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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	
OHIO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58)	Docket Nos. 50-440-A 50-346-A
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)	(Suspension of Antitrust Conditions) ASLBP No. 91-644-01-A

ANSWER OF CITY OF CLEVELAND, OHIO, INTERVENOR, IN OPPOSITION TO PETITIONS FOR REVIEW OF THE NOVEMBER 18, 1992 DECISION OF THE ATOMIC SAFETY AND LICENSING BOARD

Pursuant to 10 C.F.R. §2.786, City of Cleveland, Ohio, Intervenor ("Cleveland") answers in opposition to the petition for review of Ohio Edison Company ("OE") and the joint petition for review of Cleveland Electric Illuminating Company ("CEI") and Toledo Edison Company ("TE"), collectively "petitioners", of the Atomic Safety and Licensing Board's ("Board") decision of November 18, 1982 with respect to the "bedrock" legal issue.[1/]

1/ The "bedrock" legal issue stipulated by the parties is as follows:

> Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain
> (continued...)

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Petitioners' petitions for review are identical, word for word, in the presentation of their argument on that issue. The only difference in their petitions is that OE alone seeks review of the Board's disposition of OE's alleged agency bias issue. CEI and TE expressly state in their petition (p. 2, n. 3) that they "do not join in OE's allegations regarding agency bias".

Their arguments for review of the Board's decision are mere repetitions of their rejected arguments made to the Board in their joint motion for summary disposition and joint reply to the cross-motions for summary disposition of Cleveland and of other parties.

The Board correctly rejected petitioners' arguments based upon the Board's comprehensive analysis of each argument. There is no basis for Commission review of the Board's decision on the "bedrock" legal issue.

I. THE BOARD'S DECISION CORRECTLY INTERPRETS SECTION 105 OF THE ATOMIC ENERGY ACT

Petitioners' position is that no matter how egregious petitioners' violations of the antitrust laws may be (Prehearing Conference Transcript ("PHCT") at 151) the Commission has no authority under Section 105c to impose or retain antitrust license conditions unless the Commission finds that the actual cost of the

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1/(...continued)
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. (LBP-92-32 at 6).

power from the licensed unit is lower than the cost of other sources of power in the relevant market, appropriately measured and compared. For purposes of the disposition of petitioners' position on the bedrock legal issue, OE's counsel advised the Board that OE assumes, arguendo, that its "competitive behavior has not changed at all" (PHCT at 153, 155). See Decision at 33, n. 66. The "competitive behavior" of petitioner is described by the Licensing Board in 5 NRC at 165-179, 187-237, and by the Appeal Board in 10 NRC at 311-382. In their petition for review at 5, note 10, CEI and TE apparently intend to retreat from this basic assumption, thereby attempting to change the legal basis under which the bedrock legal issue was presented to the Board.

In short, petitioners contend that the Commission's authority is entirely dependent upon the competitive impact of the particular licensed nuclear facility measured solely by the comparative cost of the nuclear generated power from that facility. Therefore, Petitioners conclude, the Board "was mistaken when it invoked a `market power' test rather than the cost-based test applicable to Section 105(c)", citing to the Board's decision at page 39.

In support of that position, petitioners argue (OE at 5, CEI and TE at 5-6) that the Board has ignored the fact that Section 105c does not grant the Commission plenary authority over antitrust matters. The Board has not held and neither Cleveland nor any other party has argued that the Commission has plenary antitrust

authority.[2/] Rather, the Board held that the Commission is not confined to a "cost test."

The Board correctly concluded that the plain and unambiguous words of the statute establish that the lower cost of nuclear generated power is not a necessary prerequisite to the Commission's authority to impose and retain antitrust license conditions. Petitioners are unable to point to anything in any subsection of Section 105 that places a cost-based test limitation upon the Commission's authority to impose antitrust license conditions or excludes market power and monopolization analyses as a basis for finding that the "activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." The only limitation on the Commission's authority to impose remedial antitrust license conditions is the requirement that the Commission find that there is a nexus--a relationship--"between the prescribed antitrust situation and the license activities". The Toledo Edison Co., et al. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3; Perry Nuclear Power Plant, Units 1 and 2), LBP-77-1, 5 NRC 133, 237 (1977). The Licensing Board found that there is a very substantial nexus. Id. at 255. The Davis-Besse/Perry Appeal Board affirmed the integral nexus between the proposed nuclear facilities and the pernicious and pervasive anticompetitive and unlawful activities of petitioners. The Toledo Edison Co., et al. ALAB-560, 10 NRC 265, 286 (1979).

