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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
OHIO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1 Facility Operating License No. NPF-58)	Docket No. 50-440-A Docket No. 50-346-A (Suspension of Antitrust Conditions)
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY **THE TOLEDO EDISON COMPANY** (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58) (Davis-Besse Nuclear Power Station, Unit 1, Facility Operating License No. NPF-3)	ASLBP No. 91-644-01-A

BRIEF OF AMERICAN MUNICIPAL POWER-OHIO, INC. IN OPPOSITION TO APPLICANTS' MOTION FOR SUMMARY DISPOSITION AND CROSS-MOTION FOR SUMMARY DISPOSITION

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DISPOSITION AND CROSS-MOTION FOR SUMMARY DISPOSITION

Pursuant to the Atomic Safety and Licensing Board's ("ASLB" or "Board") November 14, 1991 Order setting a schedule for the filing of summary disposition motions and responses thereto, American Municipal Power-Ohio, Inc. ("AMP-Ohio") 1/ hereby responds in opposition to the January 6, 1992 motion for summary disposition ("Motion") filed on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The

1/ AMP-Ohio was granted intervention as a party in the proceeding by the ASLB's October 7, 1991 order.

Toledo Edison Company (collectively, "Applicants"). AMP-Ohio asks that the ASLB: (1) reject Applicants' request that the Board answer in the affirmative the "bedrock" legal issue; 2/ (2) answer the "bedrock" legal issue in the negative; and (3) terminate this proceeding.

Background

Applicants' January 6, 1992 motion is the latest chapter in their continuing effort to avoid the antitrust conditions imposed by the Nuclear Regulatory Commission ("NRC") in 1979 upon the Perry and Davis-Besse nuclear power station licenses. 3/ Applicants have previously failed to convince the NRC Staff, the Director of the Office of Nuclear Reactor Regulation, and the Department of Justice that Congress intended for nuclear power plant antitrust license conditions to come and go from moment-to-moment, depending upon the relative price of nuclear power vis-a-vis alternatives. The reason Applicants have thus far been

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2/ As stated in Applicants' motion, the bedrock issue is the following:

> Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain the antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared?

Brief at 2 (footnote omitted).

3/ Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC 265 (1979), aff'g LBP-77-1, 5 NRC 133 (1977).

unsuccessful is that their argument is wrong, whether considered from the perspectives of statutory analysis, legislative history analysis, regulatory analysis, or common sense. While lengthy, Applicants' latest brief adds nothing new. Applicants' position is no more valid now than when it was first advanced.

As has been the case in previous phases of this proceeding, AMP-Ohio understands that the city of Cleveland, Ohio ("Cleveland") will also be filing in opposition to Applicants' motion. AMP-Ohio will try not to replicate Cleveland's effort (though there will be some overlap, as both responses are being filed on the same day), but will instead elaborate on our joint position in a few areas, including the specific impact of the requested relief on AMP-Ohio and the urgent need for continuation of the antitrust conditions. Indeed, as recounted infra, there appears to be as much (if not more) reason today than there was in 1979 to impose stringent antitrust conditions upon the Applicants. 4/

Summary of Position

Putting aside for a moment arguments over statutory analysis, legislative history and the equal protection clause of

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4/ AMP-Ohio's failure to duplicate Cleveland's efforts should be understood as AMP-Ohio's recognition that redundancy is counterproductive and not as a reflection of minimal interest in the outcome of this proceeding. Just the opposite is the case, for AMP-Ohio is desperately concerned that the license conditions imposed on the Applicants remain in effect. Indeed, AMP-Ohio fears that if those license conditions are suspended, the great strides made since the late 1970s to reverse the ill effects of the Applicants' anticompetitive conduct (found and described at length in the earlier decisions in this docket) will be reversed.

the U.S. Constitution, there is a simple reason why Applicants' motion must be denied: their position makes no sense. In order to operate effectively, utilities -- whether licensees or customers -- must make long-term generation and power supply planning decisions. For example, in deciding to a build a particular generating facility, a utility makes a determination that the plant will be economic (vis-a-vis alternatives) over the course of its commercial life, if not for every moment the plant is in commercial service. Such decisions are directly affected by the ability of a customer or a licensee to rely upon the existence (or absence) of conditions contained in a nuclear power plant license.

Applicants nonetheless argue that Congress was so ignorant about the realities of the electric industry that it enacted legislation requiring the NRC to eliminate antitrust license conditions if at any point during the life of the licensed nuclear facility the costs of its power and energy dip below that of alternative resources. The basis for this contention is the claim that Section 105(c) of the Atomic Energy Act, 42 U.S.C. § 2135(c), allows the NRC to impose antitrust conditions upon nuclear plant licensees only where there is a cost advantage to the nuclear power and energy generated at the licensed facility as compared with alternatives. Thus, even if the NRC has, as it does here, unchallenged evidence that the licensee has been and continues to be engaged in anticompetitive conduct, the Commission is (in the Applicants' view) powerless to

continue antitrust conditions where the licensee's nuclear power is not "low cost."

If Congress truly intended to limit the NRC's antitrust authority in a way which could have such disruptive, anticompetitive and long-term effects on utilities and their planning processes, the Applicants should be able to cite to specific statutory language or portions of legislative history evidencing such a desire (or even expectation) on the part of Congress. The Applicants have presented no such evidence. If Congress intended that the NRC be required to switch license conditions on or off with each rise or fall in nuclear power costs (and there will surely be relative cost increases and decreases over the course of a 40-year license), one would expect the Applicants to be able to demonstrate that the language of Section 105(c) requires the NRC to review and evaluate relative generation costs, or at least to consult with the Federal Energy Regulatory Commission ("FERC") or other federal agencies regarding the costs of alternative resources. No such demonstration has been attempted, because no supporting evidence exists.

