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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of	
OHIO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58)	Docket No. 50-440-A 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

APPLICANTS' REPLY TO OPPOSITION CROSS-MOTIONS FOR SUMMARY DISPOSITION AND RESPONSES TO APPLICANTS' MOTION FOR SUMMARY DISPOSITION

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I. INTRODUCTION & SUMMARY

On January 6, 1992, Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TECo") (collectively, "Applicants") filed a Motion for Summary Disposition ("Applicants' Motion") on the bedrock legal

issue in this case.[1/] Opposing responses to that Motion, in some cases combined with cross-motions for summary disposition, were filed on March 9, 1992 by the Staff of the Nuclear Regulatory Commission ("NRC Staff"),[2/] the Department of Justice ("DOJ"),[3/] the City of Cleveland ("Cleveland"),[4/] American Municipal Power-Ohio, Inc. ("AMP-O"),[5/] and Alabama Electric Cooperative ("Alabama")[6/] (collectively, the "Opposition"). This Reply addresses the arguments raised by the Opposition in their March 9 filings.

In this Reply, Applicants focus on the legal issue in controversy in this case and, in so doing, put to rest the miscellaneous and largely diversionary claims made by the Opposition.

1/ See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 N.R.C. 269, amended by Order (Nov. 21, 1991) at 3 n.3.

2/ NRC Staff's Answer in Opposition to Applicant's Motion for Summary Disposition and NRC Staff's Cross-Motion for Summary Disposition, March 9, 1992 ("NRC Staff Answer").

3/ Response of the Department of Justice to Applicant's Motion for Summary Disposition, March 9, 1992 ("DOJ Response").

4/ Motion for Summary Disposition of Intervenor, City of Cleveland, Ohio, and Answer in Opposition to Applicants' Motion for Summary Disposition, March 9, 1992 ("Cleveland Answer").

5/ Brief of American Municipal Power-Ohio, Inc. in Opposition to Applicants' Motion for Summary Disposition and Cross-Motion for Summary Disposition, March 9, 1992 ("AMP-O Brief").

6/ Alabama Electric Cooperative's Combined Cross-Motion for Summary Disposition and Response to Applicants' Motion for Summary Disposition, March 9, 1992 ("Alabama Response").

Specifically, Applicants' Reply is divided into the following six propositions:

(1) This case is about the meaning of Section 105(c) of the Atomic Energy Act of 1954, as amended ("the Act"), 42 U.S.C. § 2135(c), and specifically, whether "activities under a license" can "create or maintain a situation inconsistent with the antitrust laws"[7/] when a licensed facility does not produce low-cost power. The Opposition's theories of the case do not focus with precision on the language of Section 105(c) and thus do not address this fundamental legal issue.

(2) Notwithstanding the Opposition's claims, Applicants' competitive position -- to the extent it is favorable -- has not been, and cannot be, "created" or "maintained" by a high-cost power plant.

(3) Notwithstanding the Opposition's claims, relative cost was a determinative factor in the enactment and application of Section 105(c).

(4) Many of the Opposition's arguments are red herring assertions and alarmist claims about the factual and legal consequences of granting the relief

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7/ 42 U.S.C. § 2135(c)(5).

Applicants seek. These arguments are factually wrong and legally inapposite.

(5) The Opposition's interpretation of Section 105(c) is unconstitutional; in contrast, Applicants' interpretation is not.

(6) Cleveland is incorrect about the application to this case of the doctrines of *res judicata*, collateral estoppel, law of the case, and laches.

II. ARGUMENT

A. The Fundamental Legal Issue In This Case, Largely Left Unaddressed By The Opposition, Is The Meaning Of The Conditional Language That Triggers An Antitrust Review Under Section 105(c) Of The Act

It is ironic, indeed, that the NRC Staff asserts that Applicants' Motion fails to address the language in Section 105(c) of the Act that triggers NRC's antitrust review authority,[8/] for it is the specific, conditional language of Section 105(c) on which Applicants' Motion is founded. Indeed, Applicants' Motion is

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8/ NRC Staff Answer at 7. In fact, there is a virtual chorus among the Opposition on this point. See AMP-O Brief at 7 ("the Applicants are uninterested in the language of Section 105(c)"); Cleveland Answer at 16 ("Applicants' motion, however, makes no meaningful effort to analyze the provisions of Section 105(c) to support Applicants' position.")

devoted to an analysis of Section (c).[9/] Applicants will not repeat the detailed analysis of Section 105(c) contained in their Motion. Nevertheless, what cannot be overemphasized is the centrality to this case of the meaning and purpose of Section 105(c)'s conditional "whether" clause, i.e., "whether the activities under a license would create or maintain a situation inconsistent with the antitrust laws."

The Opposition not only argues wrongly that Applicants do not address the statute, but they also mistakenly assert that the statute is clear on its face, and that it is not about cost.[10/]

9/ See Applicants' Motion at 31-33 (description of Section 105 and the "particularized regime" specified in subsections (a), (b), and (c)); id. at 15-30 (description of NRC's limited and unique antitrust authority under Section 105(c) in contrast to the plenary antitrust authority vested in other Federal agencies, as well as in private attorneys general); id. at 34-45 (description of legislative history leading to adoption of conditional language set forth in Section 105(c)); id. at 45-57 (description of case law's treatment of particular nature of NRC's authority under Section 105(c)); id. at 33, 57-75 (analysis of specific circumstances excluded by Section 105(c)'s conditional language, i.e., circumstances when licensed activities *do not* create or maintain a situation inconsistent with the antitrust laws); see also id. at 77-88 (the NRC Staff and DOJ advocate an interpretation of Section 105(c) that denies equal protection under the law).

10/ Cleveland Answer at 16 ("the statute is plain and unambiguous"); NRC Staff Answer at 7 ("the clear statutory language does not require a finding of low cost electricity as a condition precedent to the Commission's antitrust authority."); DOJ Response at 9-10 ("Despite the clear language of the Act, Applicants ask this Licensing Board to read into the Act a condition precedent . . . ."); AMP-O Brief at 7 ("Section 105(c) plainly does not require a finding that a nuclear plant produce relatively 'low cost' power. . . .");

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The Opposition is fixated on the fact that the word "cost" is not in Section 105(c). But this is hardly the determinative test, for under that principle, the due process clause of the Constitution is not about fairness. Moreover, it is no more than self-serving and certainly not self-evident that the conditional language of Section 105(c) is clear on its face. The only reason why the Opposition makes such a claim is because they do not want the Board to seriously examine the legislative history and the adjudicatory applications of the conditional language of Section 105(c); for, as Applicants showed in their Motion and reemphasize in this Reply,[11/] these indicia of the meaning of Section 105(c) lend enormous support to Applicants' position. Before focusing on these well-established interpretive tools for understanding a statutory provision, however, it is helpful to address the precise, semantic issues presented by Section 105(c), as well as the theories of the case that are presented by the Opposition in lieu of Applicants' cost theory. Three points of semantics deserve particular mention at the outset:

(1) The inclusion in Section 105(c) of the word "whether" indicates that activities under a

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Alabama Response at 8 ("The 'express language of the statute' offers no support to Applicants' claim that the economics of power from their nuclear facilities must be determined in order to make an affirmative Section 105(c)(5) finding.")

11/ See Section II.C, infra.

license sometimes prompt NRC's antitrust remedial authority and sometimes they do not. If this were *not* the case, Section 105(c) would not include the word "whether"; instead, all activities under a license would prompt the imposition of antitrust conditions, and the NRC would not be required to determine "whether" they do.

(2) The specific activities under a license that prompt the imposition of antitrust conditions by the NRC (in contrast to the remedial authority of other agencies charged with antitrust responsibilities under the Federal antitrust laws,[12/]) are those activities that "create or maintain a situation inconsistent with the antitrust laws." Conversely, those activities under a license that do *not* "create or maintain. . ." simply do *not* trigger NRC's antitrust authority.

(3) Once the specific language of Section 105(c)'s conditional standard of review is evaluated, the only remaining issue is whether a high-cost facility can "create or maintain . . ." Logic dictates that it cannot, for the incremental impact on the marketplace of a less competitive product than is

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12/ See Applicants' Motion at 25-31.

> otherwise available necessarily cannot enhance the product owner's competitive position in that market. As discussed in more detail in Section II.B, infra, the efforts by the Opposition notwithstanding, the only coherent and logical interpretation of Section 105(c) is the Applicants' interpretation.[13/]

In their effort to rebut Applicants' analysis of Section 105(c), the Opposition expends considerable energy (and paper) on formulating a theory of the case; however, these theories simply do not adequately explain the meaning of Section 105(c)'s conditional antitrust standard. The Opposition's theories fall into three categories: (1) the competitive behavior theory; (2) the scope of NRC's review and remedial authority under Section 105(c) (the Facility theory); and (3) theories based on monopoly and other general antitrust principles.

13/ Moreover, as Applicants' Motion made clear, this conclusion also follows from the history of Section 105(c)'s promulgation and use, for neither the legislators who adopted Section 105(c), nor the proponents of the provision that was adopted, nor the subsequent interpreters of Section 105(c) intended NRC to exercise its antitrust remedial authority in the absence of a low-cost facility. See Applicants' Motion at 34-57.

1. Issues of Competitive Behavior

The general thesis advanced by all of the Opposition parties, but addressed in most detail by Cleveland, is that the critically important consideration in Section 105(c) analysis is the competitive behavior of licensees and not "the relative cost of the power from the nuclear unit."[14/] While Cleveland acknowledges, in passing, that there must be "a nexus, a relationship, between the antitrust conduct of the Applicants and the 'activities under the license'",[15/] Cleveland pays short shrift both to this critical requirement and to the centrality of cost in satisfying this requirement.

Focusing instead on issues of competitive behavior, Cleveland spends considerable time reviewing the record in the Davis-Besse/Perry antitrust proceeding. Of particular interest to Cleveland is the dominant position of the licensees in the 1970's in Ohio with respect to the sale of electricity.[16/] Cleveland also reviews the NRC's concerns and findings in that proceeding with respect to the use by the licensees of their market dominance.[17/]

14/ Cleveland Answer at 3.

15/ Id. at 4 (quoting 42 U.S.C. § 2135(c)(5)).

16/ Id. at 8-15.

17/ Id. at 8-15. Even Cleveland's focus here -- on Applicants' allegedly blocking Cleveland's access to bulk power -- is a

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Applicants do not disagree with Cleveland that a detailed analysis was conducted during the NRC's Davis-Besse/Perry antitrust proceeding of Applicants' market position. In fact, Applicants made this point in their Motion.[18/] Furthermore, as to how Applicants used their market position in the 1970's to compete in the marketplace, Applicants have no dispute with Cleveland that considerable focus was placed on this question in the Davis-Besse/Perry antitrust proceeding. As Cleveland knows, for the purposes of argument, Applicants have chosen to accept those findings in this case.[19/]

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tacit recognition by Cleveland, perhaps without it appreciating the fact, that at the time it was initially licensed, Perry was important to Cleveland, as well as to the Applicants, because of its expected provision of low-cost bulk power. Neither Cleveland nor the Applicants would have had any motivation to have access to the plant, to block others from it, or even to be bothered by being blocked from access to it, if it had been anticipated that Perry would not provide low-cost bulk power.

18/ Applicants' Motion at 46.

19/ See Applicants' Motion at 17 n.29; OE Application at 28. Applicants' *arguendo* assumption about its past competitive behavior does not equate with a statement of agreement or disagreement by Applicants with the earlier record on this subject. See Black's Law Dictionary (6th ed. 1990) at 107. Applicants' position simply is that, for purposes of argument, they take the record as it is found. Compare AMP-O Brief at 30 n.19. Applicants also submit that allegations about their present competitive conduct are not material to resolving the pending Motion; however, because of their offensive and distracting nature, Applicants have summarily addressed these allegations in this Reply. See Section II.D.1, infra.

In short, the substantial discussion by Cleveland of competitive behavior, including its importance in determining NRC's remedial action in the Davis-Besse/Perry antitrust proceeding (as well as in other NRC cases), is not the issue here.

This does *not* mean, however, that Applicants agree with the legal significance Cleveland places on this information. Cleveland's analysis simply is beside the point. ***For it is not until the nuclear facility being licensed is determined to be of competitive value that the general position and conduct in the marketplace of the facility's owners becomes relevant under Section 105(c).*** In the Davis-Besse/Perry case, as well as in the other proceedings where NRC imposed antitrust remedies, the "activities under the license," namely the construction and operation of the nuclear power plant, were expected by all parties to be competitively advantageous and, consequently, the specific "activities" to be "license[d]" could affirmatively contribute to the competitive position of the owners in the marketplace.[20/] In the

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20/ Counsel for the City of Cleveland, who represented the Municipal Electric Utility Association of Alabama ("MEUA") in the Farley case before the Atomic Energy Commission ("AEC"), see n.21, infra, effectively argued this very point in 1972. In its brief, MEUA stated:

> The net effect of the activities of the Applicant . . . is to exclude everyone else from the possibility of using any means to secure the benefits of nuclear-fueled electric generation other than the means being attempted by the Applicant's wholesale customers in this proceeding.

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instant proceeding, however, where the reality did not meet the expectation, *the Opposition fails to confront or address the starting point for Section 105(c) analysis, which is the necessary predicate for the imposition of antitrust remedies by the NRC.* And yet it is this very factor -- the high cost of the Davis-Besse and Perry nuclear plants -- which make it logically impossible for the "activities under the license[s]" to "create or maintain a situation inconsistent with the antitrust laws".

Another way to evaluate Cleveland's thesis that competitive behavior is the linchpin of Section 105(c) analysis is to consider how this thesis fits with the unique language of Section 105(c). Under Cleveland's theory, Section 105(c) would invoke NRC's antitrust authority when the "licensee's activities" generally, *not* its "activities under the license" specifically, create or maintain a situation inconsistent with the antitrust laws. But this is not what Section 105(c) says. Instead, its focus is very precise and, not surprisingly, its vantage point is the

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> What the Association and its members seek in this proceeding is not, as Applicant appears to maintain, an order directing the cessation of antitrust activities, but, rather, an opportunity to obtain participation in the nuclear units for which the Applicant seeks AEC license.

Answering Brief of MEUA before the AEC on Jurisdiction of Atomic Energy Commission and Scope of Prelicense Antitrust Review (Nov. 9, 1972) at 8.

subject of unique interest to the NRC, namely, the impact of the activities to be licensed by the NRC on the competitive environment in which the licensed facility will operate. *If Cleveland's thesis is correct, the "activities under the license" would be irrelevant and Section 105(c)'s conditional standard would be meaningless.*

2. The Farley Theory

Alabama's theory of the case, repeated with lesser emphasis by DOJ, the NRC Staff and Cleveland, is that the bedrock legal issue in this case was raised by Alabama Power Company in the Farley antitrust proceeding and was rejected by the Appeal Board and the Eleventh Circuit Court of Appeals.[21/] Alabama either does not understand the issue raised by Applicants, or is trying to fit a square peg into a round hole.

In fact, Farley effectively illustrates both the centrality of the cost advantage of nuclear power to NRC's antitrust mandate, and the fact that the market analysis that takes place in a Section 105(c) analysis is only meaningful and relevant once it

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21/ Alabama Response at 7-12; DOJ Response at 8 n.10; NRC Staff Answer at 16, 19-22; Cleveland Answer at 21, 44-48; see Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-646, 13 N.R.C. 1027 (1981), a.f'd, 692 F.2d 1362 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983).

is established that a nuclear facility produces low-cost electricity.[22/]

Alabama contends (along with DOJ and Cleveland) that Applicants are asking this Board to "focu[s] narrowly on the nuclear plant," an argument that was "rejected in Alabama Power by the Court of Appeals."[23/] Alabama is wrong; its characterization of the issue in controversy in this case, as well as the issues in controversy in Farley, is imprecise and erroneously obscures the meaning of Section 105(c).

The Farley case, on which Alabama relies, resolves two legal issues that arise in Section 105(c) analyses; however, neither of these issues is presented in this proceeding. The first issue addressed by the Appeal Board and the Eleventh Circuit Court of Appeals in Farley was the proper scope of inquiry under Section 105(c) in assessing the competitive environment in which the facility owners operate,[24/] *viz.*, "the scope of [NRC's] inquiry and form of its analysis of the economic structure in the relevant power markets and the past conduct of Alabama Power."[25/] As the Court of Appeals observed, the word "create" in Section

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22/ See Applicants' Motion at 46-47, 70-75.

23/ Alabama Response at 8-9; see also DOJ Response at 8 n.10 ("the NRC is not limited to examining the operations of the nuclear plant in isolation from the other activities of the licensee"); Cleveland Answer at 44-48.

24/ ALAB-646, 13 N.R.C. at 1042-44; 692 F.2d at 1367-68.

25/ 692 F.2d at 1367.

105(c) "directs the NRC to look forward to see if an anticompetitive situation could arise."[26/] In contrast, the word "maintain" requires "a careful look at the present -- and the past -- to see if an anticompetitive climate exists," if the applicant has acted anticompetitively and, therefore, to determine "whether there is a 'situation' to maintain, and *whether issuing this license will maintain it.*"[27/]

As Applicants already have made clear,[28/] Applicants fully appreciate the broad-scope inquiry of the competitive environment and the applicant's conduct in it that is required as part of a Section 105(c) analysis. However, the Farley scope-of-inquiry holding resolves a different Section 105(c) issue than the one at issue here. The bedrock legal issue in this case focuses on whether there is a requirement under Section 105(c) that *precedes* and is independent from the agency's consideration of the competitive environment, i.e., that the nuclear facility produce low-cost power and, therefore, be capable of creating or maintaining a situation inconsistent with the antitrust laws. Such a requirement exists if the language of Section 105(c), providing that "the activities under the license . . . create or maintain . . .", is to have any meaning. Thus, while the word "create" involves a look forward, and the word "maintain" requires

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26/ Id.

27/ Id. at 1367-68 (emphasis added).

28/ See Section II.A.1, supra.

looking back and forward, it is Applicants' contention that none of these looks are necessary or appropriate in the absence of a low-cost nuclear facility.

The second issue resolved in Farley is similarly distinct from the pending bedrock legal issue. That issue was the scope of remedial authority vested in the NRC by Section 105(c).[29/] In particular, the Court found appropriate the Appeal Board's imposition of conditions granting the applicant's competitors the right to an ownership interest in the Farley facility and providing for access to the applicant's transmission facilities.[30/] Once again, Applicants fully appreciate the broad-scope remedial authority of the NRC to "find a remedy to address its antitrust concerns."[31/] But this authority, which is exercised after findings about the competitive environment are made, has nothing to do with whether the NRC must first establish that a facility's operation is low cost and therefore will either create or maintain a "situation."[32/]

29/ 692 F.2d at 1367, 1369-70.

30/ Id. at 1370.

31/ Id. at 1369.

32/ Cleveland argues that the Farley applicant's objection to the remedy of Farley ownership access was an argument which establishes that cost is not pivotal in a Section 105(c) analysis. Cleveland Answer at 47-48. Cleveland has jumbled the facts and law.

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In short, Applicants believe that the only rational interpretation of Section 105(c) requires the NRC to engage in a three-step process: (1) determining whether a nuclear facility will "create or maintain"; (2) determining whether there is a "situation" that will be created or maintained by the facility;

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First, the applicant's argument in Farley to which Cleveland refers related exclusively to the scope of NRC's remedial authority under Section 105(c) -- a different issue than that presented by this case.

Second, the point of the Appeal Board in Farley, in rejecting the argument to which Cleveland refers, was that the competitive value of ownership of Farley (18.9 mills per Kwh) exceeded the competitive value of unit power from the facility (26.2 mills per Kwh). See ALAB-646, 13 N.R.C. 1027, 1104 n.248. Because of this fact, access to unit power was deemed an insufficient remedy to offset the anticompetitive situation found to exist. Instead, ownership of the nuclear plant was required. Id. at 1103-06. This conclusion was affirmed by the Court of Appeals. 692 F.2d at 1369.

Cleveland relies on the applicant's unsuccessful argument in its appellate brief in the Court that Alabama Electric Cooperative was building a low-cost, coal-fueled plant (23.94 - 25.71 mills/kwh) and therefore that the evidentiary record did not support the remedy imposed by the Appeal Board. See Cleveland Answer at 48 and Appendix B (citing Brief of Petitioner Alabama Power Company (Feb. 22, 1982) in the Court of Appeals). But this argument failed to convince the Court of Appeals that the NRC's remedy was unjustified, which was not surprising in light of the competitive value (18.9 mills per Kwh) to Alabama Electric Cooperative of ownership in the Farley facility.

In short, contrary to Cleveland's assertion, the discussion to which Cleveland refers does *not* suggest that "'the windfall head start' phrase does not refer to a competitive advantage associated with the anticipated low cost of nuclear power." Cleveland Answer at 48. To the contrary, the value of a nuclear plant was that it provided low-cost bulk power; accordingly, ownership of it was required in Farley.

and (3) determining the proper remedy to address such a "situation." Farley focused on steps (2) and (3) in a Section 105(c) analysis. It did not focus on step (1), which is the subject of this proceeding.[33/]

The Opposition is wrong in its assessment that Farley is dispositive here.[34/] For both the language of the Court about the value possessed by owners of nuclear power plants -- "the unbridled beneficiaries of the windfall head start"[35/] -- and the facts of the low cost of the Farley facility[36/] -- as reflected

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33/ As Applicants' Motion makes plain, there was substantial dicta in Farley which supports Applicants' understanding of the critical importance of the step (1) analysis. Applicants' Motion at 46-47, 70-75. But the Opposition focuses on the other two legal issues that were resolved in Farley, and confuses them with the bedrock legal issue that the Board must resolve in this case.

34/ Cleveland is not only wrong on that issue, but it misrepresents the Court's decision in Farley when it says "the court specifically recognized that the cost attractiveness of nuclear power has nothing at all to do with the NRC's authority to impose antitrust conditions. . . ." Cleveland Answer at 46-47. The Court did no such thing. In fact, not only did it not "specifically recogniz[e]" this point, but if one can draw any inference from Farley, it clearly would be to the contrary.

35/ 692 F.2d at 1369; see Applicants' Motion at 46-47.

36/ In the 1977 Licensing Board decision on Farley, LBP-77-24, 5 N.R.C. 804, 960 (1977), modified, ALAB-646, 13 N.R.C. 1027 (1981), aff'd, 692 F.2d 1362 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983), the Board observed:

> The issues of nexus and access to nuclear facilities, which are interrelated, must be viewed in the context of the electric utility industry in the real world today. The nation

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by the competition's desire to both buy an ownership share in it and to have access to power produced by it -- are wholly inconsistent with Cleveland's description of the case. Thus, it is Cleveland, not Applicants, who provide a "blatant distortion" of the Court's decision in Farley.[37/]

3. Issues of General Antitrust Law

The NRC Staff argues that the relative low cost of a nuclear power plant is not a necessary predicate to the NRC's exercise of its antitrust authority under Section 105(c) because "[t]he

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> is in the midst of a profound and continuing energy crisis, with the cost and availability of all fuels the subject of serious concern. Oil and natural gas appear to be of declining significance for the generation of electricity, and hydroelectric capacity is now quite limited. Coal and nuclear power appear to be the chief sources of present and future energy requirements. Of these, nuclear power is still less expensive than coal, although its costs too continue to rise sharply.
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> These [the Farley] nuclear units represent an important new source of energy, at a time when the traditional sources of fuel for future use may well be unavailable or prohibitively expensive . . . . We find that the exclusion of [Alabama Electric Cooperative] from the Farley nuclear facilities probably would create a decisive competitive advantage to Applicant.

37/ Cleveland Answer at 48.

general body of antitrust law lends no support to this proposition."[38/] The Staff then reviews the analysis applied by the courts in various monopolization and tying cases under the Sherman and Clayton Acts,[39/] and concludes that, since these cases did not turn upon a finding of low cost, neither does Section 105(c).

The problem with the NRC Staff's argument is that it is wholly inapposite to the issue pending here.

A Section 105(c) antitrust review does rely on general principles of antitrust law to assess market conditions and competitive behavior and, in that regard, the Federal antitrust laws are applied by the NRC (and DOJ) in reaching determinations under Section 105(c).[40/] ***But this does not mean, as the NRC Staff suggests, that a Section 105(c) analysis is the same thing as an analysis under the general antitrust laws.***

In NRC's antitrust analysis, the critical inquiry is the incremental competitive impact of a nuclear facility on its

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38/ NRC Staff Answer at 8.

39/ Id. at 8-12.

40/ The NRC Staff correctly refers to Section 105(c)(5), in which reference is made to DOJ's advice as to "adverse antitrust aspects" of a licensing matter. NRC Staff Answer at 7. However, the Staff's reliance on Section 105(a) is misplaced. See id. That provision does not concern the use of the general antitrust laws by the NRC; rather, it makes clear that the plenary authority of *other* agencies under the Federal antitrust laws is unaffected by NRC's Section 105 authority. See Applicants' Motion at 23-25.

owners' (and their competitors') market position. The necessary predicate to NRC's evaluation of the market conditions in a particular applicant's service area is the understanding that ownership of the nuclear power plant to be licensed will enhance the owner's competitive position in that market. If NRC then finds that the facility owner's market position and past or prospective conduct are such that the addition of the facility is likely to affirmatively contribute to the owner's competitive position, it is authorized to broadly remedy that circumstance in whatever fashion will avert the anticompetitive consequences of concern. On the other hand, if ownership of the facility will *detract* from the market position of the owner, a Section 105(c) remedy is unnecessary and improper.

In contrast, the Federal antitrust laws are neither limited to nor uniquely concerned with the impact of one asset of a competitor on the marketplace. Federal antitrust laws usually concern themselves with the market position and behavior of industry competitors generally. Moreover, as to those antitrust cases that concern themselves with the acquisition of a particular asset, that asset is only of interest if it ***enhances*** its owners' market position or its ability to engage in anticompetitive conduct. Certainly, if it ***detracts*** from its owners' competitive position, it presents no issue under the Federal antitrust laws.

The NRC Staff misses the point when it argues that there are adverse antitrust findings under the general antitrust laws that

do not depend upon the cost of a product.[41/] That's because the purpose of the analysis under the Federal antitrust laws is not the same as the purpose for which the NRC involves itself in antitrust matters.

Cleveland also advocates a general antitrust law thesis. Cleveland contends that monopolization, which includes "the power to control prices to exclude competition," and the "control of productive capacity," is not dependent on cost.[42/] Cleveland then asserts, "There is no doubt that the addition of nuclear units would maintain and even increase Applicants' monopoly power, regardless of the cost of the output of those units."[43/] But like the Staff, Cleveland is focused on a subsidiary issue when it looks to questions of market dominance. This issue is subsidiary because while it becomes of great interest to the NRC under Section 105(c) *once* it is established that the nuclear facility is competitively advantageous, it is not sufficient,

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41/ Similarly, the NRC Staff again misses the point when it contends that at least one circuit court found cost to be insufficient to show monopoly or market power. NRC Staff Answer at 9 (citing Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 30 (1st Cir. 1990), cert. denied, 111 S. Ct. 1337 (1991)). Contrary to the NRC Staff's suggestion here, Applicants are *not* saying that low cost is sufficient to establish monopolization or market power under Section 105(c). But ***under Section 105(c)***, the low cost of a new facility ***is*** a necessary threshold determination that must be established ***before*** there is any relevance to NRC's assessment of market power and its use (e.g., monopolization).

42/ See Cleveland Answer at 17-22.

43/ Id. at 17-18, 19.

alone, to prompt the agency's authority under Section 105(c). *For if dominance, per se, triggered NRC's remedial authority under Section 105(c), the construction and operation of an additional nuclear facility would be irrelevant because virtually all license applicants are dominant in their service territories.* If this were the case, the consideration of "activities under a license" would be similarly irrelevant. In short, Cleveland's interpretation of Section 105(c), like the Staff's, makes meaningless the language of the statute.[44/]

Monopolization analysis may well focus on the control and not the cost of generation available in a marketplace because the central issue in such cases often is the degree of dominance by a competitor. In such analyses, however, the value of a particular new asset is not being challenged. For example, in United States v. Grinnell Corp., 384 U.S. 563 (1966), cited by Cleveland,[45/] which concerned the burglary and fire protection industry and, particularly, the accredited central station service business, the issues were the definition of the relevant market for purposes of establishing monopolization under Section 2 of the Sherman Act and the degree of dominance of the defendants in that market. There was no dispute over the assumption in the case that dominance in the relevant market was competitively advantageous.

