transformed the electric power industry. As of June 30, 1987,

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35/ FERC cannot order wheeling unless it determines under FPA § 212 that its order: (1) is not likely to result in a reasonably ascertainable uncompensated economic loss of any utility affected by the order; (2) will not place an undue burden on any utility; (3) will not unreasonably impair the reliability of any utility; and (4) will not impair the ability of any utility to render adequate service to its customers.

more than 3,300 facilities accounting for about 58,000,000 KW in capacity have achieved qualifying facility (or "QF") status nationwide. In Ohio alone, power plants accounting for more than 700,000 KW in capacity have achieved QF status as of the same date.[36] When operational, these small power plants, in the aggregate, will have added new generating capacity in Ohio equivalent to that of a small nuclear plant. Compared with the generation capacity added under the shrunken CAPCO nuclear construction program (only four of the nine nuclear plants expected in 1977 to be in operation by the late 1980's actually will be in operation; four have been cancelled altogether and construction work on the remaining plant has been indefinitely suspended), small power producers obviously constitute a significant presence in the bulk power purchase market. This presence simply did not exist in 1977, and further demonstrates how fundamentally different the competitive environment within which CEI and TE operate today is from the environment in which the license conditions were imposed.

Finally, PURPA's legislative history reflects a congressional recognition of the complex problems afflicting the electric utility industry since the time operating licenses were

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36/ Federal Energy Regulatory Commission, The Qualifying Facilities Report, July 1, 1987.

sought for Perry and Davis-Besse. In the words of the Committee on Energy and Natural Resources:

> These [problems] include declining load factors, increasing fuel costs, rapidly rising costs of new capacity, lower than expected powerplant reliability and a virtual end to economies of scale at the largest sizes of generation plants.

H.R. Rep. No. 95-442, 95th Cong., 1st Sess. 32 reprinted in [1978] U.S. Code Cong. & Admin. News, p. 7906. The economies of scale presumed to exist with respect to the licensed nuclear units, and the competitive advantages that flowed therefrom, simply never materialized.

PURPA's enactment by itself constitutes a substantial and material change in the CEI and TE competitive environment occurring since the license conditions were imposed. When considered together with the high cost of nuclear power, the emergence of independent power suppliers, the erosion of CEI's and TE's municipal markets, and the dissolution of CAPCO, CEI and TE submit that there is overwhelming evidence of changed circumstances sufficient to warrant suspension of the antitrust conditions.

C. THE NRC SHOULD SUMMARILY GRANT APPLICANTS' REQUEST TO SUSPEND THE ANTITRUST CONDITIONS.

1. The NRC Should Bifurcate or Phase Its Consideration of the Separate Grounds Upon Which This License Amendment Application is Premised.

CEI and TE seek relief from the antitrust conditions on the basis of the fact that nuclear power is not the economically superior form of baseload generation it was universally believed to be when the license conditions were imposed. Consequently, the decisive competitive advantage presumed to arise from the unconditional licensing of Perry and Davis-Besse simply does not exist. The extinguishment of this competitive advantage defeats the statutory basis for imposing the antitrust license conditions. Moreover, the fact the license conditions are not being relied upon to secure access to nuclear power, as the drafters of section 105(c) plainly intended, but instead are being relied upon to avoid nuclear power and its associated cost burdens, demonstrates that the perpetuation of the license conditions is completely inconsistent with the purposes of Section 105(c).

Since this ground for relief is premised upon a fact as to which there may be no genuine dispute, and since relief is controlled entirely by legal and policy considerations, CEI and TE submit that, under the authorities cited below, the NRC should summarily grant Applicants' request for relief for the reasons stated in this application.