To the contrary, there is much evidence that Congress did not intend that the NRC be available to monitor electric power and energy costs over several decades, and to suspend or reimpose conditions as the economics of the utility industry change. As will be explained in the sections which follow:

1. While Congress (like others) may have expected that nuclear power would be low cost relative to other options,

Section 105 does not impose as a condition precedent upon NRC action the obligation to determine, as an initial or continuing matter, that the licensed nuclear plant is producing low-cost power. Applicants' motion is in reality an impermissible request for an administrative modification of the statute. The Atomic Energy Act may be modified only by Congress, not the NRC.

2. The NRC Staff's interpretation of Section 105 (supported by the Department of Justice), under which the Commission can continue antitrust conditions whether or not nuclear power remains a relatively low cost option, is consistent with prior and current administrative interpretation of the law.

3. The earlier NRC decisions explaining the bases for the conditions which Applicants now seek to evade demonstrate why the imposition of antitrust conditions cannot depend solely upon cost considerations.

4. Applicants do not challenge the continuing validity of earlier findings of anticompetitive conduct on their part. Indeed, a review of Applicants' conduct in recent years vis-a-vis AMP-Ohio demonstrates the need for continued enforcement, not abandonment, of the conditions.

5. Acceptance of Applicants' position would render the NRC's antitrust conditioning authority meaningless and defeat the pro-competition purpose of the statute. If the conditions can be suspended (and presumably reimposed) based on current (and changing) power costs, the conditions will have no practical value to customers and may well be detrimental to licensees.

Argument

I. NEITHER SECTION 105(C) NOR ITS LEGISLATIVE HISTORY SUPPORTS APPLICANTS' REQUESTED RESTRICTION UPON THE NRC'S AUTHORITY TO IMPOSE OR CONTINUE ANTITRUST CONDITIONS

While an evaluation of Section 105(c) must, of course, begin with the statute itself, 5/ Applicants state at the outset (Motion at 5) that their interpretation is not based on the statutory language. Thus, Applicants argue the "universally anticipated economic superiority of nuclear power plants generally ... was the necessary predicate for the imposition of antitrust license conditions," basing this contention on "the legislative history of Section 105(c) ..., the record of the proceedings imposing the license conditions, and judicial and administrative applications of Section 105(c) ....." Id.

It is easy to see why the Applicants are uninterested in the language of Section 105(c). Section 105(c) plainly does not require a finding that a nuclear plant produce relatively "low cost" power during every moment of commercial operation as a continuing prerequisite for the imposition and continuation of antitrust conditions. The statute states that to require license conditions the NRC must make a "finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws ....." 42 U.S.C.

5/ Applicants allege agreement with the principle that statutory construction begins with the language of the statute (Motion at 34 n.76), but then ignore the point, claiming that statutory language is only a "primary" but not "exclusive" source of understanding.

§ 2135(c)(5). In the event the NRC makes a "finding ... in the affirmative[,]" it has the authority to "issue a license with such conditions as it deems appropriate." Section 105(c)(6), 42 U.S.C. § 2135(c)(6). As explained by the Antitrust Division of the Department of Justice (in its June 13, 1990 letter to Dr. Thomas Murley) and subsequently endorsed by Dr. Murley, the NRC's Director of the Office of Nuclear Reactor Regulation (in his April 24, 1991 letter rejecting Applicants' position):

> This broad standard [in Section 105(c)] invests the NRC with the responsibility to determine, on a case by case basis, whether ownership of a particular plant by a particular utility system is likely to have anticompetitive effects of the type the antitrust laws are intended to remedy. The statute directs the NRC not only to look forward to determine if any anticompetitive situation could arise, but also to look at the past to see if 'an anticompetitive climate exists and to see if the applicant has acted in an anticompetitive manner.' 4/

4/ Alabama Power Co. v. NRC, 692 F.2d 1362, 1367-68 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983).

DOJ Letter at 2-3, quoted in NRC Staff's April 24, 1991 Evaluation of Applicants' Position ("NRC Staff Evaluation"), at 4.

Nor does Applicants' lengthy analysis of legislative history (Motion at 35-47) demonstrate the correctness of their position, for at most this presentation shows that Congress expected that nuclear power would be significantly less expensive

than alternatives. 6/ Even if this assumption is correct, more is needed before the Applicants can leap from a congressional expectation to the conclusion (Motion at 33) that a nuclear plant "[m]ust [p]roduce [l]ow-[c]ost [p]ower" in order to create a situation inconsistent with the antitrust laws. As explained by both the NRC Staff and the DOJ, Congress did not make demonstration of the cost superiority of nuclear power a prerequisite for the NRC's exercise of its conditioning authority. NRC Staff Evaluation at 8; DOJ Letter at 2.

Indeed, Applicants point out that Joint Committee Report, the acknowledged "best source of legislative history" for the 1970 amendments to the Atomic Energy Act (including Section 105(c)) 7/ "does not address what it means when it refers to 'antitrust considerations in relation to the strengthening of free competition in free enterprise ....'" 8/ Similarly, the DOJ noted that the "Joint Committee Report, in discussing the language that was enacted, does not suggest that anticompetitive effects must be traceable to a finding that the nuclear plant will be low cost. In fact, cost is not mentioned at all...." DOJ Letter at 3. The failure of Congress to specify, in either the statute or the Joint Committee Report, the factual

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6/ See e.g., Motion at 45, where Applicants twice refer to Congress' "expectation" that nuclear power would be low in cost.

7/ Alabama Power Co. v. NRC, 692 F.2d 1362, 1368 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983).

8/ Motion at 35-36, quoting Atomic Energy - Utilization for Industrial or Commercial Purposes, H.R. Rep. No. 1470, 91st Cong., 1st Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4981, 4994-95.

prerequisites for antitrust conditions makes it impossible to conclude, as Applicants do, that "relative cost is the **only essential variable** in nuclear power plant operations in determining 'whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws.'" (Motion at 33, emphasis in original). Instead, it makes more likely the conclusion that Section 105(c) "invests the NRC" with the broader responsibility to determine "whether ownership of a particular plant ... is likely to have anticompetitive effects of the type the antitrust laws are intended to remedy." DOJ Letter at 2, footnote omitted.

