SHAW, PITTMAN, POTTS & TROWBRIDGE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
2300 N STREET, N. W.
WASHINGTON, D. C. 20037

TELEX/CABLE
89-2693 (SHAWLAW WSH)

TELEPHONE
(202) 663-8130

VIRGINIA OFFICE
1501 FARM CREDIT DRIVE
MCLEAN, VIRGINIA 22102
(703) 790-7900

TELECOPIER
(202) 223-3760 & 223-3761

ZAP MAIL
(202) 775-0338

ROBERT E. ZAHLER, P.C.

July 5, 1988

Mr. Cecil O. Thomas
Chief, Policy Development and Technical
Support Branch Programs Management
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Ohio Edison Company Antitrust
License Amendment Application

Dear Mr. Thomas:

Enclosed is a copy of "Response of Ohio Edison Company to Comments on its Antitrust License Amendment Application."

I would note that at pages 3 and 7, Ohio Edison has requested that the Commission hold the present proceeding on the license amendment application in abeyance pending resolution of the court action filed on June 22, 1988. In addition, at page 7, note 11, Ohio Edison has requested copies of all comments received from the Attorney General on the license amendment application.

Sincerely yours,

Robert E. Zahler

Counsel for Ohio Edison Company

Enclosure

cc: Service List

2999
'11

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, NUCLEAR REACTOR REGULATION

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

RESPONSE OF OHIO EDISON COMPANY TO COMMENTS ON ITS ANTITRUST LICENSE AMENDMENT APPLICATION

Gerald Charnoff
Robert E. Zahler
Deborah B. Charnoff
Margaret S. Spencer

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
Tel: (202) 663-8000

Dated: July 5, 1988

TABLE OF CONTENTS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, NUCLEAR REACTOR REGULATION

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

RESPONSE OF OHIO EDISON COMPANY TO COMMENTS ON ITS ANTITRUST LICENSE AMENDMENT APPLICATION

On September 18, 1987, Ohio Edison Company ("OE"), a co-owner of the Perry Nuclear Power Plant, Unit 1 ("Perry"), submitted an application ("OE Appl.") to the Director of Nuclear Reactor Regulation requesting that the Perry Operating License (No. NPF-58) be amended by suspending the antitrust license conditions insofar as they apply to OE. The Nuclear Regulatory Commission ("Commission" or "NRC") published notice of this application on December 22, 1987, and invited comments on the application from "[a]ny person who wishes to express views pursuant to the antitrust issues raised in this amendment request * * *."[1/] Following two extensions of time within which to submit comments,[2/] written comments on the application were received from the City of Clyde, Ohio,[3/] the City of Cleveland, Ohio,[4/] and American

---

1/ See 52 Fed. Reg. 48473-74 (Dec. 22, 1987).

2/ Notices granting the extensions were published at 53 Fed. Reg. 4475 (Feb. 16, 1988) and 53 Fed. Reg. 9386 (Mar. 22, 1988).

3/ See "Comments of the City of Clyde, Ohio Opposing Request to Suspend the Perry Nuclear Power Plant Antitrust License Con-

(Continued next Page)

Municipal Power-Ohio, Inc. ("AMP-O").[5] On April 19, 1988, OE informed the Commission of its intent to respond to these comments.

I. PRELIMINARY STATEMENT

On June 22, 1988, OE filed an action in the United States District Court for the District of Columbia against the NRC. Ohio Edison Co. v. Zech, et al., No. 88-1695. That Complaint seeks: (1) an order suspending the antitrust license conditions insofar as they apply to OE; or, in the alternative (2) an order directing the NRC to so suspend the antitrust license conditions; and (3) such further relief as the Court deems reasonable, just and proper.[6] OE filed this Complaint because of the extraordinary events which took place on the floor of the United States

---

(Continued)

ditions and Petition for Leave to Intervene," dated February 5, 1988 (hereinafter cited as "Clyde Br.").

4/ See "Answer of City of Cleveland, Ohio, in Opposition to Ohio Edison Company's Application for Suspension of Perry Operating License Antitrust Conditions," dated February 19, 1988 (hereinafter cited as "Cleveland Br.").