CEI's and TE's second and wholly independent ground for relief -- that the competitive environment within which they operate has substantially and materially changed since the license conditions were imposed -- is premised not only upon the high cost of nuclear power, but upon additional facts. To the extent the NRC finds CEI's and TE's assertions concerning changed competitive circumstances to raise genuine issues of material fact, it must, under the same authorities, conduct an evidentiary hearing to resolve those issues.[37]

CEI and TE therefore urge the NRC to adopt a bifurcated or phased approach to the disposition of this application. The Commission should focus first on the indisputable fact of high cost nuclear power, and establish such procedures as it determines are appropriate with respect to the resolution of all legal and policy issues surrounding the disposition of this application on that ground. Then, depending upon the final disposition of the first phase, the Commission should turn to CEI and TE's alternative ground for relief, convening evidentiary proceedings only to the extent necessary to resolve disputed facts surrounding the changes in the competitive environment within which CEI and TE operate. This bifurcated or phased approach would promote both the interests of justice and administrative economy.

37/ However, as noted below, there is no statutory requirement that such a hearing be conducted prior to making the requested amendment effective.

2. The Requested License Amendments Involve "No Significant Hazards Consideration" and Thus May be Made Immediately Effective.

Section 189(a)(1) of the Act, 42 U.S.C. § 2239(a)(1)(1988 Supp.), sets forth the hearing framework for the amendment of licenses for nuclear plants. That section provides, in part, that "[i]n any proceeding . . . for the granting, suspending, revoking or amending of any license . . ., the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . . ." Id. (emphasis added).[38] In Sholly v. NRC, 651 F.2d 780 (D.C. Cir. 1980), vacated to consider mootness, 459 U.S. 1194 (1983), the D.C. Circuit Court of Appeals held that the NRC could not make an amendment immediately effective if there was an outstanding request for a hearing. As noted by the Ninth Circuit in San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (1986), this decision prompted an amendment to section 189(a) known as the "Sholly" amendment. Enacted in 1983, the Sholly amendment provides that the NRC may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment "involves no significant hazards consideration," notwithstanding the pendency of a request for a hearing. 42 U.S.C. § 2239(a)(2)(A).

38/ As noted earlier, the language of Section 189 illustrates that the NRC has ample statutory authority to amend the subject licenses in order to suspend the antitrust conditions.

Pursuant to the Sholly amendment, the NRC promulgated detailed regulations for making a "no significant hazards consideration" determination. Under these regulations, the NRC may make a license amendment immediately effective only if the amendment does not:

> (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
>
> (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
>
> (3) Involve a significant reduction in a margin of safety.

10 C.F.R. § 50.92

The instant application obviously implicates none of these concerns. Accordingly, the NRC staff should resolve this application with a finding of "no significant hazards consideration," thereby permitting the requested license amendment to become immediately effective, even if an interested party should request a hearing on the application.

3. Neither the Administrative Procedure Act Nor the NRC's Regulations Require that Any Formal Hearing be Held with Respect to a License Amendment Application, Even if One Should Be Requested by an Interested Party, Where There Are No Genuine Issues of Material Fact to Be Resolved.

Under Section 5 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554 (Supp. 1988), the formal hearing procedures set forth in APA sections 7 and 8 are applicable only if the adjudication in question "is required by statute to be determined on the record after opportunity for an agency hearing . . . ." Based on an exhaustive review of the legislative history of the Act, the Commission has held that Section 189 of the Act, discussed above, does not require a Section 554 hearing in every licensing or license amendment case. Kerr-McGee Corporation, 15 N.R.C. 232 (1982). Rather, the NRC found the legislative history to support the view that informal procedures may be better suited than trial-type evidentiary hearings to certain adjudications:

> The emphasis, today, in the absence of a specific statutory directive as to the requisite form of a hearing, is on the requirements of a particular case, not on formalistic interpretations of statutory words . . . .

Id. at 253 (quoting RCA Global Communications v. FCC, 599 F.2d 881, 886 (2d Cir. 1977)). Thus, the Commission concluded that the word "hearing" in section 189(a) does not trigger the formal hearing requirements of APA Section 5.