In essence, the Applicants are contending that a modification of the Section 105 standard for the imposition of conditions is needed on the ground that Congress' 1970 assessment of the economics of the nuclear power industry is no longer accurate. Applicants' request that an administrative agency amend a federal statute because times have changed must be rejected. Not surprisingly, the federal courts have long been unwilling to allow federal agencies to exercise Congress' authority to modify statutory language to reflect alleged changes in circumstances.

In Federal Power Commission v. Texaco, 417 U.S. 380, 394-96 (1974), the Supreme Court explained that federal agency efforts to legislate in response to changing times were prohibited, holding that the FPC could not rely on current market prices to determine "just and reasonable" rates under the Natural Gas Act. Noting that it had been "persuasively argued" that the

competitive structure of the natural gas industry had changed since the passage of the Natural Gas Act, the Court nevertheless declined the invitation "to overturn congressional assumptions embedded into the framework of regulation established by the Act." Id. at 400. The Court concluded that "[t]his is a proper task for the legislature where the public interest may be considered from the multifaceted points of view of the representational process." Id.

Similarly, in Metropolitan Transportation Authority v. FERC, 796 F.2d 584, 593 (2nd Cir. 1986), the MTA argued to the court that because "yardstick competition," the economic theory underlying the Niagara Redevelopment Act, 16 U.S.C. § 836 et seq. (a statute passed in the late 1950's), "makes little sense in today's energy market," the FERC (or the court) should be free to ignore restrictions imposed under the law. The court rejected this argument, stating that assuming arguendo the current invalidity of the economic premise for the law, "'it is not for FERC or ourselves to second-guess [Congress'] basic determination.'" Id., quoting Power Authority of the State of New York v. FERC, 743 F.2d 93 105 (2nd Cir. 1984).

The rule that administrative agencies cannot modify statutory provisions has been tested and upheld on numerous occasions, particularly in the context of environmental regulation. In NRDC v. Train, 568 F.2d 1369 (D.C. Cir. 1977), for example, the D.C. Circuit rejected the EPA's assertion that the Agency had statutory authority to exempt certain categories of point sources from the permit requirements of Section 402.

The court found EPA's arguments concerning its discretion to act and administrative infeasibility under the Clean Water Act ("CWA") unpersuasive. Id. at 1374-75. Further, the D.C. Circuit acknowledged that it could not validate ERA's assumptions about the purpose of the CWA, but rather that "assumptions embedded in the framework of regulation(s)" could be overturned only by Congress, id. at 1377 (citing Federal Power Commission v. Texaco, supra).

Two years later, in Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979), the D.C. Circuit revisited and thoroughly explored this issue. The court held that the EPA had abused its administrative authority "by promulgat[ing] a blanket exemption from statutory requirements for certain stationary sources that emit less than 50 tons of any air pollutant per year." Id. at 358. Thus, the rule as enunciated by the D.C. Circuit is that "categorical exemptions from the clear commands of a regulatory statute, though sometimes permitted are not favored." Id.

The court in Alabama Power noted that the rule against administrative exemptions "is strict but not absolute" and addressed two exceptions to the rule. First, the court acknowledged that administrative necessity might constitute a basis for administrative action based on implied authority not explicitly established in the statute. Id. 9/ Second, the court

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9/ The court stated that such "streamlined agency approaches or procedures" are often acceptable when such measures are necessary to allow the agency to carry out "the mission assigned to it by Congress." Id.

stated that categorical exemptions may be allowed where the substance of the exemption deals with de minimis circumstances. 10/ Obviously, neither exception applies here and, in any event, neither exception permits an agency to depart from the language of the statute. Rather, agencies may in appropriate circumstances invoke these exceptions as a tool to implement the legislative scheme envisioned by Congress. See Alabama Power Co., 636 F.2d at 358-61.

Just as an administrative agency cannot modify statutory provisions in light of changed circumstances, neither can an agency support such action as a method to further public policy objectives underlying a particular statute. In Office of Consumers' Council v. FERC, 655 F.2d 1132 (D.C. Cir. 1980), the D.C. Circuit held that FERC had exceeded its statutory authority when, due in part to the perceived slowness of congress, FERC granted a certificate of public convenience and necessity and approved certain financing arrangements for a coal gasification plant. Id. at 1151. The court stated (at 1152) that it:

> is not for an administrative agency however to preempt congressional action or fill in where it believes some federal action is needed. It goes without saying that appropriate respect for legislative authority requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions

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10/ Citing District of Columbia v. Orleans, 406 F.2d 957 (D.C. Cir. 1968) (stating that the "de minimis" doctrine "was developed to prevent trivial items from draining the time of courts"). The court in Alabama Power further stated that whether a matter will be construed as de minimis depends upon the particular factors, but that a de minimis situation does not present the ability "to depart from the statute, but rather a tool to be used in implementing the legislative design." Alabama Power Co., 636 F.2d at 360.

of competing public priorities whose resolution properly lies with Congress.

For these reasons, Applicants' attempt to obtain administrative modification of the Atomic Energy Act should be rejected.

II. THE NRC STAFF'S INTERPRETATION OF SECTION 105(C) IS CONSISTENT WITH STAFF'S RECENT EXPLANATION OF THE SCOPE OF NRC ANTITRUST REVIEW

Applicants challenge (Motion at 46) the NRC Staff's finding (Evaluation at 8) that the NRC's antitrust determinations need not rest in every instance exclusively upon cost considerations, claiming it is "flatly at odds" with decisions cited by Staff. This challenge collapses when considered in light of the instant case. As explained by Staff (and as will undoubtedly be detailed by Cleveland), "the licensees concede that cost was not an issue" in the 1979 licensing conditions proceeding. NRC Staff Evaluation at 10 & n.14. Instead, the Perry and Davis-Besse licensing proceedings properly focused on the Applicants' conduct vis-a-vis the policies underlying the antitrust laws.