44/ See Section II.A.1, supra.

45/ Cleveland Answer at 17.

Interestingly, Cleveland relies upon a decision recently issued by the Federal Energy Regulatory Commission ("FERC") to support the proposition that the relative cost of generating capacity is irrelevant to the ability to monopolize.[46/] But the Northeast Utilities case, on which Cleveland relies, is a useful illustration of a type of analysis more analogous to that necessary under Section 105(c) than the type of analysis advocated by Cleveland. Unlike many antitrust cases, which involve a broad-scale assessment of conditions in a particular marketplace, Northeast Utilities involved FERC's assessment of the effect on competition in the marketplace of a particular merger -- that of two public utility companies, Public Service Company of New Hampshire and Northeast Utilities. "To determine the merger's effect on competition, the Commission compared the premerger competitive situation with the competitive situation that would result from an unconditioned merger."[47/] Without such a comparison, FERC would have been unable to determine "any anticompetitive effects of the merger."[48/]

The Northeast Utilities before-and-after analysis is analogous to the analytical approach Applicants are advocating in the present case, i.e., that it is the competitive impact on the

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46/ Northeast Utils. Serv. Co., Opinion No. 364-A, 58 FERC ¶ 61,070 at 61,192 (Jan. 29, 1992).

47/ 58 FERC at 61,189.

48/ Id. at 61,190.

status quo ante of a particular event -- the construction and operation of the nuclear facility -- that . NRC's concern under Section 105(c). Similarly, in Northeast Utilities, FERC was interested in the competitive impact of a utility merger. In that case, FERC found that the merger would increase the merged company's dominance and corresponding market power in the short-term bulk power market, as well as reduce competition in transmission by eliminating one company from the business of ownership (and hence control) over transmission access.[49/] The issue for FERC was the ***control*** of established assets and whether the ***change in control*** caused by the merger would lessen competition in the marketplace.

Under Section 105(c) of the Act, the issue is analogous but somewhat different, namely, whether ***the creation and use of a new asset*** will adversely affect competition in the marketplace. Not surprisingly, in the FERC situation, the value of the assets in question -- transmission and generation -- were not in controversy;[50/] the question instead was whether the ***change in control*** over those valuable assets would be competitively detrimental. In a Section 105(c) case, of course, the issue is the competitive impact of ***an additional asset***. It is Applicants' contention that this asset, the nuclear power plant, has no

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49/ Id. at 61,192.

50/ There was a question of fact over the value of strategic transmission corridors. See id. at 61,194.

competitive value unless it is low cost relative to alternative sources of electricity.

In summary, the Northeast Utilities case is useful, analogously, to a Section 105(c) case because both involve the impact of a particular change in a particular market. However, the nature of the change is very different in the two situations and, hence, the competitive analysis necessarily focuses on different factors. Neither of these situations, however, fits the Cleveland general antitrust framework, where market conditions are examined broadly without regard to the impact of a particular event on them.

Finally, Applicants cannot help but observe that the NRC Staff and Cleveland's emphasis on the activities of DOJ and FERC in the arena of competition in the electric utility industry documents the fact that many agencies have responsibility for evaluating and taking remedial action with respect to perceived anticompetitive situations in this industry. Whether the need is found for wheeling,[51/] other transmission services,[52/] or access to power,[53/] utility competitors, like Cleveland and AMP-O in this case, have many protectors who jealously guard their rights.

51/ See Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), cited by Cleveland and the NRC Staff. Cleveland Answer at 18; NRC Staff Answer at 11 n.16.

52/ See Northeast Utils., 58 FERC at 61,203-04.

53/ See id. at 61,194 (short-term bulk power market).

As Applicants described in detail in their Motion, and notwithstanding the effort by the Opposition to suggest to the contrary, the proper exercise by the NRC of its particularized Section 105(c) authority, which would result in the suspension of the license conditions at issue here, will *not* leave Applicants free to somehow gouge their competition, even if there were any basis -- which there emphatically is not -- for assuming Applicants would be so inclined.[54/]

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In summary, the theories of the case advanced by the NRC Staff, Cleveland, DOJ, and Alabama place substantial reliance on arguments that simply do not meet the issue in this proceeding. Applicants do not disagree with the Opposition that NRC's antitrust reviews often address issues of competitive conduct in detail and that the scope of activities that NRC is authorized to review under Section 105(c) encompasses competitive activities independent of the "activities under the license." This was the holding of the Eleventh Circuit in Farley.[55/] But this broad-scope analysis by NRC only takes place *after* Section 105(c)'s threshold determination is made that the nuclear facility in

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54/ See Section II.D.1, infra (discussion of sensational accusations of AMP-O regarding Applicants' conduct); see also Section II.B, infra (discussion of DOJ accusation about Applicants' alleged "incentive").

55/ 692 F.2d at 1367-68.

question is economically advantageous. Furthermore, Applicants fully appreciate the fact that certain cases under the Federal antitrust laws do not necessarily turn on the issue of cost. But none of these observations are at all inconsistent with or even relevant to the fact of the unique nature of NRC's antitrust mandate, which is *not* to look at competition or monopolization generally in the marketplace, but to assess and, *if necessary*, to remedy, the impact of the introduction of a particular facility on the "situation."

Ironically, Alabama Electric Cooperative referred to this very mandate, and the centrality of nuclear power's low cost to it, in its appellate brief in the Farley case:[56/]

> [I]n 1970 Congress designated the Commission as the primary agency to insure through its licensing process that ***the economic advantages of base load nuclear power*** are not used to create or perpetuate anticompetitive situations in the production and sale of electric power. . . . The NRC's mission is then significantly different from that of other regulatory agencies which are concerned merely with taking into account antitrust considerations in arriving at determinations of reasonableness or the public interest . . . . Thus, Congress has directed the Commission to undertake specific and unique antitrust responsibilities with respect to the use of nuclear power in the electric power industry.

56/ Brief for Intervenor Alabama Electric Cooperative, Inc. (11th Cir. May 10, 1982) at 17-18 (emphasis added; footnote and citation omitted).

Cleveland, too, acknowledges this very principle in its Answer when it states (quoting the Licensing Board in the Davis-Besse/Perry proceeding): "It is the effect of the licensed activities measured against particular situations which is the predicate for Commission involvement in Section 105(c) license consideration . . . ."[57/] Of course, Applicants' position is that if it is *not* necessary to remedy the impact of a particular facility on the "situation," NRC is not authorized to impose antitrust remedies on the particular licensees.

B. Applicants' Competitive Position Cannot Be Enhanced, And Hence A "Situation" Cannot Be "Created" Or "Maintained," By A High-Cost Facility

The NRC Staff, DOJ and the City of Cleveland contend that the acquisition of a high-cost facility can enhance its owners' competitive position in the marketplace. This assertion defies logic.

The language of Section 105(c) requires the creation or maintenance of a situation inconsistent with the antitrust laws, and it requires that the activities under the license create or maintain that situation. If these requirements are not met, NRC's antitrust remedial authority is not authorized.

57/ Cleveland Answer at 14 (citing Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3; Perry Nuclear Power Plant, Units 1 & 2), LBP-77-1, 5 N.R.C. 133, 238 (1977) ("Davis-Besse/Perry")).

Thus, in order to meet the criteria of Section 105(c), a nuclear facility either must itself create an anticompetitive situation, or it must in some affirmative way contribute to the maintenance of an anticompetitive situation. If its existence cannot contribute to an anticompetitive situation, it necessarily cannot "maintain" one. If a nuclear facility is high cost, it certainly does not create an anticompetitive situation, nor does it contribute in any way to the maintenance of such a situation. To the contrary, a high-cost facility would lessen its owners' competitive position in the market, both because the facility's expense would make its owners' costs greater than the expenses of its competitors and because there would be less demand for the facility's product than for lower-cost electricity from other facilities. Accordingly, such a nuclear facility would not prompt agency action under Section 105(c).[58/]

The NRC Staff's effort to make cost an immaterial (albeit relevant[59/])issue in Section 105(c) analysis is done by

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58/ AMP-O asserts that cost is not pivotal but that, instead, "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.'" AMP-O Brief at 10, (citing DOJ advice letter at 2 (footnote omitted)). AMP-O's characterization of the case is remarkably lacking in insight. The question that AMP-O ducks and that is posed by the bedrock legal issue in this case is whether it is *possible* for "a particular plant . . . to have anticompetitive effects" if it is a relatively high-cost plant.

59/ See NRC Staff Answer at 9-11.

analogizing NRC cases to so-called tying arrangements under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14.[60] Noting that the central inquiry in a tying case is "economic power," the Staff argues that because a cost advantage is not the only means of acquiring economic power, a licensee can have economic power from a nuclear power plant "without regard to the cost of that product."[61]

A closer look at the NRC Staff's own analysis discloses the fallacy in the Staff's position. According to the Staff, economic power can be derived from three different sources: legal distinctiveness (e.g., patented products), physical distinctiveness (e.g., land), and economic distinctiveness "from having a cost advantage in producing the product."[62] Assuming this simplified analysis is true,[63] electricity from a particular

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60/ In a tying arrangement, a producer seeks to extend its market power by requiring the purchase of a product (the "tied product") with the purchase of a product in which the producer has market power (the "tying project"). Northern Pacific Ry. v. United States, 356 U.S. 1, 5-6 (1958). Although often decided under Section 1 of the Sherman Act and Section 3 of the Clayton Act, the focus of tying cases is on the producer's economic power in the tying product market. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 446 U.S. 2 (1984). Thus tying cases are analytically similar to general monopolization cases decided under Section 2 of the Sherman Act, which, as discussed above, are inapposite in analyzing Section 105(c).

61/ NRC Staff Answer at 11.

62/ Id. at 10.

63/ See NRC Staff Answer at 9-11.

generating facility is neither legally nor physically distinct from electricity from another.

Electricity is a fungible product. The only distinction among different producers of electricity is the cost advantage of one method of production over another. After all, no one cares whether their lights are working because their electricity comes from a coal plant or from a nuclear plant. But a consumer does care if his cost of electricity is higher than his neighbor's. To state this proposition another way, large quantities of high-cost bulk power do not provide to their owner any "economic power" because no one wants high-cost bulk power.[64/] This fact is illustrated in this case by the absence of any requests by Cleveland, AMP-O or others to obtain access to Perry or Davis-Besse. It also is vividly illustrated by the concerted effort by these parties to use the NRC's antitrust license

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64/ The NRC Staff's description of the inherent value of "bulk power or baseload generating capacity" is so ignores the fact that if bulk power was the value of concern to Congress in amending Section 105(c), it simply would have mandated license conditions for every nuclear plant, since essentially all nuclear plants are base-loaded. NRC Staff Answer at 10. This simply is not what Section 105(c) requires.

Thus, as Applicants already have emphasized, it is not surprising that the legislative history of Section 105(c) focuses on "low-cost bulk power" from NRC-licensed facilities. See Applicants' Motion at 35-47. It is only the nuclear plant (which inherently produces baseload power) that *also* produces low-cost power with which Congress was concerned and, accordingly, that Section 105(c) was designed to address.

conditions to *avoid* using power from these facilities -- a fact the Opposition does not deny.

Thus, even if it were true that Applicants were the only parties positioned to "acquire[]" or "h[o]ld" Davis-Besse and Perry,[65/] this condition would not give Applicants any "economic power." Consequently, contrary to the NRC Staff, Applicants have no "power in the product to engage in anticompetitive behavior."[66/]

DOJ endeavors to analytically avoid the centrality of cost to a Section 105(c) analysis by arguing that, "If the increased cost of nuclear power has lessened Applicants' competitive ability," -- a critical admission, of sorts, by DOJ -- "their incentive to handicap their rivals may now be even greater than it was originally."[67/] In short, NRC should continue to impose license conditions on the Applicants because, in DOJ's view, Applicants now have a greater incentive to act anticompetitively than they would have had if their nuclear facilities produced low-cost power.[68/] DOJ's pejorative allegations about Applicants have no basis in fact and are wholly self-serving. But beyond their lack of foundation, the analytical argument advanced by DOJ makes no

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65/ NRC Staff Answer at 10.

66/ Id. at 11.

67/ DOJ Response at 17 n.22.

68/ Id.

sense. DOJ's argument leads to the conclusion that general antitrust law would impose remedies on the most economically disadvantaged competitor; after all, in DOJ's view, it is the competitive underdog who has the greatest incentive to misbehave. The fact is that Applicants' incentive, or lack thereof, is not relevant, any more than the incentive of disadvantaged competitors is relevant in traditional antitrust law. The real issue in general antitrust analysis that is relevant to DOJ's theory is the issue contained in DOJ's admission -- the ability or inability of a company to compete. In the context of Section 105(c), the issue is even more specific: whether the "activities under the license" enhance a licensee's ability to compete. When that ability is *reduced* rather than enhanced, as DOJ appears to acknowledge is the case here, there is no statutory basis for the imposition of antitrust license conditions on a licensee.

The NRC Staff, DOJ and the City of Cleveland also endeavor to distinguish away two notable indicia in the government's prior applications of Section 105(c) that a high-cost nuclear facility is outside the scope of NRC's antitrust purview because it reduces, rather than enhances, a utility's ability to compete. These are the Fermi decision,[69/] discussed by the NRC Staff and

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69/ Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), LBP-78-13, 7 N.R.C. 583, aff'd, ALAB-475, 7 N.R.C. 752 (1978).

Cleveland,[70] and certain DOJ advice letters,[71] discussed by DOJ and Cleveland.[72]

Applicants' Motion reviews the decisions of the Licensing Board and the Appeal Board in Fermi, and Applicants will not repeat that discussion here.[73] In summary, in that case, the Licensing Board observed and the Appeal Board held that the use of anticompetitive acts to *force* a utility's competitor into sharing the high costs of a nuclear facility, in contrast to denying a competitor access to a low-cost plant, is not a cognizable interest under Section 105(c).

The NRC Staff says that "Fermi provides no precedent with respect to the bedrock issue here."[74] Cleveland shares this view.[75] The NRC Staff cites two reasons for this conclusion. First, that "there was no analysis of the cost of electricity from the yet to be constructed nuclear plant in the decisions," and that, consequently, the reference to "'costs and expenses of Fermi 2' . . . may have been nothing more than a reference to

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70/ NRC Staff Answer at 26-27; Cleveland Answer at 52-54.

71/ Davis-Besse advice letter, 36 Fed. Reg. 17,888 (1971); Zimmer advice letter, 37 Fed. Reg. 14,247 (1972); Forked River advice letter, 36 Fed. Reg. 19,711 (1971); Susquehanna advice letter, 37 Fed. Reg. 9,410 (1972).

72/ DOJ Response at 16 n.21; Cleveland Answer at 56-62.

73/ See Applicants' Motion at 57-64.

74/ NRC Staff Answer at 27.

75/ Cleveland Answer at 52.

construction costs."[76] Second, the Staff maintains that "the Fermi case factually has nothing to do with competition between utilities or the use of licensed activities to create or maintain an anticompetitive situation."[77] Cleveland echoes this second thesis.[78] The analysis by the NRC Staff and Cleveland utterly fails scrutiny.

As to the cost of electricity, the Staff is misguided on two counts. First, the issue raised by the petitioner in Fermi was the cost burden from its utility's obligation to purchase Fermi-2 power.[79] Contrary to the NRC Staff's hypothesis about construction costs, purchases of power always reflect both construction *and* operating costs; moreover, it is impossible to purchase power from a facility that is not operating. Furthermore, as to the absence of analysis in the decisions of Fermi-2's costs, the Appeal Board made clear that, in ruling on the petitioner's allegations, "for purposes of her petition and this appeal we must accept them."[80] In short, there was no need for any discussion of the factual allegation of high cost (in fact, such discussion

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76/ Id.

77/ Id.

78/ "Indeed, the petition for intervention presented no antitrust or competitive matter either under the AEA or any of the antitrust laws." Cleveland Answer at 54.

79/ LBP-78-13, 7 N.R.C. at 586, 589; see Applicants' Motion at 57-58.

80/ ALAB-475, 7 N.R.C. at 757 (citation omitted); see Applicants' Motion at 61-62.

would have been inappropriate) because, for purposes of ruling on the adequacy of the petition and the Licensing Board's rejection of it, the Appeal Board was required to accept petitioner's allegation as factually correct -- just as this Board necessarily will do in ruling on the bedrock legal issue in this case.

Furthermore, as to the NRC Staff and Cleveland assertion that Fermi has nothing to do with ***competition*** or its ***use*** under Section 105(c), the Opposition is misguided here, as well. On the question of ***competition***, they are in error, for the Fermi petitioner's claim was that certain "private utilities used their 'monopoly powers . . . to force [the cooperatives] into buying [part of the Fermi nuclear plant].'"[81/] In short, petitioner in fact ***did*** allege the anticompetitive use of market power. As to the ***use*** to which that market power was put, however, the Opposition's comment that Fermi did not raise a Section 105(c) claim is exactly Applicants' (and the Fermi Appeal Board's) point: because the alleged anticompetitive activity was taking place in order to require petitioner and others to participate in a high-cost facility, rather than to deny access to a low-cost one, petitioner's injuries were "beyond the zone of interests that

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81/ ALAB-475, 7 N.R.C. at 757 (citation omitted); see Applicants' Motion at 51. Cleveland says "access to the nuclear power was not at issue." Cleveland Answer at 53. Cleveland is wrong. The entire issue was required access to a high-cost nuclear power plant.

Section 105(c) of the Atomic Energy Act was designed to protect or regulate."[82/]

In summary, the effort by the NRC Staff and Cleveland to distinguish Fermi is analytically flawed. In fact the Appeal Board held in Fermi that the consequences of a high-cost nuclear facility are outside the scope of NRC's authority under Section 105(c) notwithstanding alleged anticompetitive acts by the facil- s owners.

Finally, as to the DOJ advice letters to which Applicants red in their Motion,[83/] notwithstanding DOJ and Cleveland's testations,[84/] in two of the instances to which Applicants referred, DOJ's analysis in its advice letters was that a Section 105(c) proceeding would be unnecessary because the nuclear facilities in question -- Davis-Besse 1 and Zimmer -- were not then anticipated to be low cost relative to the available alternatives. Furthermore, as Applicants' Motion states, while the outcome of the Forked River and Susquehanna advice letters was different because of the anticipated low cost of those facilities, critical reliance was placed by DOJ in those cases on the cost factor.

82/ ALAB-475, 7 N.R.C. at 757-58; see Applicants' Motion at 60-64.

83/ Applicants' Motion at 64-67.

84/ DOJ Response at 16 n.21; Cleveland Answer at 56-62.

In conclusion, the Opposition fails in its effort to analyze away the cost factor by reference to tying arrangements under the Federal antitrust laws, and Applicants' so-called "incentive" to behave improperly. And notwithstanding substantial efforts to do so, the Opposition also cannot distinguish away the Fermi case and those DOJ advice letters that previously addressed the issue now pending before this Board. The ineluctable conclusion from a review of all of this analysis is that the NRC has no antitrust authority when a licensed facility produces high-cost electricity.

C. The Legislative History And Adjudicatory Applications Of Section 105(c) Provide Compelling Evidence That Low Cost Is A Threshold Requirement For Agency Action Under Section 105(c), Notwithstanding The Opposition's Effort To Minimize This Evidence

There is a collective roar from the Opposition to the effect that Applicants' Motion does not present a fair-handed picture of either the legislative history of Section 105(c) or the cases that have applied Section 105(c)'s conditional standard.[85/] Nothing is further from the truth; in fact, it is the Opposition's description and treatment of the legislative history and applicable case law that is unreasonable.

85/ See NRC Staff Answer at 14-18 (legislative history) and 18-29 (case law); DOJ Response at 10-15 (legislative history) and 16-17 (case law); Cleveland Answer at 16-33 (legislative history) and 34-56 (NRC cases); AMP-O Brief at 8-10 (legislative history); and Alabama Response at 12-14 (legislative history).

1. Legislative History

a. Use of legislative history

Not surprisingly, the Opposition would like the Licensing Board to ignore the substantial treatment of cost in the legislative history of Section 105(c).[86/] Accordingly, the Opposition and, particularly, the NRC Staff and DOJ, endeavors to convince the Board to do so by arguing first, that the meaning of Section 105(c) is clear on its face[87/] and that, consequently, the Board should not look at legislative history; and second, that because the report of the 1970 legislation issued by the Joint Committee on Atomic Energy[88/] does not use the word "cost," cost is not of importance, and therefore it is unnecessary for the Board to delve any further into the legislative history.[89/]

Applicants already have addressed the Opposition's claims that the meaning of Section 105(c) is so self-evident that it would be inappropriate to resort to well-established means of

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86/ See Applicants' Motion at 34-45.

87/ See NRC Staff Answer at 5-6, 14-15; see also Cleveland Answer at 16.

88/ See, Report of the Joint Committee on Atomic Energy: Amending the Atomic Energy Act of 1954, as Amended, to Eliminate the Requirement for a Finding of Practical Value, to Provide for Prelicensing Antitrust Review of Production and Utilization Facilities, and to Effectuate Certain Other Purposes Pertaining to Nuclear Facilities, H.R. No. 1470, 91st Cong., 2d Sess. 9 (1970), reprinted in 1970 U.S.C.C.A.N. 4981 ("Joint Committee Report").

89/ See NRC Staff Answer at 14-15; DOJ Response at 10-12.

better understanding it.[90] In summary, notwithstanding the Opposition's claim to the contrary, and recognizing that the word "cost" is not in Section 105(c), the meaning of the conditional language of Section 105(c) is not "express".[91] Furthermore, to the extent the meaning of the whether" phrase of Section 105(c) can be discerned from semantically parsing the specific words contained in it, those words on their face require a threshold showing that the "activities under a license" in some way "create or maintain."[92] Logically, such a showing is not possible in the absence of a low-cost facility.[93] In short, for the Opposition to rely on the absence of the word "cost" in Section 105(c) is not only superficial, it defies the "plain meaning" of the statute, given a reasonable effort to discern it.

b. Contents of legislative history

As to the legislative history of Section 105(c), Applicants' Motion addressed the Joint Committee Report, and the Opposition's interpretation of its so-called "silence" on the issue of cost.[94] Several points bear emphasis here. First,

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90/ See Section II.A, supra; see also discussion of proper use of legislative history set forth in Applicants' Motion at 34 n.76.

91/ DOJ Response at 7 (quoting Farley, 692 F.2d at 1373).

92/ See Section II.A, supra.

93/ See Section II.B, supra.

94/ Applicants' Motion at 36.

notwithstanding the Opposition's effort to aggrandize the Joint Committee Report,[95/] and without challenging in any way the proposition that this document should be the starting point for analysis of the legislative history of the 1970 amendments to the Act, the plain fact of the matter is that the Joint Committee Report is *not* an analytical document. Applicants urge the Board to review that Report, which is attached hereto as Appendix 1. From its review, the Board will see that the Report is a brief document summarizing the 1970 amendments to the Act. It treats very briefly the section of the Act at issue here,[96/] focusing exclusively on the fact that Section 105's standard for imposing antitrust remedies does not require actual violations of the antitrust laws. Certainly, the standard of reasonable probability of contravention of the antitrust laws is not the only issue in a Section 105(c) analysis; yet this is the implication of the Opposition's position when it argues that one can reasonably conclude from the Joint Committee Report that low-cost power is not a necessary prerequisite before the "activities under the license," referenced in passing in the Joint Committee Report, are capable of being "inconsistent with any of the antitrust laws."[97/] This argument is particularly unconvincing where, as

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95/ See DOJ Response at 10 ("a Report that explained its deliberations and its interpretation of the legislation").

96/ See Applicants' Motion at 35-36.

97/ Joint Committee Report at 13-15, 28-31; see also DOJ Response at 11-12.

here, it is motivated by the self-serving purpose of directing the Board's attention away from the substantial consideration of the proposed statutory amendments contained in two volumes of legislative history,[98] and particularly, the pivotal importance placed on cost in that history.

The low cost of nuclear power probably was not specifically included in the Joint Committee Report because, unlike the one observation about Section 105(c) that was made in the Report, it was not a controversial issue at the time the 1970 amendments were adopted. It was generally accepted that nuclear power would be the most economic and, hence, attractive energy source of the future. In short, it is not at all surprising that the summary Joint Committee Report does not address the importance of cost in a Section 105(c) analysis.

When the Opposition finally turns its attention to the materials in the legislative history that address the purpose and intended scope of Section 105(c) and, in so doing, discuss cost, they seek to minimize, if not impugn, the testimony of the most authoritative and objective witnesses who appeared before the Joint Committee in support of the proposed legislation. For example, the NRC Staff asserts that "the Applicants have only

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98/ See Prelicersing Antitrust Review of Nuclear Powerplants, Hearings Before the Joint Committee on Atomic Energy, Part 1, 91st Cong., 1st Sess. 1 (1970) ("Joint Committee I") at 75; Prelicensing Antitrust Review of Nuclear Powerplants, Hearings Before the Joint Committee on Atomic Energy, Part 2, 91st Cong., 2d Sess. 461 (1970) ("Joint Committee II").

succeeded in finding a few statements by various witnesses, not legislators, in which views were expressed to the effect that access to 'low cost' electricity may give some a competitive advantage over others without such access."[99/] Describing these statements as a "few selective quotations,"[100/] the NRC Staff then argues that, contrary to Applicants' representations, there was a "diversity of opinion presented to the Joint Committee relating to cost."[101/]

The facts belie the characterizations of the Opposition about the testimony before the Joint Committee. First, it is not a reasonable portrayal of the dialogue among the witnesses and the members of the Joint Committee to suggest that the witnesses focused on low cost but the legislators did not.[102/] By its nature, the testimony presented to the Committee tended to be *from* witnesses *to* Committee legislators. However, as Applicants' Motion reflects,[103/] dialogue between these two groups of participants addressed the issue of cost, and there was consistent

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99/ NRC Staff Answer at 15 (citing Applicants' Motion at 36-44).

100/ NRC Staff Answer at 15; see also id. at 16 ("a few selected statements of witnesses"); Cleveland Answer at 30 ("selected excerpts from witnesses who were not members of Congress"); Alabama Response at 12 ("highly selected quotations of witnesses").

101/ Id. at 16.

102/ Id. at 15.

103/ Applicants' Motion at 36-40 (dialogue among witnesses and Committee members).

concurrence among the participants in these dialogues as to the centrality of "the newly available cheap source of power"[104/] to the need for adoption of Section 105(c).[105/]

Second, to describe Applicants' recitation of the relevant legislative history as a "few selective quotations" is inaccurate. The discussion of the legislative history contained in Applicants' Motion includes primarily the views expressed on this issue by every Federal government witness who testified before the Committee and addressed the subject. To be specific, during the first session of hearings convened by the Joint Committee, five government witnesses testified: the General Counsel and the Chairman of the Atomic Energy Commission (Hennessey and Ramey), the Assistant Secretary for Water Quality and Research for the Department of the Interior (Klein), the Acting Assistant Attorney General of the Antitrust Division of DOJ (Comegys), and the Director, Energy Policy Staff, Office of Science and Technology (Freeman).[106/] Applicants' description of the legislative

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104/ Joint Committee I at 75 (AEC General Counsel Hennessey).

105/ Throughout the legislative history, most of the statements made are made by witnesses, not Committee members. But even in the legislators' questions there are references to low-cost nuclear power. See, e.g., Joint Committee II at 407 (question from Representative Hosmer to a utility witness regarding "your nice new, cheap nuclear plant."); see also Joint Committee I at 5 (statement by Senator Aiken concerning need to ensure that "the practices of democracy as well as the health of our people" are not put "on the altar of uncontrolled economic desire.").

106/ See Joint Committee I at (III).

history relies on the testimony of all of these witnesses with the exception of the testimony of the Assistant Secretary for Water Quality, whose testimony did not concern the pending antitrust legislation but, rather, addressed environmental quality issues also under consideration.[107/] Applicants also referred to a speech delivered by the Director of Policy of the Antitrust Division of DOJ (Donnem) that was inserted into the record in anticipation of the testimony that was to follow by the representative from DOJ,[108/] and follow-up correspondence after the witnesses testified between the Committee and DOJ.[109/]

In short, in assessing the intended purpose and "particularized regime"[110/] of Section 105(c) set forth in the legislative history, Applicants relied on the testimony of the witnesses who, presumably, were both the most expert in the field and the most objective advocates of the public interest. These witnesses also were unequivocal advocates of the proposed legislation -- a necessary criteria for reliance upon them in assessing legislative history.[111/] Ironically, these were the witnesses from the very agencies (NRC and DOJ) who now belittle the testimony!