[2/] "Plenary" is defined as "full, entire, complete, absolute, perfect, unqualified." Blacks' Law Directory, Sixth Ed. at 1154.

The Appeal Board found (id. at 290-294) that the clear message conveyed by Section 105 is that "Congress did not want nuclear plants authorized in circumstances that would create or maintain anticompetitive situations without license conditions designed to redress them".

In the South Texas case, the Commission found that Section 105(a), referred to in Section 105(c), declares Congress' intent that "[n]othing in this Act shall relieve any person from operation of the" Sherman, Clayton and Federal Trade Commission ("FTC") Acts, the "traditional antitrust statutes" and requires the Commission to "apply principles developed by the Antitrust Division [of the DOJ], the Federal Trade Commission and the Federal courts to [the nuclear] industry." Houston Lighting and Power Co., (South Texas Project, Units 1 and 2), CLI 77-13, 5 NRC 1303, 1316 (1977) (material in brackets supplied).

The antitrust principles developed by the DOJ, the FTC and the Federal courts do not restrict antitrust remedial conditions, in the case of power plants, to situations where the power produced is lower cost than other sources of power, appropriately compared and measured, or prohibit consideration of market power, monopolization, and other traditional antitrust issues. Indeed, the critical statutory language refers to conduct--"activities"--as do the antitrust laws and their underlying principles. There is no reference to cost of the power.[3/] Surely, if that were the criti-

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[3/] The essence of monopoly power is insensitivity to cost. Petitioners stipulated to their dominance of generation and transmission. 5 NRC at 142 and 154; 10 NRC at 278-79.
(continued...)

cal criterion for the exercise of the Commission's authority under Section 105c, and if that were Congress' intent, so critical a criterion would have been expressed and not left to implication.

Although the Commission does not enforce the antitrust laws in general as do the FTC and DOJ, it is significant that the Commission is not required to find an actual violation of the antitrust laws to impose antitrust license conditions. The Commission need only find that the conduct under the license is potentially "inconsistent" with the antitrust laws. Alabama Power Co., 692 F.2d 1362, 1368 (11th Cir. 1982), cert. denied, 464 U.S. 816, 78 L.Ed.2d 85 (1983). Thus, rather than restricting the Commission's authority in the application of the antitrust laws, Congress' grant of authority under Section 105c is more expansive than that of a court, which must find an actual violation of the antitrust laws to enforce remedies. Under Section 105c the Commission's authority is intentionally broad.

The interpretation of Section 105c sought to be imposed by petitioners, and rejected by the Board, is also shown to be

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3/(...continued)
Contrary to petitioner's argument (OE at 5; CEI and TE at 4-5), that the higher cost of the nuclear power "would necessarily allow competitors greater competitive freedom . . . to attract new customers", if petitioners were successful in deleting the antitrust license conditions, petitioners expect to be able to sell what they claim is non-competitive nuclear power by reason of its high cost to the resale cities because their wholesale monopoly power would enable them to prevent the resale cities from purchasing power elsewhere. Decision at 34, n. 67. The antitrust license conditions, among other things, require the petitioners to provide wheeling service over their transmission facilities which now enables the resale cities to purchase power from other sources. Petitioners argument ignores this very important antitrust condition.

invalid by Section 105c itself. Section 105c(5) authorizes the imposition of antitrust license conditions where the activities under the license "maintain" a situation inconsistent with the antitrust laws. As the Eleventh Circuit ruled in Alabama Power Company, supra, 692 F.2d at 1367-68, the Commission is thereby authorized to consider past anticompetitive conduct as a basis for imposition of antitrust license conditions. Obviously, past conduct would not have involved a nuclear power plant. Consequently, the cost of nuclear power could not have been involved in the past anticompetitive conduct, as was the case with petitioners' past anticompetitive conduct. Thus, as the Eleventh Circuit correctly ruled, the "statute clearly calls for a broad inquiry and common sense does not allow to the contrary". Alabama Power, supra, 692 F.2d at 1368. Petitioners erroneously would have the statute narrowly interpreted as turning on a single element, i.e., the cost of the nuclear power. Petitioners would have the Commission ignore all of the principles of anticompetitive conduct, such as monopolization, no matter how egregious petitioners' anticompetitive conduct may be.