Notwithstanding the Staff's finding (accompanied by citation to Ohio Edison's original application), the Applicants argue (Motion at 53) that the "linchpin of the Appeal Board's determination that the NRC could impose competitive restraints on the Applicants was that the nuclear power plants in question would be competitively advantageous since nuclear power would be cheap." An analysis of the decision does not support the Applicant's claim. Most importantly, the conduct examined by the

NRC and the conditions adopted as a result of that conduct go well beyond simply ensuring access to low cost nuclear power. As explained by the NRC Staff:

> the remedies fashioned in the Perry/Davis-Besse proceeding demonstrate that the Boards' primary concern was with market structure and the Applicants' pre-existing anticompetitive practices. These remedies largely focused, not on making the plants' nuclear power available to competitors (although, to be sure, this option was made available to competitors should they choose to use it), but upon ensuring that competitors would have access to transmission lines, coordination services, other sources of power, and CAPCO [Central Area Power Coordination Group] membership and privileges on terms no less favorable than those which were available to CAPCO members (10 NRC at 296-99). Thus, regardless of whether the nuclear plants proved able to provide direct cost advantages to their owners, the license conditions served to ensure that the Applicants would be unable to use their coordination planning, their existing and planned transmission lines, or their existing and planned generating capacity -- including the increased baseload capacity afforded by these plants -- in furtherance of their anticompetitive practices.

NRC Staff Evaluation at 10-11, footnote omitted.

Similarly, Applicants argue that the Department of Justice failed initially to request initiation of an antitrust review concerning David-Besse "because the nuclear facility in question did not give to its owners a 'significant cost advantage' which could be used anticompetitively." (Motion at 64, quoting 36 Fed. Reg. 17888 (September 4, 1971)). This contention is not accurate. In fact, the Department of Justice made clear in the quoted letter that it was the conduct of the Applicants, not the anticipated economics of the facility, which

would be determinative of the need for an antitrust review. Indeed, in explaining the "Illikely competitive effects of granting the application" (36 Fed. Reg. at 17889, emphasis in original), the DOJ states that access to low-cost nuclear power is not the touchstone for Section 105(c) review:

> Our investigation reveals that the city of Cleveland's municipal electric system is the only competing municipal utility which has expressed an interest in obtaining an ownership share of the Davis-Besse plant. We do not, however, regard the presence or absence of such requests as determinative of our antitrust inquiry. CEI and Toledo Edison, through their membership in the CAPCO pool and their interconnections with adjacent major utilities, have obtained ... the benefits of coordination and the resulting low-cost power .... The municipally owned electric utilities, on the other hand, have no transmission network and cannot benefit ... without some measure of access to applicant's transmission network and to coordination with applicants. Thus we think it is necessary to analyze the actions of Toledo Edison and CEI toward these municipal systems to determine whether they have attempted to prevent the municipal systems from obtaining such access.

36 Fed. Reg. at 17889-90 (emphasis added).

It was on the basis of an analysis of the Applicants' actions, undertaken notwithstanding data showing that the construction of Davis-Besse would "not give Toledo Edison or CEI a significant cost advantage," that the DOJ concluded initially that there would be no need for an antitrust hearing. 36 Fed. Reg. at 17890. Applicants' effort to argue the contrary should be rejected.

Finally, Staff's interpretation of the Commission's authority is consistent with a recent NRC analysis of the

Commission's antitrust conditioning authority with respect to the Seabrook Nuclear Power Station, a facility the output of which can hardly considered relatively "low cost." NRC antitrust review of the Seabrook license was triggered by the change in Seabrook ownership which would result from the proposed corporate combination of Northeast Utilities and Public Service Company of New Hampshire. 11/

The Staff's August 1991 "Recommendation," signed by the Director of the Office of Nuclear Reactor Regulation on February 9, 1992, succinctly describes the process through which the NRC assesses antitrust issues and considers the imposition of conditions:

> All applicants for an NRC ... license ... undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in [the] applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

11/ It can be fairly stated that if "low cost" power and energy were a condition precedent to the imposition of antitrust conditions, the recent Seabrook antitrust review would have been totally unnecessary.

NRC Staff Recommendation at 6 (emphasis added). Thus, at all stages of review the focus in deciding on the need for antitrust conditions is the "applicant's conduct" and "activites," not solely (or even generally) the relative cost of the nuclear power and energy produced at the licensee's facility. 12/

III. APPLICANTS' POST-LICENSE CONDUCT DEMONSTRATES THE NEED FOR CONTINUED VIGOROUS ENFORCEMENT, NOT SUSPENSION, OF THE LICENSE CONDITIONS

Remarkably, Applicants state (Motion at 17) that they do not "disturb[] the NRC's previous findings as to their competitive behavior[,]" contending that "[t]o the contrary, for purposes of their Applications and this Motion, each of the Applicants has accepted the NRC's prior determination concerning its competitive behavior" (Motion at 17 & n.29). The NRC Staff feared that in light of this admission:

> a suspension of [the antitrust] conditions would invite a reintroduction of many of the very practices which were found to be anticompetitive during the extensive litigation which resulted in the conditions' imposition, and might lead ultimately to a lessening of competition.

NRC Staff Evaluation at 11.

Applicants make no secret of their future anticompetitive plans, stating that suspension of the conditions means that "Ohio municipalities will not be able to rely on them

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12/ Similarly, the court in Alabama Power Co. v. NRC, 692 F.2d at 1367 (emphasis added), notes that Section 105(c) requires the NRC to "take a careful look at the present -- and the past -- to see if an anticompetitive climate exists and to see if the applicant has acted in an anticompetitive manner."

as they have, to avoid sharing in the Applicants' nuclear energy supply investment." (Motion at 30). 13/ Nonetheless, Applicants advise municipalities (and this Board) not to worry, devoting several pages (Motion at 23-30) to a recitation of the various antitrust laws under which, if necessary, they can be sued. AMP-Ohio shares the NRC Staff's concern that absent the conditions, it will be necessary to seek legal relief. Indeed, Ohio Edison's actions vis-a-vis AMP-Ohio since the imposition of the conditions show that Ohio Edison, even with the stringent conditions, cannot be trusted to behave in accordance with the antitrust laws or the license conditions now in effect. 14/

For example, in flagrant violation of both License Condition No. 10 and a separate contractual requirement, Ohio Edison in 1988 filed with the FERC a schedule for service to AMP-Ohio providing for only full-requirements service, to take effect upon the expiration of a five-year contract that AMP-Ohio and Ohio Edison had entered into in 1983. Ohio Edison refused to offer the option of partial-requirements service, contending that the contract left to Ohio Edison the choice of offering full- or partial-requirements service. Primarily on the basis of Ohio Edison's contrary representations in conjunction with its

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13/ This statement means, of course, that the Applicants will use their transmission monopolies to force AMP-Ohio and its members to purchase power from the Applicants, while denying the publicly-owned utilities access to the Applicants' competitors.