107/ See Joint Committee I at 55-66.

108/ See id. at 6-12.

109/ See id. at 142-49.

110/ Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 N.R.C. 1303, 1309 (1977) ("South Texas").

111/ See Applicants' Motion at 34 n.76.

In addition, after reviewing the statements made by the government witnesses, Applicants also cited the testimony in support of the legislation given during the second session of hearings by counsel to the Mid-West Electric Consumers Association, Inc. (Wise).[112/] Obviously, Applicants relied on this testimony because it reflected the viewpoint of the rural electric cooperatives and municipally owned electric systems, i.e., those entities, like Cleveland and AMP-O, who were the intended beneficiaries of the legislation.

Not only does the NRC Staff belittle the testimony of its own expert witnesses and the testimony of the primary beneficiaries of the proposed legislation, but it criticizes Applicants for their exclusion of the testimony of witnesses who were not happy with the legislation as proposed. In particular, the NRC Staff chastises Applicants for "ignor[ing] the other views of the remaining nineteen or so witnesses who appeared before the Joint Committee."[113/]

Applicants in fact did not cite to the testimony during the second session of hearings given primarily by witnesses from the nuclear utility industry.[114/] In addition, Applicants did not

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112/ See Joint Committee II at 461-74 (cited in Applicants' Motion at 43-45).

113/ NRC Staff Answer at 15 n.22.

114/ See Joint Committee II at (III) (index to testimony, referencing thirteen nuclear utility executives).

refer to the testimony of four consumer and municipality witnesses, one labor union representative and two witnesses from the small, publicly-owned utility sector. But this testimony need not have been cited in order to provide to the Board a fair and accurate description of the legislative record on which the adopted legislation was based. As to the nuclear industry witnesses, had Applicants relied upon them, the Opposition surely would have dismissed their testimony as wholly self-serving; for these were witnesses from companies, like the Applicants, who already had committed to and, in some cases, were operating nuclear-powered facilities. Second, it would have been inappropriate to rely on these witnesses because they were not advocates of the legislation, primarily because of the industry's serious concern about the delay in the licensing process that it anticipated from passage of the legislation.[115/]

This is not to say, however, that the nuclear industry witnesses did not consider nuclear power to be cost-advantageous over other available alternatives. As the executive representing

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115/ See, e.g., testimony of the Chairman of the Board, Commonwealth Edison Co. (Ward), Joint Committee II at 382-393 (cited by DOJ in DOJ Response at 14); testimony on behalf of the Edison Electric Institute by the Vice President, Finance and General Counsel of Duke Power Co. (Horn), Joint Committee II at 320-45; testimony of the Chairman of the Board of Directors and President of Carolina Power & Light Co. (Harris), Joint Committee II at 489-507; testimony of the President of Consumers Power Co. (Campbell), Joint Committee II at 513-522.

the Edison Electric Institute ("EEI") testified,[116/] EEI opposed the legislation primarily because of its concern about delay and the increase in facility costs that such delays would cause. In addition, however, EEI testified against the antitrust requirement in the proposal, because it would permit the sale of power to one or more customers "from the utility's newest, most economic plant" without regard to the sharing of costs from a utility's older, higher-cost plants.[117/] In contrast, with respect to new fossil-fueled plants, "with the current coal shortage . . . their operating costs are likely to be higher than systemwide costs."[118/] In short, EEI acknowledged and, in fact, considered the legislation unreasonable with respect to, new *low-cost* nuclear facilities.

Similarly, Shearon Harris, the Chairman of the Board of Directors and President of Carolina Power & Light Company, testified that his company objected to the antitrust provisions of the proposed legislation because they "would unnecessarily delay the completion of essential nuclear-generating plants."[119/] But in describing the purpose of the legislation, Mr. Harris observed that "the so-called antitrust issues relate to accessibility of

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116/ See n.115, supra.

117/ Joint Committee II at 324-25.

118/ Id. at 325.

119/ Joint Committee II at 491, 495-98.

power supply and the cost of that power. This is really what you are talking about."[120/]

The issue was put quite succinctly by the Chairman of the Board of Northeast Utilities, Sherman R. Knapp:[121/]

> I recognize that one concern which underlies all of these bills is that of access of smaller utility systems to the benefits of nuclear technology. Before expressing to you my concerns on the proposed bills,[122/] I should define for you the Northeast Utilities position on the access problem.
>
> In 1966, Northeast Utilities issued a policy statement defining for each of its own municipal wholesale customers in Connecticut and Massachusetts a basis on which each of these customers would be entitled to share directly in the cost experience of the new large generating units, nuclear and non-nuclear, that the Northeast Utilities system is installing. . . .
>
> Representative HOSMER. That is pretty generous.
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> Senator AIKEN. Unthinkable. [laughter.]

In short, it is absurd for the Opposition to suggest[123/] that Applicants have somehow distorted the legislative history in

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120/ Id. at 500. It was Mr. Harris' recommendation that such matters be left to the responsibility of the Federal Power Commission, and that the AEC not be given overlapping responsibilities in this area. Id. at 500-01.

121/ Id. at 394-95.

122/ Mr. Knapp's major concerns were: (1) that the AEC should not have responsibility for antitrust matters; (2) that antitrust matters should not be permitted to delay the licensing process; and (3) that the standard for AEC action should be actual or prospective violations of the antitrust laws. Id. at 397-99.

123/ See n.100, supra.

their reliance primarily on the government witnesses who testified on behalf of it.[124/]

124/ DOJ argues that the testimony of executives from two nuclear utility companies, Commonwealth Edison Company and Southern California Edison Company, somehow rebuts the testimony of the myriad other witnesses who describe nuclear's attraction as its provision of low-cost bulk power. DOJ Response at 14-15. This is incorrect. In fact, in the context of whether he would advocate a Section 105(c)-type rule for fossil plants, which he did not, J. Harris Ward, the Chairman of the Board of Commonwealth Edison, did comment that there were pros and cons to investments in each mode of generation, with the economics of scale in nuclear generation being "somewhat (but not uniquely) greater;" and nuclear fuel generally being cheaper. Joint Committee II at 391; see DOJ Response at 14. Mr. Ward also observed that the experience of his company with its first nuclear facility, Dresden 1, "convinced us of the promise of nuclear power and led us to make a larger nuclear commitment than any other investor-owned utility in the nation." Joint Committee II at 382. None of these observations suggest in any way that Mr. Ward considered nuclear's attractiveness and value to be something other than its provision of low-cost bulk power.

As to the testimony of William R. Gould, the Senior Vice President of California Edison, the reason why nuclear power was the base load power of choice for this company was because it was ***the most economic option available.*** See Joint Committee II at 436. The absence of fossil-fueled facilities as viable alternatives because of environmental considerations does not make nuclear plants less advantageous from a cost perspective. In fact, the Final Environmental Statement (FES) for the San Onofre facilities, to which Mr. Gould refers in his testimony, compares the costs and benefits of the proposed nuclear plants and hypothetical fossil-fueled plants. Calculated on the basis 1978 present worth (million dollars), the NRC Staff concludes that the nuclear plants would be cheaper ($1393.1 vs. $2098). See Final Environmental Statement related to the proposed San Onofre Nuclear Generating Station Units 2 and 3 (March 1973) at Table 13.1; see also Applicants' Environmental Report, Construction Permit Stage, San Onofre Nuclear Generating Station, Units 2 and 3 (July 1970) at 8.1-6 ("the installation of San Onofre Units 2 and 3 is economically and environmentally preferable"). In short, DOJ is wrong about Mr. Gould's perspective, as well.

A review of the other testimony in the legislative record, including the testimony of the labor union, consumer, municipality and small, publicly-owned utility witnesses, is fully consistent, and shows that these witnesses also understood that the purpose of the Section 105(c) legislation was to provide access to nuclear power, which would be relatively low cost compared to viable alternatives.[125/]

Moreover, if the NRC Staff really wanted to present a complete picture of the balance of the legislative history of the 1970 amendments to Section 105(c), at least with respect to its treatment of the issue of cost, as it suggests it does, it would have acknowledged the written question from the Committee and lengthy response thereto from the General Manager of the American

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125/ The witness from the AFL-CIO (Taylor), for example, testified that "all utilities, regardless of ownership should share in the benefit of nuclear power generation," including "being able to purchase power at the same prices which the private utilities pay, and a fair share of pooling operations," i.e., "have the legal right to obtain an equitable power supply at a fair price." Joint Committee II at 544. Thus, this witness also considered the value of the proposed legislation to be its ability to make accessible the cost advantage of nuclear-powered facilities. Similarly, the testimony of the Staff Counsel to the General Manager, National Rural Electric Cooperative Association (Robinson) also focused on the economic -- i.e., cost -- advantage of nuclear power:

> If nuclear energy is going to be the principle source of generation in the future, as it appears to be for either economic reasons or reasons of the need to prevent air pollution, . . . then we want to be able to participate in it to whatever small degree we can.

Joint Committee II at 429.

Public Power Association ("APPA") (Radin), which represented 1,400 local and, for the most part, small publicly-owned electric utilities in 48 states, Puerto Rico, Guam and the Virgin Islands. In that exchange, the APPA identified the relative cost of bulk power as *the* factor providing a "decisive competitive advantage" to a utility over its competitors.[126/]

126/

Question 1. The Justice Department indicated that as part of the antitrust review it will be necessary to determine the extent to which a large scale nuclear plant affords its participants a "decisive competitive advantage" over their competitors. (Part 1, p.9)

(a) In your experience, is there such direct competition between utilities, as either wholesalers or retailers of electricity, that a variation in the cost of their product could result in a "decisive competitive advantage" in the usual sense?

(b) Would a competition advantage result from one new plant or from a total system, including back-up capacity?

Answer: (a) '. . . [C]ompetition complements regulatory activity in providing service that meets the public needs. . . . [s]uch competition can and should be encouraged here in the consumer's best interest.'

The Federal Power Commission's 1964 "National Power Survey" showed generation accounts for 51%, transmission for 10%, and distribution for 39% of the total delivered cost of power; the relative cost of each of these functions was based on a composite national average for all segments of the industry. These figures indicate *the significant role which the cost of bulk power supply . . . plays in inter-utility competition . . . .*

Competitive impacts of availability of a low-cost source of bulk power supply are documented in a study by the Tennessee Valley Authority . . . .

Footnote continued on next page.

In short, notwithstanding the Opposition's assertions to the contrary, the balance of the legislative history that addresses the purpose and meaning of Section 105(c), which requires the NRC to remedy antitrust concerns in certain, specified "situations," is fully in accord with the *most weighty* legislative history, to which Applicants' Motion refers.

While the Opposition places substantial reliance on a report prepared by Philip Sporn, then retired President of American

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> Additional evidence of the competitive character of the cost of bulk power supply is found in the activities of private power companies in seeking to prevent access by local public power systems to the most economic sources . . . .
>
> *In summary, it is our experience that the cost of bulk power supply affects the competitive situation and can involve a "decisive competitive advantage."* . . .
>
> (b) . . . In obtaining their bulk power supply, individual utilities normally canvass the alternatives available to them. It may be determined that wholesale purchases from another utility, self generation, or a combination o[f] both, represents the most economic source. However, analysis may also reveal that a utility -- acting for itself or in concert with others -- can realize significant savings by participating in a large unit, or a series of units, the output of which will be shared with necessary reserves and transmission supplied or purchased by participants. While the cost of reserves and transmission must be factored into the analysis, it is clear that in many situations a definite competitive advantage may flow from a solution of this kind.

See Joint Committee Report II at 346, 358-60 (quoting speech by Henry Ginhorn at SEC proceedings involving the proposed merger of New England Electric System, Eastern Utilities Associates and Boston Edison Company) (emphasis added).

Electric Power Company, about the costs of nuclear power,[127] this reliance is misplaced. Mr. Sporn's report is included at the end of the first session of hearings on the proposed legislation; however, it does not address or even mention the pending legislation.[128] In fact, Mr. Sporn did not testify before the Joint Committee on the subject of the legislation, nor does there appear to be reference in the hearing record to the appended report by Mr. Sporn. Rather, the report is a think piece on the state of the entire electric utility industry.[129]

Furthermore, a review of Mr. Sporn's report establishes the following: (1) Mr. Sporn was concerned about the rising cost of the nuclear *and* fossil-fueled industries, which "hopefully . . . will be arrested soon"[130]; (2) Mr. Sporn nevertheless believed that, primarily because of environmental concerns, "within a very short time -- say 50 years -- we will be heading into an all-

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127/ See NRC Staff Answer at 16; DOJ Response at 13-14; Cleveland Answer at 30-31.

128/ See Joint Committee I at 300-311. While Mr. Sporn's report is appended to hearings convened in November, 1969, it encompasses developments in nuclear power economics through December, 1969. Thus, it obviously was not prepared to present at those hearings.

129/ Apparently, Mr. Sporn produced such reports from time to time, because reference is made by the AEC to a Sporn report with essentially the same title covering an earlier timeframe in connection with AEC's 1966 determination "to await a reliable estimate of the economics" of nuclear power before making a "practical value" determination. 31 Fed. Reg. 221, 223 n.3 (1966); see generally Section II.C.1.c, infra.

130/ Joint Committee II at 304.

nuclear energy economy"[131]; and (3) the purpose of Mr. Sporn's report was to advocate that the Joint Committee and the AEC take responsibility for leading the country towards improved decisionmaking in planning, research and other aspects of energy utilization.

While Mr. Sporn's report does not present the glowing picture of the economics of nuclear power that is found repeatedly throughout the legislative history of the 1970 amendments to Section 105,[132] his report certainly does not contradict the fact that the purpose of Section 105(c)'s antitrust review was to ensure access to nuclear plants, which were considered by the

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131/ Id. at 309. The anticipated dominance of nuclear energy in the utility industry is reflected elsewhere in the legislative history. See e.g., appended statement by Senator Philip A. Hart, Joint Committee II at 559 ("I should think that one of the most important problems will be the terms of access for small utility systems to these new, low-cost energy sources. These plants will provide much of the power growth in this country in the foreseeable future, so the problem assumes great importance.").

132/ It is interesting to note that in the 1973 Final Environment Statement for the operation of the Donald C. Cook Nuclear Plant, Units 1 and 2, built by Mr. Sporn's former company, American Electric Power Company, the proposed nuclear facilities were estimated by the AEC *in 1973* to be substantially *less* costly than the cost of postulated coal-fired and air-fired alternatives; specifically, the comparison yielded $85.5 versus $173.7 and $234.7 million for the "annualized equivalent during operation of life-of-plant cost." While the anticipated construction cost of the nuclear plants were higher ($620, versus $474 and $337 million), the annual operating cost of the nuclear plants was anticipated to be substantially lower ($242, versus $447 and $949 million).

proponents (and opponents) of the legislation to be sources of low-cost bulk power vis-a-vis the available alternatives.[133/]

In summary, Applicants' Motion provides an accurate picture of the contents and tenor of the legislative history of Section 105(c) with respect to the issue of cost. That picture reflects the centrality of low cost to Section 105(c) determinations. Moreover, one might ask, if it was not the prospective low-cost advantage of nuclear power, what was it that led Congress to authorize the imposition of antitrust remedies as a part of the nuclear licensing process? The Opposition provides no answer to this question.

c. The "practical value" context of the legislative history

In addition to misrepresenting the contents of the testimony before the Joint Committee on Section 105(c), the Opposition's position is painfully inconsistent with the entire context of the 1970 amendments to the Act.

133/ DOJ incorrectly concludes, "Based on the information before it, Congress correctly ***could have*** concluded that the power generated by nuclear units would not necessarily be lower cost than that generated by fossil units." DOJ Response at 15 (emphasis added). Of course, Congress did not reach this conclusion. Moreover, the question Applicants now pose is whether, in such circumstances, the high-cost nuclear facility could "create or maintain" a "situation". In any event, for Congress to have reached the conclusion DOJ now promotes, it would have had to wholly disregarded the views of ***all*** of the witnesses who testified on this subject before the Joint Committee, including the DOJ witnesses.

In providing for the Section 105(c) antitrust review process, Congress also eliminated the "practical value" finding that, until 1970, had been required before the Act's then-existing antitrust provision came into play.[134/] The requirement that a finding of practical value be made before facilities would be licensed under Section 103 of the Act and subject to antitrust reviews was based principally upon (1) an anticipated scarcity of and consequent need to ration nuclear materials, and (2) the desire to designate the point at which a facility type would no longer be eligible for government assistance. The former rationale quickly became moot as the anticipated scarcity never materialized. The latter rationale also became moot because the second generation of reactors was not receiving financial assistance from the government.[135/]

Prior to the 1970 amendments, nuclear plants had been licensed as "research and development" facilities under Section 104 of the Act. The antitrust provision of the Act did not apply to Section 104 licenses and, thus, facilities licensed before 1970 were not subjected to antitrust reviews. Before that antitrust provision became applicable, the Act required the NRC to determine that nuclear plants were commercially viable, i.e.,

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134/ See n.88 supra, with title to Joint Committee Report encompassing the "Finding of Practical Value" and the provision of a "Prelicensing Antitrust Review."

135/ See 31 Fed. Reg. 221, 223 (1966) (proposed AEC rule on practical value); see also Joint Committee I at 41.

that, pursuant to the statutory language, they had "practical value."[136/] Critics of the AEC alleged that it dragged its feet in making the practical value determination to avoid the antitrust review provisions of the Act.

By 1970, the statutory requirement for a finding of practical value had been overtaken by events. Numerous facilities licensed as research and development reactors were being constructed and going into commercial nuclear power plants. In short, the reality was that by 1970, the technology and economics of nuclear power appeared to be sufficiently developed that reasonably accurate predictions about costs could be made.[137/] Accordingly, the statutory requirement for an agency finding of practical value was eliminated, and the commercial licensing process, with its associated antitrust review, was initiated.[138/]

136/ The Atomic Energy Act of 1954, Pub. L. No. 83-703, § 102, 68 Stat. 919, 936-937 (1954).

137/ Letter from AEC Chairman Glenn J. Seaborg to Joint Committee Chairman Holifield (Aug. 29, 1966), reprinted in Hearings Before the Joint Committee on Atomic Energy on Participation by Small Electrical Utilities in Nuclear Power, 90th Cong. 2d sess. 261, 271 (1968) ("1968 Hearings") (there was no longer a need for a mechanism that would serve to designate the point at which a facility type has reached the commercial stage).

138/ Ft. Pierce Utils. Auth. v. United States, 606 F.2d 986, 989 (D.C. Cir.), cert. denied, 444 U.S. 842 (1979); see also id. at 993 ("The 1970 amendments were, in effect, a congressional finding of 'practical value,' requiring the Commission thereafter to issue 'commercial' licenses under section 103, rather than 'research and development' licenses under section 104(b).").

It is ironic, indeed, that the NRC Staff, as well as others in the Opposition, endeavor to rewrite history such that cost was not an integral part of the 1970 amendments. For the concept of practical value, in the words of the General Counsel of the AEC, required the following findings:[139/]

> (1) the technical feasibility of the reactor concept and its basic technical characteristics had been adequately demonstrated and
>
> (2) *there had been sufficient demonstration of the cost of construction and operation* of the type of nuclear power plant as to provide a sound basis, with reasonable extrapolation, for a reliable estimate of the economic competitiveness of power produced in this type of plant with power that would be produced in a comparable conventional power plant that would be constructed at the same time and place.

The understanding that "practical value" meant commercial viability permeates the AEC's record on this issue,[140/] as well as the legislative history.[141/]

139/ Memorandum to the Commissioners from AEC General Counsel Joseph F. Hennessey (Feb. 12, 1964) at 8 on the subject of the finding of practical value under Section 102 of the Act, 1968 Hearings 261, 265 (emphasis added); accord, letter from Chairman Glenn J. Seaborg to Senator Pastore, Chairman, Joint Committee on Atomic Energy (May 15, 1964) at 2.

140/ See (Second) Memorandum to the Commissioners from General Counsel Hennessey (Feb. 12, 1964) on the subject of the finding of practical value under Section 102 of the Act, at 6, 1968 Hearings at 259; proposed rulemakings on the finding of practical value, 29 Fed. Reg. 221 (1966) (proposed rule); 31 Fed. Reg. 16,732, 16,733 (1966); Annual Report to Congress of the Atomic Energy Commission for 1970 (Jan. 1971), at 6 n.14 ("A practical value rule making proceeding initiated by the AEC by notice of June 26, 1970 was terminated by

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Having established that nuclear facilities were sufficiently commercially viable, the cost question that remained for consideration on a case-by-case basis, and that appears repeatedly throughout the legislative history of Section 105(c),[142] was the issue posed by Section 105(c); namely, is a particular facility not only commercially viable, but so competitively advantageous that its construction and operation would create or maintain a situation inconsistent with the antitrust laws? If this latter finding was made, the agency was authorized by Section 105(c) to remedy the anticompetitive impact of the licensed facility. On the other hand, if a licensed facility would *not* be competitively advantageous, it would not "create or maintain . . .", and remedial action by the Commission would be unauthorized.

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notice published on December 29. On two past occasions, the Commission has considered the matter, and concluded each time that a finding could not be made on the basis of cost information limited to the prototype and noncompetitive nuclear power reactors then in operation. (See pp. 17-18, 'Annual Report to Congress for 1965' and p. 433, 'Annual Report to Congress for 1966').").

141/ See, e.g., Joint Committee Report at 9; Joint Committee I at 15 (Senator Aiken); id. at 25 (AEC Chairman Ramey); see also South Texas, CLI-77-13, 5 N.R.C. at 1313 (1977) (citing 116 Cong. Rec. H9,447 (daily ed. Sept. 30, 1970)) ("[i]n 1970 Congress found nuclear power to have acquired 'commercial value,' and amended the Act to remove the 'anachronism' requiring an AEC finding of commercial value"); Cities of Statesville v. AEC, 441 F.2d 962, 970, 975 (D.C. Cir. 1969) (en banc) (practical value determination requires demonstration of commercial utility;" [t]hese atomic power plants are not like radio stations of proven technical and commercial feasibility. . . .").

142/ See Section II.C.1.b; Applicants' Motion at 34-45.

2. Cases Applying Section 105(c)

The NRC Staff and Cleveland also argue that case law does not support Applicants' understanding of Section 105(c).[143/] Applicants will not repeat in this Reply their detailed discussion of the cases that apply Section 105(c), and the reliance of those cases on the low cost of a nuclear facility as the necessary prerequisite for the imposition of antitrust conditions on NRC licensees.[144/] The cases summarized by Applicants in their Motion speak for themselves and, as Applicants' citations to them make clear, rely on the cost factor to establish the necessary requirement that the introduction of the licensed activities into the marketplace will "create or maintain a situation inconsistent with the antitrust laws."[145/] In this Reply, Applicants turn to the Opposition's efforts to minimize and, in some cases, distort the language and meaning of the cases that address Section 105(c).

Most of the NRC Staff's rebuttal can be reduced to two propositions, neither of which is material to this case: (1) that NRC's antitrust cases express significant concerns over

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143/ NRC Staff Answer at 18-29; Cleveland Answer at 33-56.

144/ See Applicants' Motion at 45-57.

145/ NRC Staff Answer at 25.

anticompetitive practices and remedies, and not just cost or nuclear facility access;[146] and (2) that these cases did not hold that low cost is a jurisdictional prerequisite to agency action under Section 105(c).[147] Applicants do not contest either of these propositions; at the same time, neither proposition is significant.[148]

As Applicants indicated in their Motion,[149] and discussed in Section II.A.1, supra, the substantial discussion in NRC cases of issues of competitive behavior are a reflection of the fact that these issues were factually complicated and highly contested. In contrast, there was no controversy over the determination that the proposed facility in question would produce low cost power that would enhance the applicant's competitive position in the marketplace. Notwithstanding its uncontroversial

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146/ NRC Staff Answer at 19-23 (discussion of Midland and Davis-Besse/Perry antitrust proceedings).

147/ Id. at 24-25, 28-29.

148/ AMP-O piggybacks on [illegible] arguments advocated by the NRC Staff. See AMP-O Brief at 14-18. AMP-O's exposition adds nothing to the relevant analysis here. For example, AMP-O cites to the NRC Staff Evaluation rejecting Applicants' license amendment requests for the erroneous proposition that "the licensees concede that cost was not an issue in the 1979 licensing conditions proceeding." AMP-O Brief at 14 (citing NRC Staff Evaluation at 10 & n.14). Moreover, AMP-O's reference to the Davis-Besse DOJ advice letter contradicts AMP-O's theory of the case; for in the very passage quoted at length by AMP-O, emphasis is placed by DOJ on the critical importance of "access" to "low-cost power" from the CAPCO nuclear facilities. See AMP-O Brief at 16 (citing 36 Fed. Reg. 17,888, at 17,889-90).

149/ Applicants' Motion at 46.

nature, however, this expectation of low cost and, hence, competitive advantage, was a necessary prerequisite to consideration of market conditions and, given those conditions, the remedies to be authorized to offset the anticompetitive advantage that the nuclear facility was anticipated to provide.

As to the absence of a holding that cost is a jurisdictional prerequisite, Applicants fully recognize that Fermi is the only case that explicitly addresses this issue.[150/] But that should occasion no surprise. All of the cited cases involved construction permit applications, submitted at a time when the universal expectation was that the proposed facilities would be economically preferable to any other available alternative. No applicant would have proceeded if it did not hold this expectation. Very little, if any, discussion was required as to low cost until now, when the economic reality is at odds with the expectation. In short, until now, there has been no challenge to the low-cost findings that were the predicate for NRC's remedial action under Section 105(c). The NRC Staff's argument suggests that the absence of an explicit holding on this issue in the antitrust proceedings that took place under Section 105(c) constitutes a holding to the contrary, i.e., that the low cost of a facility is

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150/ See Applicants' Motion at 57-64; Section .I.B, supra.

not a threshold requirement under Section 105(c).[151] Obviously, this is not the case; the question simply was not addressed in those cases.[152]

Cleveland also argues that NRC is authorized to impose antitrust conditions on licensees without regard to the relative cost of the nuclear facility.[153] To a significant extent, Cleveland relies on the same argument that the NRC Staff unsuccessfully advances, i.e., that because issues of competitive behavior were litigated extensively in these proceedings, the Section 105(c) remedies that were imposed did not require the prerequisite finding of low cost as a starting point for the analysis leading up to them.[154] As is the case with the NRC Staff analysis, the

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151/ See, e.g., NRC Staff Answer at 24 ("the Board [in Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-452, 6 N.R.C. 892 (1977) ("Midland")] did not hold that it would have no jurisdiction to impose antitrust license conditions without a material finding of 'low cost'").

152/ Thus Applicants agree that in Midland, there were found to be "advantages to nuclear power other than cost." NRC Staff Answer at 25. "Dependability" and "efficiency" were two such advantages identified by the Appeal Board. See id. at 24-25. The question before *this* Board, however, is whether "advantages" like dependability and efficiency are, in fact, competitively advantageous in the absence of the cost advantage. Both logic and the conjunctive language of Midland to which the NRC Staff refers ("efficient, dependable *and* economic baseload generation") suggest that they are not. See Midland, ALAB-452, 6 N.R.C. at 1095 (emphasis added).

153/ Cleveland Answer at 34.

154/ See, e.g., Cleveland Answer at 38 ("Thus, the Licensing Board [in Louisiana Power & Light Co. (Waterford Steam Electric Generating Station) LBP-73-46, 6 A.E.C. 1168 (1973)

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position of Cleveland is both illogical and inconsistent with the analysis contained in the decisions at issue.[155/] In addition, however, Cleveland takes improper liberties with the language of the cases, as evidenced by the very citations to which it refers.