Finally, petitioners undertake to belittle the importance of the antitrust review duties of the Commission as "peripheral authority" (OE at 8; CEI and TE at 7). However, antitrust concerns were of importance to Congress from the first enactment of the Act in 1946. From that date to the present the Act has included provisions requiring the Commission to prevent monopolization of nuclear power, the development of which the public had funded. Section 105a leaves no room for doubt about the "special concern of

Congress that antitrust influence be identified and corrected in the incipiency" in connection with the issuance of construction permits and operating licenses. Houston Lighting and Power Co., supra, 5 NRC at 1316 (1977).

In sum, the Commission's authority is not restricted in the application of the antitrust laws. Under Section 105 the Commission's authority extends to any and all conduct that is prohibited under the antitrust laws, as the Board correctly ruled.

II. THE LEGISLATIVE HISTORY SUPPORTS THE BOARD'S DECISION

The plain and unambiguous language of Section 105, as the Board correctly found, establishes that lower cost nuclear power is not a necessary prerequisite to the Commission's authority to impose and retain antitrust license conditions. There is, therefore, as the Board ruled, no need to resort to legislative history. Sierra Club v. Clark, 755 F.2d 608, 615, n. 9 (8th Cir. 1985), citing Tennessee Valley Authority v. Hill, 437 U.S. 153, 184, n. 29, 57 L.Ed.2d 117, 140 (1978). The Board nevertheless reviewed the legislative history of the 1970 amendments that produced the current provisions of Section 105. Having reviewed the pertinent history, the Board correctly ruled that the legislative history confirmed its rejection of petitioners' flawed view of Section 105.

In support of their position, petitioners point to testimony of witnesses in the Congressional hearings. Although some witnesses expressed views that the nuclear power would be of lower cost than power from other sources, other witnesses expressed contrary views. The important point about the testimony is (1)

hearing testimony by witnesses not members of the House or Senate generally is not a reliable indicator of Congressional intent, (2) the particular testimony did not by implication or otherwise propose the restrictions petitioners would impose on the Commission's antitrust review authority, (3) Congress did not so construe the testimony, and (4) Congress did not act to impose the restraint.

The "best source of legislative history" and the "most persuasive evidence of legislative intent" underlying the 1970 amendments is the Joint Committee Report ("Joint Report") (H.R. Rep. No. 91-1470, 91st Cong., 1st Sess. (1970), reprinted in 1970 USCCAN 4931). Alabama Power, supra, 692 F.2d at 1368; Sierra Club, supra, 755 F.2d at 615. Petitioners would rather forget the Joint Report. It makes no reference whatever to the cost of nuclear power as affecting the Commission's antitrust review authority under Section 105. The Joint Report specifically recognizes that the Commission would have to review the totality of all circumstances in order to determine whether licensing of the nuclear power project "would create or maintain a situation inconsistent with the antitrust laws". Joint Report at 5010-12. Congress recognized that regardless of the cost of nuclear power, construction and operation of a nuclear power project could exacerbate anticompetitive practices. Id. at 4994-95. For example, to ensure a captive market for the power, OE proposes to eliminate the restraint of the antitrust license conditions, such as the condition which requires OE to provide wheeling services over its transmission facilities (PHCT at 159-160).

In an effort to overcome the Board's eminently correct reliance on the Joint Report and the Board's correct reading of the legislative history, petitioners allege (OE at 6; CEI and TE at 5-6) that the Board ignored the "broader context" in which the 1970 amendments to Section 105 took place, namely, the "practical value" aspect. There is nothing about "practical value" that affects the Board's analysis of the legislative history.

Between 1946, when the Act originally came into being, and 1970, the Commission was precluded from licensing a nuclear power project for commercial purposes unless the Commission could make a "report" to the President (from 1946 to 1954) that such projects had "practical value" or could make a "finding" (required from 1954 to 1970) of "practical value." In 1970, Congress eliminated the "practical value" requirement. Petitioners, in their reply to cross-motions for summary disposition of the bedrock legal issue, for the first time seized on this elimination to argue that it was made because by 1970 it "appeared" that reasonably accurate predictions about costs could be made.[4/] (Petitioners' Reply to Cross-Motion for Summary Disposition at 57-60). On this basis, petitioners then conclude that "cost was an integral part of the 1970 amendments" (Id. at 60) and that the Commission by the 1970 amendments was, therefore, authorized to impose antitrust license

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[4/] Contrast this claim with petitioners' claim that certain cost data on Perry important to petitioners' conclusion about the high cost of the reactors was not available until the unit was in commercial operation in 1987 thereby precluding the applicability of the doctrine of "laches" as a bar to petitioners' application for deletion of the antitrust license conditions. Decision at 19-20.

conditions only when by reason of the cost of the power the nuclear power project was "competitively advantageous" and would create or maintain a situation inconsistent with the antitrust laws.