5/ See "Answer of American Municipal Power-Ohio, Inc. in Opposition to Ohio Edison Company's Application for Suspension of Antitrust Conditions," dated April 6, 1988 (hereinafter cited as "AMP-O Br."). In addition, included in AMP-O's first motion for an extension of time was a request for leave to intervene in this proceeding. See "Motion of American Municipal Power-Ohio for Leave to Intervene and Motion for Extension of Time for Filing Comments," dated January 29, 1988 (hereinafter cited as "AMP-O Motion").

6/ For the convenience of the parties, a copy of the Complaint is attached to this Response as Exhibit A.

Senate on March 29, 1988. At that time Senators Metzenbaum and others indicated in unmistakable fashion that they already had brought to bear, and would in the future continue to bring to bear, inappropriate political pressure to have the NRC dismiss OE's application to suspend the antitrust license conditions.

Notwithstanding the judicial action taken, OE is filing this Response when due because OE believes setting forth its views on the issues raised by the three commenting parties is beneficial and will serve to expedite the eventual consideration of OE's application before the court. In particular, the comments filed by Clyde, Cleveland, and AMP-O paint a misleading picture of the relevant legal and factual issues. This Response by OE addresses the submitted comments and therefore is necessary to complete the administrative record. By making this filing, OE is not waiving its complaint that the inappropriate political pressure exercised against the NRC now and forever precludes this agency from ruling on the OE antitrust license amendment application. OE expects that at some point during the court proceedings, the Commission will forward to the court the entire record of proceedings before it, and that record will become part of the judicial proceedings. This Response, therefore, will be available to the court to better inform the court about OE's position on the issues raised by the commenting parties.

In view of the pending court action, OE requests that the NRC hold this proceeding in abeyance until the court rules on OE's Complaint.

II. INTRODUCTION AND SUMMARY

This Response includes a point-by-point answer to each of the significant issues raised by the commenting parties. In the case of Clyde and AMP-O, this point-by-point answer is relatively straightforward. The response to Cleveland is only slightly more complex, not because the issues raised by Cleveland are more difficult, but because the Cleveland comments to a large extent are unbelievably prolix and include much extraneous and irrelevant material. The Commission should cut through the "smoke screen" raised by Cleveland and consider each issue on the merits. That evaluation shows that issues raised by the commenting parties are invalid.

A. Despite the claims by Cleveland and AMP-O to the contrary, the NRC clearly has the authority to consider and adjudicate OE's license amendment application. This authority resides in the Director of Nuclear Reactor Regulation and was expressly recognized by the Appeal Board in its Perry decision. The "particularized regime" of antitrust review under Section 105(c) does not change this result. While the statute does limit when the NRC can consider antitrust issues for the first time, the statute does not alter the NRC's continuing jurisdiction over licenses to which antitrust conditions were previously attached.

B. The principles of res judicata and collateral estoppel do not bar the NRC from adjudicating OE's license amendment application. The crucial question is whether changed circumstances

warrant suspension of the antitrust license conditions. That inquiry is not altered by the legal principles of preclusion suggested by Cleveland. If, as OE maintains, the cost of nuclear power has risen so dramatically such that construction and operation of Perry cannot be said to "create or maintain" a situation inconsistent with the antitrust laws, then the license conditions should be suspended and principles of res judicata or collateral estoppel should not preclude that result.

C. The equitable doctrine of laches and other equitable considerations raised by the commenting parties do not provide a justification for rejecting the OE license amendment application. The commenting parties' arguments require one to assume that OE will, in the future, violate the law. In addition, the commenting parties should have known that the conditions could be revoked, modified or suspended. Nor have those parties shown that OE unreasonably delayed in presenting its amendment application to the Commission.

D. The substantive arguments offered by the commenting parties for opposing the OE license amendment application should be rejected. The OE application makes a prima facie case that the dramatic change in the economics of nuclear power is sufficient reason for suspending the antitrust license conditions.

In addition to the errors of law and fact made by the commenting parties, their papers disclose some confusion about the

correct procedural posture of this proceeding. OE, therefore, describes in the next section of this Response its understanding of how this proceeding should be conducted.