For example, Cleveland asserts that in the Waterford I case,[156/] "[t]he NRC did not even mention 'cost' in the factors to be evaluated."[157/] However, the very point of the quotation from which Cleveland draws this conclusion is that "it would be insufficient for a petitioner simply to describe a situation inconsistent with the antitrust laws, regardless of how grievous the situation might appear to be. A meaningful nexus must be established between the situation and the 'activities under the

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("Waterford II")] recognized that the increase in market power that would accompany operation of the nuclear facility would occur regardless of whether the nuclear power was low cost because the applicant was excluding its competitors from access to alternate suppliers."); see also id. at 39, 42, 44, 45, 49 (parallel analysis by Cleveland of Kansas Gas and Electric Co., (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 N.R.C. 558 (1975) ("Wolf Creek"), Midland, Farley and Davis-Besse/Perry decisions); id. at 54 ("[t]he NRC decisions demonstrate that it is conduct, not cost, that is the focus in any inquiry under Section 105(c)."). But see text at nn.156-167, infra.

155/ See Applicants' Motion at 45-57.

156/ Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7, 6 A.E.C. 48 (1973).

157/ Cleveland Answer at 36.

license.'"158/ Cleveland seems to be saying that because the word "cost" was not used in this paragraph, cost is not at issue. But the issue here is whether any such nexus can be established if the activities under the license involve the operation of a competitively high-cost plant. In any event, when Cleveland endeavors to flesh out this language by reference to the Waterford II Licensing Board order, it disproves its own assertion. Specifically, Cleveland cites the following statements, (which focus entirely on cost!) by the Licensing Board, in which it summarizes the intervenor's allegation and its own determination that an adequate relationship had been established by the intervenor between the "situation" and the "activities under the license":159/

> . "They allege a monopoly in and an attempt to monopolize the construction and ownership of ***large, low cost electric generating units*** in Applicant's area";
>
> . "***petitioners cost disadvantage*** is exacerbated due to Applicant's alleged refusal to enter into coordinated operation agreements";
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> . "This results in ***even higher unit costs***, thus increasing their competitive disadvantage. . . ."

Surely Cleveland appreciates the fact that the Waterford facility was anticipated to be one of these large, low-cost

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158/ Cleveland Answer at 35 (citing Waterford I, CLI-73-7, 6 A.E.C. at 49).

159/ Cleveland Answer at 36-37 (citing Waterford II, LBP-73-46, 6 A.E.C. at 1169-70) (emphasis added)).

electric generating units to which the Board was referring. This appreciation is evidenced by the reprehensible omission by Cleveland of the following portion (and only that portion) of the Board's statement:[160/]

> *According to petitioners, the direct effect of unconditional approval of the Waterford 3 license would be to further and substantially widen the disparity in power production costs. Waterford would make available to Applicant 1,065 mW of comparatively low cost electric power. Petitioners complain that recent rises in fossil fuel costs will further enhance the cost differential between power they produce and power produced at Waterford 3.*

Thus, the Waterford II Board clearly did *not* recognize or believe, as Cleveland avers, that "the increase in market power which would accompany operation of the nuclear facility would occur regardless of whether the nuclear power was low cost."[161/] To the contrary, the low cost of Waterford 3 was the necessary predicate for the Board's determination that it was authorized to consider the need for the imposition of Section 105(c) remedies.

Cleveland's arguments about other NRC antitrust cases fail for the same analytical reason as does its treatment of the Waterford set of cases. For example, Cleveland mistakenly argues that the Appeal Board decision in Wolf Creek supports its

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160/ LBP-73-46, 6 A.E.C. at 1169 (emphasis added); compare Cleveland Answer at 36-37.

161/ Cleveland Answer at 38.

thesis.[162] In fact, in the lengthy quotation on which Cleveland relies,[163] the Appeal Board was explaining the need to evaluate the prior existing anticompetitive conditions in order to determine whether operation of the Wolf Creek facilities -- to which the local cooperative was being denied access -- would "maintain" those conditions.[164] But before any anticompetitive situation could be "intertwined with or exacerbated by the award of a license," the activities under the license had to be such that the licensee could "use nuclear-generated power to the disadvantage of competitors."[165] This could not be realized if the nuclear-generated power was high cost.

Similarly, Midland involved the integration of "the cheapest available power, low cost nuclear generation, within the applicant's system and the denial of access to that generation to the applicant's competitors."[166] In Davis-Besse/Perry, "it [was] undisputed that the power available from the subject nuclear

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162/ Cleveland Answer at 39-42.

163/ See Cleveland Answer at 41.

164/ See Wolf Creek, ALAB-279, 1 N.R.C. at 568. Contrary to Cleveland's pejorative remark, Applicants did not ignore Wolf Creek. See Cleveland Answer at 39; but see Applicants' Motion at 21-22.

165/ ALAB-279, 1 N.R.C. at 568-69.

166/ ALAB-452, 6 N.R.C. at 1096 n.772 (citing DOJ's Opening Brief on Appeal at 142), 1098 (citing DOJ's Reply Brief on Appeal at 124); see Applicants' Motion at 47-52; compare Cleveland Answer at 42-44.

units is expected to be the cheapest base load power available to serve new and growing loads."[167/]

In short, Cleveland distorts the record in the NRC antitrust proceedings on which it relies in order to justify its mistaken theory that low cost is not a pivotal, threshold determination in Section 105(c) analyses. The NRC Staff does not take the liberties with the record that Cleveland does; but it ducks both the language about cost contained in these cases and the meaning that reasonably can be derived from this language. The analyses of both parties is incorrect.

D. The Opposition's Red Herring Arguments Are Beside The Point

In a raft of sundry charges, the Opposition attacks Applicants' Motion. These charges, which can be characterized as "red herrings" in that they seek to divert attention away from the real issue in this case when, in fact, they raise neither material nor correct allegations, concern (1) misrepresentations about the impact of NRC's removing the antitrust license conditions it now imposes on Applicants; and (2) efforts to recast Applicants' case in legal contexts that are inapplicable.

167/ DOJ Appeal Brief in Davis-Besse/Perry at 179 (citations to record omitted); see Applicants' Motion at 52-56; compare Cleveland Answer at 48-52.

1. The Impact of Removing the License Conditions

In an effort to alarm the Licensing Board about the consequences of granting Applicants' Motion, a number of representations are made by AMP-O[168/] about the impact of removing the antitr. ' license conditions currently imposed on the Applicants. These representations do not provide an accurate picture of the situation that can be anticipated to exist if Applicants' Motion is granted. The Opposition's effort to digress from the legal question at issue to issues of fact (as ·ell as fantasy) is irrelevant to the resolution of this case; nevertheless, in view of the considerable effort made by AMP-O to sensationalize and distort the factual context of the pending issue of law, Applicants summarily address this digression here.

AMP-O says that it "fears that if those license conditions are suspended, the great strides made since the late 1970's to reverse the ill effects of the Applicants' anticompetitive conduct . . . will be reversed."[169/] To the extent AMP-O honestly has such fears, they are irrational, for they have no foundation in reality.

168/ AMP-O Brief at 3 n.4 5, 18-22, 30 n.19. See also discussion by Applicants of DOJ's bizarre assertions about Applicants' "incentive to handicap their rivals." Section II.B, supra.

169/ AMP-O Brief at 3 n.4.

The reality is that Applicants' obligation to provide for the electric energy requirements of their municipal customers and, specifically, for OE to provide for the electric energy requirements of AMP-O on behalf of its customers, is set forth in detailed tariffs or rate schedules that have been approved and are on file with FERC. As AMP-O well knows, one of these rate schedules requires OE to provide wheeling services to AMP-O.[170/] This requirement is wholly independent of Applicants' obligations under the NRC license conditions.

Thus, regardless of OE's intent, a subject Applicants will address momentarily, as AMP-O well knows, OE *could not* engage in the conduct AMP-O represents will inevitably occur with the removal of the antitrust license conditions. For even if OE sought to modify its tariff obligations with the nefarious intent described by AMP-O, the burden would rest squarely on OE to justify to FERC a proposed tariff modification.[171/]

In short, contrary to the inference AMP-O would have the Board draw, even in the absence of the NRC's license conditions, Applicants *cannot* unilaterally change its service requirements to

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170/ "Rate Schedule for Transmission Service," OE's Wholesale Tariff (on file with FERC).

171/ FERC's responsibility to take into account the antitrust impact of the wholesale electric power rates that it monitors is summarily described in Applicants' Motion at 27-29.

AMP-O or the municipalities it serves and, specifically, OE cannot deny wheeling services to AMP-O, as AMP-O suggests.[172/]

As to AMP-O's imaginative description of the contract disputes it has had with OE,[173/] and its self-serving, obnoxious conclusion that because of these disputes, OE "cannot be trusted to behave in accordance with the antitrust laws,"[174/] contrary to AMP-O's suggestion, just because OE does not agree with AMP-O's interpretation of a contract does not mean that OE's intent is improper. Mind-boggling as it might seem to AMP-O, OE has obligations to others besides AMP-O, such as its retail customers and its investors, and the interests of these parties is not always consistent with AMP-O's stated self-interest. Several facts should be quite evident, however: (1) AMP-O was successful in its pursuit of its contract interpretations, suggesting every

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172/ On a related point, DOJ is inconsistent when it argues, on the one hand, about Applicants' alleged anticompetitive incentive, while at the same time maintaining that the authority of other agencies is irrelevant. DOJ Response at 17-18. To the extent DOJ has a legitimate argument about Applicants' incentive, which it does *not*, see Section II.B, supra, the responsibility of other agencies in this subject area is very relevant. Applicants readily recognize that the antitrust authority of other agencies is not determinative of the scope of authority vested in the NRC. But appreciation of the plenary authority over antitrust matters vested in other agencies and the federal courts does clarify (1) the qualified nature of NRC's authority under Section 105(c), and (2) the context in which Applicants would function without the continued imposition of the conditions at issue here.

173/ See AMP-O Brief at 18-22.

174/ Id. at 19.

ability to protect its perceived interests without reliance on the NRC,[175] and (2) AMP-O is not the oppressed player in the utility industry in Ohio that it would have the Board believe.

In summary, AMP-O's alarmist assertions about the consequences of removing the antitrust license conditions do not square with the facts. Even if Applicants had the intent ascribed to them by AMP-O, which available evidence contradicts, Applicants' competitive behavior is now and will continue to be closely monitored and regulated by FERC. In addition, of course, as Applicants described in their Motion,[176] there are multiple avenues of relief available to AMP-O if Applicants were to behave in a manner inconsistent with the antitrust laws.[177] This is not the purpose of the NRC's involvement in antitrust issues.

2. The Opposition's Inapplicable Legal Claims

There are four diversionary assertions by the Opposition that recast Applicants' case, and the legal question presented by it, in legal terms and contexts that simply do not apply.

175/ AMP-O's comment about OE's inability to gain the support of its own arbitrator is ridiculous. See AMP-O Brief at 21. There obviously was no need for this individual to vote when the swing vote agreed with the arbitrator picked by AMP-O.

176/ Applicants' Motion at 25-30.

177/ See AMP-O Brief at 19.

DOJ argues that the issue before this Board is one of remedial discretion;[178] that the NRC has broad remedial authority under Section 105(c);[179] and that this NRC authority is not lost "because of changed circumstances subsequent to the issuance of remedial orders."[180] DOJ's legal framework is incorrect.

The issue pending before this Board is neither an issue of remedies nor a matter of agency discretion. Rather, the bedrock issue in this case raises a question of the meaning of a statutory provision and the authority vested in the NRC by that provision. In particular, Applicants are raising the question of whether Congress intended Section 105(c) to be used to enforce antitrust conditions when the nuclear facilities to which those conditions are attached provides no cost advantage to its owners.

Contrary to DOJ's assertion, Applicants are not arguing that NRC has "lost" its legal authority because of changed circumstances. The scope of NRC's authority in this area has remained unchanged. Rather, it is Applicants' position that, because of the unanticipated high cost of these facilities, once that high cost was evident, NRC did not have the authority to impose these

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178/ DOJ Response at 2.

179/ Id. at 6.

180/ Id. at 6-7.

license conditions on Applicants.[181] Thus, Applicants understand that as long as the facilities were expected to be low cost, the imposition of remedies under Section 105(c) analysis of the "situation" was appropriate. However, NRC's Section 105(c) authority -- as is the case with all exercises of authority -- is not unbounded. In this context, Applicants believe the established (as opposed to the anticipated) facts *do not and never would have* supported the exercise of that authority.

In a similar argument, AMP-O mischaracterizes Applicants' position as a request for an administrative modification of a statute.[182] AMP-O is wrong. It is Applicants' contention that Section 105(c) as written and properly applied cannot authorize antitrust license conditions in the present situation, i.e., when Applicants' facilities produce relatively high cost power. Thus, contrary to AMP-O's argument, Applicants are not asking this

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181/ DOJ asserts that the only consideration is whether a "situation inconsistent" is created or maintained by the activities under the license "at the time the antitrust conditions are imposed." DOJ Response at 8. This cannot be true: the conditions were imposed on Perry before the nuclear facility was operational.

182/ AMP-O Brief at 6, 10-14. All of the cases cited by AMP-O concern situations where an agency sought to ignore or modify provisions of a statute, action that Applicants certainly are not seeking in this case. See id. at 10-14 (citing FPC v. Texaco, 417 U.S. 380, 394-96 (1974); Metropolitan Transp. Auth. v. FERC, 796 F.2d 584, 593 (2d Cir. 1986), cert. denied, 479 U.S. 1085 (1987); NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977); Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979); Office of Consumers' Council v. FERC, 655 F.2d 1132 (D.C. Cir. 1980)).

Board to modify the Act, or in any way to go beyond its vested authority.

AMP-O and the NRC Staff also alarmingly contend that Applicants' interpretation of Section 105(c) would make that provision meaningless because it would impose at least the risk that licensee antitrust conditions could be changed "at any time."[183/] In a doomsday scenario appeal, AMP-O and the NRC Staff then assert that this would cause financing and planning problems for AMP-O and others, unending litigation, and administrative nightmares.[184/] This threat is entirely manufactured. For in the real world, the circumstances that led to Applicants' position are that the actual costs of Perry and Davis-Besse *never* comported with the anticipated cost of these facilities. Thus, contrary to the NRC Staff's remark, Applicants' request for license amendments has nothing to do with "fluctuations in the [relative] cost of electricity."[185/]

Furthermore, with the completion of the construction phase -- i.e., there are now fixed sunk costs for construction (including experience as to needed capital additions) -- and actual experience with operating costs for these facilities, it is unreasonable (unfortunately) to contend that there is any real

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183/ AMP-O Brief at 4-5, 22-24; NRC Staff Answer at 8 n.12, 13 n.19, 17-18 and nn.26-27.

184/ AMP-O Brief at 25-26; NRC Staff Answer at 18 n.27.

185/ NRC Staff Answer at 8 n.12.

"risk" that these facilities will ever be low-cost, as they were anticipated to be.[186/]

In short, there is no basis in fact for the Opposition's concern that "the Commission's jurisdiction with respect to antitrust conditions could come and go over the life of a license."[187/] And with respect to the extremely remote possibility that circumstances could change dramatically and for the better with respect to the relative cost of nuclear power, it is far from aberrational for the NRC to have to change license requirements by the suspension or reimposition of a requirement because of wholly unanticipated circumstances. In fact, this very remote possibility is precisely why Applicants sought suspension, rather than revocation of the subject license conditions. This also explains the position of the Appeal Board in the Davis-Besse/Perry antitrust proceeding with respect to the possibility that the license conditions might have to be changed if they proved inequitable to Applicants in the future.[188/]

In short, it is AMP-O and the NRC Staff's far-fetched scenario that is meaningless, not Applicants' understanding of

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186/ Similarly, if Applicants are correct, as they intend to show during Phase 2 of this proceeding, that the cost of their nuclear facilities should be compared to the cost of contemporaneously built fossil plants, this comparison also is relatively fixed, with the only variable being changes in the cost of operation.

187/ NRC Staff Answer at 8 n.12; see also AMP-O Brief at 23.

188/ ALAB-560, 10 N.R.C. at 294.

Section 105(c). Accordingly, the litany of unpleasant consequences which AMP-O and the NRC Staff describe do not follow from the reality of electric utility economics.

Finally, the NRC Staff asserts that Applicants' understanding of the purpose of Section 105(c) is wrong because there is no reliable way to quantify actual costs before a plant is operational.[189/] The NRC Staff's assertion is no more than a challenge to the Congressional finding of practical value;[190/] for the specific purpose and meaning of that finding was that the technology and economics of nuclear plants was now sufficiently developed that reasonably accurate predictions about costs could be made. In light of this finding, an analysis of the anticipated costs of each facility and the competitive consequences of those costs became both possible and, hence, a requirement under Section 105(c).

Moreover, as the NRC Staff recognizes, before plant operation, Section 105(c) analyses appropriately rely on before-the-fact, predictive assessments of actual costs.[191/] This is what was deemed feasible with the determination of "practical value." However, just because this estimation process is feasible does not mean it will prove to be correct. When reality is at marked

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189/ NRC Staff Answer at 12-13.

190/ See Section II.C.1.c, supra.

191/ See NRC Staff Answer at 13 n.20.

variance with earlier expectations, the NRC must conform its license requirements to reality.

The Staff's objection to Applicants' analysis on the basis of the alleged impossibility of predetermining actual costs also flies in the face of the NRC's practice. NRC's own regulations require the submittal by applicants of cost information in connection with the Staff's review under Section 105(c).[192/] This information is used by the NRC in its evaluation. Thus, since the passage of the 1970 amendments, NRC has issued cost determinations which, while predictive in nature, are intended to be sufficiently reliable to be accurate. When such estimates turn out to be inaccurate such that NRC is imposing requirements that make no sense, it is authorized and, indeed, under Section 105(c), is obliged, to remove those requirements. Certainly, in its application of its safety requirements, the NRC routinely acts in this manner, whether through the issuance of innumerable amendments of specific technical license requirements that prove to be inapplicable, or the amendment of generic requirements that prove to be unnecessary and even counterproductive.[193/]

192/ 10 C.F.R. Part 50, App.L, §§ II.11 and II.12; see Applicants' Motion at 65 n.142.

193/ See Modification of General Design Criterion 4 Requirements for Protection Against Dynamic Effects of Postulated Pipe Ruptures, 52 Fed. Reg. 41,288 (1987) (a regulatory amendment which allowed the removal of specified safety requirements that research, "coupled with operating experience," indicated not only were not necessary, but could negatively

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E. The Opposition's Attempts To Refute Applicants' Equal Protection Argument Are Unavailing

The Opposition has raised three arguments in opposition to the Applicants' assertion that continued imposition of the license conditions would deny the Applicants equal protection under the law.[194/] The Opposition's arguments are unavailing; they distort the Applicants' argument, and fail either to articulate a rational basis for the current imposition of license conditions under Section 105(c) or to distinguish the legal authority on which Applicants' equal protection argument is based.

1. The Faulty Invalidation Argument

Cleveland and the NRC Staff characterize the Applicants' equal protection argument as a request for the NRC to declare section 105(c) unconstitutional, which they state is beyond the power of an administrative agency.[195/] However, Cleveland and

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impact safety); see also 53 Fed. Reg. 35,995 (1988) (revisions to acceptance criteria for emergency core cooling systems because former calculation method subsequently shown to be overly conservative, "unnecessarily" restricting the operation of some nuclear reactors, "resulting in increased costs of electricity generation"). It is this same type of accommodation to the facts as we now know them that Applicants seek in this case.

194/ See NRC Staff Answer at 13 n.20.

195/ See Cleveland Answer at 62; NRC Staff Answer at 29.

the NRC Staff have mischaracterized the Applicants' position, which addresses the statute "as applied".196/

Contrary to the Cleveland and NRC Staff assertions, it is Applicants' position that the interpretation of Section 105(c) advocated by the Opposition, which would permit the *continued application* of license conditions under the present circumstances, would deny Applicants equal protection. In contrast, adoption of Applicants' theory of the case, which could result in the suspension of the license conditions, depending on the outcome of Phase 2 of this case, would avoid the constitutional violation Applicants' address. In short, Applicants are not asking the NRC to declare Section 105(c) unconstitutional; to the contrary, Applicants are requesting a constitutional interpretation of Section 105(c).

Thus, the legal authority cited by the City of Cleveland is not on point. For example, in Panitz v. District of Columbia, 112 F.2d 39 (D.C. Cir. 1940), the court simply noted that a tax assessor did not have the power to rule on constitutional objections to the underlying tax statute. Similarly, in Engineers Public Service Co. v. SEC, 138 F.2d 936 (D.C. Cir. 1943), vacated, 332 U.S. 788 (1947), the court stated that an administrative agency cannot pass upon the constitutionality of the act which it administers. In each of these instances, the agency was

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196/ Applicants' Motion at 75.

asked to rule on the constitutionality of an underlying statute. In contrast, the Applicants are not challenging the constitutionality of the underlying statute. Rather, Applicants are challenging the faulty interpretation of that statute that the Opposition advocates.

2. The Absence of a Rational Basis

Each of the Opposition, except for DOJ, has attempted to assert a "rational basis" for Section 105(c) that would overcome Applicants' constitutional argument.[197/] However, this basis -- ostensibly separate from the cost factor -- does not withstand the most superficial inspection as a "rational" basis.

The Opposition's identified rational basis behind Section 105(c) is the government's desire to prevent nuclear operators from benefiting from the government's enormous investment in nuclear technology. The government did not want this technology to give those nuclear operators cooperating with the government a "windfall head start" and use nuclear power to disadvantage rivals.[198/]

197/ Cleveland Answer at 63; see also NRC Staff Answer at 30-31; AMP-O Brief at 29; Alabama Response at 15.

198/ Id. The NRC Staff repeats this argument in its description of the legislative history of Section 105(c), asserting "that Congress was long concerned with preventing those with the greatest resources from having an unfair advantage over their competitors once government-developed and funded scientific and technological nuclear know-how was turned over

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The problem with the Opposition's "rational basis" is that it is simply substituting buzz words for the unmistakable meanings intended by them. For technology, per se, has no inherent value; witness a technological lemon, such as the Edsel. The focus on the benefit of nuclear technology in the legislative history of Section 105 was simply another way of expressing a concern about the competitive advantage, in the form of lower costs, that would be given by the government to nuclear power plant licensees; for licensees would, in effect, be subsidized by the government's prior nuclear technology expenditures. In short, notwithstanding the Opposition's effort at distinguishing technology *per se* from its value to society, the "windfall head start" of nuclear technology was strictly an economic headstart, as nuclear power plant licensees' competitive position was expected to be enhanced vis-a-vis owners of competing sources of electric power, including oil and coal.[199/]

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to private enterprise." NRC Staff Answer at 16-17. But what does this really amount to, if not access to low-cost power?

199/ AMP-O and Cleveland each summarily offer an additional rational basis argument. AMP-O argues that Applicants are seeking to overturn Section 105(c) and that that section is "rationally related" to the "undeniably legitimate goal" of "strengthening free competition in private enterprise." AMP-O Brief at 29-30. AMP-O is wrong on several counts. First, Applicants are *not* seeking to overturn Section 105(c); rather, Applicants seek a rational interpretation of Section 105(c). Secondly, a rational interpretation of Section 105(c) does promote free competition in private

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Moreover, the NRC Staff is incorrect when it asserts that "nuclear plants are distinguishable from other types" because of the government's technological investment in nuclear technology and know-how.[200/] The fact is that the federal government has invested enormous research and "taxpayer funds"[201/] in many energy technologies, e.g., to develop "clean" coal, to improve coal mine safety, to make wind power viable. The distinction between these investments and the government's investment in nuclear technology is the enormous economic and competitive advantage that Congress and others anticipated from the operation (and therefore, necessarily, from the government's licensing) of nuclear power plants.

Furthermore, as Applicants noted in their Motion, one must evaluate the rationality of a statute, or an interpretation of a statute, under the present circumstances rather than the circumstances existing at the time the statute was enacted. As courts

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enterprise. An irrational interpretation of Section 105(c), such as AMP-O's, which places antitrust conditions on less competitive private enterprises, does not.

Cleveland offers the additional argument that a rational basis for its interpretation of Section 105(c) is the ability of a large nuclear plant to enhance its owners' dominance in the market. Cleveland Answer at 63. This assertion is illogical unless the plant is a low-cost facility. See Section II.B, supra.

200/ NRC Staff Answer at 30 n.40.

201/ Id.

have noted, the "constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." Milnot v. Richardson, 350 F. Supp. 221, 224 (S.D. Ill. 1972) (citing Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)). Analogously, an interpretation of a statute resting upon a particular set of facts may become irrational if those facts cease to exist.

Unfortunately, nuclear technology has not provided the expected windfall. This is because, and only because, the costs of nuclear power are far higher than was anticipated when Section 105(c) was enacted. Thus, the government's investment in the development of nuclear technology has proved to be irrelevant in the competitive arena. The Opposition argument accordingly fails; for there is no inherent value in technology if it produces no economic benefit.[202/] In short, the government support of nuclear technology is not a rational basis for the continued

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202/ Thus, the Opposition's citation to the Court of Appeals' decision in Farley, see n.21, is not helpful to them. For the reference in Farley to the "publicly held wealth of knowledge and scientific progress," 692 F.2d at 1368, that was being made available to private utilities is simply a short-hand way of articulating the economic value of that information. It is a statement recognizing that nuclear power has certain cost advantages. Because that information of itself provides no economic benefit, if the cost of nuclear power is higher than competing means of generating electricity, as Applicants contend, the "wealth of knowledge" made available to public utilities is of no competitive value, and provides no rational basis for continued application of conditions imposed to offset that value.

imposition of antitrust conditions when nuclear plants produce relatively high cost power.

3. Applicants' Legal Authority Is Persuasive

The Opposition seeks to discredit Applicants' equal protection argument by citing cases elaborating on the "rational basis" standard of equal protection analysis, such as Massachusetts Bd. v. Murgia, 427 U.S. 307 (1976), and Schweiker v. Wilson, 450 U.S. 221 (1981).[203] But Applicants already recognize that the rational basis standard, which applies here, is the most lenient standard in equal protection analysis.[204] Thus, these cases simply underscore the parties' agreement that a statute or interpretation must have an underlying *rational* basis.

The Opposition also tries to persuade the Board that Applicants' legal authority is somehow distinguishable. For example, AMP-O attempts to divert attention from the "filled mi..." cases cited by Applicants by the assertion that they involve a "direct link" between a change in circumstances and the inability to achieve a statutory objective.[205] Yet, just such a direct link is precisely what exists in the present case. As Applicants have shown,[206] Section 105(c) *is* directly linked to the expected cost

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203/ See AMP-O Brief at 27.

204/ See Applicants' Motion at 77.

205/ AMP-O Brief at 31.

206/ Id. at 30.

advantage of nuclear power. Much as changed circumstances severed the direct link between the ban on filled milk and the original, underlying health considerations, a similar severing has occurred here between the anticipated costs at the time the license conditions were imposed and the actual costs, today, of the Davis-Besse and Perry nuclear power plants.

Similarly, AMP-O attempts to distinguish Wessinger v. Southern Ry., 470 F. Supp. 930 (D.S.C. 1979), (invalidating a presumption of negligence against railroads involved in grade crossing accidents) by stating that advances in technology negated the benefits of the statute, and "left railroads subject to an irrational inequity."[207/] Once again, just such an irrational inequity exists in the present case, if the NRC were to interpret Section 105(c) such that nuclear power plants are subject to unjustifiable conditions to which other electrical generating plants are not.

AMP-O further attempts to distinguish the "changed circumstances" authority cited by the Applicants by suggesting that it is "Lochner era" precedent that employed a stricter "rational basis" standard.[208/] This assertion is erroneous. The cases cited by Applicants have never been overruled, and in fact are cited by modern-day courts striking down statutes lacking a

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207/ Id. at 31.

208/ Id. at 30 n.20.

"rational basis." Thus, the 1979 and 1976 courts in Wessinger and Gallagher v. Evans, 536 F.2d 899 (10th Cir. 1976) cite Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405 (1935) (a "Lochner-era" case) in striking down the railway and election laws at issue.