14/ The NRC showed great prescience in stating at the time the conditions were imposed that "[w]e think that the applicants should not be taken at their word." Toledo Edison Co., 10 NRC at 308.

original filing of the 1983 contract with the FERC, that agency granted AMP-Ohio's request for summary rejection of Ohio Edison's 1988 full-requirements rate filing and ordered the Company to file schedules providing for partial-requirements service. Ohio Edison Co., 43 FERC ¶ 61,316 (1988).

Fortunately for AMP-Ohio, Ohio Edison's conduct in this instance was in breach of a contract on file with the FERC as well as the antitrust license conditions, and summary relief was therefore available from FERC. Nevertheless, Ohio Edison's action demonstrates its cavalier disregard for the license conditions. Indeed, when AMP-Ohio was advised in late 1987 that Ohio Edison intended to file a full-requirements-only tariff, counsel for AMP-Ohio by letter dated December 1, 1987 warned counsel for Ohio Edison that doing so would violate the NRC license conditions. That warning (see Appendix A hereto) detailed AMP-Ohio's interpretation of the contract but continued that, in any event, the license conditions required Ohio Edison to offer partial requirements service and that AMP-Ohio formally requested that Ohio Edison do so. The warning and request were ignored.

Another of Ohio Edison's violations of both the Perry antitrust conditions and the 1983 contract between AMP-Ohio and Ohio Edison involved the question of the entitlement of two municipal systems to multiple delivery points. The contract provided that, by mutual agreement which could not be unreasonably withheld, AMP-Ohio could obtain additional delivery points. In early 1987, AMP-Ohio made a formal request to Ohio

Edison for installation of second delivery points to serve the municipal electric systems of AMP-Ohio members Cuyahoga Falls and Hudson, Ohio. This request was flatly refused by Ohio Edison, which declined even to discuss the possible technical arrangements.

As in the case of its rejected FERC filing, Ohio Edison sought to avoid its clear obligation by advocating a completely untenable interpretation of the 1983 contract. Once again its position was roundly rejected, but this time only after AMP-Ohio bore the expense and delay of a contested arbitration proceeding. At the conclusion of that proceeding, the arbitrators found that Ohio Edison had breached its contract with AMP-Ohio, rejecting Ohio Edison's absurd claim that the availability of "additional delivery points" was limited to single delivery points at theoretical new municipal systems, rather than multiple delivery points at existing systems. The utter lack of basis for Ohio Edison's position in that case is demonstrated by its inability to obtain the vote of even Ohio Edison's own party-appointed arbitrator; the arbitrators voted 2-0 in favor of AMP-Ohio, with one not voting.

Given that Ohio Edison does not challenge the 1979 NRC findings of anticompetitive conduct and, as explained here, continues to violate the antitrust conditions imposed by the NRC, it is particularly unseemly of the Applicants even to suggest that those conditions now be suspended. As Chairman Miller correctly commented during a colloquy with counsel for Ohio Edison at the September 19, 1991 prehearing conference:

> **CHAIRMAN MILLER:** ... Clearly the City of Cleveland can quite properly raise [questions as to whether applicants have acted anticompetitively]. If you were trying on behalf of your client to get rid of all of the antitrust conditions, why would they not be perfectly entitled to say the conditions not only are the same as when these things became the law of the case, but they're worse.
>
> Why wouldn't, in fairness, they be entitled to create such an issue?
>
> **MS. CHARNOFF:** ... Because regardless of what they proved -- they could prove that we were the worst competitors in the United States. It would make no difference.
>
> **CHAIRMAN MILLER:** That's interesting. Do you mean this Board would be disposed, even despite such a showing as you've hypothesized, the Board would say, well, yes, but you're nice people and we'll throw out all these nasty conditions? That doesn't make sense; does it?

Tr. 150-151.

It truly "doesn't make sense" to suspend the conditions where Ohio Edison has shown little or no respect for them, and it does not "make sense" to suppose that Congress crafted a statutory scheme under which nuclear plant owners could rid themselves of antitrust license conditions while continuing to violate them.

III. ACCEPTANCE OF APPLICANTS' POSITION WOULD RENDER THE NRC'S SECTION 105(C) CONDITIONING AUTHORITY MEANINGLESS

It is black letter law both that a statute must be interpreted so as not to be meaningless, and that a law should not be read as inconsistent with the purpose for which it was adopted. U.S. v. American Trucking Associations, 310 U.S. 534,

543-44 (1940). 15/ If it is concluded that the antitrust conditions imposed under a nuclear power plant license can be "suspended" whenever the cost of nuclear power and energy dips below the price of alternatives (and presumably resumed whenever the cost goes back up), the 1979 antitrust conditions will have been rendered effectively useless. A utility cannot engage in the type of long term power supply planning needed to ensure reliable service unless the conditions governing access to supply options are stable. If the access conditions can be suspended at any time (and for urknown periods of time, if not permanently) then the conditions cannot be relied upon.

