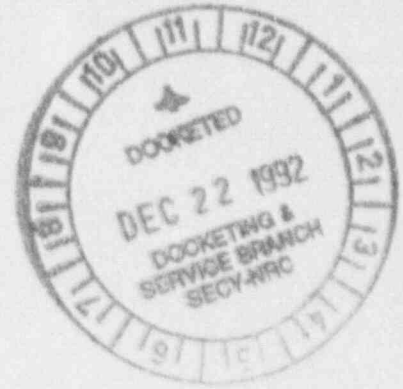


13478

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of	)	
	)	
OHIO EDISON COMPANY	)	
	)	
(Perry Nuclear Power Plant,	)	
Unit 1)	)	
and	)	Docket Nos. 50-346A
	)	50-440A
	)	
THE CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY	)	
THE TOLEDO EDISON COMPANY	)	
	)	
(Perry Nuclear Power Plant,	)	(Applications for
Unit 1, and Davis-Besse	)	Suspension of
Nuclear Power Station,	)	Antitrust Conditions):
Unit 1)	)	ASLBP No. 91-644-01-A

ALABAMA ELECTRIC COOPERATIVE'S  
ANSWER TO APPLICANTS' PETITIONS FOR REVIEW

Pursuant to the Commission Order of December 10, 1992 in this Docket and to 10 C.F.R. §2.786 (1992), Alabama Electric Cooperative (AEC), a party to this proceeding, submits its Answer to the Petitions for Review filed on December 8, 1992 by Applicants, The Cleveland Electric Illuminating Company, The Toledo Edison Company and Ohio Edison Company.

Applicants' Petitions for Review challenge the legal conclusions of the Licensing Board's Decision, LBP-92-32 (November 18, 1992). Alabama Electric Cooperative submits

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that the Applicants' contentions themselves are clearly erroneous on the merits, that the Petitions have failed to identify any error, or any question on which there is a significant possibility of error, in the legal conclusions of the Board's Decision, and have raised no substantial and important question of law, or any other matter encompassed within 10 C.F.R. §2.786(b)(4)(1992). For these reasons, the Commission should deny Applicants' Petitions for Review.

The two Petitions for Review filed by the Applicants raise the same contention -- that pursuant to Section 105 of the Atomic Energy Act, the Commission loses jurisdictional authority to retain previously-imposed antitrust license conditions with respect to a nuclear unit if it can be shown that the power produced by the unit is more costly than that available from an alternative source. Ohio Edison Petition at 3-4; CEI/TECo Petition at 3-4. Thus, Applicants would have the Commission's antitrust jurisdiction dependent on a day-to-day basis upon the comparative cost of the output of the particular unit.

The Licensing Board's Decision rejected Applicants' fanciful statutory interpretation on the incontestable ground that such a contention lacked a modicum of support (1) in the plain meaning of the statute; (2) in the

legislative history of the statute; (3) or in any relevant precedent. LBP-92-32 at 21-61. Applicants' Petitions simply do not fairly or reasonably accurately state the actual bases for the Board's decision, and hence the Petitions fail to call in question the Board's conclusions. Compare, Ohio Edison Petition at 5-7 and CEI/TECo Petition at 4-6 with LBP-92-32 at 21-61.

The Licensing Board did not base its decision on the "position that the addition of a high cost facility may be competitively advantageous to an operator," as the Applicants claim. Ohio Edison Petition at 5; CEI/TECo Petition at 4-5. Rather, the Board determined, inter alia, that:

"The Applicants thus are incorrect in their assertion that the comparative high cost associated with a nuclear facility that a utility chooses to construct (or continue to operate) is an initial and potentially dispositive factor in any Commission analysis under section 105c. Instead, that provision directs that the focus of the Commission's consideration must be whether, considering a variety of factors, a nuclear utility has market dominance and, if so, given its past (and predicted) competitive behavior, whether it can and will use that market power in its activities relating to the operation of its licensed facility to affect adversely the competitive situation in the relevant market. Accordingly, because it is not in accord with the established antitrust regulatory scheme that the Congress placed in section 105c, we must reject the Applicants' 'cost comparison' interpretation of that provision, as embodied in the 'bedrock' legal issue."

LBP-92-32 at 46 (footnotes omitted). Applicants' Petitions for Review must be denied, because they are premised on a wholly inaccurate characterization of the bases of the Board's decision.

Applicants are clearly in error when claiming that "the Licensing Board was mistaken when it applied a 'market power' test rather than the cost-based test [claimed to be] applicable to Section 105(c)." Ohio Edison Petition at 6; CEI/TECo Petition at 5 (footnote omitted). The Board correctly read the controlling statutory language, its history and authoritative interpretations, and necessarily concluded:

"As we have seen, in delineating the basis for the Commission's antitrust remedial authority, the language of section 105c makes reference only to any 'situation inconsistent with the antitrust laws.' The antitrust laws, in turn, incorporate a market power analysis that is not dependent solely upon a determination about the cost of doing business or a 'cost comparison' analysis of competitors. As a consequence, under any 'logical' reading of this provision, to accept the Applicants' position we would have to superimpose their 'cost comparison' analysis onto an otherwise unambiguous statute that on its face, does not incorporate that analysis. We cannot do this consistent with established principles of statutory interpretation."

LBP-92-32 at 39-40. Applicants' bizarre theory is wholly unpersuasive and is conclusively rebutted by the Licensing Board's thoroughgoing analysis of the statute and its history.