Alabama cites East New York Savings Bank v. Hahn, 326 U.S. 230 (1945), as allowing a statute to have some "rational basis" even where circumstances have changed. Yet this case is irrelevant here. Alabama acknowledges that the case was decided primarily under the Contract Clause.[209/] Moreover, Alabama fails to mention the particular legislative actions which prompted the court's holding in that case. Specifically, in Hahn, the court refused to strike down a statute authorizing a moratorium on mortgage foreclosures, noting that the legislation was the subject of "frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts."[210/] Nothing remotely resembling such legislative study has taken place in the present case. Congress has neither continuously re-evaluated Section 105(c), nor readjusted the statute to account for changing circumstances. Thus, Hahn provides no basis whatsoever for the rationality of the continued imposition of license conditions.

209/ Alabama Response at 20 n.19.

210/ 326 U.S. at 234-35.

In summary, the Applicants' contention that continued imposition of the license conditions is not rationally related to the underlying purpose of Section 105(c) remains valid. The Opposition's purported "rational basis" -- the government's investment in nuclear technology -- is illusory, since technology of itself has no value if it produces no economic benefit. The Opposition cannot distinguish the Applicants' legal authority demonstrating that changed circumstances can affect the constitutionality of a statute, as applied. In short, interpreting Section 105(c) as allowing the continued imposition of license conditions in the absence of a low-cost nuclear facility would deny Applicants equal protection under the law.

F. The Doctrines Of Collateral Estoppel, *Res Judicata*, Law Of The Case, and Laches Do Not Preclude Review of the "Bedrock" Legal Issue

Cleveland and Alabama argue that this proceeding is improper because the issues either were or should have been raised by Applicants in the original antitrust proceeding in which the license conditions at issue here were imposed.[211/] Cleveland and Alabama are wrong. The previously litigated issues, characterized by Cleveland as the "nexus" issues, differ significantly from the pending "bedrock" legal issue. In addition, the facts have substantially changed, Applicants have not unreasonably

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211/ Cleveland Answer at 62-80; Alabama Response at 5-6. This argument is not raised by the NRC Staff, DOJ or AMP-O.

delayed and the Opposition has not been prejudiced in any way by the initiation of this proceeding in 1987.

Moreover, in raising the defenses of collateral estoppel, *res judicata* and law of the case, Cleveland asserts a legal position that, if accepted, effectively would preclude all claims for license amendments or suspensions. The essence of Cleveland's argument is that because the relative costs of generating nuclear and non-nuclear power were addressed in the Perry and Davis-Besse construction permit and operating license proceedings more than fifteen years ago, Applicants are barred today from litigating the stipulated legal issue, "whether the license conditions cannot be retained if the cost of power from the licensed plants exceeds that available from other sources."[212/] Cleveland's crabbed interpretation of *res judicata*, collateral estoppel and law of the case effectively would preclude all requests for license amendments. Every license amendment application seeks relief from, or a change to, some requirement imposed upon the licensee during earlier NRC proceedings. Cleveland's unreasonable interpretation of these proceedings directly contradicts the extensive regulatory scheme expressly providing for such license amendment requests.

212/ See Cleveland Answer at 64-65.

1. The Doctrines of Collateral Estoppel and *Res Judicata* Do Not Apply

Collateral estoppel precludes relitigation of the same issue resolved previously in the same or in a separate proceeding.[213] The issue must have been material and relevant to the disposition of the first action, so that its resolution was necessary to the outcome of the earlier proceeding.[214] *Res judicata* precludes relitigation of a cause of action that was or could have been raised in a prior proceeding.[215] "Generally, *res judicata* precludes parties, or their successors in interest, from bringing again to a court the same cause of action as one previously determined on the merits."[216]

Cleveland argues that the bedrock legal issue was previously litigated and therefore cannot be raised now. Alabama argues that "this radical contention" should have been raised in the

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213/ See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), ALAB-183, 7 A.E.C. 210, 212-13 (1974), remanded on other grounds, CLI-74-12, 7 A.E.C. 203 (1974).

214/ See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 N.R.C. 525, 536 (1986) ("Shearon Harris"); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 N.R.C. 563, 565 (1979), aff'd, ALAB-575, 11 N.R.C. 14 (1980) ("South Texas").

215/ 'Cause of action" is defined in Black's Law Dictionary (6th ed. 1990) at 221 as "The fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. . . ."

216/ United States Dept. of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, 16 N.R.C. 412, 420 (1982) ("Clinch River"); South Texas, LBP-79-27, 10 N.R.C. at 565-66.

prior antitrust proceeding.[217/] Neither of these contentions is correct.

a. The earlier "nexus" arguments

In the original antitrust proceeding in this docket, Applicants consistently advocated a narrower interpretation of the so-called "nexus" requirements than either the Licensing Board or, subsequently, the Appeal Board adopted in the case.[218/] The Applicants' nexus argument was advanced in two contexts, as it was in the Farley case, discussed previously:[219/] (1) Applicants argued that any anticompetitive impact of the proposed CAPCO nuclear facilities was already offset by the availability of wholesale power purchases from the proposed nuclear facilities so that the "licensed activities" would not "create or maintain a situation inconsistent with the antitrust laws," i.e., the requisite "nexus" was missing between the activities and the situation; and (2) Applicants maintained that any *relief*

217/ Cleveland Answer at 71-75; Alabama Response . 5.

218/ See Applicants' Joint Brief before the Atomic Safety and Licensing Board in Support of Their Proposed Findings of Fact and Conclusions of Law, Aug. 30, 1976, at 674-97; Applicants' Appeal Brief in Support of Their Individual and Common Exceptions to the Initial Decision, Apr. 14, 1977, ("Applicants' Appeal Brief") at 124-37 (Section III. "Nexus"); and at 294-97 (Section V.C "Relief: Failure to Design Relief that Does Not Exceed the Jurisdictional Authority of the Commission").

219/ See Section II.A.2, supra.

that might be proposed had to be confined to participation in and operating arrangements of the proposed nuclear facilities.[220/] These so-called nexus arguments are completely different from the bedrock legal issue in this case.[221/]

The determinative bedrock legal issue underlying Applicants' pending license amendment requests is whether the NRC is authorized under Section 105(c) of the Act to retain antitrust license conditions if it finds that the actual cost of electricity from the licensed facility is higher than the cost of electricity from alternative sources.[222/] Applicants assert in this proceeding that the Davis-Besse and Perry operating licenses *cannot* provide them with a competitive advantage and, accordingly, fall outside

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220/ The Applicants' nexus arguments were summarily described by the Appeal Board in ALAB-560, 10 N.R.C. at 384 (footnotes omitted):

> Two of the arguments made by applicants in their challenge to the Licensing Board's findings on the issue of nexus are (1) that only the applicants' latest offer for nuclear access, and not prior anticompetitive practices of the applicants, has any relevance to "activities under the license" because only it will reflect the "activities under the license" which must be the subject of the Commission's finding under Section 105c(5) of the Atomic Energy Act (42 U.S.C. § 2135c(5)) and (2) that [the remedy of] third-party wheeling has no connection with "activities under the license."

221/ See Section II.A.2, supra, for a detailed discussion of the difference between the two Farley nexus issues, on the one hand, and the bedrock legal issue, on the other.

222/ See n.1, supra.

the scope of section 105(c), because they actually generate power at relatively higher costs. In contrast, the nexus arguments in the prior proceeding were not based on, nor did they challenge, the proposition that the CAPCO nuclear plants were expected to be competitively advantageous.[223/]

223/ Cleveland pejoratively distorts Applicants' Appeal Brief and Applicants' argument generally, when it argues to the contrary, *viz.*, the bedrock legal issue is "old wine . . . presented in the same old bottles." Cleveland Answer at 66 (footnote omitted).

In the pages of Applicants' Appeal Brief to which Cleveland refers, Applicants focused on the importance the Licensing Board placed on the facilities being competitively advantageous, see Applicants' Appeal Brief at 125-27, and their view that this economic or cost advantage was a necessary prerequisite to the Board's nexus analysis. See Cleveland Answer at 65 (citing Applicants' Appeal Brief at 127 n.147). While this principle is equally valid today and, in fact, is central to Applicants' theory of the case, the legal argument advanced by Applicants in 1977 is totally different from the bedrock legal issue raised for the first time now. For while Applicants "observe[d]" that the nuclear units were no longer ***as*** economically attractive as they were considered to be several years earlier, see id. at 66 (emphasis added, citing Applicants' Appeal Brief at 127), the legal significance of this fact was that whatever advantageous economies there were -- and there still were such economies -- they would be shared by the municipal electric systems because they were wholesale customers of Applicants.

Thus, the previously raised issue was whether wholesale power purchases were sufficient, without the opportunity for ownership or unit power purchases, to offset the competitive advantage of the proposed nuclear facilities. No legal or factual issue was raised as to the existence of such a competitive advantage. *To the contrary, Applicants did not challenge the fact that the nuclear facilities were expected to be economically advantageous.*

In short, the bedrock legal issue was not raised, considered or resolved by the prior litigation.

Moreover, as to facts litigated in the 1970's, Applicants do not disagree with Cleveland that the *anticipated* costs of Perry and Davis-Besse were identified during the prior proceeding, as were comparative costs of other facilities. In fact, Applicants summarized in their Motion much of this factual testimony and the factual and legal findings made by the Licensing and Appeal Boards from it.[224/] For example, DOJ observed in its brief to the Appeal Board that, "The marketing of power from the subject nuclear units will enable Applicants to lower their average cost of power. It is undisputed that the power available from the subject nuclear units is expected to be the cheapest base load power available to serve new and growing loads."[225/] But again, the purpose of this testimony was to emphasize the competitive *value* of the nuclear plant and the need for broad-scope remedies beyond the offer of wholesale power purchases. It was *not* to affirm, rebut or in any way address the bedrock legal issue in this case, or the facts as they have actually materialized.

To the extent the distinction between the prior and the present litigation is not obvious, perhaps the discussion of *res judicata* in Vermont Yankee will clarify the matter further.[226/]

224/ See Applicants' Motion at 52-56.

225/ DOJ Appeal Brief at 179 (citations to record omitted).

226/ See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 N.R.C. 838, 847-51 (1987), aff'd on this issue and modified on other grounds, ALAB-869, 26 N.R.C. 13 (1987).

In Vermont Yankee the licensee sought to amend its operating license in 1987 to expand the spent fuel pool. An intervenor raised the issue of the effect of the proposed amendment on the facility's system for maintaining the temperature of the spent fuel pool water. The licensee alleged that the claim was barred by *res judicata* because the intervenor could have raised the issue in a 1977 proceeding on an application to amend the operating license to increase storage capacity of the same spent fuel pool.[227/] The Licensing Board ruled that *res judicata* did not apply. Because the system in 1977 was considered only for "backup purposes" and for "full core off-load,"[228/] the Licensing Board found that the second (1987) amendment application involved evaluation of the system for uses other than those considered in the 1977 amendment request. In short the second application presented "a question that [was] different in ***degree***, (if not in ***kind***) from the 1977 issue."[229/] Thus, the Board found the intervenor had not had "a fair chance to challenge the proposed routine (yearly) use" in the prior proceeding.[230/]

In the present case, the question is different in ***degree and kind***. While nuclear costs were discussed in the 1970's proceeding, the issues of law to which these facts were applied were

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227/ Id. at 849.

228/ Id. at 848 (citation omitted).

229/ Id. at 849 (emphasis added).

230/ Id. at 849-850.

completely different from the issue Applicants now raise. Thus, there is a difference in the *kind* of question at issue. Furthermore, in the prior proceeding, Applicants' and the other parties' arguments (necessarily) were based on *anticipated* and not *actual* costs. Indeed, Applicants could *not* have argued, in the hypothetical, that *if* nuclear power were high cost relative to non-nuclear power, the NRC lacked the jurisdiction to impose the antitrust license conditions. Moreover, Applicants could not have anticipated and did not anticipate the *degree* of change in cost from that anticipated to that actually realized. The essence of the current factual issue is that history has proven in fact that the costs of nuclear power from Perry and Davis-Besse are higher than from alternative sources. This issue was not and could not have been litigated in 1977, except by a prophet.

The previous nexus arguments and the current "bedrock" legal issue are clearly different. Applicants did not -- and could not -- raise the pending legal issue in the prior proceeding. Moreover, the issue was neither resolved in that case, nor necessary to the case's resolution. Applicants also do not seek to "avoid[] an existing forum" in filing their amendment Applications.[231/] To the contrary, this is the only forum available for amendment or suspension of the antitrust license

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231/ See Cleveland Answer at 71 (quoting Consolidated Edison Co. of New York, Inc. (Indian Point, Unit Nos. 1, 2 & 3), CLI-75-8, 2 N.R.C. 177 (1975) ("Indian Point")).

conditions.[232/] Similarly, Applicants do not "assert[] . . . different legal theories in a second suit" in an attempt to offer arguments which could have been raised in previous proceedings.[233/] The arguments were not and could not have been made because the events had not yet occurred.

b. The exception of changed circumstances

Without regard to the issues litigated in the prior antitrust proceeding, the dramatic increase in the actual cost of nuclear power from that anticipated at the time the subject facilities were licensed, constitutes changed circumstances compelling consideration of Applicants' pending amendment requests. For "where circumstances have changed from when issues were formerly litigated, either as to the context of law, the burden of

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232/ In contrast to the present scenario, the Indian Point licensee asserted that it should not be forced simultaneously to argue its case in "two separate forums." Indian Point, CLI-75-8, 2 N.R.C. at 177. All parties agreed that "the subjects raised warrant[ed] hearing in an adjudicatory proceeding." The only real issue was *which* of the two forums was appropriate for the hearing. Id.

233/ See Cleveland Answer at 71 n.20 (citing Farley, ALAB-182, 7 A.E.C. at 212); Ness Inv. Corp. v. United States, 595 F.2d 585, 588 n.6 (Ct. Cl. 1979). The Ness court precluded claims under *res judicata* because "the factual and legal questions relating to the alleged breach which plaintiffs present to this court are *identical* to those considered by the Board." Ness, 585 F.2d at 588-89 n.6 (emphasis added). See also Shearon Harris, ALAB-837, 23 N.R.C. at 537-538 (the Licensing Board found "no showing of significantly changed circumstances" where intervenors presented merely a more specific version of their previous contention). That clearly is not the situation in this proceeding.

proof . . ., or as to the facts material to the dispute," or where there are overriding considerations of public policy, such as where an agency is "feeling its way into an undeveloped frontier of law and policy," the doctrines of collateral estoppel and *res judicata* do not apply.[234/]

The dramatic increase in the cost of generating nuclear power relative to the cost of generating non-nuclear power constitutes a "significantly changed circumstance."[235/] The specific changed circumstances include significant increases in

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234/ Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), LBP-77-20, 5 N.R.C. 680, 681 (1977); Farley, ALAB-182, 7 A.E.C. at 215 (citing 2 Kenneth C. Davis, Administrative Law Treatise 566 (2d ed. 1979 & Supp. 1989)); see also Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-74-12, 7 A.E.C. 203, 203-04 (1974) (recognizing the changed circumstances/public interest; exception to the doctrines of collateral estoppel and *res judicata*); General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 N.R.C. 283, 286 (1986) (collateral estoppel inapplicable where there has been a material change in factual or legal circumstances or there exists a special public interest factor in the case); Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-349, 4 N.R.C. 235, 246 (1976) (*res judicata* does not bar the litigation of matters which only "become available" after the original proceeding); Clinch River, CLI-82-23, 16 N.R.C. at 420 (material changes in fact or law have operated to preclude the *res judicata* effect of a decision; balanced against the policy considerations underlying *res judicata* are the "need for flexibility to implement new policy initiatives and the possibility of a more accurate decision through further proceedings").

235/ All parties to this action have agreed to determine whether nuclear power costs are in fact greater than alternative power costs only if Applicants first succeed on the bedrock legal issue. Thus only a brief review of the relative cost analysis presented in the Applications is necessary at this time to establish a genuine issue as to a material fact -- the applicability of the changed circumstances exception.

capital investment costs attributable primarily to federal regulatory initiatives, legislative initiatives, and high inflation, as well as comparable increases in nonfuel operating costs. In their Applications, OE and CEI/TECo approached the issue of cost somewhat differently, but with the same outcome: a very significant change in the cost of nuclear power from that anticipated when Davis-Besse and Perry were initially licensed.[236/]

Cleveland argues that certain things that ultimately caused the increased nuclear costs -- "more stringent environmental requirement[s], new technical regulations adopted by the NRC, adverse economic conditions" -- either occurred or were forecast prior to the close of the record in the operating license

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236/ In its Application, OE compared the 30-year levelized cost (including capital, O&M, and fuel) for a nuclear plant as anticipated in 1976 with the actual 1987 30-year levelized cost for Perry. This comparison ($27 versus $184 per MWh) indicated a 580% change between the anticipated and the actual cost. See OE Application at 69-71.

In their Application to amend the Davis-Besse and Perry licenses, CEI and TECo refer to cost trend data compiled by the Department of Energy. See CEI/TECo Application at 24-29 (citing An Analysis of Nuclear Power Plant Operating Costs, Energy Information Administration, Office of Coal, Nuclear, Electric and Alternate Fuels, DOE/EIA-0511 (released Mar. 15, 1988) (hereinafter, "DOE Report")). The DOE's compilation of cost trend data shows that, between 1974 and 1984, routine operating and maintenance ("O&M") expenses increased by an average of 12 percent per year. Similarly, "postoperational capital costs" increased at an average annual rate of 17 percent over the ten years preceding the filing of the Applications. Finally, the DOE Report finds that total non-fuel operating costs (including both O&M costs and capital additions) nearly quadrupled between 1974 and 1984.

stage.[237] This argument, even if true, proves nothing; for the *actual* increase in costs *resulting from* these events were not ascertainable until years later, and the increased costs turned out to be devastating to the economics of Davis-Besse and Perry relative to non-nuclear generation. Applicants are entitled to present proof of those resulting increased costs in the second phase of this proceeding.[238]

In the operating license proceeding in Limerick, the Licensing Board re-examined environmental costs considered during the construction permit proceeding that were associated with the method of cooling. That Board explained, "environmental costs *ascertainable only as the plan gained greater concreteness after the construction permit was issued* have not been considered. . . . It is appropriate that they are considered now . . . ."[239] Similarly, in this case, neither the bedrock legal issue nor the facts which prompt Applicants' license amendment requests were ripe for review during the earlier proceeding. For in that case, there was no challenge to the finding that the proposed facilities were competitively advantageous. As it must, Cleveland acknowledges that the

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237/ Cleveland Answer at 75. Cleveland fails, of course, to acknowledge that many of the more stringent and costly regulatory requirements followed the 1979 Three Mile Island accident.

238/ See Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), LBP-82-43A, 15 N.R.C. 1423, 1461 (1982) ("Limerick").

239/ Limerick, LBP-82-43A, 15 N.R.C. at 1462 (emphasis added).

Applications are "based on events [occurring] subsequent to the construction permit proceeding."[240/] Obviously, neither Applicants nor any of the other parties could have quantified the impact of these changes before the facilities were operational.

Cleveland's reliance on Farley in its attempt to invoke *res judicata* and collateral estoppel is misplaced.[241/] Farley addresses only the issue of "whether, *in the absence of a particularized allegation of material supervening developments* or some other special circumstance," a participant in the litigation of an issue considered and decided in the construction permit proceeding is entitled to raise the *identical* issue in an operating license proceeding involving the same reactor.[242/] Indeed, Farley supports Applicants position. It expressly provides that "a subsequent modification of the significant facts or a change or development in the controlling legal principles may make [the original] determination obsolete or erroneous, at least for future purposes."[243/] Moreover, this very point was made by the

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240/ See Cleveland Answer to OE Application at 65.

241/ See Cleveland Answer at 68-77.

242/ Farley, ALAB-182, 7 A.E.C. at 212 (emphasis added).

243/ Id. at 213 (quoting Commissioner v. Sunnen, 333 U.S. 591, 599-600 (1948)). In Farley, the Appeal Board also observed that even the relitigation of issues, which is not involved here, may be more appropriate in NRC licensing cases than in other administrative adjudications:

Footnote continued on next page.

Appeal Board in the Davis-Besse/Perry proceeding when it recognized that the license conditions might have to be changed in the future if they proved inequitable to Applicants.[244/]

* * * * *

Applicants have not previously raised the bedrock legal issue in this case, nor could they have done so; for the facts which gave rise to the issue pending before this Board did not exist at that time. In any event, because the factual circumstances have radically changed, the doctrines of collateral estoppel and *res judicata* do not apply.

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> [T]here is perhaps more room in the sphere of reactor licensing than in many of the other areas of administrative adjudication for reexamination of a *specific* issue on the basis that, *as to that issue*, developments in the technology have worked a material change in circumstances.

Id. at 215 (emphasis in original).

244/ ALAB-560, 10 N.R.C. at 294.

2. The Law of the Case Doctrine Does Not Apply

The "law of the case" doctrine "precludes re-litigation of the same issue *in the same proceeding*."[245/] The Licensing Board in *this* proceeding already has determined that the Applicants' license amendment requests involve a *separate* proceeding from the previous construction permit and operating license proceedings. Accordingly, the "law of the case" doctrine, as defined by Cleveland, has no preclusive effect here.

Chairman Miller summarized the Board's view that the Applications present a new proceeding:

> We do not deem this to be a continuation of any prior proceeding. We are aware, of course, of the *prior proceedings*, both licensing, operating license, as well as construction permit, and the antitrust proceedings set up by Congress in 105(c) and so forth. No problem with that.
>
> We deem this however, to be a new proceeding with a different number and pursuant to the directions given to us, the Licensing Board, as well as the authority by the Commission, as evidenced by the notice.
>
> So in that respect, we do not regard this as being a continuation.[246/]

Judge Bechhoefer concurred in Judge Miller's conclusion:

245/ Cleveland Answer at 67 (emphasis added); see generally Public Serv. Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 N.R.C. 253, 259 (1978) ("Marble Hill").

246/ Preh. Conf. Tr. (Sept. 19, 1991) at 14 (emphasis added).

> I think, as Judge Miller pointed out, this is clearly a separate proceeding. The Commission doesn't continue these proceedings. It's like a construction permit or an operating license. They all have the same docket number, but the proceeding is considered a different proceeding.247/

Moreover, in their Prehearing Conference Order, the Board clearly established "the law of the case" on *this* issue:

> In presenting . . . arguments [regarding *res judicata*, collateral estoppel, law of the case and laches], however, Cleveland should recognize that, notwithstanding a similar docket designation, this proceeding is separate and apart from the earlier Commission antitrust proceedings regarding Davis-Besse and Perry that resulted in the license conditions now at issue.248/

The Board's order is consistent with past Commission determinations. For example, in Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-3, 29 N.R.C. 51, 53 n.1 (1989) aff'd, ALAB-915, 29 N.R.C. 427 (1989), the Licensing Board determined that "the construction permit and operating license phases of an application are considered separate proceedings."249/ Moreover, as a procedural matter, the

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247/ Id. at 17.

248/ Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-91-38, 34 N.R.C. 229, 244 n.43 (1991) (preh. conf. order).

249/ Cleveland misrepresents an earlier statement by the Appeal Board in Farley as a determination that "all regulatory acts in connection with a nuclear proceeding are part of the same

Footnote continued on next page.

Commission has always distinguished between proceedings after an operating license is issued and the operating licensing proceeding itself.[250]

Moreover, the Appeal Board has recognized:

> [T]he doctrine of the law of the case is not an ironclad rule; its application [is] a matter of discretion. Where a court is convinced that its declared law is wrong and would work an injustice, it retains the power to apply a different rule of law in the interests of settling the case before it correctly. Surely an administrative tribunal has comparable flexibility.[251]

Cleveland has failed to account for the discretionary nature of the application of the "law of the case." If Applicants are correct that the Commission lacks the authority to retain antitrust license conditions where the cost of nuclear power is higher than alternative sources, then the Commission's interest

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> proceeding or 'cause of action' as the proceeding in which the operator of the facility originally sought authorization to construct and operate the facility." See Cleveland Answer at 60 (citing Farley, ALAB-182, 7 A.E.C. at 215). The passage in Farley upon which Cleveland relies states that while there may be a sufficient basis for treating an operating license proceeding as involving the same cause of action as the construction permit proceeding, there is "*no need for a definitive decision on that question here.*" Farley, ALAB-182, 7 A.E.C. at 215 n.7 (emphasis added).

250/ See, e.g., Vermont Yankee, supra (distinction made between two operating license amendment proceedings involving the same facility).

251/ Marble Hill, ALAB-493, 8 N.R.C. at 260 (footnote omitted).

in "settling the case before it correctly" should signal rejection of the application of the "law of the case." Thus Cleveland's "law of the case" defense is meritless, particularly in light of the fact that this proceeding is not the same as the prior Davis-Besse/Perry antitrust proceeding.

3. The Equitable Doctrine of Laches Does Not Apply

Cleveland also raises the equitable doctrine of laches to bar NRC's consideration of this case.[252] However, Cleveland has failed to show (i) unreasonable delay on the part of Applicants and (ii) undue prejudice to Cleveland, the two necessary elements of a laches claim.[253]

First, in order for laches to apply, Applicants must have delayed unreasonably in requesting relief from the antitrust license conditions. There was no such delay in this case. The NRC did not issue the full-power operating license for Perry until the Fall of 1986. Judicial review of that license was not complete until Spring 1987. Perry was not placed into commercial operation until November 1987. Thus, OE's filing in September, 1987 and the CEI/TECo filing in May, 1988 certainly do not

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252/ See Cleveland Answer at 77-80.

253/ See, e.g., Van Bourg v. Nitze, 388 F.2d 557, 565 (D.C. Cir. 1967) (quoting Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966) (to establish the defense of laches "the evidence must show both that the delay was unreasonable and that it prejudiced the defendant.")

constitute unreasonable delay. In fact, it was absolutely necessary for Applicants to wait until Perry went into full production to file the amendment requests in order to have evidence of actual cost data. Had Applicants filed *before* Perry went fully on line, no doubt Cleveland would have objected to the use of such estimates.

Moreover, Cleveland fails to establish that it suffered prejudice as a result of the alleged delay.[254/] Cleveland has not alleged any difficulty in producing witnesses due to the passage of time. Cleveland complains about its detrimental reliance on the conditions and the unfairness that would result from their removal.[255/] Cleveland fails to bring to the Board's attention the independent agreement it and other municipal systems in Ohio have with CEI and TECo to continue the conditions in effect without regard to their imposition by the NRC.[256/]

254/ See EEOC v. Vucitech, 842 F.2d 936, 942 (7th Cir. 1988) (laches is usually invoked in situations where delay in prosecuting claim has made claim harder to defend against because death of witnesses or other developments); Bennett v. Tucker, 827 F.2d 63, 69 (7th Cir. 1987) (defendant must establish "more than just inconvenience" to prove laches); Powell v. Zuckert, supra, 366 F.2d at 638 (prejudice normally contemplated in applying laches "stems from such factors as loss of evidence and unavailability of witnesses, which diminish a defendant's chances of success").

255/ See Cleveland Answer at 79-80 (describing alleged acts taken in reliance on license conditions).

256/ See Cleveland Plain Dealer, Apr. 12, 1992, at 1A.

Finally, whatever actions Cleveland took in reliance on the license conditions, it did so with full knowledge that these conditions could be terminated or suspended for a variety of reasons. For example, the NRC may have refused to grant the Perry and Davis-Besse operating licenses resulting in termination of the appended license conditions. The licenses might also be terminated for a variety of other reasons. Furthermore, the unequivocal Appeal Board language regarding the possibility of modification of the license conditions if they proved to be inequitable to Applicants[257/] put all parties on notice in 1979 of the possibility that the Perry and Davis-Besse antitrust license conditions could change.

* * * * *

In summary, the bedrock legal issue and the factual inquiry related to it are issues that have not been resolved before and are ripe for review. Notwithstanding Cleveland and Alabama's claims to the contrary, the doctrines of collateral estoppel, *res judicata*, law of the case, and laches do not apply.

257/ ALAB-560, 10 N.R.C. at 294.

III. CONCLUSION

For the reasons set forth in Applicants' Motion and reemphasized in this Reply, Applicants respectfully maintain that the Commission is without authority as a matter of law under Section 105 of the 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. Notwithstanding substantial effort by the Opposition to divert attention away from the bedrock legal issue, the purpose of this phase of the proceeding is to resolve this issue of law. Applicants respectfully request that the issue be resolved in their favor and that the parties proceed to Phase Two of this proceeding, designed to address the factual issue of cost.