III. PROCEDURAL ISSUES[7/]

Both Clyde and AMP-O have petitioned for leave to intervene in this adjudication.[8/] Both parties also believe they are late in seeking such intervention and have purported to address the factors governing late intervention set forth in the Commission's regulation at 10 C.F.R. § 2.714(a)(1)(i)-(v). The parties apparently have taken this position because, as AMP-O states, they believe "this case began nearly fifteen years ago."[9/] This analysis of the current adjudication is wrong.

When OE filed the present application to amend the Perry Operating License, a new proceeding was initiated. To be sure, that proceeding has the same docket number as that used during the 1970's.[10/] But that arises only because the NRC has assigned

---

7/ OE repeats that the procedural discussion which follows would have governed had not inappropriate political pressure been exerted on the NRC. As a result of that pressure, this matter must now be resolved by the federal district court. The discussion which follows in the text is not a waiver of OE's view that the courts, and not the agency, must now decide this case in the first instance.

8/ See Clyde Br. at 1-2, 13-14; AMP-O Motion at 1-5. While Cleveland has not sought to intervene, it does request "summary denial of the application." Cleveland Br. at 1.

9/ E.g., AMP-O Motion at 2; see also Clyde Br. at 13 ("[t]he licensing proceeding began years ago, and Clyde's petition for leave to intervene undoubtedly is untimely").

10/ Cleveland's comments erroneously include a caption that lists "Docket Nos. 50-440a, et al." OE does not know to

(Continued next Page)

a single docket number for each nuclear power plant. Procedures governing the amendment application, including review of the application, notices relating to the application, determinations about that application, and formal, on-the-record hearings on that application, are set forth in the Commission's regulations at 10 C.F.R. § 2.101-.106 and 50.91-.92. The Commission already has given notice of receipt of the application and requested comments. The Commission also has requested comment on the application from the Department of Justice.[11/] In the normal course, having received OE's application, comments by interested parties, and OE's Response, the NRC would have been in a position to rule on the application. However, because of the inappropriate political pressure brought to bear on the agency, OE has requested that the NRC stay any action pending resolution of the court proceeding (see p. 3, supra).

(Continued)

what other dockets the "et al." is intended to refer. It should be clear that the only antitrust license conditions applicable to OE arise from the Perry Unit 1 Operating License. In addition, both Cleveland and Clyde have captioned this matter in the name of "The Cleveland Electric Illuminating Company, et al." Again, neither Cleveland Electric Illuminating nor any other former member of the Central Area Power Coordination Group ("CAPCO") or co-owner of Perry Unit 1 is a party to this proceeding. Thus, OE believes it incorrect to title this proceeding in the name of a nonparty or to refer to other nonexistent parties by use of "et al."

11/ See 52 Fed. Reg. 48473 (Dec. 22, 1987) ("[a] copy of the application for amendment has been forwarded to the Attorney General for his review and comment * * *"). OE has not received or been served with any comments from the Attorney General. OE requests copies of all comments received from the Attorney General.

IV. THE NRC HAS THE AUTHORITY TO ADJUDICATE OE'S LICENSE AMENDMENT APPLICATION

Both Cleveland and AMP-O offer the remarkable argument that the Commission lacks authority to adjudicate the license amendment application submitted by OE.[12/] It would indeed be a strange administrative regime that accepted a power to regulate and monitor its licensees and, in particular, to impose conditions on the conduct of those licensees, and then stood helplessly by, mute in response to a request by its licensee that some condition be modified, asserting only that it lacked the authority to consider the proposed modification. Such a result would be especially anomalous here, where this Commission plays so active a role in the day-to-day affairs of its licensees. And, as indicated below, that the license amendment application involves antitrust issues rather than health and safety concerns is no reason for the Commission to shirk its responsibility to properly consider and adjudicate all license amendment requests it receives from its licensees.

12/ See Cleveland Br. at 24-52; AMP-O Br. at 10-13. For the most part, AMP-O merely repeats and summarizes the arguments presented by Cleveland on this issue.