Petitioners are wrong again. As they admit (id. at 58) the "practical value" requirement was originally included in the 1946 Act in order to husband scarce nuclear materials and to designate the time when a nuclear project would no longer be eligible for government assistance. Additionally, the Joint Report (at 4993) discloses that the Commission in that long span of 24 years was never able to make a "practical value" determination. Yet the Act included provisions requiring the Commission to prevent monopolization of nuclear power (supra, p. 8). As the Joint Report states (id.), the requirement of a finding of "practical value" had become an "archaic symbol" which was "now neither practical nor of value" and all witnesses at the hearings on the 1970 amendments and all advice received by the Joint Committee within and outside of government favored its removal. Id. It was removed for that reason. The elimination of the requirement of a finding of "practical value" provides no support for petitioner's position on the bedrock legal issue.

III. THE BOARD'S DECISION IS SUPPORTED BY COMMISSION PRECEDENTS AND THE ATTORNEY GENERAL'S ADVICE LETTERS

Petitioners contend (OE at 6-7; CEI and TE at 5-6) that the Board's decision on the bedrock legal issue is contrary to the Commission's legal precedents and the Attorney General's advice letters. Petitioners are wrong again. The Board's decision is consistent with, and is supported by, Commission precedents and

Attorney General's advice letters.

In its cross-motion for summary disposition Cleveland submitted a comprehensive analysis of the Commission's decisions and the Attorney General's advice letter relied on by petitioners. In addition, Cleveland analyzed Commission decisions and Attorney General's advice letters most relevant to the instant proceedings, the advice letters on proposed Davis-Besse Units 2 and 3 and proposed Perry Unit 1, ignored by petitioners. The page limitation applicable to this response precludes comprehensive review of those decisions and advice letters analyzed in Cleveland's cross-motion at pages 33 to 61. In summary, Cleveland's comprehensive analysis conclusively establishes that the petitioners' reading of the decisions and advice letters is fatally flawed.

The Attorney General's advice letters relied on anti-competitive conduct, such as the unlawful exercise of monopoly power, not on the cost of nuclear power, for the recommendation for antitrust review hearings.

In a December 17, 1973 Perry advice letter of which petitioners were well aware the Attorney General explained, referring to a 1971 Davis-Besse advice letter relied on by petitioners as asserted support for their wrong conclusion, that no antitrust hearing had been recommended at that time because "there had been no formal request for participation" in the unit and because "the Applicants [the petitioners] appeared to be responding voluntarily and adequately to certain allegations of anticompetitive conduct." (material in brackets supplied). Having learned since 1971 of petitioners' egregious anticompetitive conduct and that such

conduct was continuing, the Attorney General recommended antitrust hearings with respect to the Perry and Davis-Besse Units. The advice letter made no reference to any change in the cost of nuclear power since the prior letter. Anticompetitive conduct, not the cost of the nuclear power (as petitioners erroneously contend), was the basis for the recommendations.

IV. THE BOARD'S DECISION DOES NOT DENY PETITIONERS EQUAL PROTECTION OF ANY CONSTITUTIONAL RIGHTS

Petitioners argue (OE at 7; CEI and TE at 6-7) if the cost of nuclear power is not competitively advantageous compared to other sources of power there is no rational basis for continuing to impose "restrictive antitrust license conditions not imposed on identically situated operators of non-nuclear facilities". Absent a rational basis, petitioners conclude, the Board's decision deprives petitioners of equal protection of the law as guaranteed by the United States Constitution.

This claim was frivolous when made in petitioners' motion for summary disposition and remains frivolous. There is a well-established rational basis for the Federal Government's imposition of antitrust review with respect to nuclear power which, surely, is well-known to petitioners although they may not like it. The Board correctly points out, citing Alabama Power, supra, 692 F.2d at 1368-69 (Decision at 64):

> As the court recognized in the Alabama Power case, section 105 reflects the congressional concern that the unique technology underlying commercial power reactors, which in its crucial initial stages was largely government developed and financed, should not become a tool for increasing the competitive

advantage of some private utilities at the expense of others.