In this regard, the Commission has noted that a formal hearing is not required under Section 189 unless there are disputed adjudicative facts to be resolved before a license is amended. Kerr-McGee, 15 NRC at 255. In applying the same principle, the courts have gone even further: even where a statute imposes a requirement for an "on the record hearing" prior to agency action, thus triggering the hearing requirements of APA Section 5, federal courts have repeatedly held that a formal evidentiary hearing is required only where there are genuine issues of material fact to be resolved. See e.g., Vermont Department of Public Service v. FERC, 827 F.2d 127 (1987); Consolidated Oil & Gas Co. v. FERC, 806 F.2d 275 (D.C. Cir. 1986); Cerro Wire & Cable Co. v. FERC, 677 F.2d 124 (D.C. Cir. 1982). "A hearing need not be commenced simply to resolve . . . legal or policy issues." Kerr-McGee, 15 NRC at 255 (citing Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206, 1220 (D.C. Cir. 1975)).

Consequently, neither the Atomic Energy Act nor the APA require that any formal hearing be held with respect to this license amendment application, even if one should be requested by an interested party, where there are no genuine issues of material fact to be resolved. Because the high cost of nuclear power cannot be disputed, Applicants' first ground for relief involves only legal and policy issues. CEI and TE therefore submit that the Commission should summarily amend the Perry and

Davis-Besse licenses by suspending the antitrust conditions, for the legal and policy reasons stated herein.

III. CONCLUSION

In 1977 the NRC imposed antitrust conditions with respect to its licensing of CEI's and TE's interests in the Perry and Davis-Besse nuclear plants because it believed that the low-cost promise of nuclear power would confer upon CEI and TE a decisive competitive advantage. The existence of that competitive advantage was essential to the exercise of the NRC's limited antitrust authority under Section 105(c) of the Act, for Congress in 1970 conferred that authority in the shared belief that owners of nuclear power plants would obtain a decisive competitive advantage. Congress did not want the perceived competitive advantage arising from activities under a nuclear license to "create or maintain a situation inconsistent with antitrust laws." In imposing antitrust conditions in reliance upon Section 105(c), the NRC acted to ensure that utilities lacking the financial wherewithal to underwrite the investment costs associated with nuclear plants nonetheless had access to what was then universally regarded as the economically superior form of baseload generation.

The presumed economic superiority of nuclear power was the essential factual predicate both to the enactment of Section 105(c) and the NRC's imposition of antitrust conditions with

respect to the Perry and Davis-Besse licenses. In the intervening ten years since the antitrust conditions were imposed, it has become clear that, for a multitude of reasons, nuclear power has not lived up to its low-cost promise. Apart from the extraordinary disparities in investment costs as between nuclear and conventional plants, nuclear plants also are now more expensive to operate and maintain than conventional plants, excluding fuel costs. These facts cannot be disputed. As a result, in 1988, ownership of a nuclear plant does not give rise to any decisive competitive advantage; to the contrary, the unforeseen costs of owning, operating and maintaining a nuclear plant today place those utilities responsible for these costs at a distinct competitive disadvantage.

The best evidence of this competitive disadvantage is as compelling as it is ironic: those utilities for whose benefit the antitrust conditions were imposed have come to rely upon the wheeling condition to avoid nuclear power and its associated cost burdens. This result plainly is contrary to the purposes Congress intended to be served by Section 105(c), and it is contrary to the NRC's intent in imposing the antitrust conditions in the Perry and Davis-Besse operating licenses. Moreover, as a separate matter, the substantial and material changes that have occurred in the competitive environment in which CEI and TE operate compel reevaluation and, we submit, suspension of the antitrust conditions. To perpetuate the antitrust conditions in

the face of the competitive disadvantages arising from the ownership of Perry and Davis-Besse and the other changes in competitive environment in which CEI and TE operate adds gratuitous insult to the economic injury already being sustained by CEI and TE.

The NRC has both the authority and, in these circumstances, the duty to suspend the antitrust conditions immediately. Each of the independent grounds for relief upon which CEI and TE have premised this application support suspension of the antitrust conditions. The NRC or its delegatee should summarily grant this relief on the basis of the high costs of nuclear power alone. However, should the NRC remain unconvinced that nuclear power is no longer the economically superior choice of baseload generation it was believed to be ten years ago, or should it believe that there is some question whether the competitive environment within which CEI and TE operate has changed substantially and materially during the past ten years, it should convene an evidentiary hearing on this application to resolve any factual disputes. Even should the NRC

determine that such a hearing is necessary, the Sholly amendment nonetheless authorizes it to make the requested license amendment effective immediately, pending the outcome of the hearing.