A. The Appeal Board Explicitly Authorized The Director Of Nuclear Reactor Regulation To Consider Antitrust License Amendment Applications

The simple and complete answer to the lack of authority argument raised by Cleveland and AMP-O is that the Appeal Board already has ruled on this matter and has unmistakably held that the Director of Nuclear Reactor Regulation has the authority to entertain antitrust license amendment applications from licensees.[13/] The Appeal Board stated:

> We agree that license conditions seemingly fair today may prove inequitable tomorrow. * * * * Commission regulations give the Director of Nuclear Reactor Regulation -- who is assisted by an able antitrust staff -- authority to modify license conditions where necessary and provide as well as [sic] means for review of his determinations. 10 CFR Section 2.200-2.204 and Section 2.206.[14/]

Cleveland offers three reasons why this clear and direct holding of the Appeal Board should be simply ignored. First, Cleveland asserts that this holding is "mere dicta." Cleveland Br. at 49. Just because Cleveland asserts this holding is dicta does not, of course, make it dicta. That this language is not

---

13/ See OE Appl. at 50-52. As if to deflect attention from the significance of the Appeal Board's prior ruling, and with a flash of literary style, Cleveland dismisses OE's reference to the Appeal Board ruling as "much ado about certain dicta." Cleveland Br. at 48. Despite the boldness of Cleveland's argument, the Cleveland position is nothing more than a brazen attempt to ignore the most relevant precedent on this point.

14/ Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 N.R.C. 265, 294 (1979) (hereinafter "ALAB-560").

repeated in the conditions themselves (as Cleveland apparently believes it should have been) is of no significance. Having ruled once on this matter, there was no need for the Appeal Board to repeat its ruling in the conditions. The test of whether language in a decision is or is not dicta is whether that language was necessary for the result reached. In the Perry proceeding, the applicants challenged various aspects of the relief formulated by the Licensing Board.[15/] In response to specific concerns about reductions in wheeling service and the extent to which municipalities and cooperatives might use the services offered under the license conditions, Mr. Sharfman's opinion would have vested the Licensing Board with continuing jurisdiction to resolve such concerns.[16/] The Appeal Board majority rejected that solution and instead identified the Director of Nuclear Reactor Regulation as the agency official vested with continuing jurisdiction.[17/] It is thus clear that the opinion language was necessary for the result reached, and is not, as Cleveland would assert, "mere dicta."

Second, Cleveland appears to argue that the referenced sections of the Commission's regulations, 10 C.F.R. §§ 2.200-.206, apply only to violations and do not cover the present

---

15/ See ALAB-560, 10 N.R.C. at 385-98.

16/ Id. at 392 and 398.

17/ Id. at 294.

situation.[18/] Cleveland can make such an argument only by citing to, and quoting from, the wrong section of the Commission's regulations. Thus, at page 50 of its brief, Cleveland quotes from 10 C.F.R. § 2.201 -- the provision on notice of violation. It is, of course, not surprising that the scope of that provision is limited to violations, as Cleveland attempts to argue by emphasizing that word in its quotation. What Cleveland ignores is the language in 10 C.F.R. § 2.200 on the entire scope of the Commission's Part 2, Subpart B regulations. In contrast to the language quoted by Cleveland from Section 2.201, Section 2.200 states:

> This subpart prescribes the procedure in cases initiated * * * upon request by any person, * * * to modify, suspend, or revoke a license, or to take other action as may be proper * * *.

There can, therefore, be little doubt that the Appeal Board was entirely correct when it identified the Director of Nuclear Reactor Regulation as the Commission official with continuing jurisdiction over the antitrust license conditions. See also 10 C.F.R. §§ 50.90-.92 (procedures governing licensee requests for license amendments).

Third, Cleveland apparently believes there is some significance in the fact that Mr. Sharfman's original formulation would

---

18/ Cleveland Br. at 49-50; see also AMP-O Br. at 12. For the reasons indicated in the text, Cleveland's extended discussion (at pages 50-52) on the Director's enforcement decision of June 25, 1979, is wholly irrelevant.

have vested the Licensing Board with continuing jurisdiction only in cases of "extreme hardship."[19/] If by noting this Cleveland means to imply that the Director's authority is similarly limited to situations involving "extreme hardship," that too is clearly wrong. In commenting on the Director's authority, the Appeal Board majority was not creating any new authority. It was simply confirming that authority which already existed under the Commission's rules. That Mr. Sharfman would have gone beyond this already existing authority and have authorized the Licensing Board to retain jurisdiction in cases of "extreme hardship" cannot possibly be viewed as thereafter limiting the Director's authority in a similar manner. There is just no connection between the Director's authority and that continuing jurisdiction Mr. Sharfman would have given the Licensing Board.