Respectfully submitted,

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Dated: May 7, 1992

91ST CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
No. 91-1470

AMENDING THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, TO ELIMINATE THE REQUIREMENT FOR A FINDING OF PRACTICAL VALUE, TO PROVIDE FOR PRELICENSING ANTITRUST REVIEW OF PRODUCTION AND UTILIZATION FACILITIES, AND TO EFFECTUATE CERTAIN OTHER PURPOSES PERTAINING TO NUCLEAR FACILITIES

SEPTEMBER 24, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HOLIFIELD, from the Joint Committee on Atomic Energy, submitted the following

REPORT

[To accompany H.R. 18679]

The Joint Committee on Atomic Energy, having considered H.R. 18679, an original committee bill to amend the Atomic Energy Act of 1954, as amended, and for other purposes, report favorably thereon and recommend that the bill do pass.

SUMMARY OF BILL

H.R. 18679 would amend the Atomic Energy Act of 1954, as amended, to accomplish the following principal purposes:

1. *Abolish the concept of a finding of practical value (sec. 3 of the bill).*—The bill would amend section 102 of the Atomic Energy Act which now requires that the Atomic Energy Commission first make "a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or commercial purposes" before the Commission may issue licenses for such type of facility pursuant to section 103 of the act, the section concerned with "commercial" licenses.

Under the bill, utilization or production facilities for commercial or industrial purposes would be subject to licensing under section 103, and no finding of "practical value" would be required. Two exceptions to such licensing under section 103 would be provided for and these are later described in this report.

2. *Clarify the procedure for prelicensing antitrust review (sec. 6 of the bill).*—The bill would clarify and revise the present text of subsection

105c. of the Atomic Energy Act relative to antitrust review of applications for AEC licensing of utilization or production facilities for industrial or commercial purposes.

3. *Authorize variation of disciplines in the composition of atomic safety and licensing boards (sec. 10 of the bill).*—The bill would amend the first sentence of subsection 191a. which now requires that of the three members of any atomic safety and licensing board two members "shall be technically qualified" and the third "shall be qualified in the conduct of administrative proceedings." The amendment in the bill would permit two members to have "such technical or other qualifications as the Commission deems appropriate to the issues to be decided"; the third member would, as in the present text of this section, be one "qualified in the conduct of administrative proceedings."

4. *Require the Government to enter into an arrangement with the National Council on Radiation Protection and Measurements for a comprehensive and continuing review of basic radiation protection standards, and an arrangement with the National Academy of Sciences for a comprehensive and continuing review of the biological effects of radiation on man and the ecology (sec. 11 of the bill).*—The bill would substitute the scientific efforts of these eminent bodies for the functions presently required of the Federal Radiation Council pursuant to subsection 274h. of the Atomic Energy Act.

5. *Reaffirm with greater clarity the intention of the Joint Committee, and in the opinion of the committee the intention of the Congress, underlying a provision of the Private Ownership of Special Nuclear Materials Act, enacted into law as Public Law 88-489 on August 26, 1964 (sec. 8 of the bill).*—The bill would change several words in subsection 161 v. of the Atomic Energy Act to emphasize the underlying intention as evidenced by the legislative history, and as correctly discerned by the Comptroller General of the United States in the GAO "Report to the Joint Committee on Atomic Energy" of July 17, 1970, captioned "Review of Proposed Revisions to the Price and Criteria for Uranium Enrichment Services." Although the General Accounting Office questions the legality of a proposed implementation by the AEC of subsection 161 v. of the Atomic Energy Act, on the ground that it does not appear to be consistent with the intention of the Congress in enacting the statute, the committee is concerned that the AEC has not desisted; the committee recommends that the original legislative intent be reiterated and the wording of the statute buttressed in support of its intended purpose.

The bill is comprised of three separate parts, although the three parts all relate to licensed nuclear facilities. The first part, discussed below under the heading "Part I," covers items 1, 2, and 3 above and embraces sections 1 through 7 and sections 9 and 10 of the bill. Part II pertains to item 4 above and section 11 of the bill. Part III pertains to item 5 above and section 8 of the bill.

Part I

Legislative History

Shortly after the completion by the Commission of its first rule making proceeding for consideration of a finding of "practical value" under section 102 of the Atomic Energy Act of 1954, which resulted

in the determination by the Commission, in December 1965 "that there has not yet been sufficient demonstration of the cost of construction and operation of light water, nuclear electric plants to warrant making a statutory finding that any types of such facilities have been sufficiently developed to be of practical value within the meaning of section 102," the Joint Committee requested the AEC's views on the continued need for the statutory requirement for such finding. The Commission replied that the principal bases underlying the "practical value" provisions of the 1954 act had receded in significance and that it was considering proposing legislation to eliminate the "practical value" concept from the statute.[1]

In 1967, during the first session of the 90th Congress, Senators Aiken and Kennedy, of New York, introduced a bill (S. 2564, 90th Cong., first sess., 1967) which would have enlarged substantially the Commission's jurisdiction over the licensing of reactors. S. 2564 would, among other things, have required consideration in the licensing process of the impact of a proposed nuclear plant on the most efficient development of power resources in the particular region; and it would have barred the issuance of a nuclear plant license unless the Commission found that the applicant had granted to all interested utilities an opportunity to participate "to a fair and reasonable" extent in the ownership of the proposed facility.

S. 2564 was the subject of extensive hearings before the Joint Committee in 1968.[2] Following these hearings, the Commission proposed legislation (S. 3960, 90th Cong., second sess., 1968) and additional bills were introduced by members of the Joint Committee (S. 3851, H.R. 18869, 90th Cong., second sess., 1968) which would have eliminated the present statutory requirement for a finding of "practical value" as a condition of commercial licensing. Because of the need for further comment by interested Government agencies and for additional hearings, no legislative action was taken on these bills while the 90th Congress was in session; however, the Joint Committee indicated that consideration of the "practical value" question would be a matter for its attention in the next Congress.

During the first session of the 91st Congress, several legislative measures were introduced concerning prelicensing review of nuclear powerplants; S. 212 was introduced on January 15, 1969, by Senator Anderson, for himself and Senator Aiken; H.R. 8289 was introduced on March 5, 1969, by Representative Holifield, for himself and Representative Price; H.R. 9647 was introduced on March 27, 1969, by Representative Holifield, by request (H.R. 9647, and the identical companion bill, S. 1853, introduced by Senator Pastore on Apr. 18, 1969, are the AEC bills); and S. 2768 was introduced on August 4, 1969, by Senator Tydings.

S. 212, H.R. 8289, and H.R. 9647 would eliminate from the Atomic Energy Act of 1954 the requirement that a finding of the "practical value" of a type of utilization or production facility be made before such type of facility may be licensed by the AEC as "commercial."

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[1] This exchange of correspondence is printed in "Hearings on Licensing and Regulation of Nuclear Reactors" before the Joint Committee on Atomic Energy, 90th Cong., first sess., pt. 7, app. 8, pp. 995, 998-999 (1967). See also testimony of Commissioner Ramey before the Joint Committee on Aug. 29, 1968, which is printed in "Hearings on AEC Omnibus Legislation, 1968," before the Joint Committee on Atomic Energy, 90th Cong., first sess., app. 7, pp. 194-195 (1967).

[2] "Hearings on Participation by Small Electrical Utilities in Nuclear Power," before the Joint Committee on Atomic Energy, 90th Cong., second sess., pts. 1 and 2 (1968).

Under these legislative proposals, practically all nuclear powerplants would be subject to a prelicensing antitrust review by the Commission, with the advice of the Attorney General, pursuant to a revised subsection 105c. S. 212 also would confer upon the Commission regulatory authority to control the thermal effects of heated effluents discharged from nuclear powerplants. S. 2, 68 would declare the protection of the environment to be a purpose of the Atomic Energy Act and would authorize the Commission to establish "such standards to protect and promote the preservation of environmental quality" as the Commission deems appropriate.

The National Environmental Policy Act of 1969 (Public Law 91-190) and the Water Quality Improvement Act of 1970 (Public Law 91-224) were enacted into law subsequent to the introduction of the above-mentioned bills. These statutes add certain functions concerning environmental matters to the licensing activities of Federal agencies. In light of the recent laws the Joint Committee principally focused its current attention on the advisability of deleting the existing prerequisite to licensing under section 103—a finding of "practical value"—and on a suitable statutory process for the "commercial" licensing of nuclear facilities that includes due regard for antitrust considerations.

During the second session of the 90th Congress, initial public hearings were held by the committee on bills (H.R. 18667 and S. 3851) substantially similar to S. 212 and H.R. 8289.

During the 91st Congress, public hearings were held by the committee in 1969 and 1970. These hearings, summarized below, are published under the caption "Prelicensing Antitrust Review of Nuclear Powerplants, Hearings before the Joint Committee on Atomic Energy," 91st Congress, 1st session, part 1, (1969), and 91st Congress, 2d session, part 2 (1970).

The full Joint Committee met in executive session on July 28, 1970, and approved certain amendments to H.R. 8289, H.R. 9647, S. 212, and S. 1883 which were incorporated in an original bill introduced on July 28, 1970, by Chairman Holifield (for himself, Representative Price of Illinois, and Representative Hosmer) as H.R. 18679 and on July 29, 1970, by Vice Chairman Pastore as S. 4141. At that meeting the committee also voted to approve the reporting of the original bill favorably without amendment and to adopt this committee report. Thereafter, on September 24, 1970, the committee effected several changes in the text of the report and voted unanimously to adopt the report as revised.

Hearings

Public hearings on S. 212, H.R. 8289, H.R. 9647, S. 1883 and S. 2768 were held on November 18, 19, and 20, 1969, and on April 14, 15, and 16, 1970. Representatives of the Commission and of various other Federal agencies and departments interested in the legislation testified at the initial hearings (November 18-20, 1969). Part 2 of the hearings (April 14-16, 1970) afforded interested individuals and organizations the opportunity to present their views on the proposed legislation.

The following witnesses appeared on behalf of the U.S. Atomic Energy Commission:

James T. Ramey, Commissioner
Joseph F. Hennessey, General Counsel

The following additional witnesses appeared on behalf of other Federal agencies and departments:

Carl L. Klein, Assistant Secretary for Water Quality and Research, Department of the Interior.
Walker B. Comegys, Acting Assistant Attorney General, Antitrust Division, Department of Justice.
S. David Freeman, Director, Energy Policy Staff, Office of Science and Technology.

Witnesses presenting the views of industry and the public are listed below in the order of their appearance at the hearings on April 14-16, 1970:

Carl Horn, Jr., vice president, finance, and general counsel, Duke Power Co., on behalf of the Edison Electric Institute (accompanied by John J. Kearney).
Alex Radin, general manager, American Public Power Association (accompanied by Lawrence Hobart).
J. Harris Ward, chairman of the board, Commonwealth Edison Co.
Sherman R. Knapp, chairman of the board, Northeast Utilities (accompanied by C. Duane Blum of Day, Berry & Howard, Hartford, Conn.).
Michael F. Colins, secretary-treasurer, Municipal Electric Association of Massachusetts, represented by George Spiegel, counsel, and accompanied by Worth Rowley, counsel.
Charles A. Robinson, Jr., staff counsel to the general manager, National Rural Electric Cooperative Association.
William R. Gould, senior vice president, Southern California Edison Co., Los Angeles, Calif. (accompanied by Alan M. Nedry and David N. Barry III).
William C. Wise, counsel, Mid-West Electric Consumers Association, Inc.
J. O. Tally, Jr., general counsel, ElectriCities of North Carolina.
Shearon Harris, chairman of the board of directors and president of the Carolina Power & Light Co. (accompanied by Charles D. Barham, Jr., associate general counsel).
Edward Berlin of Berlin, Roisman & Kessler, general counsel for the Consumer Federation of America.
James H. Campbell, president of Consumers Power Co., Jackson, Mich. (accompanied by Jud Bacon).
Donald C. Allen, vice president of New England Electric System and President of Yankee Atomic Electric Co. (accompanied by Frederick E. Greenman).
George H. R. Taylor, secretary, AFL-CIO Staff Committee on Atomic Energy and Natural Resources.

Committee Comments

A. Background

1. The Atomic Energy Act of 1946

Almost a quarter century ago, the Atomic Energy Act of 1946 committed fully and securely to the exclusive control of the specially

created civilian agency called the Atomic Energy Commission the development, utilization and control of atomic energy. This major statute recognized at the outset that whereas the significance of the atomic bomb was evident, the beneficial potential of the new source of energy for civilian purposes had yet to be explored. The national policy was expressed that "subject at all times to the paramount objective of assuring the common defense and security, the development and utilization of atomic energy shall, so far as practicable, be directed toward improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace."

Section 7 of the Atomic Energy Act of 1946 included the following provisions:

> (b) REPORT TO CONGRESS.—Whenever in its opinion, any industrial, commercial, or other nonmilitary use of fissionable material or atomic energy has been sufficiently developed to be of practical value, the Commission shall prepare a report to the President stating all the facts with respect to such use, the Commission's estimate of the social, political, economic, and international effects of such use and the Commission's recommendations for necessary or desirable supplemental legislation. The President shall then transmit this report to the Congress together with his recommendations. No license for any manufacture, production, export, or use shall be issued by the Commission under this section until after (1) a report with respect to such manufacture, production, export, or use has been filed with the Congress; and (2) a period of ninety days in which the Congress was in session has elapsed after the report has been so filed. In computing such period of ninety days there shall be excluded the days on which either House is not in session because of an adjournment of more than three days.
>
> (c) ISSUANCE OF LICENSES.—After such ninety-day period, unless hereafter prohibited by law, the Commission may license such manufacture, production, export, or use in accordance with such procedures and subject to such conditions as it may by regulation establish to effectuate the provisions of this Act. The Commission is authorized and directed to issue licenses on a nonexclusive basis and to supply to the extent available appropriate quantities of fissionable material to licensees (1) whose proposed activities will serve some useful purpose proportionate to the quantities of fissionable material to be consumed, (2) who are equipped to observe such safety standards to protect health and to minimize danger from explosion or other hazard to life or property as the Commission may establish; and (3) who agree to make available to the Commission such technical information and data concerning their activities pursuant to such licenses as the Commission may determine necessary to encourage similar activities by as many licensees as possible. Each such license shall be issued for a specified period, shall be revocable at any time by the Commission

> accordance with such procedures as the Commission may establish, and may be renewed upon the expiration of such period. Where activities under any license might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of fissionable material or atomic energy which appears to have these results. * * *

The opening section of the Atomic Energy Act of 1946 recognized that many factors then unknown would affect the use of atomic energy for civilian purposes, and it wisely declared that "any legislation will necessarily be subject to revision from time to time."

No "practical value" report was made by the Commission pursuant to subsection 7(b) of the Atomic Energy Act of 1946, and no antitrust exercise was conducted under subsection 7(c) of that act, with respect to any utilization or production facility.

Within 8 years after the passage of the 1946 act Congress began to consider, and to discuss and debate extensively, major proposed revisions intended to bring the 1946 act up to date in relation to the many developments achieved in the interim and to the outlook at that time for the future.

2. The Atomic Energy Act of 1954

When the Atomic Energy Act of 1954 was passed, it was the hope of the Congress that the major revisions designed to lessen the Government's monopolistic grip on civilian applications of atomic energy would encourage private industry and the free enterprise system to contribute markedly to the development and use of atomic energy to increase the standard of living and improve the general welfare.

The legislative report accompanying the House and Senate bills (H.R. 9757 and S. 3690) that substantially evolved into the Atomic Energy Act of 1954 included the following remarks under the caption "Changing Perspectives in Atomic Energy":

> * * * It was commonly believed 8 years ago that the generation of useful power from atomic energy was a distant goal, a very distant goal. Atomic energy then was 95 percent for military purposes, with possibly 5 percent for peacetime uses. The resources of the Atomic Energy Commission and of its contractors appeared fully adequate to develop atomic-power reactors at a rate consistent with foreseeable technical progress. Moreover, there was little experience concerning the health hazards involved in operating atomic plants, and this fact was in itself a compelling argument for making the manufacture and use of atomic materials a Government monopoly.
>
> Today, however, we can draw on the experience acquired

in designing, building, and operating more than a score of atomic reactors. It is now evident that greater private participation in power development need not bring with it attendant hazards to the health and safety of the American people. Moreover, the atomic-reactor art has already reached the point where atomic power at prices competitive with electricity derived from conventional fuels is on the horizon, though not within our immediate reach. * * *

Many technological problems remain to be solved before widespread atomic power, at competitive prices, is a reality. It is clear to us that continued Government research and development, using Government funds, will be indispensable to a speedy and resolute attack on these problems. It is equally clear to us, however, that the goal of atomic power at competitive prices will be reached more quickly if private enterprise, using private funds, is now encouraged to play a far larger role in the development of atomic power than is permitted under existing legislation. In particular, we do not believe that any developmental program carried out solely under governmental auspices, no matter how efficient it may be, can substitute for the cost-cutting and other incentives of free and competitive enterprise. * * *

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In summary: Statutory provisions which were in harmony with the state of atomic development in 1946 are no longer consistent with the realities of atomic energy in 1954. Legislation not responsive to the needs and problems of today can serve only to deny our Nation, and like-minded nations as well, the true promise of atomic energy—both in augmenting the total military strength of the free world, and in increasing opportunities for beneficent uses of the atom.

Among the major revisions effected by the Atomic Energy Act of 1954 are those in chapter 10 of the 1954 act concerned with "Atomic Energy Licenses."

In chapter 10, the concept of "practical value," utilized in the 1946 act, was retained in substance (sec. 102), however, it was converted to the form of "a finding in writing" to be made by the Commission whenever it concluded "that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or commercial purposes." Only subsequent to such a finding could the Commission, in accordance with the provisions of chapter 10, issue "commercial" licenses for the type of utilization or production facility covered by its finding of practical value (sec. 103).

To date, the Commission has not made an affirmative finding of practical value, although it has carefully considered the matter on two separate occasions. On July 10, 1964, the Commission published a notice in the Federal Register (29 F.R. 9458) that it had under consideration the matter of a possible finding of practical value with respect to some type or types of light water nuclear powerplants. It requested public comments, and then conducted an extensive rule making proceeding in the course of which over 100 written comments

were received. This exercise culminated in the Commission's determination, dated December 29, 1965, to decline to make a section 102 finding on the ground that nuclear powerplant operating experience up to that time was limited to small-scale facilities that were not economically competitive; the Commission stated:

> While certain economic evaluations governing the award of contracts for scaled-up plants not involving Government assistance provide strong indication that economic competitiveness will be achieved, we have decided to exercise our discretion to await a reliable estimate of the economics based upon a demonstration of the technology and plant performance. Pending the completion of scaled-up plants, and the information to be obtained from their operation, and in light of the legislative history, the Commission has determined that there has not yet been sufficient demonstration of the cost of construction and operation of light water, nuclear plants to warrant making a statutory finding that any types of such facilities have been sufficiently developed to be of practical value within the meaning of section 102 of the Atomic Energy Act of 1954, as amended.

On October 18, 1966, following another rulemaking petition and Commission consideration, the Commission again determined that a section 102 finding of "practical value" should not be made, and that such a finding should await a reliable estimate of the applicable economics based upon a demonstration of plant performance and the nuclear technology involved. Recently, on June 26, 1970, the Commission published a notice in the Federal Register (35 F.R. 10460) that it would again consider the matter of a finding of "practical value," and that it was seeking public comment.

In accordance with chapter 10 of the 1954 act, because there has not yet been a finding of practical value no license for a nuclear powerplant or other nuclear facility has been issued under section 103. To date, the construction and operation of all civilian nuclear powerplants have been licensed under subsection 104b. which provides for the licensing of "utilization and production facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes."

The high degree of practical interest and the controversies that have centered on the difference between licensing a nuclear powerplant under section 103 and under subsection 104 b. are essentially due to subsection 105 *c.* in chapter 10 of the 1954 act. As finally composed, after considerable discussion and debate by the 83d Congress which passed the 1954 act, the text of subsection 105 *c.* bore only some resemblance to the provisions of subsection 7(c) of the 1946 act in regard to antitrust considerations. The Commission's express authority in subsection 7(c) to refuse to issue a license or to establish conditions in order to prevent antitrust situations was muted into dead silence. The general antitrust theme was restated simply in terms of advice from the Attorney General. The nature and scope of the advice were described in a broad-brush clause of inexact import. Subsection 105 *c.* reads as follows:

> c. Whenever the Commission proposes to issue any license to any person under section 103, it shall notify the Attorney General of the proposed license and the proposed terms and conditions thereof, except such classes or types of licenses, as the Commission, with the approval of the Attorney General, may determine would not significantly affect the licensee's activities under the antitrust laws as specified in subsection 105 a. Within a reasonable time, in no event to exceed 90 days after receiving such notification, the Attorney General shall advise the Commission whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws, and such advice shall be published in the Federal Register. Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section.

Several of the present members of the committee served on this body 16 years ago during the period when the 1954 act was conceptualized, heavily debated, and finally crystallized and enacted by the Congress. The recollections of these members have not dimmed in regard to the evolvement and formulation of the principal features of chapter 10 and of other major features of the 1954 act. The detailed review by the committee staff of the 10 inches of legislative history bearing on the Atomic Energy Act of 1954 has served to confirm their recollections, as well as to assist the whole committee in its review of the salient background events.

In the full perspective that a mature backward look can now provide, it is obvious that the Atomic Energy Act of 1954 failed to anticipate the exact course of the future development and use of civilian nuclear power and to devise a perfect licensing system. Also, as a consequence of the many doubts and concerns in the Congress, the enacted bill, including chapter 10, contained a number of compromise provisions, some of them in the form of relatively vague or ambiguous language. At that time a finding of practical value and the applicability of subsection 105 c. were matters for the distant future, and the whole projected picture of things to come varied considerably depending on individual imaginations, preferences and anxieties. When the Senate passed the atomic energy bill (H.R. 9757 after substituting language of S. 3690) on July 27, 1954, Senator Ervin who voted for the bill, made a statement which included the following remarks:

> * * * Much of the debate in the Senate overemphasized the power aspects of the bill. This is true because experts in the atomic energy field state that it will be 12 years or more before it will be economically feasible to produce power by atomic energy for general uses in any substantial quantities. As a consequence, those who have overemphasized the power aspects of the matter are somewhat like the man who invited his friends to a rabbit stew before he made the rabbit gum [1] to catch the rabbit.
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> * * * * *

[1] Well known in North Carolina as a rabbit trap (courtesy of Senator Ervin's office).

> As a result of my study I reached the deliberate conclusion that the atomic energy bill is a meritorious measure. To be sure it is not perfect. No bill of such magnitude can be perfect.

It is of interest to note that the bill which the Senate passed on July 27, 1954, contained the following version of subsection 105 (c):

> c. Whenever the Commission proposes to issue any license to any person under section 103, it shall notify the Attorney General of the proposed license and the proposed terms and conditions thereof, except such classes or types of licenses, as the Commission, with the approval of the Attorney General, may determine would not significantly affect the licensee's activities under the antitrust laws as specified in subsection 105 a. Within a reasonable time, in no event to exceed ninety days after receiving such notification, the Attorney General shall advise the Commission whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws. *If the Attorney General advises the Commission that issuing the license would create or maintain a situation inconsistent with the antitrust laws, then the Commission shall not issue such license unless it makes a finding approved by the President that the issuance of such license is essential to the common defense and security, and the finding is published in the Federal Register.* Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate or necessary, to enable him to give the advice called for by this section. [Italics added.]

The italicized sentence had been proposed by Senator Humphrey, and his amendment to the text had been supported by Senator Hickenlooper, the vice chairman of the Joint Committee and in charge of the bill on the floor of the Senate. The explanatory colloquy in the Senate on July 24, 1954 in regard to this amendment clearly indicates that the words "tend to" were purposely omitted and that the phrase "inconsistent with the antitrust laws" was intended to be the equivalent of actual violation of the antitrust laws.

The Senate version on July 27, 1954, recaptured to some extent the feature in subsection 105 c. of the House and Senate bills as originally reported out by the Joint Committee which specifically would have placed an obligation on the Commission not to issue a license if the Attorney General or the Federal Trade Commission believed that the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and if, thereafter, the Federal Trade Commission so found under the basic laws governing antitrust matters and the jurisdiction of the Federal Trade Commission. This provision went on to state that all parties to the Federal Trade Commission hearings could appeal the Federal Trade Commission's determination in the courts.

Debates on the provisions of the atomic energy bills continued in the Congress into August 1954. Ultimately, after two conference reports, the Senate and the House agreed on the version which was

signed into law by the President on August 30, 1954. The House-Senate committee of conference deleted from subsection 105 c. the sentence added by the Humphrey amendment. In the accompanying statement by the Managers on the Part of the House the deletion was explained as follows:

> In connection with the issuance of licenses for utilization and production facilities, the House bill provided certain requirements with respect to the antitrust laws (sec. 105). Among these was the requirement that the Commission obtain the advice of the Attorney General before issuing any such license. The Senate amendment required that the Commission follow the advice of the Attorney General unless the President made a finding that the issuance of such a license was essential to the common defense and security and the finding was published in the Federal Register. This amendment in effect made the advice of the Attorney General a decision binding upon the Commission and the applicant without hearing. The conference substitute deletes the portion of the provision added by the Senate amendment which required that the advice of the Attorney General be followed, but requires that the advice of the Attorney General be published in the Federal Register.

Though the language and possible effect of subsection 105 c. of the Atomic Energy Act of 1954 were born unclear, it can scarcely be said after a full review of the history of the 1954 act that the text of subsection 105 c. was inadvertently or haphazardly created. Rather, it was the deliberate product of a very deliberative legislative process.

In any event, the mechanism of subsection 105 c.—however the courts would be inclined to construe it—was intended to lie dormant until awakened into activity by a finding of practical value by the Commission followed by the proposed issuance of a "commercial" license for the type of nuclear facility covered by the finding. Unlike the sleeping princess of the fairytale, who by definition was not only beautiful but also endurable on a live-happily-ever-afterward basis, the awakening into activity of subsection 105 c., as presently constituted, would probably mainly result in uncertainty, expensive delays, and extended litigation. Subsection 105 c. in chapter 10 of the 1954 act needs to be clarified and revised.

Chapter 10, which this committee strongly believes should be clarified and improved, contains in the first two subsections of section 105 provisions which the committee does not propose to amend.

Subsection 105 b. contains the broad-brush requirement that the Commission promptly report to the Attorney General "any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of" the antitrust laws "or to restricted free competition in private enterprise." This requirement is separate and distinct from subsection 105 c. and, in the judgment of the committee, is both sound in concept and practical. The funnel for information of this general sort ought to have a very wide mouth to assure that the Attorney General is as fully informed as possible.

Subsection 105 a. wisely emphasizes that "Nothing contained in this Act"—and this includes subsection 105 c.—"shall relieve any person from the operation" of the antitrust laws. It further provides that in the event a licensee is found to have violated the antitrust laws in the conduct of the licensed activities that "the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act."

B. PRINCIPAL REASONS FOR PROPOSED LEGISLATION

1. Finding of practical value

The concept of a "Finding of Practical Value" (sec. 102), plausible in 1954 when transmuted from the cautious approach of subsection 7(b) of the 1946 act, has been overtaken by developments. It is now an archaic symbol of what may once have been a good idea. Clearly it is now neither practical nor of value. Unfortunately, under the present law it is also a formidable roadblock to "commercial" (sec. 103) licensing of nuclear powerplants and other industrially or commercially useful nuclear facilities. The Commission has recently begun once again the cumbersome exercise of attempting to surmount this hurdle to section 103 licensing, and a good deal of time and expense will be consumed in the full execution of the administrative process entailed. When it ends the Commission may or may not make an affirmative finding with respect to a type or types of facility, and it seems prudent to assume that the Commission's determination—whatever it turns out to be—will set off another round of controversy.

If the Commission makes a finding of "practical value," serious legal problems would probably come into play. These could include such matters as the convertibility of subsection 104 b. licenses to section 103 licenses, and, of course, the interpretation and effect of the provisions of subsection 105 c. The accompanying delays and expense could be extremely onerous. It must be borne in mind that the licensing process is already being extended and sorely strained these days, and costly delays are being experienced, due to the sudden impact of the National Environmental Policy Act of 1969 (Public Law 91-190) and the Water Quality Improvement Act of 1970 (Public Law 91-224); thus far, the attempted implementation of these acts seems to be creating more delays due to legal questions of interpretation and implementation than to environmental considerations as such.