Respectfully submitted,

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Dated: May 2, 1988

APPENDIX A

The license conditions attached by the Licensing Board to the licenses for the Davis-Besse 1, 2, and 3 and the Perry 1 and 2 nuclear units[479] are hereby revised to read as follows:[480]

1. Applicants shall not condition the sale or exchange of wholesale power or coordination services to an entity buying wholesale power from them or acquiring nuclear access from them, in a manner described in License Condition 9, upon the condition that any such entity:

a. enter into any agreement or understanding restricting the use of or alienation of such energy or services to any customers or territories;

b. enter into any agreement or understanding requiring the receiving entity to give up any other power supply alternatives or to deny itself any market opportunities;

c. withdraw any petition to intervene or forego participation in any

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[477] For example, though we said (in the paragraph quoted) that "it is far from certain" that access to this specific plant will be necessary, we went on to say that "there would seem to be little doubt respecting the Licensing Board's authority to provide relief in *Davis-Besse* and *Perry* on a systemwide basis . . . ." ALAB-208, *supra* at 969.

[478] Brief of the city of Cleveland in support of exceptions, p. 17.

[479] 5 NRC, *supra* at 256-59.

[480] The words listed below have the definitions indicated when used in the conditions:

Entity shall mean any electric generation and/or distribution system or municipality or cooperative with a statutory right or privilege to engage in either of these functions.

Wheeling shall mean transportation of electricity by a utility over its lines for another utility, including the receipt from and delivery to another system of like amounts but not necessarily the same energy. Federal Power Commission, *The 1970 National Power Survey*, Part 1, p. I-24-8.

proceeding before the Nuclear Regulatory Commission or refrain from instigating or prosecuting any antitrust action in any other forum.

2. Applicants, and each of them, shall offer interconnections upon reasonable terms and conditions at the request of any other electric entity in the CCCT which seeks to or is buying wholesale power from them or seeks to or is acquiring nuclear access from them in a manner described in License Condition 9; such interconnection to be available (with due regard for any necessary and applicable safety procedures) for operation in a closed-switch synchronous operating mode if requested by the interconnecting entity. Ownership of transmission lines and switching stations associated with such interconnection shall remain in the hands of the party funding the interconnection subject, however, to any necessary safety procedures relating to disconnection facilities at the point of power delivery. Such limitations on ownership shall be the least necessary to achieve reasonable safety practices and shall not serve to deprive purchasing entities of a means to effect additional power supply options.

3. Applicants shall engage in wheeling for and at the request of any entity in the CCCT which is acquiring nuclear access from them, in a manner described in license condition 9:

(1) of electric energy from delivery points of applicants to the entity; and,

(2) of power generated by or available to the other entity, as a result of its ownership or entitlements[481] in generating facilities, to delivery points of applicants designated by the other entity.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of applicants, the use of which will not jeopardize applicants' system. In the event applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effected until reductions of at least 5 percent have been made in transmission capacity allocations to other applicants in these proceedings and thereafter shall be made in proportion to reductions imposed upon other applicants to this proceeding.

Applicants shall make reasonable provisions for *disclosed* transmission requirements of entities in the CCCT acquiring nuclear access from them in a manner described in license condition 9, in planning future transmission either individually or within the CAPCO grouping. By "disclosed" is meant the giving of reasonable advance notification of future requirements by such entities.

4. (a) Applicants shall make available membership in CAPCO to any entity in the CCCT with a system capability of 10 MW or greater;

(b) A group of entities with an aggregate system capability of 10 MW

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[481] "Entitlement" includes but is not limited to power made available to an entity pursuant to an exchange agreement.

or greater may obtain a single membership in CAPCO on a collective basis.[482]

(c) Entities applying for membership in CAPCO pursuant to License Condition 4 shall become members subject to the terms and conditions of the CAPCO Memorandum of Understanding of September 14, 1967, and its implementing agreements; except that new members may elect to participate on an equal percentage of reserve basis rather than a P/N allocation formula for a period of twelve years from date of entrance. Following the twelfth year of entrance, new members shall be expected to adhere to such allocation methods as are then employed by CAPCO (subject to equal opportunity for waiver or special consideration granted to original CAPCO members which then are in effect).