B. The "Particularized Regime" Of Antitrust Review Under Section 105(c) Does Not Divest The Director Of His Authority To Consider Antitrust License Amendment Applications

Both Cleveland and AMP-O further attack the authority of the Director of Nuclear Reactor Regulation to consider OE's license amendment application by arguing that the "particularized regime" of antitrust review vested with the Commission somehow precludes the Director from considering this amendment application.[20/]

19/ Cleveland Br. at 48-49; see also AMP-O Br. at 12-13 n.7.

20/ Cleveland Br. at 25-47; AMP-O Br. at 10-11. On this issue, AMP-O again merely restates and summarizes the Cleveland position.

Despite the extended and prolix nature of Cleveland's argument, the singular fact ignored by Cleveland is that the Appeal Board decision here (ALAB-560) authorizing the Director to consider antitrust license amendments was rendered after all of the agency decisions relied upon by Cleveland for the proposition that in the antitrust arena the Director does not have continuing jurisdiction. Thus, Cleveland's argument is reduced to the absurdity that prior agency decisions overrule a later decision by the Appeal Board. Indeed, to accept the Cleveland argument requires one to assume that the Appeal Board either forgot about or was ignorant of those prior decisions. A more reasonable explanation, and one supported by a proper reading of the cases, is that, even in the antitrust arena, the Director continues to retain authority to modify existing license conditions.

Although lengthy, much of the Cleveland argument is either irrelevant or establishes points not in dispute. OE does not quarrel with the general propositions that (1) the NRC's antitrust authority is limited, (2) "plenary antitrust review" (see Cleveland Br. at 29) generally is restricted to the construction permit stage, and (3) antitrust review can occur at the operating license stage only where "significant changes" are present. All of these points deal, however, with requests by non-licensees to have the conduct of a licensee investigated, and as a result of that investigation, impose new or additional antitrust conditions on that licensee. The legislative history quoted by Cleveland,

and reviewed in the agency decisions cited by Cleveland, aptly demonstrates that congressional concerns over the adverse impacts that might result from repeated antitrust investigations of licensees led to a "particularized regime" of antitrust review intended to prevent such adverse impacts by severely restricting the occasions on which such investigations could occur.

Cleveland's argument hinges on its reading of one Commission decision and one Appeal Board decision. In Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 N.R.C. 1303 (1977), the Commission held that an antitrust review could not for the first time be initiated "during the period between issuance of the construction permit and application for an operating license." The solution in that case was to expedite filing of the operating license application and consider the antitrust issues in that proceeding. In Florida Power & Light Co. (St. Lucie Plant, Unit No. 1), ALAB-428, 6 N.R.C. 221 (1977), the Appeal Board held that an antitrust review could not for the first time be initiated after issuance of the operating license.[21/] As the Appeal Board observed in Florida Power, this result followed directly from the Commission's decision in South Texas. See 6 N.R.C. at 226-27.

21/ Cleveland purports to see something sinister because OE's amendment application did not cite the Florida Power case. See Cleveland Br. at 26 & 34. As explained in the text of this Response, that decision is not especially relevant to the situation raised by OE's amendment application, and therefore was not cited in the application.

Because the Appeal Board's decision in Florida Power precluded both a licensing board and the Director of Nuclear Reactor Regulation from initiating an antitrust review for the first time after issuance of the operating license, Cleveland argues that in this case the Director is similarly precluded from addressing the OE license amendment application. It is, however, the very difference between an initial antitrust review, on the one hand, and continuing jurisdiction over a previously conducted antitrust review, on the other hand, that Cleveland ignores and which explains the differing Appeal Board rulings in Florida Power and ALAB-560. Post-licensing antitrust review like that sought in Florida Power is precluded because "Congress had no intention of giving [the NRC] authority which could put utilities under a continuing risk of antitrust review." 6 N.R.C. at 206, quoting the Commission decision in South Texas, 5 N.R.C. at 1317. But, where a utility already has been subject to the risk of antitrust review, and has had antitrust license conditions imposed, "the Director of Nuclear Reactor Regulation * * * [has] authority to modify license conditions where necessary * * *." ALAB-560, 10 N.R.C. at 294.