All of the witnesses at the committee's hearings and all the advice the committee has received on this subject, from within and outside of the Government, favor removal of the concept of "practical value" from the Atomic Energy Act of 1954. The committee has endeavored to proceed responsibly with legislation to accomplish this objective in a sensible manner.

2. Clarification of procedure for prelicensing antitrust review

In the committee's judgment, no sensible legislation to remove the roadblock to "commercial" licensing under section 103 could fail to clarify and revise the present provisions of subsection 105c. The bill proposed by the committee clarifies the antitrust review standard and explicitly describes the Commission's authority and responsibility in relation to advice from the Attorney General. The clarified standard

and the specified procedures are reasonable and workable. The bill and the explanation in this report should assure a full understanding of the standard and of the process entailed. A detailed review of the new subsection 105c. is contained in the section by-section account in this report.

Of course, the committee is intensely aware that around the subject of prelicensing review and the provisions of subsection 105c., hover opinions and emotions ranging from one extreme to the other pole. At one extremity is the view that no prelicensing antitrust review is either necessary or advisable and that the first two subsections of section 105 concerned with violation of the antitrust laws and the information which the Commission is obliged to report to the Attorney General are wholly adequate to deal with antitrust considerations. Additionally, there are those who point out that it is unreasonable and unwise to inflict on the construction or operation of nuclear powerplants and the AEC licensing process any antitrust review mechanism that is not required in connection with other types of generating facilities. At the opposite pole is the view that the licensing process should be used not only to nip in the bud any incipient antitrust situation but also to further such competitive postures, outside of the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system. The Joint Committee does not favor, and the bill does not satisfy, either extreme view.

The committee is recommending the enactment of prelicensing review provisions which—as in the proposed Atomic Energy Act of 1954 that the Joint Committee originally reported out, and as is in the version of subsection 105c that the Senate passed on July 27, 1954—do not stop at the point of the Attorney General's advice, but go on to describe the role of the Commission with respect to potential antitrust situations.

The legislation proposed by the committee provides for a finding by the Commission "as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.

It is important to note that the antitrust laws within the ambit of subsection 105 c. of the bill are all the laws specified in subsection 105 a. These include the statutory provisions pertaining to the Federal Trade Commission, which normally are not identified as antitrust law. Accordingly, the focus for the Commission's finding will, for example, include consideration of the admonition in section 5 of the Federal Trade Commission Act, as amended, that "Unfair methods of competition in commerce, and unfair and deceptive acts in commerce, are declared unlawful."

The committee is well aware of the phrases "may be" and "tend to" in the Clayton Act, and of the meaning they have been given by virtue of decisions of the Supreme Court and the will of Congress—namely, reasonable probability. The committee has—very deliberately—also chosen the touchstone of reasonable probability for the standard to be considered by the Commission under the revised subsection 105 c. of the bill.

The committee did not deem it advisable to extend the boundaries of the considerations to be taken into account by the Commission beyond the antitrust laws and the policies clearly underlying those laws. The situation is different in respect to AEC's developmental regime; here Government funds are extensively devoted to the research and development aspects of atomic energy and the Commission has the duty not only to see to it that the funds are employed to best advantage in relation to the specific statutory missions involved but to be mindful of the general objective of strengthening free competition in private enterprise. The absence of specific guiding criteria toward this objective, where the expense of the activity is borne by the Government, does not amount to an intolerably gross and unfair infliction on private enterprise of the convictions of a Federal agency, though these may often be based on generally debatable philosophical principles. Here, too, the committee, in its authorization process and in its "watchdog" role, is in a position to react with respect to any particular Commission measure relative to the objective of strengthening free competition in private enterprise which the committee may believe to be unsupportable or unwise; the committee could not so effectively react in context of a licensing matter. The committee recognizes that there is not a clear boundary between antitrust considerations in relation to the strengthening of free competition in free enterprise and measures to accomplish such objective for reasons other than the antitrust laws or underlying antitrust policy; the Commission will have to exercise discretion and judgment.

5. Authorization for varying expertise in the composition of atomic safety and licensing boards

Under the present provisions of subsection 191a. of the Atomic Energy Act of 1954 two of the three members of an atomic safety and licensing board must "be technically qualified"; the third member must "be qualified in the conduct of administrative proceedings." If the Commission is to consider potential antitrust situations as part of its licensing process, as specifically provided for in the bill, it will be necessary as a practical matter that the Commission be authorized to have such expertise on the boards as is desirable in relation to the issues. The proposed revision would permit two of the three members of the board to have "such technical or other qualifications as the Commission deems appropriate to the issues to be decided."

The committee believes that the flexibility that would be provided by the proposed amendment may well turn out to be useful in connection with other matters within the orbit of the Commission's licensing process.

The committee expects and will urge the Commission to make every reasonable effort to deal with the potential antitrust feature under subsection 105c. of the bill fully but expeditiously. Clearly, a separate board or boards should be utilized in the implementation of paragraphs (5) and (6) of subsection 105c. The committee anticipates that all the functions contemplated by these paragraphs would be carried

out before the radiological health and safety review and determination process is completed, so that the ent[illegible] licensing procedure is not further extended in time by reason of the added antitrust review [illegible]ion.

Part II

Legislative History

In 1959, the Atomic Energy Act of 1954 was amended by the addition of section 274 which recognized the interests of the States in the peaceful uses of atomic energy and provided for programs of cooperation between the States and the Commission. Subsection 274h statutorily established a "Federal Radiation Council, consisting of the Secretary of Health, Education, and Welfare, the Chairman of the Atomic Energy Commission, the Secretary of Defense, the Secretary of Commerce, the Secretary of Labor, or their designees, and such other members as shall be appointed by the President". The Council was required to consult with "qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurements, and qualified experts" in other fields, and to advise the President "with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards . . ."

In recommending the inclusion of this feature in section 274, the Committee considered that thereby basic radiation protection guides would be arrived at pursuant to high scientific standards, and that a continuing, comprehensive review process by the Council would keep it thoroughly abreast of all pertinent scientific information and alert to any need to revise its radiation protection guides. The Committee believed that the Council should function as a statutory body because of its important responsibilities, rather than simply as an arm of the executive branch which it had theretofore been.[1]

Committee Comments

The Federal Radiation Council recommended radiation protection guides, and these guides have been followed by the AEC and other Government agencies. Based on all the information available to this committee, and on the advice furnished to this committee by outstanding scientists whose opinions are highly regarded by their peers and scientific associates, the guides that constitute the bases for AEC's radiation protection standards are valid and appropriate from radiological health and safety standpoints.

However, the committee has come to appreciate the fact that the members of the Federal Radiation Council are really too occupied with the principal activities of their respective departments and agencies, and with duties imposed by membership on other committees, to devote their continuing attention to the functions of the Council as envisioned by the committee when it recommended the inclusion in the act of subsection 274h in 1959.

On March 20, 1970, the Chairman of the Joint Committee wrote the following letter to the Federal Radiation Council.

[1] Executive Order No. 10831, dated August 17, 1959.

Congress of the United States,
Joint Committee on Atomic Energy,
Washington, D.C., March 20, 1970

Hon. Robert H. Finch,
Chairman, Federal Radiation Council,
Federal Office Building, No. 7, Washington, D.C.

Dear Mr. Chairman: On January 28, 1970, you had occasion to write to Senator Muskie, chairman of the Subcommittee on Air and Water Pollution of the Public Works Committee, relative to testimony of Dr. Gofman and Dr. Tamplin before that subcommittee. Also on January 28, 1970, Dr. John Gofman appeared as a witness before the Joint Committee on Atomic Energy in the course of this committee's hearings on the environmental effects of producing electric power, and he presented written testimony in support of his contention that there should be an immediate ten-fold reduction to the Federal Radiation Council guidelines for radiation exposure to the population at large. Dr. Gofman's written material consisted on nine documents which are listed on the attachment to this letter; he stated that the material was being furnished concurrently to the Federal Radiation Council for review.

I understand from your letter to Senator Muskie that as Chairman of the FRC you have recommended that the Council undertake a complete review of the present FRC guidelines in the light of all available scientific information. As chairman of the Joint Committee on Atomic Energy, I thoroughly believe in the advisability of a full-scale review. My belief is not motivated by the views of Dr. Gofman and Tamplin; rather, it has seemed to me that the effective discharge of FRC's responsibilities under section 274h. of the Atomic Energy Act of 1954, as amended, should entail thorough periodic reviews to take advantage of factual and meaningfully evidentiary developments. My own thought is that a complete reexamination should, as a minimum, be conducted every 5 years. FRC's knowledgeable conclusions, following such a review and evaluation on a sound scientific basis, should serve to reinforce general confidence in the integrity of FRC's performance of its statutory duties, as well as to help Federal agencies and the public who will be affected by the guidelines.

I would expect that such reviews of radiation protection guidelines will be conducted in accordance with the highest procedural and substantive standards of true scientific inquiry.

Please let this committee know what the FRC's plans are in regard to the review of the guidelines for radiation protection. Your cooperation in this important matter is appreciated.

I am sending a copy of this letter to the other members of the Council.

Sincerely yours,

Chet Holifield, *Chairman*

FRC's reply was to the effect that a review of the guidelines was in progress. The review has apparently not yet been completed.

The committee firmly believes that the time has come to abolish the Federal Radiation Council and to substitute for the present text of subsection 274 h. of the Atomic Energy Act new, detailed requirements

in regard to the need for a continuing, comprehensive review of radiation protection standards and the bases therefor. The National Council on Radiation Protection and Measurements, known in 1959 when subsection 274 h. was enacted into law as the National Committee on Radiation Protection and Measurements, and thereafter specially recognized by the Congress under its revised name, has informally advised the committee that it would be willing to enter into a contractual arrangement with a Government agency to carry out the functions specified in the revised provisions of subsection 274 h. in the bill. These functions would include (i) the conduct by the NCRPM of a full-scale review of the radiation protection guides presently in effect by virtue of the recommendations of the FRC, and of all available scientific information; (ii) the preparation and submittal by the NCRPM to the executive branch and to the Congress, by December 31, 1970, of its first complete report of its review activities, including its recommendations respecting basic radiation protection standards; (iii) the submittal by the NCRPM of annual, and other, reports thereafter; and (iv) the prompt publication of these reports by the Government agency or by the NCRPM.

The revised subsection 274 h. also calls for an arrangement with the National Academy of Sciences for a comprehensive and continuing review of the biological effects of radiation on man and the ecology. The work of the Academy would be coordinated with the functions of the NCRPM. The committee has been informally advised by the Academy that it would be agreeable to entering into a contractual arrangement with a Government agency to perform the required service.

The committee visualizes that the contracts may be for an extended period of years, perhaps about 5 years subject to renewal by mutual agreement of the parties, and on a cost basis subject to the availability of appropriations.

These two unique and preeminent scientific bodies are the most knowledgable collection of experts in the fields of radiation and effects of radiation. The arrangements would require that their work be carried out in accordance with high substantive and procedural standards of sound scientific investigation and findings. Their publicized reports and findings should create and maintain the most solid and credible foundation for basic radiation protection standards that can be realistically achieved. (See Appendix.)

The committee intends that under the arrangements the NCRPM and the NAS will concern themselves essentially with information and matters pertaining to the "hard" sciences, as distinguished from sociological or "soft" science considerations. The latter considerations, including the sociological aspects of such factors as "risk-benefit," would be identified and dealt with by a Government agency having authority to establish radiation protection standards. Under the revised subsection 274 h., all of these matters pertaining to basic radiation protection standards pertinent to the health and safety aspects of exposure to radioactivity resulting from the development, use or control of atomic energy would be promptly publicized and reported to the Joint Committee and made available to the public.

The contracting Government agency may, in the discretion of the President, be the Environmental Protection Agency recently proposed by the President in Reorganization Plan No. 3—should this plan come into effect pursuant to law—or the Atomic Energy Commission, or another Government agency or agencies. Any Government agency or agencies designated by the President may administer the contractual arrangements.

PART III

LEGISLATIVE HISTORY

Ten years after the Atomic Energy Act of 1954 became law, the Joint Committee recommended, and there was enacted into law, the Private Ownership of Special Nuclear Materials Act (Public Law 88-489, Aug. 26, 1964). For the first time persons were permitted to own special nuclear material; the Commission was required to phase out its distribution of such material by lease.

In the processing and refining chain from raw material to the enriched uranium used as a fuel for nuclear powerplants, the AEC's gaseous diffusion plants at Oak Ridge, Tenn., Paducah, Ky., and Portsmouth, Ohio, are still the exclusive provider of toll enriching services. The Private Ownership of Special Nuclear Materials Act authorized the Commission to enter into arrangements for the furnishing of enrichment services to domestic licensees and to others abroad; the applicable provisions were set forth in subsection 161 v., as follows:

> v. (A) enter into contracts with persons licensed under sections 53, 63, 103 or 104 for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission; and
>
> (B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to section 123 while comparable services are made available pursuant to paragraph (A) of this subsection: *Provided*, That (i) prices for services under paragraph (A) of this subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis which will provide reasonable compensation to the Government. *And provided further*, That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

Provided, That before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

Pursuant to the requirement of this subsection, proposed criteria were submitted by the Commission in June 1966, and following extensive hearings by the committee were adopted on December 23, 1966. Among other things, these criteria set forth the basis for the price to be charged for the enrichment services and specified a ceiling price of $30 per separative work unit; the ceiling price was made subject to escalation for power and labor costs.

Committee Comments

On November 10, 1969, the President announced that he had asked the AEC to operate its diffusion plants as a separate organizational entity within the AEC "in a manner which approaches more closely a commercial enterprise." The White House release stated that the President's decision was "based on his belief that the Federal Government's responsibility for uranium enrichment as the owner-operator of the Nation's only enrichment facilities eventually should be ended." It further stated that the President would not seek legislation at this time to authorize sale of the facilities to private industry.

The chairman of the Joint Committee issued a statement the same day in response to the release from the White House. Included in his comments were the following remarks:

> Before the Congress would even consider taking such a major step, there isn't the slightest doubt in my mind that it would want to put any such proposal under a microscope in order to assure the protection of the public interest.
>
> I want to assure interested members of the public that any significant proposed changes in ownership of the plants will be the subject of full, complete, and comprehensive Joint Committee public hearings to consider all of the factors involved before the legislative branch approves, disapproves, or modifies any such proposals.

It was clear then, as it is now, that the transfer of the gaseous diffusion plants to private ownership cannot be legally effected without an enabling statute. The President has not as yet proposed any legislation to accomplish his intended purpose.

On June 11, 1970, the Commission submitted to the Joint Committee a proposed amendment to the existing criteria for pricing enriching services and a proposed increase in the price per separative work unit. The proposed amendment to the criteria was submitted pursuant to the requirement in subsection 161 v. that before the Commission establishes criteria (including revisions to criteria theretofore established) "the proposed criteria shall be submitted to the Joint Committee and a period of 45 days shall elapse while Congress is in session * * * unless the Joint Committee, by resolution in writing waives the conditions of * * * such 45-day period." The proposed increase in price would change the price of a separative work unit from $26 to $28.70. Proposed increases in price within duly established criteria are not required by subsection 161 v. to be submitted to the Joint Committee for review.

The amendment to the criteria proposed by the Commission would change the basis for computing the charge for separative work from one of cost recovery by AEC to a basis which, according to the AEC, would be more closely comparable to a commercial operation. Essentially as set forth in the amendment to the criteria, the new basis for pricing would consist of the following:

> In recognition of the commercial nature of the primary market to be served, and of the fact that the existing facilities were constructed primarily for noncommercial markets, AEC's charge for enriching services will be established at the level estimated to be equivalent to the charge for separative work performed in new uranium enrichment facilities designed, constructed, and operated primarily to meet commercial markets, using debt-equity ratios, rates of return on investment, and appropriate allowances for Federal corporate income taxes, State and local taxes and insurance deemed by the Commission to be appropriate for a private industrial enriching enterprise.
>
> AEC will review periodically the charge for enriching services on the basis of (a) updated projections of the cost of separative work produced in a new enriching plant and (b) the cost of money in the private sector of the economy. As a result of such reviews, AEC will make any appropriate revisions in the charge for enriching services in accordance with the foregoing basis but within the limitations of the ceiling price of $30 plus escalation for the cost of power and labor).

Public hearings were held by the Joint Committee on June 16 and 17, 1970, to consider the AEC submittal of amended criteria. On June 16, testimony was received from the following witnesses:

Commissioner Wilfrid E. Johnson
Commissioner James T. Ramey
Commissioner Theos J. Thompson
Joseph F. Bouchard, General Counsel
John P. Abbadessa, Controller

On June 17, representatives of the General Accounting Office appeared and provided preliminary views on the salient aspects of the AEC submittal.

These representatives were:

Dean K. Crowther, Assistant Director, Civil Division (AEC Audit)
Daniel F. Stanton, supervisory auditor
Thomas P. McCormick, supervisory auditor

Also, on July 16, an executive hearing was held by the committee to receive testimony from the AEC on the classified aspects of the gas centrifuge process for uranium enrichment.

The public hearings are printed in the Joint Committee publication entitled "Uranium Enrichment Pricing Criteria. Hearings June 16 and 17, 1970." This print also contains the comments of a number of individuals and companies in the nuclear industry; the committee invited the expression of views by interested people and organizations.

The criteria that the Commission has adopted in December 1966, and which have been in use since, had been carefully reviewed by the General Accounting Office and by the Joint Committee before they were established.[1] These criteria accurately implemented the fundamental concept apparent during the 1964 hearings[2] preceding the enactment into law of subsection 161 v. and during the 1966 hearings[3] prior to the establishment of the criteria, and described in the Joint Committee's report accompanying the Private Ownership Act.[4] This fundamental concept was that the price to be charged by the AEC should be based on the recovery of appropriate Government costs averaged over a period of years in order to provide a stable pricing situation. Additionally, the legislative background discloses the following underlying intent, which GAO in its July 17, 1970, report to the Joint Committee correctly describes as follows:

> The legislative history of this subsection 161 v. shows an intent to fix a charge based generally upon the recovery of the Government's costs as stated on page 2 of the House Report 1762. The only concern of the Joint Committee on Atomic Energy was that the reduction or possible elimination in military needs for enriched uranium might cause the prices required to recover costs to increase so significantly that the development of atomic power would be impeded. The statements on page 18 of the House report with respect to flexibility and consideration of the national interest are directed specifically and solely to this particular problem.
>
> In our opinion, the statements concerning flexibility and national interest would indicate that they relate only to the recovery of less-than-full costs and merely create one exception to the earlier positive statement on page 2 of the report that the charge for enriching uranium will be "based generally upon the cost of doing necessary processing or separative work in the Government's diffusion plants." We think the statement on page 2 reasonably could be interpreted as reflecting an intent to preclude the setting of prices so as to recover more than the Government's full costs over a period of time. * * *

The criteria established by the Commission in December 1966 complied with the provisions and the spirit of subsection 161 v. of the Atomic Energy Act. The Commission proposed to implement the

[1] "Uranium Enrichment Services Criteria and Related Matters" JCAE hearings, 89th Cong., second sess., August 1966.

[2] "Private Ownership of Special Nuclear Materials, 1964", JCAE hearings, 89th Cong., second sess., June 1964.

[3] Senate Report No. 1325, House Report No. 1762, 89th Cong., second sess., dated August 3, 1966.

Government cost factors in the criteria by employing an averaging technique to be applicable for the period 1966 through 1975. The Commission's criteria also provided (par. 5(d)) for a ceiling price of $30 subject only to escalation for the costs of electric power and labor. In establishing the price the AEC planned to utilize a contingency factor to provide for risks of operation and estimates. In regard to the Commission's plan the GAO, in a 1966 report to the Joint Committee, expressed the view that:

> * * * the provisions having an effect on pricing afford a reasonable basis for recovering, over a long term of operation, the Government's cost of furnishing enrichment services * * * we believe that the proposed ceiling charge is adequate to permit recovery of appropriate Government costs projected over a number of years.

Following further study and computations, the AEC announced on September 21, 1967, that the price it would charge for enriching services would be $26 per separative work unit, subject to change on 6 months' notice but within the guaranteed $30 ceiling, plus the escalation factor. In reply to the specific request of the Joint Committee, the GAO stated in a letter report of September 25, 1967, to the Joint Committee that the announced $26 price was "adequate to permit recovery of appropriate Government costs projected over a number of years and is consistent with the Commission's criteria published in the Federal Register on December 23, 1966." The GAO also commented as follows:

> Further, considering that the charge also provides a margin for contingencies, we do not see a basis for asserting that a subsidy is being provided to the domestic or foreign nuclear industries, or any portion thereof.

Thus, the criteria and the implementing price fully accorded with the legislative intent underlying the provisions of subsection 161 v. of the Atomic Energy Act.

As soon as the Joint Committee received AEC's proposed amendment to the criteria on June 11, 1970, it requested the General Accounting Office to subject the submittal to a very careful review. The Report to the Joint Committee by the Comptroller General on July 17, 1970, contains the results of the GAO review. The report states that based on GAO's interpretation of the legislative history of subsection 161 v. the proposed amendment to the basis for pricing does not appear to be consistent with the intention of the Congress. Among other things, GAO states:

> Because of the questionable need for, and the applicability of, the proposed criteria and GAO doubts as to its clear authorization, GAO does not believe the proposed criteria should be adopted without further action by the Congress.

In the judgment of the Joint Committee, the recently proposed changes to the basis for pricing enriching services are contrary to law because they are clearly inconsistent with the intent of the Congress. The purpose of 161 v. was to provide for reasonable compensation to the Government on the basis of the recovery of appropriate Government costs averaged over a period of years. The new criteria scrap this basis. The substitute so-called criteria are composed of a number of

analogous factors related to a fancifully conceived, privately owned plant of the future. The excessive vagueness of the new criteria also contravene the will of the Congress because under the statute proposed criteria are required to be submitted to the Joint Committee for review and the intent was to give the Congress the opportunity to review something that had some definite meaning or predictable range of consequences.

With the new so-called criteria vague enough to be essentially meaningless, the proposed new price of $28.70 may, under the revised criteria, be increased at any time or times without further revisions to the criteria requiring submittal to the committee. Such increases would apparently be motivated by the desire to increase potential enrichment revenues sufficiently to make private investment in the existing or new enriching plants more attractive—at the expense of the fuel buyer and the public. And, when it suits the AEC, any additional amendment to the criteria could readily be proposed to raise the ceiling price of $30, such a proposal could easily be justified if the presently proposed criteria are established, on the ground that the $30 factor relates to the Government's costs whereas the principal basis for pricing does not. The $30 ceiling factor would doubtlessly only temporarily be endured; once the major hurdle represented by a pricing system based on the recovery of the Government's cost is surmounted, the road ahead to major price increases would be a clear one.

Under the purview of subsection 161 v. as intended by the Congress, and under the criteria in effect since 1966—which would continue in effect under the revision proposed in the bill—any submittal of revised criteria to raise the $30 ceiling would have to be supported by a showing of substantial increase in Government costs, aside from power and labor costs which are now covered by escalation factors.

Aside from the question of legality, in the Committee's judgment it is unnecessary and unwise to advance a new and ambiguous formula for pricing nuclear enriching services as a precedent to selling the Government-owned diffusion plants. Hypothetical estimates of prices under commercial-type operation can be made independently of a change in the present statutory basis for computing the enrichment services charge. The GAO noted that what the AEC had recommended by way of criteria changes was not essential to the fundamental policy—commercial-like operation—which it was intended to implement. The report stated:

> We believe that, with respect to the new criteria providing for operating and cost experience on a commercial basis that will assist private industry in making decisions regarding the possible transfer to private industry of enrichment plants, data concerning the projected operation of a conceptual plant can be accumulated with equal facility under either [existing or proposed] criteria.

AEC testified in June that Government accounting practices for the gaseous diffusion plants would continue to be performed in the usual Government cost accounting mode and comparison with the new criteria would be through supplementing financial statements to yield "commercial" pricing data. It is obvious that so-called commercial statistics are a function of accounting techniques and, however useful they may be, there is no basis for the argument that the development

of hypothetical cost factors would justify modification of the entire pricing structure.

Under the criteria in effect since 1966, which are consistent with the letter and spirit of subsection 161 v., the AEC, in order to smooth out unnecessary fluctuations, computed cost data over a 10-year period 1966 to 1975. Such 10-year period represented a "reasonable period of time" within the intent of the Congress as apparent from the legislative history of subsection 161 v. Such period, together with the allocation of costs to standby and excess capacity, were approved by the GAO in 1966 and 1967 as consistent with the criteria and as adequate to assure recovery of Government costs. In its current report GAO expresses the opinion that a price increase may be warranted. The Committee is agreeable to an appropriate increase in price under the criteria established and in use since 1966.

The Joint Committee believes it advisable for the Commission, within the context of the applicable criteria, to reassess the enrichment services charge at such fixed intervals and utilizing such averaging periods as, in the opinion of the Commission, are reasonably calculated to assure recovery of appropriate Government costs, with relative price stability, and the contingency factors necessary to provide for cost variations.

The Joint Committee is deeply concerned about the Commission's presently proposed amendment to the criteria. It constitutes a deliberate effort to thwart the will of Congress and it would accelerate the inflationary trend in the price of all other fuels. Heretofore, the stable pricing system for enriching uranium has represented a steadying influence against the upward fluctuations in the prices of other fuels.

The bill would amend subsection 161 v. to support and affirm with greater clarity the intention of the Congress as correctly discerned by the GAO in its July 17, 1970, report. The Committee expects that this reiteration of congressional intent would preclude any further attempt to deviate from the purpose of the statute.

Under the clarified version of subsection 161 v., it is intended that the criteria in effect since 1966 will continue to be in effect unless and until the Commission proposes revisions thereto that conform to the requirements of the statute and submits them to the Committee for the 45-day review period. The Committee recommends that the Commission consult with the General Accounting Office in regard to any such proposed revisions that it may deem desirable. The Joint Committee would be kept fully informed, and any report furnished the Commission by the GAO would also be made available to the Committee.

Section-by-Section Analysis

Section 1 of the bill amends paragraph (4) of subsection 31 a. of the Atomic Energy Act of 1954, as amended, which now reads as follows:

> (4) utilization of special nuclear material, atomic energy, and radioactive material and processes entailed in the utilization or production of atomic energy or such material for all other purposes, *including industrial uses*, the generation of

usable energy, and *the demonstration of the practical value of utilization or production facilities for industrial or commercial purposes*, and (italic added)

The italicized portions would be re-worded to accord with the subsequent provisions of the bill respecting the elimination of the concept of a finding of "practical value" and concerning the licensing of utilization and production facilities for industrial or commercial purposes. The phrase "including industrial uses" would be revised to "including industrial or commercial uses" and the phrase "the demonstration of the practical value of utilization or production facilities for industrial or commercial purposes" would be changed to "the demonstration of advances on the commercial or industrial application of atomic energy." These changes are essentially technical in nature; they do not effect any major substantive alteration of subsection 31 a. of the Act.

Section 2 of the bill amends the second sentence of section 56 of the Atomic Energy Act of 1954, as amended, which now provides:

> The Commission shall also establish for such periods of time as it may deem necessary but not to exceed ten years as to any such period, guaranteed purchase prices for uranium enriched in the isotope 233 produced in a nuclear reactor by a person licensed *under section 104* and delivered to the Commission within the period of the guarantee. (Italic added.)

The italicized phrase would be revised to "under section 103 or section 104". With respect to guaranteed purchase prices for U233, which the Commission has recently established for a 5-year period, it is appropriate and advisable that these apply to licensed nuclear facilities, including, as provided for in the bill, those licensed under section 103.

Section 3 of the bill amends section 102 of the Atomic Energy Act of 1954, as amended, to eliminate the requirement for a finding by the Commission "that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or commercial purposes" as a condition precedent to the "commercial" licensing of such type of facility under section 103.