V. CONCLUSION

For each and all of the foregoing reasons, petitioners' petitions for review should be denied. The Commission declined to review the 1979 decision of the Appeal Board with respect to the imposition of the antitrust license conditions.[5/] There is no more basis for Commission review of the Board's decision of November 18, 1992, on the bedrock legal issue, than there was for Commission review of the Appeal Board's 1979 decision.

Respectfully submitted,

Reuben Goldberg

Channing D. Strother, Jr.

Danny R. Williams
Director of Law
June W. Wiener
Chief Assistant Director
of Law
William T. Zigli
Assistant Director of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44115
Telephone (216) 664-2000

Reuben Goldberg
Channing D. Strother, Jr.
David C. Hjelmfelt
Goldberg, Fieldman & Letham, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone (202) 463-8300

Attorneys for
City of Cleveland, Ohio

December 23, 1992

5/ The petitioners did not seek court review. Only Duquesne Light Company and Pennsylvania Power Company, co-licensees, filed court petitions for review which they subsequently withdrew.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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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)	(Suspension of Antitrust Conditions) ASLBP No. 91-644-01-A

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANSWER OF CITY OF CLEVELAND, OHIO, INTERVENOR, IN OPPOSITION TO PETITIONS FOR REVIEW OF THE NOVEMBER 18, 1992 DECISION OF THE ATOMIC SAFETY AND LICENSING BOARD has been served upon the parties or their attorneys on the attached Service List, this 23rd day of December, 1992, by hand delivery to those persons located in Washington, D.C. and Maryland and by Federal Express to persons located in other states.

Reuben Goldberg

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SERVICE LIST

Joseph Rutberg, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
One White Flint No, Rm. D19
11555 Rockville Pike
Rockville, MD 20852

Janet Urban, Esq.
U.S. Department of Justice
Antitrust Division
Transportation, Energy and Agriculture Section
Room 9816 JCB
555 4th Street, N.W.
Washington, D.C. 20001

David R. Straus, Esq.
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
4350 East-West Highway
Bethesda, MD 20814

Anthony J. Alexander, Esq.
Vice President and General Counsel
Ohio Edison Company
76 South Main Street
Akron, OH 44308

Gerald Charnoff, Esq.
Deborah B. Charnoff, Esq.
Margaret S. Spencer, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

James P. Murphy, Esq.
Colleen A. Conry, Esq.
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Post Office Box 407
Washington, D.C. 20044-0407

Kenneth L. Hegemann, P.E.
President
American Municipal Power-Ohio, Inc.
601 Dempsey Road
P.O. Box 549
Westerville, OH 43081

Administrative Judge
G. Paul Bollwerk, III
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission, Rm. E402A
4350 East-West Highway
Bethesda, MD 20814

Sherwin E. Turk, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
One White Flint No, Rm. 15H20
11555 Rockville Pike
Rockville, MD 20852

Administrative Judge
Charles Bechhoefer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission, Rm. E413
4350 East-West Highway
Bethesda, MD 20814

Administrative Judge
Marshall E. Miller, Chairman
Atomic Safety and Licensing Board
1920 South Creek Blvd.
Spruce Creek Fly-In
Datona Beach, FL 32124

D. Biard MacGuineas, Esq.
Volpe, Boskey and Lyons
918 16th Street, N.W.
Suite 602
Washington, D.C. 20006

Mr. Philip N. Overholt
Office of Nuclear Plant Performance
Office of Nuclear Energy
U.S. Department of Energy, NE-44
Washington, D.C. 20585

Steven R. Hom, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
One White Flint No, Rm. 15D10
11555 Rockville Pike
Rockville, MD 20852

John Bentine, Esq.
Chester, Hoffman, Wilcox & Saxbe
17 S. High Street
Columbus, OH 43215

Gregg D. Ottinger, Esq.
John P. Coyle, Esq.
Duncan & Allen
1575 Eye Street, N.W.
Suite 300
Washington, D.C. 20005

David A. Lambros, Esq.
Law Director
City of Brook Park
6161 Engle Road
Brook Park, OH 44142