The problems inherent in the Applicants' position cut both ways. Not only will customers be at great risk if access conditions (for example) can be suspended at any time, but licensees may face potential financing and planning problems if conditional obligations can be turned off and reactivated with the movement of the price of nuclear power vis-a-vis alternatives. During the hearings on the 1970 amendments to the Atomic Energy Act (which included Section 105(c)), Joint Committee Chairman Holifield touched on this issue as part of a discussion of the difficulties in authorizing multiple antitrust reviews:

> I think if you hold over the head of any investor of $100 million in a plant, let us say, the fact that he builds the plant to channel the power into his own system of

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15/ See also Sutton v. U.S., 819 F.2d 1289, 1295 (5th Cir. 1987); National Bank of Elizabeth, New Jersey v. Smith, 591 F.2d 223, 231 (3rd Cir. 1979); and FTC v. Manager, Retail Credit Co., Miami Br. Off., 515 F.2d 988, 995 (D.C. Cir. 1975).

> distribution, at that point he should be aware of any diversion from that plant to another source. He should not be put in the position, it seems to me, of double jeopardy in that he is given the construction permit to proceed without antitrust review and then suddenly 6 years later, or 7 years later, whenever his plant is finished he is faced with an intervenor or a legal situation which he had to go again through the process of antitrust review.
>
> * * *
>
> Suddenly, they are faced with a diversion, let us say, of 25 or 30 or 40 percent of their power into another system.

Hearings on Prelicense Antitrust Review of Nuclear Power Plants Before the Joint Committee on Atomic Energy, 91st Cong., 2d Sess. (1970) at 37-38, quoted in Houston Lighting & Power Co. (South Texas Unit Nos. 1 and 2), 5 NRC 1303, 1315 (1977).

By the same token, even the Applicants are constrained to admit that the goal of Section 105(c) antitrust review is to ensure competition between nuclear licensees and others. Motion at 34 ("the genesis of the congressional grant of antitrust authority to the NRC was the concern about the competitive advantages of low-cost nuclear power"). A determination that the antitrust conditions can be lifted at any moment would mean that they could not be relied upon to improve the competitive environment, thereby defeating Congress' goal. The law should not be so interpreted.

IV. APPLICANTS' POSITION SHOULD BE REJECTED BECAUSE ACCEPTANCE WOULD CREATE A SITUATION WHICH WOULD BE IMPOSSIBLE TO ADMINISTER

If the Applicants' legal position is adopted, the NRC will (as noted in the "bedrock" issue statement) take on the task of "appropriately measur[ing] and compar[ing]" alternative sources of electric power, and will have to use the results of these comparisons to decide whether antitrust condition suspension (and resumption) is in order. As has been previously explained, there is no evidence that Congress intended the NRC to take on this responsibility, which would be formidable. The NRC Staff correctly notes that

> energy costs for power plants using any source of fuel can vary greatly from year to year .. [The Applicants'] approach would result in unending litigation over perceived real or short-term developments which are asserted to affect the appropriateness of retaining previously imposed antitrust conditions ....

NRC Staff Evaluation at 12.

The problems inherent in administering such a scheme can be enormous. In any cost comparison proceeding, potentially relevant issues would include:

> (1) identification of the "costs" which should be included in conducting a comparison; for example, should the environmental costs (and benefits) of nuclear power be included, along with the same costs and benefits of other energy producing technologies?
>
> (2) accounting for the impact of statutory changes which have an effect on power costs; for example, how should the 1990 Clean Air Act Amendments of 1990, which significantly raise the future cost of producing coal-fired power and energy, be considered?

(3) accounting for unforseen events; for example, should the conditions be subject to resumption in the event that there is a coal strike? and

(4) determining the market which should be examined in assessing relative costs; for example, what is the market for alternatives to nuclear power produced at the licensed facilities?

Overall, Applicants are asking the NRC to assume broad oversight of the costs of both nuclear and non-nuclear energy sources. If Congress intended that the NRC exercise, as part of its Section 105(c) antitrust responsibility, long-term, potentially continual oversight of relative resource costs, then there should be at least some indication in either the statutory language or the legislative history to such effect. The Applicants have pointed to nothing in either the law or the legislative history which shows that Congress wanted the NRC to be on call to monitor alternative resource costs over the several decades in which the Perry and Davis-Besse plants will be in commercial service.

V. APPLICANTS' MERITLESS EQUAL PROTECTION ARGUMENT SHOULD BE REJECTED

Applicants assert that if Section 105 does not require suspension of the antitrust conditions when the price of nuclear power is not "[c]ompetitively priced," then the statute as applied denies Applicants' equal protection of the law. (Motion at 75-86). 16/ Applicants' argument should be rejected because

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16/ Applicants state (Motion at 75) that the fifth amendment due process clause "requires the federal government to observe the
[FOOTNOTE CONTINUED ON NEXT PAGE]

Section 105(c) meets the applicable equal protection standard in that it is rationally related to the achievement of a legitimate government objective. Section 105 (and the Atomic Energy Act generally) was passed in part to strengthen competition. The imposition of antitrust conditions, even where nuclear power is not "low cost," is rationally related to the achievement of that goal because, as explained by the NRC in the licensing decisions in this proceeding, construction of the Perry and Davis-Besse units without conditions would have enabled the Applicants to broaden their existing anticompetitive practices. NRC Staff Evaluation at 10-11.

The Applicants correctly explain that for equal protection purposes, Section 105(c) need only meet the "admittedly ... lenient" standard of being merely rationally related to a legitimate government objective. Motion at 77. See Schweiker v. Wilson, 450 U.S. 221, 230, 234-35 (1981). The Supreme Court noted that the rational relationship test employs a "relatively relaxed standard," and that in such a review the legislation at issue is presumed to be valid. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976). The Court has also emphasized the limitations on its own ability to substitute its judgment for that of Congress:

> 'It is not within our authority to determine whether the Congressional judgment expressed

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[FOOTNOTE CONTINUED FROM PRECEDING PAGE]
principles of equal protection ...." Although the fifth amendment does not contain an equal protection clause similar to that found in the fourteenth amendment, the due process clause itself does provide equivalent protections. U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 173 n.8 (1980).

> in that Section is sound or equitable, or whether it comports well or ill with the purposes of the Act . . . The answer to such inquiries must come from Congress, not from the Courts.'