Under the revised section 102, all utilization and production facilities for industrial or commercial purposes, with two exceptions, would be subject to licensing under section 103. The two exceptions would be (i) facilities constructed or operated under an arrangement with the Commission entered into under the cooperative power reactor demonstration program, unless the applicable law required licensing under section 103, and (ii) facilities covered by a subsection 104b. construction permit or operating license before and at the time the bill is enacted into law. In regard to (i), the bases for arrangements under the cooperative power reactor demonstration program, which program has for many years been separately covered in the AEC's authorization acts, are carefully reviewed by this committee. Should it be desirable in the case of any contemplated future cooperative demonstration project to require that the nuclear facility involved be licensed under section 103 instead of subsection 104b., this could be done in the enabling statute. In regard to (ii), the committee believes it would impose an unnecessary hardship on subsection 104b

licensees to compel them to convert their permits to section 103 licenses, the matter of potential antitrust review of certain subsection 104 licenses is specifically dealt with in section 6 of the bill, and is discussed below, and it appears to the committee that no useful purpose could be served by compelling any conversion to section 103. The committee here visualizes that amendments, as such, to an existing subsection 104b. license will not affect the exception to section 103 licensing. If, however, the facility is to be modified to such a degree as to constitute a new or substantially different facility, as provided in a regulation or order issued by the Commission, the exception to section 103 licensing is not intended to be applicable to the necessary license amendment. Aside from these two exception categories—demonstration facilities under the cooperative power reactor demonstration program and previously licensed 104b. facilities—any license for a utilization or production facility for industrial or commercial licenses would be issued under section 103, unless some future law otherwise specifically provides.

Section 4 of the bill amends the first sentence of subsection 103 a. of the Act which now reads as follows:

During the hearings pertaining to this legislation there was a suggestion that there ought to be a clearer indication of Congressional intent that section 272 of the Atomic Energy Act did not constitute a modification of the Federal Power Act. The Joint Committee very carefully considered this item and concluded that the legislative history of section 272 indicated quite clearly that the committee and the Congress had not intended thereby to modify or affect in any way the provisions of the Federal Power Act. The committee unanimously reconfirms this intention. In effect section 272 should be read as if the clause "to the extent therein provided" appeared at the end of the text.

> *Subsequent to a finding by the Commission as required in section 102*, the Commission may issue licenses to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 123, such type of utilization or production facility. (Italics added.)

The italicized clause would be deleted, since the requirement for a "practical value" finding would be eliminated. The concluding clause "such type of utilization or production facility" would be changed to "utilization or production facilities for industrial or commercial purposes." The revised version would provide for the issuance to persons of "commercial" licenses with respect to "utilization and production facilities for industrial or commercial purposes."

Section 5 of the bill would revise subsection 104 b. of the act to authorize the issuance of licenses under that subsection for utilization or production facilities for industrial or commercial purposes (i) where specifically authorized by law, or (ii) where the facility is constructed or operated under an arrangement with the Commission entered into under the cooperative power reactor demonstration program, and the applicable statutory authorization does not require licensing under section 103, or (iii) where the facility was theretofore licensed under subsection 104 b.

In revising the text of subsection 104 b., the committee has retained the present requirement that "the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under the Act," but deleted the balance of the present text because subsection 104 b. licenses would not be convertible to section 103 licenses under the bill, and because there is no longer any need to provide for priority of licenses to these activities which will, in the opinion of the Commission, lead to major advances in the application of atomic energy for industrial or commercial purposes."

In retaining the present language respecting the imposition of the minimum amount of regulations and terms of license, the committee wishes to emphasize that the only purpose here was to reiterate, not to make new law; thus, requirements of applicable laws, such as the National Environmental Policy Act of 1969 (Public Law 91-190) and the Water Quality Improvement Act of 1970 (Public Law 91-224), enacted subsequent to the Atomic Energy Act of 1954, remain unaffected by the reiteration of this feature of the present provisions of subsection 104 b.

The bill does not affect in any way subsections 104 a., 104 c., or 104 d., or the caption of section 104, "Medical Therapy and Research and Development."

The committee is aware that university-licensees under subsection 104 c., and other licensees under subsections 104 a. or 104 c., sometimes use these reactors for industrial or commercial purposes. It is the intention of the committee that such insubstantial use not affect licensing under section 104; however, should the Commission find that any facility so licensed is being used substantially for industrial or commercial purposes, then the Commission shall determine whether such use is sufficiently substantial to entail licensing under section 103.

Section 6 of the bill clarifies and revises subsection 105 c. of the act. The bill does not affect in any way the important features contained in the provisions of subsections 105 a. and 105 b. of the 1954 act. These subsections remain separate, distinct, and wholly unaffected by the proposed revised subsection 105 c. For example, the Attorney General's advice under the new subsection 105 c., and the participation by the Attorney General or his designee in the proceedings referred to in paragraph (5) of the subsection, would be completely separate and apart from any actions the Attorney General may deem advisable in relation to the antitrust laws referred to in subsection 105 a. Also, under paragraph (1) of the new subsection 105 c., the Attorney General may, in his discretion, should he consider that his advice might prejudice planned actions under the antitrust laws referred to in subsection 105 a., or for any other reason, render no advice to the Commission.

Paragraph (1) of revised subsection 105 c., requires the Commission promptly to transmit to the Attorney General a copy of any license application to construct or operate a utilization or production facility under section 103. Paragraph (1) also requires the Commission promptly to transmit to the Attorney General written requests for potential antitrust review which are made by any persons who intervened, or who sought by timely written notice to the Commission to intervene, in the construction permit proceeding for a facility licensed under subsection 104 b. prior to the enactment of the bill into law.

The Attorney General would have "a reasonable time, but in no event to exceed 180 days after receiving a copy of such application or written request" to "render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission" with respect to antitrust considerations. The committee expects full and expeditious cooperation by the applicant, the Commission and the Attorney General. To facilitate an early review by the Attorney General, the committee suggests that, promptly upon enactment into law of this bill, the Commission and the Attorney General work out a suitable understanding in regard to the nature of the information the Attorney General would wish to have at the outset. The Commission could then plan to obtain the information from the applicant at the same time that the application is submitted to the Commission.

The advice which the Attorney General may provide would be advice which he "determines to be appropriate in regard to the finding to be made by the Commission." The advice need not necessarily fall within the orbit of the present clause "tend to create or maintain a situation inconsistent with the antitrust laws." If the Attorney General deems it to be appropriate, he need not render any advice, in which case he should so inform the Commission. If he renders advice, paragraph (1) requires that it include "an explanatory statement as to the reasons or basis therefor"; this requirement is only fair and reasonable, and it should help facilitate and expedite the subsequent procedure.

Paragraph (2) of revised subsection 105 c. provides that the potential antitrust review shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 "unless the Commission determines such review is advisable on the ground that significant changes have occurred in the licensee's activities or proposed activities subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility." The committee sees no sense in two such exercises unless there have been significant intervening changes. The committee expects that the Commission will consult with the Attorney General in regard to its determination respecting significant changes. The term "significant changes" refers to the licensee's activities or proposed activities; the committee considers that it would be unfair to penalize a licensee for significant changes not caused by the licensee or for which the licensee could not reasonably be held responsible or answerable.

The committee recognizes that applications may be amended from time to time, that there may be applications to extend or renew a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for purposes of triggering subsection 105 c., other applications which may be filed during the licensing process.

Paragraph (3) provides that with respect to any Commission permit issued under subsection 104 b. before enactment of the bill into law, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding to raise the prelicensing antitrust issue will have the right to obtain an antitrust review under this subsection; to do this, such person must make a written request to the Commission within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or the date of enactment into law of this subsection, whichever is later. It is the committee's intent that such potentially eligible intervenors must be persons who could have qualified as intervenors under the Commission's rules at the time of the initial attempt to intervene if prelicensing antitrust review were then properly for Commission consideration.

Paragraph (4) provides that, upon the request of the Attorney General, the Commission shall furnish or cause to be furnished "such information as the Attorney General determines to be appropriate" for the advice he is to give. The committee expects that the Commission will make every reasonable effort to provide information sought by the Attorney General.

There is an important aspect that the committee considers must be recognized and especially dealt with in a prudent and responsible manner, and that is the matter of proprietary information or data. The system in subsection 105 c. as in connection with other aspects of the licensing procedure, should be such as to provide reasonable safeguards against any leaks or unwarranted dissemination of information or data of a proprietary nature provided by or in behalf of the applicant, and whether or not the applicant is the proprietor.

Paragraph (5) requires that the Commission promptly publish in the Federal Register the advice it receives from the Attorney General. It further provides that if the Attorney General "advises that there may be adverse antitrust aspects and recommends that there be a hearing" that the Attorney General or his designee may participate as a party "in the proceedings thereafter held by the Commission on each licensing matter in connection with the subject matter of his advice." Such proceedings must be held by the Commission if the Attorney General advises that there may be adverse antitrust aspects and recommends a hearing. Also, if he does not so advise and recommend, but antitrust issues are raised by another in a manner according with the Commission's rules or regulations, the Commission would be obliged to give such consideration thereto as may be required by the Administrative Procedure Act and the Commission's rules or regulations. Paragraph (5) requires that the Commission "give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter." Whether or not the Attorney General appears as a party, all advice and information provided by the Attorney General that is utilized by the Commission in arriving at its finding must be made a matter of record. Paragraph (5) further requires that the Commission "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." This finding by the Commission is required only in those cases where

the Attorney General advises there may be adverse antitrust aspects or antitrust issues are raised by another in a manner according with the Commission's rules and regulations.

With respect to the above finding, although the words "reasonable probability" do not appear in the standard, the concept of reasonable probability is intended to be a silent partner to the factors in the standard. The standard must be considered in the focus of reasonable probability—not certainty or possibility.

The standard pertains to the activities of the license applicant. The activities of others, such as designees, fabricators, manufacturers, or suppliers of materials or services, who, under some kind of direct or indirect contractual relationship may be furnishing equipment, materials or services for the licensed facility would not constitute "activities under the license" unless the license applicant is culpably involved in activities of others that fall within the ambit of the standard.

Paragraph (6) provides that if the Commission finds "the activities under the licence would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105 a." that the Commission "shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest." On the basis of all its findings—the finding under paragraph (5) and its findings under paragraph (6)—the Commission would have the authority "to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate." While the Commission has the flexibility to consider and weigh the various interests and objectives which may be involved, the committee does not expect that an affirmative finding under paragraph (5) would normally need to be overridden by Commission findings and actions under paragraph (6). The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accommodating the other public interest concerns found pursuant to paragraph (6). Normally, the committee expects the Commission's actions under paragraph (5) and (6) will harmonize both antitrust and such other public interest considerations as may be involved. In connection with the range of Commission discretion, the committee notes that pursuant to subsection 105 a. the Commission may also take such licensing action as it deems necessary in the event a licensee is found actually to have violated any of the antitrust laws. Of course, in the event the Commission's finding under paragraph (5) is in the negative, the Commission need not take any further action regarding antitrust under subsection 105 c.

Paragraph (7) of revised subsection 105c. substantively carries over from the present text the exception that the Commission "with the approval of the Attorney General, may except from any of the requirements of this subsection such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws."

Paragraph (8) endeavors to deal sensibly with those applications for a construction permit which, upon the enactment of the bill into law,

would have to be converted to applications under section 103. In some cases, there might well be hardships caused by delays due to the new requirement for a potential antitrust review under revised subsection 105c. Paragraph (8) would authorize the Commission, after consultation with the Attorney General, to determine that the public interest would be served by the issuance of a permit containing conditions to assure that the results of a subsequently conducted antitrust review would be given full force and effect. Paragraph (8) similarly applies to applications for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3).

Section 7 of the bill effects a perfecting change in subsection 161 a of the act to delete the reference to a finding of practical value.

Section 8 of the bill changes several words in the first proviso of subsection 161 v. to support the intention of the Congress when this subsection was enacted into law. The clarifying provision expressly indicates that the prices for enriching services "shall be on a basis of recovery of the Government's costs over a reasonable period of time." As the legislative history of this statute discloses, and as the Comptroller General has discerned in his report to the Joint Committee on July 17, 1970, it was intended that the price to be charged by the AEC for toll enrichment should be based on the recovery of appropriate Government costs averaged over a period of years. Under the clarified version of subsection 161 v., the committee intends that the criteria in effect since 1966 will continue to be in effect subject to any Commission proposed revisions thereto that conform to the requirement of the statute and are submitted to the committee for its review. The committee expects that the Commission will consult with the General Accounting Office in regard to any such proposed revisions.

Section 9 of the bill amends subsection 182 c. to delete the phrase "within transmission distance" and to amend the general notice provision.

Section 10 of the bill amends the first sentence of subsection 191 a. which now requires that of the three members of any Atomic Safety and Licensing Board two members "shall be technically qualified," and the third "shall be qualified in the conduct of administrative proceedings". Section 10 would permit two members to have "such technical or other qualifications as the Commission deems appropriate to the issues to be decided"; the third member would continue to be one "qualified in the conduct of administrative proceedings."

Section 11 of the bill revises the present text of subsection 274 h. to abolish the Federal Radiation Council and to provide for contractual arrangements with the National Council on Radiation Protection and Measurements and with the National Academy of Sciences. Under the revised text, any Government agency designated by the President for the purpose would be authorized and directed to enter into and administer an arrangement with the National Council on Radiation Protection and Measurements for a comprehensive and continuing review of basic radiation protection standards, and the scientific bases therefor, pertinent to the health and safety aspects of exposure to radioactivity resulting from the development, use or control of atomic energy. Any Government agency designated by the President for the purpose would also be authorized to enter into and administer an arrangement with the National Academy of Sciences for a comprehensive and continuing review of the biological

effects of radiation on man and the ecology in order to obtain information pertinent to basic radiation protection standards. The revised subsection 274 h. specifies that the respective arrangements shall require the conduct by the National Council on Radiation Protection and Measurements and by the National Academy of Sciences, respectively, of a number of functions relative to the fields of radiation and the biological effects of radiation. Under the arrangements the National Committee on Radiation Protection and Measurements and the National Academy of Sciences will concern themselves essentially with information and matters relative to the "hard" sciences, as distinguished from sociological or "soft" science considerations. The latter considerations would be identified and dealt with by the Government agency having authority to establish radiation protection standards. All matters pertaining to basic radiation protection standards pertinent to the health and safety aspects of exposure to radioactivity resulting from the development, use or control of atomic energy would be promptly reported to the Joint Committee. The contracting Government agency may, in the discretion of the President, be any Government agency or agencies; the contractual arrangements may be administered by any Government agency or agencies designated by the President.

Changes in Existing Law

In accordance with clause (3) of rule XIII of the Rules of the House of Representatives, changes in existing law recommended by the bill accompanying this report are shown as follows (deleted matter is shown in black brackets and new matter is printed in italic):

Public Law 83 703

[Atomic Energy Act of 1954 as Amended]

"Sec. 31. Research Assistance.—

* * * * * * *

"a. (4) utilization of special nuclear material, atomic energy, and radioactive material and processes entailed in the utilization or production of atomic energy or such material for all other purposes, including industrial *or commercial* uses, the generation of usable energy, and the demonstration of [the practicable value of utilization or production facilities for industrial or commercial purposes] *advances in the commercial or industrial application of atomic energy*, and

* * * * * * *

"Sec. 56. Guaranteed Purchase Prices.—

The Commission shall establish guaranteed purchase prices for plutonium produced in a nuclear reactor by a person licensed under section 104 and delivered to the Commission before January 1, 1971. The Commission shall also establish for such periods of time as it may deem necessary, but not to exceed ten years as to any such period, guaranteed purchase prices for uranium enriched in the isotope 233 produced in a nuclear reactor by a person licensed under *section 103 or*

section 104 and delivered to the Commission within the period of the guarantee. Guaranteed purchase prices established under the authority of this section shall not exceed the Commission's determination of the estimated value of plutonium or uranium enriched in the isotope 233 as fuel in nuclear reactors, and such prices shall be established on a nondiscriminatory basis: *Provided*, That the Commission is authorized to establish such guaranteed purchase prices only for such plutonium or uranium enriched in the isotope 233 as the Commission shall determine is produced through the use of special nuclear material which was leased or sold by the Commission pursuant to section 53.

"SEC. 102. [FINDING OF PRACTICAL VALUE] *UTILIZATION AND PRODUCTION FACILITIES FOR INDUSTRIAL OR COMMERCIAL PURPOSES.*—

[Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.]

"a. Except as provided in subsection b. and c., or otherwise specifically authorized by law, any license hereafter issued for a utilization or production facility for industrial or commercial purposes shall be issued pursuant to section 103.

"b. Any license hereafter issued for a utilization or production facility for industrial or commercial purposes, the construction or operation of which was licensed pursuant to subsection 104b. prior to enactment into law of this subsection, shall be issued under subsection 104b.

"c. Any license for a utilization or production facility for industrial or commercial purposes constructed or operated under an arrangement with the Commission entered into under the Cooperative Power Reactor Demonstration Program shall, except as otherwise specifically required by applicable law, be issued under subsection 104b."

"SEC. 103. COMMERCIAL LICENSES.—

"a. [Subsequent to a finding by the Commission as required in section 102, the Commission may] *The Commission is authorized to* issue licenses *to persons applying therefor* to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 123, [such type of utilization or production facility] *utilization or production facilities for industrial or commercial purposes*. Such licenses shall be issued in accordance with the provisions of chapter 16 and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this Act."

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"SEC. 104. MEDICAL THERAPY AND RESEARCH AND DEVELOPMENT.—

* * * * * * *

"b. [The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities involved in

the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this Act to promote the common defense and security and to protect the health and safety of the public and will be compatible with the regulations and terms of license which would apply in the event that a commercial license were later to be issued pursuant to section 103 for that type of facility. In issuing such licenses, priority shall be given to those activities which will, in the opinion of the Commission, lead to major advances in the application of atomic energy for industrial or commercial purposes.] *As provided for in subsection 102 b. or 102 c., or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this Act."*

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"SEC. 105. ANTITRUST PROVISIONS.—

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"c. [Whenever the Commission proposes to issue any license to any person under section 103, it shall notify the Attorney General of the proposed license and the proposed terms and conditions thereof, except such classes or types of licenses, as the Commission, with the approval of the Attorney General, may determine would not significantly affect the licensee's activities under the antitrust laws as specified in subsection 105 a. Within a reasonable time, in no event to exceed 90 days after receiving such notification, the Attorney General shall advise the Commission whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws, and such advice shall be published in the Federal Register. Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section.]

"(1) The Commission shall promptly transmit to the Attorney General a copy of any license application provided for in paragraph (2) of this subsection, and a copy of any written request provided for in paragraph (3) of this subsection; and the Attorney General shall, within a reasonable time, but in no event to exceed 180 days after receiving a copy of such application or written request, render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor.

"(2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 103, provided, however, that paragraph (1) shall not apply to an application for a license to operate a utilization or production

facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

"(3) With respect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection 104 b. prior to the enactment into law of this subsection, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination shall have the right, upon a written request to the Commission, to obtain an antitrust review under this section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license or the facility or the date of enactment into law of this subsection, whichever is later.

"(4) Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate for the advice called for in paragraph (1) of this subsection.

"(5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105 a.

"(6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

"(7) The Commission, with the approval of the Attorney General, may except from any of the requirements of this subsection such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws as specified in subsection 105 a.

"(8) With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under section 103, and with respect to any application for an operating license in connection with which a written request for an anti-

trust review is made as provided for in paragraph (3) the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection, provided, that any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect.

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SEC. 161. GENERAL PROVISIONS.—

* * * * * * *

"n. delegate to the General Manager or other officers of the Commission any of those functions assigned to it under this Act except those specified in sections 51, 57 b., 61, [102 (with respect to the finding of practical value),] 108, 123, 145 b. (with respect to the determination of those persons to whom the Commission may reveal Restricted Data in the national interest), 145 f., and 161 s.;

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"SEC. 161. GENERAL PROVISIONS.—

* * * * * * *

"v. (A) enter into contracts with persons licensed under sections 53, 63, 103 or 104 for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission; and

"(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to section 123 while comparable services are made available pursuant to paragraph (A) of this subsection.

Provided, That (i) prices for services under paragraph (A) of this subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis [which will provide reasonable compensation to the Government] *of recovery of the Government's costs over a reasonable period of time.* * * *

"SEC. 182. LICENSE APPLICATIONS.—

* * * * * * *

"c. The Commission shall not issue any license *under section 103* for a utilization or production facility for the generation of commercial power [under section 103,] until it has given notice in writing to such regulatory agency as may have jurisdiction over the rates and services [of] *incident to* the proposed activity[, to municipalities, private utilities, public bodies, and cooperatives within transmission

distance authorized to engage in the distribution of electric energy] *, until it has published notice of the application in such trade or news publications as the Commission deems appropriate to give reasonable notice to municipalities, private utilities, public bodies and cooperatives which might have a potential interest in such utilization or production facility,* and until it has published notice of such application once each week for four consecutive weeks in the Federal Register, and until four weeks after the last notice.

* * * * * * *

"SEC. 191. ATOMIC SAFETY AND LICENSING BOARD.—

"a. Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each [composed] *comprised of* three members, [two of whom shall be technically qualified and] one of whom shall be qualified in the conduct of administrative proceedings [.] *and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided,* to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder. The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected."

* * * * * * *

"SEC. 274. COOPERATION WITH STATES.—

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"h. [There is hereby established a Federal Radiation Council, consisting of the Secretary of Health, Education, and Welfare, the Chairman of the Atomic Energy Commission, the Secretary of Defense, the Secretary of Commerce, the Secretary of Labor, or their designees, and such other members as shall be appointed by the President. The Council shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings, participate in the deliberations of, and to advise the Council. The Chairman of the Council shall be designated by the President, from time to time, from among the members of the Council. The Council shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Council shall also perform such other functions as the President may assign to it by Executive Order]

Any Government agency designated by the President is hereby authorized and directed to enter into and administer an arrangement with the National Council on Radiation Protection and Measurements for a comprehensive and continuing review of basic radiation protection standards and the scientific bases therefor, pertinent to the health and safety aspects of exposure to radioactivity resulting from the development, use or control of atomic energy, and an arrangement with the National Academy of Sciences for a comprehensive and continuing review of the biological effects of radiation on man and the ecology in order to provide information pertinent to basic radiation protection standards. The respective scopes of the arrangements may, in the discretion of the President or the designated Government agency, also encompass exposure to the effects of radiation from sources other than the development, use or control of atomic energy. The respective arrangements shall require—

(1) the conduct by the National Council on Radiation Protection and Measurements of a full-scale review of the radiation protection guides presently in effect by virtue of the recommendations of the Federal Radiation Council, and of all available scientific information;

(2) the conduct by the National Academy of Sciences of a full-scale review of the biological effects of radiation, including all available scientific information;

(3) consultations between the National Council on Radiation Protection and Measurements and the National Academy of Sciences to assure effective coordination between these two bodies to serve the objective of the arrangements;

(4) consultations by the National Council on Radiation Protection and Measurements and by the National Academy of Sciences, respectively, with scientists outside and within the Government;

(5) the preparation and submittal by the National Council on Radiation Protection and Measurements to the President, or to the Government agency administering the arrangements, and to the Congress, by December 31, 1970, of its first complete report of its review activities, which shall also set forth its recommendations respecting basic radiation protection standards and the reasons therefor;

(6) the maintenance by the National Council on Radiation Protection and Measurements of reasonably thorough knowledge of scientific matters pertinent to basic radiation protection standards within the scope of the arrangement, including studies and research previously performed, currently in progress or being planned;

(7) such recommendations by the National Council on Radiation Protection and Measurements and the National Academy of Sciences respecting the conduct of any studies or research directly or indirectly pertinent to the basic radiation protection standards, or the biological effects of radiation on man and the ecology, under the respective scope of each arrangement, as either body deems advisable from time to time;

(8) the furnishing of scientific information and advice by the National Council on Radiation Protection and Measurements and by the National Academy of Sciences, within the respective scopes of the arrangements, to the President, Government agencies, the

States, and others, at the request of the President or the Government agency administering the arrangements;

(9) the furnishing of scientific information and advice by the National Council on Radiation Protection and Measurements and by the National Academy of Sciences, within the respective scopes of the arrangements, to the Congress pursuant to the request of any Committee of the Congress;

(10) the preparation and transmittal to the President or to the Government agency administering the arrangements, and to the Congress, by the National Council on Radiation Protection and Measurements and by the National Academy of Sciences, at the end of each calendar year subsequent to 1970, of a report covering their respective review activities during the year; the report by the National Council on Radiation Protection and Measurements shall also set forth any significant scientific developments relative to basic radiation protection standards, including any recommendations, and the report by the National Academy of Sciences shall set forth any significant scientific developments bearing on the biological effects of radiation on man and the ecology, including recommendations;

(11) the preparation and transmittal to the President, or to the Government agency administering the arrangements, and to the Congress, by the National Council on Radiation Protection and Measurements, of a prompt report of any significant changes which it deems advisable to recommend in regard to its previous recommendations respecting basic radiation protection standards or the scientific bases therefor and not theretofore identified in its reports; and

(12) the conduct of the activities of the National Council on Radiation Protection and Measurements and of the National Academy of Sciences, under the respective arrangements, in accordance with both substantive and procedural standards of sound scientific investigation and findings.

Reports received from the National Council on Radiation Protection and Measurements and the National Academy of Sciences under the arrangements shall be promptly published by the Government agency administering the arrangements. All recommendations, in such reports by the National Council on Radiation Protection and Measurements, respecting basic radiation protection standards pertinent to the health and safety aspects of exposure to radioactivity resulting from the development, use or control of atomic energy, shall be carefully considered by any Government agency having authority to establish such standards, and, within a reasonable period of time, such Government agency shall submit to the Joint Committee a report setting forth in detail its determinations respecting the recommendations and the measures, revisions, or other actions it proposes to take, adopt, or effect in relation to the recommendations.

APPENDIX

A. National Council on Radiation Protection and Measurements

I. The National Committee on Radiation Protection and Measurements, referred to in subsection 274 h. of the Atomic Energy Act of 1954, as amended by Public Law 86-373, 86th Cong., first session, September 23, 1959, came into existence in September 1929.

II. By Public Law 88-376, 88th Cong. second session, July 14, 1964, the National Committee on Radiation Protection and Measurements was incorporated as the National Council on Radiation Protection and Measurements. Public Law 88-376 provides as follows:

AN ACT To incorporate the National Committee on Radiation Protection and Measurements

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

C. M. Barnes, Rockville, Maryland;
E. C. Barnes, Edgewood, Pennsylvania;
V. P. Bond, Setauket, Long Island, New York;
C. B. Braestrup, New York, New York;
J. T. Brennan, Bethesda, Maryland;
L. T. Brown, Bethesda, Maryland;
R. F. Brown, San Francisco, California;
F. R. Bruce, Oak Ridge, Tennessee;
J. C. Bugher, Rio Piedras, Puerto Rico;
G. R. Chadwick, Upper Marlboro, Maryland;
R. H. Chamberlain, Philadelphia, Pennsylvania;
J. F. Crow, Madison, Wisconsin;
R. L. Doan, Idaho Falls, Idaho;
C. L. Dunham, Washington, District of Columbia;
T. C. Evans, Iowa City, Iowa;
E. G. Fuller, Bethesda, Maryland;
R. O. Gorson, Philadelphia, Pennsylvania;
J. W. Healy, Chappaqua, New York;
P. C. Hodges, Chicago, Illinois;
A. R. Keene, Richland, Washington;
M. Kleinfeld, Brooklyn, New York;
H. W. Koch, Silver Spring, Maryland;
D. J. Livermore, Washington, District of Columbia;
G. V. LeRoy, Chicago, Illinois;
W. B. Mann, Chevy Chase, Maryland;
W. A. McAdams, Schenectady, New York;
G. W. Morgan, Kensington, Maryland;
K. Z. Morgan, Oak Ridge, Tennessee;
H. J. Muller, Bloomington, Indiana;
R. J. Nelson, Rockville, Maryland;

UNITED STATES OF AMERICA
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 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 1992, a copy of the foregoing Applicants' Reply to Opposition Cross-Motions For Summary Disposition and Responses to Applicants' Motion for Summary Disposition was served by Federal Express on each of the following:

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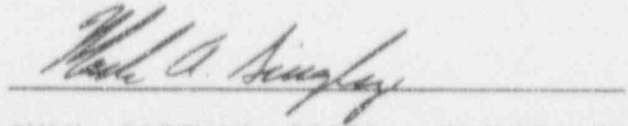

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