That the Licensing Board's reading of Section 105c is eminently correct is amply confirmed by the Eleventh Circuit's earlier decision in Alabama Power Co. v. N.R.C.<sup>1/</sup> The court emphasized that the "statute clearly calls for a broad inquiry and common sense does not allow interpretations to the contrary."<sup>2/</sup> Based on the clear meaning of the statute, the Court of Appeals rejected Alabama Power's contention that a proper NRC antitrust review should focus narrowly on the economics of the nuclear plant. The court dismissed Alabama Power's claim that "the NRC overstepped its authority in looking past the direct effects of the nuclear plant on the present or prospective competitive situation . . . ."<sup>3/</sup> The contention which the court rejected on the basis of the language of the statute, was that "Congress undoubtedly intended for NRC to assess solely the impact of the economics of power from the nuclear facility upon the power generation cost situation existing at the time the license was granted and that would

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<sup>1/</sup>Alabama Power Co. v. N.R.C., 692 F.2d 1362 at 1367 (11th Cir. 1982) cert. denied, 464 U.S. 816 (1983). This is the only judicial review on the merits of an NRC antitrust review.

<sup>2/</sup>Id. at 1368.

<sup>3/</sup>Id. at 1367.

exist thereafter.<sup>4/</sup> Applicants' effort here to resurrect this same discredited contention was properly dismissed by this Licensing Board, as it was originally rejected by the Court of Appeals in Alabama Power.

The Eleventh Circuit firmly rejected the effort to keep the NRC's antitrust review shackled by a myopic focus on the economics of power from the nuclear facility. The court strongly emphasized the broad delegated discretion inherent in the statutory mandate to the Commission to conduct antitrust reviews. 692 F.2d at 1368-1370. The court recognized that the Congress had directed the Commission to look to potential, as well as actual, anticompetitive situations and to condition licenses even in situations "which would not if left to fruition, in fact violate any antitrust law." Id. at 1368. Plainly, the possibility of evolving and changing economic circumstances was contemplated by Congress, which had determined that for NRC antitrust review purposes "a traditional antitrust enforcement scheme is not envisioned, and a wider one is put in its place." Id. In affirming the license conditions in the Alabama Power case, the Court of Appeals

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<sup>4/</sup>Brief of Petitioner Alabama Power Company in Alabama Power Co. v. N.R.C., supra, at 38. This rejected contention had been reiterated in Alabama Power Company's Reply Brief in the Eleventh Circuit at 7-9.

concluded that they "are specifically fashioned to address the anticompetitive situation which could arise from an unconditional license grant." (Emphasis added.) Id. at 1367. The court recognized that Congress had conferred on the NRC "wide powers." Id. at 1369-1370. Applicants claim here that the core of Section 105c of the Act is a review of the economics of the power produced by the nuclear unit is wholly contradicted by the scope and breadth of the Commission's antitrust reviews as required by Section 105c and as affirmed by the court of appeals, whose decision in Alabama Power also requires rejection of the grounds advanced in the Applicants' Petitions now before the Commission.

Applicants' equal protection and alleged Staff bias contentions (see Ohio Edison Petition at 7-8; CEI/TECO Petition at 6-7) are wholly frivolous and merit no review by the Commission. Applicants argue that the economics of power from nuclear units is the only rational Congressional basis for NRC antitrust reviews, and unless a nuclear unit is shown to produce relatively cheap power, then owners of such units are unconstitutionally discriminated against vis a vis other electric power producers. This argument is frivolous. It grossly misstates the legislative concerns leading to the requirement of antitrust review, as the

Licensing Board made clear. LBP-92-32 at 61-65. Also, the Board's recognition that in light of its legal determination on the merits, Applicants claims of Staff bias are immaterial is clearly correct. LBP-92-32 at 65-68.

The Licensing Board's analysis is exceptionally thorough and persuasive. Further review on the merits by the Commission itself is plainly not warranted under applicable criteria. Nor would adding such an additional and unnecessary stage to this proceeding contribute in any way to the interests of fairness and justice. The Commission should reserve its limited time and attention resources for more deserving matters.

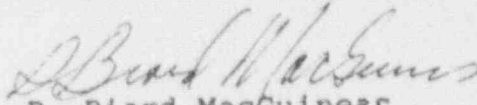
#### CONCLUSION

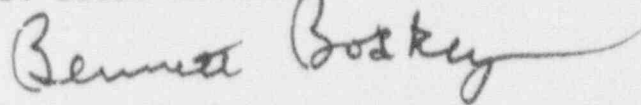
The Applicants' requests for Commission review are based on the same defective premise -- that Congress intended the Section 105c antitrust review to be contingent upon a finding as to the economics of power from the subject nuclear facility. As has been amply demonstrated in the Licensing Board's decision, that is a false assumption as to the meaning and purposes of the antitrust



provisions of the Atomic Energy Act. Applicants' requests  
for review should be denied.

Respectfully submitted,

  
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December 22, 1992

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of )  
 )  
OHIO EDISON COMPANY )  
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(Perry Nuclear Power Plant, )  
Unit 1) )  
and )  
 )  
THE CLEVELAND ELECTRIC )  
ILLUMINATING COMPANY )  
THE TOLEDO EDISON COMPANY )  
 )  
(Perry Nuclear Power Plant, ) (Applications for  
Unit 1, and Davis-Besse ) Suspension of  
Nuclear Power Station, ) Antitrust Conditions);  
Unit 1) ) ASLBP No. 91-644-01-A

Docket Nos. 50-346A  
50-440A

CERTIFICATE OF SERVICE

I hereby certify that copies of the Alabama Electric Cooperative's Answer to Applicants' Petitions for Review in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system this 22nd day of December, 1992.

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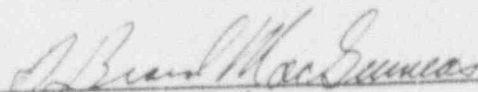
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December 22, 1992

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