U.S. Railroad Retirement Board v. Fritz, 449 U.S. at 175-76, quoting Flemming v. Nestor, 363 U.S. 603, 611 (1960). In fact, a court will deny an equal protection challenge even where Congress has not actually articulated its legitimate objective, but where the court can imagine a legitimate objective. 17/ Professor Tribe has commented that rational relationship review generally amounts to a presumption of constitutionality. Laurence H. Tribe, American Constitutional Law 1442-43 (Second Edition 1988).

In support of the proposition that "there are limits to permissible behavior under [the rational relationship] standard," Applicants cite (Motion at 77) Gavett v. Alexander, 477 F.Supp. 1035 (D.D.C. 1979). The focus of the court's attention in Gavett was not the rational relationship test, because the claim was advanced (and the court found) that the statute at issue (a portion of the Civilian Marksmanship Act) infringed upon first amendment rights. Id. at 1045. While the court overturned the law on equal protection grounds, it did so using the strict scrutiny standard, a far tougher test than the rational relationship standard applicable here. Id. at 1049. As an aside, the court briefly noted that the statute would also have failed the more relaxed rational relationship test, commenting that the "Department of Justice conceded the unconstitutionality

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17/ Allied Stores of Ohio v. Bowers, 358 U.S. 522, 529-30 (1959); U.S Railroad Retirement Board, 449 U.S. at 179.

of the law under this standard." Id. at 1049 & n.36. By contrast, in this case the Department of Justice has rejected Applicants' challenge to Section 105(c).

Gavett does not justify overturning Section 105(c). The Atomic Energy Act articulates a specific, legitimate government objective, and Section 105(c) is rationally related to attaining that objective. The Atomic Energy Act of 1954 was enacted to open up the use of nuclear energy to the private sector and to regulate that use; until that point, the United States government had maintained a monopoly over the use, control, and ownership of nuclear technology. See e.g., Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 206-207 (1983). The Congressional decision to allow private entities to benefit from the government's prior development of nuclear power carried wit' it the following explicit declaration:

> the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. § 2011(b), emphasis added. Mandating that the NRC conduct an antitrust review is undeniably rationally related to the achievement of that undeniably legitimate goal.

The changed circumstances that Applicants claim justify their equal protection challenge (that the costs of nuclear power are higher than Congress expected them to be) do not affect either the goal of the statute -- to allow use of nuclear energy where it would strengthen free enterprise -- or the rational

relationship of Section 105(c) to the goal. Applicants wrongly argue that "the professed rationale for the imposition of antitrust conditions under Section 105(c), to prevent the exploitation of cheap nuclear power, has not developed." (Motion at 79). 18/ The statute was not designed to protect solely against "exploitation of cheap nuclear power," but to ensure that "activities under [an NRC] license would [not] create or maintain a situation inconsistent with the antitrust laws." 42 U.S.C. § 2135(c)(5). Even if nuclear power is not "low cost" relative to other options on a given day in the course of several decades, there is no question that -- as was found in the licensing decisions here -- plant construction can have significant, adverse anticompetitive consequences. 19/ Therefore, irrespective of cost considerations, antitrust reviews and the imposition of conditions are still needed if the statutory goal of free competition in accordance with the antitrust laws is to be achieved. 20/

18/ See Motion at 85, where Applicants state that Section 105(c) "was designed to prevent the exploitation of low-cost nuclear power."

19/ Indeed, notwithstanding the conditions, Ohio Edison has continued to act in an anticompetitive manner, supra at Part III. Moreover, Applicants do not contest the NRC's earlier findings of anticompetitive behavior on their part. Motion at 17 n.29.

20/ Applicants cite (Motion at 79-81, 84) three Supreme Court cases for the proposition that changed circumstances can lead a court to overturn statutes on equal protection grounds. Interestingly, these cases come from the 1920s and early 1930s -- the Lochner era, in which courts employed a version of the rational relationship test that was significantly stricter than today's version. See Tribe, supra, 567-86.

By contrast, in the "filled milk" cases cited by Applicants, there was a direct link between a change in circumstances and the inability to achieve a statutory objective. In those cases, the changes in technology and nutrition directly negated the underlying purpose of the statute, which was to prevent confusion between milk and filled milk in the marketplace, and the court specifically noted that the danger of such confusion had passed. Milnot Company v. Richardson, 350 F.Supp. 221, 225 (S.D. Ill. 1972). Indeed, numerous other products that were virtually indistinguishable from the prohibited filled milk were being marketed. Id. The inequity of this situation, and because the statute "provide[d] no rational means for the achievement of any announced objective of the Act," led the court to overturn the statute on equal protection grounds. Id.

Similarly, the statute in Wessinger v. Southern Railway Co., 470 F.Supp 930 (D.S.C. 1979), had been premised on the effect on safety of the traffic conditions and automobile and railroad technology of the 1920s. Those conditions had not only changed but had also negated the safety benefits of the statute, and left railroads subject to an irrational inequity. See id. at 932-33.

Here, however, the statute specifically states that congressional intent is to allow development and use of nuclear energy so as to enhance competition, and to ensure that activities under the license will not present a situation inconsistent with the antitrust laws. Unless Applicants are

successful in demonstrating that there can be no inconsistency with the antitrust laws in the absence of a cost advantage -- a point AMP-Ohio (along with the NRC Staff, the Director of the Office of Nuclear Reactor Regulation, and the Department of Justice) believe is directly refuted by the licensing decisions in this proceeding -- then Applicants' equal protection challenge must fall. 21/

CONCLUSION

WHEREFORE, for the foregoing reasons AMP-Ohio respectfully requests that the ASLB: (1) reject Applicants'

21/ Of course, it is possible that the relatively high cost of Applicants' nuclear power might change their ability or propensity to act in anticompetitive ways. Applicants do not, however, contend that their potential for anticompetitive behavior has changed. Instead, they simply seem to be complaining that nuclear power is not encouraging them to restrict competition in the way they had thought it would.

request that the Board answer in the affirmative the "bedrock" legal issue; (2) answer the "bedrock" legal issue in the negative; and (3) terminate this proceeding.