In summary, despite Cleveland's attempt to shroud the issue in a haze of extended legal argument, the applicable rule is simple and follows directly from the Appeal Board's ruling in ALAB-560. Where antitrust license conditions have been imposed, the Commission, through in the first instance its Director of

Nuclear Reactor Regulation, has the authority to consider changed circumstances that may require modification or suspension of the license conditions.

V. THE PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT PRECLUDE ADJUDICATION OF OE'S LICENSE AMENDMENT APPLICATION

Cleveland argues in the alternative that, even if the NRC has authority to consider OE's antitrust amendment application, the NRC should summarily reject the application because, in Cleveland's view, the application is based on arguments which "involve issues raised in the construction and operating license proceeding and were or could have been raised in those proceedings. Therefore, the arguments are precluded by the doctrine of res judicata or, alternatively, collateral estoppel."[22/] In support of this claim, Cleveland sets forth a lengthy review of what it asserts are the relevant legal principles governing application of these preclusion principles in administrative proceedings.[23/] The only significant point, however, is Cleveland's explicit recognition that changed factual or legal circumstances is a sufficient reason for not applying the res judicata or collateral estoppel principles.[24/] A moment's reflection readily confirms that this must be the case, especially in administrative

---

22/ See Cleveland Br. at 53; see also AMP-O Br. at 13.

23/ See Cleveland Br. at 54-59.

24/ Id. at 56.

proceedings. By its very nature, almost every license amendment application seeks relief from, or a change to, some requirement imposed upon the licensee during earlier NRC proceedings. If the preclusion principles relied upon by Cleveland were a bar to reconsidering such matters, no license amendment could ever be granted. The hundreds of such amendments granted each year by the NRC is strong testimony that a mere recitation to res judicata or collateral estoppel principles cannot simply bar at the outset consideration of OE's antitrust amendment application.

The issue that must be addressed is whether there are changed circumstances that justify the license amendment. OE clearly recognized the need to make such a showing in its initial application, and presented an extended discussion of the applicable legal standards and how the circumstances present today differed in significant and material ways from those assumed when the license conditions were imposed.[25/] Rather than respond directly to the OE position, Cleveland has strained to impose an overly formalistic construct on the analysis by framing its arguments in terms of res judicata and collateral estoppel. As shown below, these legal arguments add little to the analysis and the Cleveland position should be rejected.

25/ A discussion of the relevant legal standards appears at pages 47-52 of the OE Appl. The assumption and bases for initially imposing the antitrust license conditions are described at pages 26-47 of the OE Appl., and the changes in those circumstances are analyzed at pages 53-79 of the OE Appl.

A. OE Did Not Raise, And Could Not Have Raised, The Arguments Now Advanced To Support Its Antitrust License Amendment Application

Cleveland asserts that OE's amendment application is based on an argument previously advanced to, and rejected by, the Appeal Board during the Perry construction permit proceeding. This argument is said to be the claim that "nuclear power has no cost advantages and, as a result, the requisite nexus between the licensed activity and the anticompetitive situation is lacking."[26/] Cleveland's position is wrong for two reasons.

First, the legal argument advanced by OE during the Perry construction permit proceeding is markedly different than the legal argument being advanced by OE in support of its license amendment application. As Cleveland correctly observes, the Perry construction permit proceeding argument revolved around "nexus" -- i.e., whether there was a sufficient connection between the licensed activities and the anticompetitive situation. During the Perry construction permit proceeding, this "nexus" argument took two forms: (1) a claim that the specific activities being reviewed by the NRC were so distinct and unrelated to the licensed activities as not to have the requisite "nexus," and (2) a claim that the relief being imposed by the NRC was so insufficiently associated with the proposed nuclear plant as to lack the requisite "nexus." These two parts of the nexus issue

---

26/ See Cleveland Br. at 65.

were litigated, briefed and argued at every juncture during the Perry proceeding. OE lost on both parts of its nexus claim and is not now advancing either argument in support of its license amendment application.