(d) New members joining CAPCO pursuant to this provision of relief shall not be entitled to exercise voting rights until such time as the system capability of the joining member equals or exceeds the system capability of the smallest member of CAPCO which enjoys voting rights.

5. Applicants shall sell maintenance power to requesting entities in the CCCT which acquire nuclear access from them in a manner described in License Condition 9, upon terms and conditions no less favorable than those Applicants make available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract; or (2) to non-applicant entities outside the CCCT.

6. Applicants shall sell emergency power to requesting entities in the CCCT which acquire nuclear access from them in a manner described in License Condition 9, upon terms and conditions no less favorable than those applicants make available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract; or (2) to non-applicant entities outside the CCCT.

7. Applicants shall sell economy energy to requesting entities in the CCCT, which acquire nuclear access from them in a manner described in License Condition 9, when available, on terms and conditions no less favorable than those available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract; or (2) to non-applicant entities outside the CCCT.

8. Applicants shall share reserves with any interconnected generation entity in the CCCT, which acquire nuclear access from them in a manner described in License Condition 9, upon request. The requesting entity shall have the option of sharing reserves on an equal percentage basis or by use of the CAPCO P/N allocation formula or on any other mutually agreeable basis.

9. (a) Applicants shall make available to entities in the CCCT access to

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[482] E.g., Wholesale Customers of Ohio Edison (WCOE).

the Davis-Besse 1, 2, and 3 and the Perry 1 and 2 nuclear units and any other nuclear units for which Applicants or any of them shall apply for a construction permit or operating license during the next 25 years. Such access, at the option of the requesting entity, shall be on an ownership share, or unit participation or the contractual prepurchase of power basis.[483] Each requesting entity (or collective group of entities) may obtain up to 10 percent of the capacity of the Davis-Besse and Perry Units and 20 percent of future units (subject to the 25-year limitation) except that once any entity or entities have contracted for allocations totaling 10 percent or 20 percent, respectively, no further participation in any given units need be offered. (b) Commitments for the Davis-Besse and Perry Units must be made by requesting entities within two years after this decision becomes final. Commitments for future units must be made within two years after a construction permit application is filed with respect to such a unit (subject to the 25-year limitation) or within two years after the receipt by a requesting entity of detailed written notice of applicants' plans to construct the unit, whichever is earlier; provided, however, that the time for making the commitment shall not expire until at least three months after the filing of the application for a construction permit. Where an applicant seeks to operate a nuclear plant with respect to which it did not have an interest at the time of the filing of the application for the construction permit, the time periods for commitments shall be the same except that reference should be to the operating license, not the construction permit.

10. Applicants shall sell wholesale power to any requesting entity in the CCCT, in amounts needed to meet all or part of such entity's requirements. The choice as to whether the agreement should cover all or part of the entity's requirements should be made by the entity, not the applicant or applicants.

11. These conditions are intended as minimum conditions and do not preclude applicants from offering additional wholesale power or coordination services to entities within or without the CCCT. However, applicants shall not deny wholesale power or coordination services required by these conditions to non-applicant entities in the CCCT based upon prior commitments arrived (at) in the CAPCO Memorandum of Understanding or implementing agreements. Such denial shall be regarded as inconsistent with the purpose and intent of these conditions.

The above conditions are to be implemented in a manner consistent

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[483] Requesting entities election as to the type of access may be affected by provisions of state law relating to dual ownership of generation facilities by municipalities and investor-owned utilities. Such laws may change during the period of applicability of these conditions. Accordingly, we allow requesting entities to be guided by relevant legal and financial considerations in fashioning their requests.

with the provisions of the Federal Power Act and all rates, charges or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them.