Respectfully submitted,

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March 9, 1992

APPENDIX A

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December 1, 1987

Thomas A. Kayuha, Esq.
Ohio Edison Company
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Re: Filing of Partial Requirements Tariff

Dear Tom:

This is to follow up on our telephone conversation of last week in which you confirmed my concern that Ohio Edison reads Article III, Section 3.2, of the 1983 settlement agreement with WCOE as retaining for Ohio Edison the option of refusing partial requirements service after the expiration of the currently effective Energy Supply Agreement. I told you on the phone that I was extremely disappointed with that strained reading of the settlement agreement, and you advised me that the Company's reading is consistent with Jim Wilson's recollections of the negotiations leading to the settlement agreement.

I have now reviewed my notes, correspondence, etc. from 1983, which confirm the obvious and fair reading of the settlement language, and I suggest that Ohio Edison officials do the same.

The settlement agreement provides as follows:

> In the event that agreement has not been reached by January 1, 1988 with respect to continuation of service to WCOE on and after October 1, 1988 Ohio Edison shall file in January, 1988 a rate schedule or rate schedules by which full or partial

> requirements service may be obtained by WCOE or by AMP-Ohio on behalf of some or all of the WCOE members subsequent to September 30, 1988.

Simply placing this language in historical perspective leads to the inexorable conclusion that the choice of partial or full requirements service shall be made by WCOE or AMP-Ohio, not by Ohio Edison. You will recall that prior to the commencement of service under the Energy Supply Agreement, the WCOE group had succeeded in obtaining partial requirements and wheeling service from Ohio Edison and were, in fact, supplying a portion of their load from other sources. It is inconceivable that WCOE would have permitted Ohio Edison to terminate partial requirement service and reimpose full requirements service upon the expiration of the Energy Supply Agreement, for that would have been a step backward that the WCOE group continually insisted they would never allow to occur. In fact, Section 3.2 was inserted in the settlement agreement specifically to assure that the WCOE members would have available to them either partial or full requirements service (at their option) after 1988 and to avoid a negotiating hammer in Ohio Edison's hands as the Energy Supply Agreement neared its termination point.

My notes and correspondence duri g the period leading up to the signing of the settlement agreement confirm the obvious. See, for example, my August 16, 1983 letter to Mike Gribler which makes clear the mutual understanding that Ohio Edison would have on file a partial requirements rate available to the Cities and that the Company would also agree to offer full requirements service to any municipality which so elected. My correspondence to the WCOE members during this period continuously assured them that partial requirements service would be available upon the expiration of the Energy Supply Agreement, if that Agreement could not be extended.

In our phone conversation, I believe you virtually agreed with me that the language of the settlement agreement and its historical context would fairly lead to this conclusion but that you were persuaded to the contrary by Jim Wilson's recollections. Like you, I place a great deal of weight on what Jim Wilson says, because I believe that he is an honorable man who would state fairly his recollections. Fortunately, my notes of negotiating sessions may clarify this situation.

During the negotiations, we requested that Ohio Edison do what Toledo Edison had agreed to do, which is to file contemporaneously with the settlement agreement a partial requirements tariff pursuant to which Cities could obtain service in the event that the Energy Supply Agreement terminated without extension. My notes of our settlement meeting on August 23, 1983, reflect Jim Wilson's opposition to having a partial requirements rate on file that early, to which I responded

(again, according to my notes) that we could agree with Ohio Edison's not filing a partial requirements rate contemporaneously with the Energy Supply Agreement as long as it agreed to file a partial requirements tariff near the end of the Energy Supply Agreement's term. I submit that Jim's recollection concerning a partial requirements tariff may be confusing his opposition to a 1983 partial requirements filing with more generalized opposition to any partial requirements tariff filing.

If necessary, and as appropriate, I can produce copies of contemporaneous notes and memoranda to clients which are fully consistent with our view that each time the word "or" is used in Section 3.2 of the Settlement Agreement the choice belongs to the customers, not Ohio Edison. I would ask that you examine contemporaneous notes and memoranda in the Company's files to see if they in fact support your contrary view.

Finally, and perhaps fortunately, this entire dispute is probably academic in any event in light of the presently-effective NRC license condition requiring Ohio Edison to offer either full or partial requirements service to any entity in the CCCT, at the customer's option. This letter will confirm my oral request on behalf of AMP-Ohio and WCOE that Ohio Edison make available partial requirements service commencing October 1, 1988, in the event that the parties are unable to agree to an extension of the Energy Supply Agreement and that Ohio Edison make such filing with the FERC by the end of January, 1988, at the same time as it files whatever tariff or tariffs it believes must be filed pursuant to the settlement agreement.

It is my hope, and the hope of the WCOE and AMP-Ohio officials, that all of this discussion is prophylactic and that future power supply arrangements between Ohio Edison and AMP-Ohio, on behalf of WCOE, can be extended by contract rather than by unilaterally filed and perhaps litigated tariffs. Surely, our energies during the next two months should be devoted to reaching an agreement governing future power supply matters rather than to a dispute over the meaning of the 1983 settlement agreement.

Yours truly,

David

David R. Straus

cc: WCOE Executive Committee
Ken Hegemann
John Bentine, Esq.

DRS:bf

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
OHIO EDISON COMPANY	Docket No. 50-440-A Docket No. 50-346-A
(Perry Nuclear Power Plant, Unit 1 Facility Operating License No. NPF-58)	(Suspension of Antitrust Conditions)
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY **THE TOLEDO EDISON COMPANY**	ASLBP No. 91-644-01-A
(Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58) (Davis-Besse Nuclear Power Station, Unit 1, Facility Operating License No. NPF-3)	

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 1992, copies of the foregoing Brief of American Municipal Power-Ohio, Inc. in Opposition to Applicant's Motion for Summary Dispostion and Cross-Motion for Summary Disposition were served upon each of the following by first-class mail:

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