The claim being made by OE today is in the nature of a jurisdictional attack. Thus, in its application OE argued that if construction and operation of a nuclear plant does not create or maintain a situation inconsistent with the antitrust laws because the economics of the plant are such that neither its construction nor its operation gives OE any competitive benefits, then the "NRC has no statutory basis for overseeing the licensee's business conduct, however anticompetitive it may be."[27/] As OE noted in its application, the universal assumption of all parties to the Perry proceeding was that nuclear power was low cost and, therefore, there was no claim that the NRC lacked the statutory basis for the antitrust proceeding.[28/]

27/ See OE Appl. at 6; see also id. at 26 ("if a nuclear facility is not economically superior, thus maintaining or creating in its owners an automatically advantageous competitive position in the marketplace, there is no statutory basis for NRC conditioning the grant of a license for that plant").

28/ In its just-issued decision in Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 56 U.S.L.W. 4751 (June 24, 1988), the Supreme Court only recently had occasion to comment on the widely held, but unachieved, assumption that nuclear power would be low cost. The high court stated (id. at 4755 n.9):

> At the time construction of Grand Gulf was initiated,

(Continued next Page)

Second, the factual claims related to nuclear power costs advanced during the construction permit proceeding were very different from the claims being made by OE in its amendment application. To be sure, as the Perry proceeding drew to a close, some concerns about the relative cost of nuclear power were beginning to appear. But as Cleveland's quotation relating to Mr. Kampmeier's testimony makes clear, the economic argument was framed in terms of the relative power costs between municipal or cooperative systems -- with their lower cost of money due to tax and financing advantages -- on the one hand, and the power costs of applicants, on the other hand. Thus, Mr. Kampmeier's testimony was cited for the proposition that a municipal system could construct a small coal-fired plant and get power from it "at a total cost equal to, or closely approximating, the cost of power to Applicants from the large nuclear facilities being licensed."29/

(Continued)

> no one anticipated the enormous cost overruns that would be associated not only with that plant but also with virtually every nuclear power facility being constructed in the United States.

See also id. at 4752 ("regulatory delays, additional construction requirements, and severe inflation frustrated the [nuclear] project"); at 4753 n.5 ("[r]egulatory delays, additional construction requirements imposed after the Three Mile Island disaster, and severe inflation, however, ran up Grand Gulf costs").

29/ Quoted in Cleveland Br. at 65.

In contrast to this claim -- which was rejected in part because the Licensing Board found that it was improper for applicants to be relying on a municipal's tax and financing advantages to show lower cost -- OE's amendment application is based on the indisputable fact that the cost of power from Perry is substantially greater than what power would have cost OE from a similarly-sized coal plant. In other words, the circumstance that has changed is that today nuclear is more expensive even for OE than a coal plant would have been, while when the Perry proceeding was litigated, such a claim was untrue. In its broadside attack, Cleve and conveniently ignores this significant factual difference.

B. Cleveland's Reliance On The So-Called "Operating License" Proceeding Is Entirely Misplaced

Cleveland constructs an elaborate argument that res judicata bars OE's license amendment application because "each of the events cited by Edison could have been raised during the operating license proceeding."[30/] Thus, Cleveland dismisses changes in circumstances relating to increases in the cost of nuclear power, the cancellation and delay of CAPCO nuclear plants, and the termination of the CAPCO pool as events which could have been, but were not, raised in a so-called "operating license" proceeding.[31/] There are a number of substantial problems with this

---

30/ See Cleveland Br. at 66.

31/ While Cleveland makes passing reference to the substance or merits of the particular changed circumstances identifie by

(Continued next Page)

argument.

First, the Cleveland claim makes assumptions about the "operating license" proceeding that are unwarranted. Despite the implication one might get from reading the Cleveland Brief, there was no hearing or formal administrative proceeding that considered antitrust issues at the operating license stage. Rather, pursuant to the NRC's regulations at 10 C.F.R. § 2.101(e), the Director of Nuclear Reactor Regulation solicited comments from interested persons to assist him in determining whether significant changes in the licensees' activities had occurred since the antitrust review at the construction permit stage. Only if the Director had determined that significant changes had occurred would there have been some form of proceeding. See C.F.R. § 2.101(e)(4). That proceeding would have been initiated by a referral to the Attorney General for his opinion (10 C.F.R. § 2.102(d)(1)) and, if appropriate, notice of a hearing (10 C.F.R. § 2.102(d)(3)). None of this occurred because, in the context of the significant changes finding required at the operating license stage, the Director found in the case of OE that there was no need to refer the matter to the Attorney General or to give notice of any proposed hearing. By no stretch of the

---

(Continued)

OE, the bulk of Cleveland's argument on the merits is addressed later in its brief. In order to avoid duplication, OE addresses all such matters in one place at Section VII of this Response.

imagination can one view the NRC's antitrust inquiry at the operating license stage as the equivalent of a formal administrative proceeding that should be afforded res judicata or collateral estoppel effects.

Second, as previously noted, Cleveland misconstrues the purpose of the antitrust inquiry at the operating license stage. That inquiry is aimed at determining whether a second, full-blown antitrust investigation of the licensee should be conducted leading possibly to the imposition of new or modified license conditions. It certainly would not be in the interests of OE to provoke such an investigation and proceeding. Indeed, there is no requirement of which OE is aware that would direct OE to raise at the operating license stage the concerns found in its amendment application.

Third, and directly related to the point just discussed, it is highly questionable whether the concerns addressed in the OE amendment application would have been relevant to the antitrust inquiry conducted by the NRC at the operating license stage. The relevant NRC regulation, 10 C.F.R. § 2.101(e)(1), begins by stating that, "[u]pon receipt of the antitrust information responsive to Regulatory Guide 9.3 submitted in connection with an application for a facility operating license * * *," the Director shall initiate his antitrust inquiry. However, none of the information to be supplied by OE in response to Regulatory Guide 9.3 addresses the matters described in OE's antitrust license

amendment application. For example, none of the questions posed by Regulatory Guide 9.3 inquires into the actual cost of nuclear power from the plant being licensed or the relative cost of nuclear power and reasonable alternatives to such power. In short, based on the way the NRC has framed the operating license antitrust inquiry, it appears to OE that the matters raised in this license amendment application would have been outside the scope of that inquiry.

C. Collateral Estoppel Does Not Bar The OE Antitrust License Amendment Application

In the alternative, Cleveland argues that the doctrine of collateral estoppel bars the NRC from considering OE's antitrust license amendment application.[32/] The bases for urging that collateral estoppel precludes the OE application are even weaker and more tenuous than the claims Cleveland makes for the application of res judicata.

Accepting for purposes of argument the criteria set out in Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 N.R.C. 609, 620 (1985), it is clear that Cleveland cannot sustain its collateral estoppel argument. As previously noted, there was no formal administrative proceeding that considered antitrust issues at the operating license stage. Thus, despite Cleveland's glib statements to the contrary, there

---

32/ See Cleveland Br. at 79-81.

was no "prior tribunal" that rendered a decision, there was no "prior valid final judgment on the merits," and the issues now raised by OE were not "actually litigated and necessary to the outcome of the first action." In short, Cleveland's collateral estoppel argument is entirely contrived. Under no circumstances could one conclude that the operating license antitrust inquiry constituted the type of prior proceeding to which one would attach preclusive effects.

VI. NEITHER EQUITABLE CONSIDERATIONS NOR THE DOCTRINE OF LACHES PRECLUDES ADJUDICATION OF OE'S LICENSE AMENDMENT APPLICATION

All commenting parties raise issues associated with what could be viewed as equitable considerations or laches. Clyde asserts that suspension of the antitrust license conditions "forecloses an assured wholesale power supply."[33/] We are told that Clyde relied upon the presence of this guaranteed source and that this was one of the reasons Clyde elected to establish a municipal electric system. AMP-O cites to the Cleveland Brief on laches and also describes at some length the "undue prejudice" allegedly resulting to AMP-O from OE's "much delayed filing for relief here."[34/] Evidence of the "undue prejudice" arises from AMP-O's reliance on the antitrust license conditions in undertaking activities like the proposed purchase of a 200 mw coal-fired plant

---

33/ See Clyde Br. at 7; see also id. at 2-6.

34/ See AMP-O Br. at 13-15.

near Marietta, Ohio. Finally, Cleveland sets forth a legal argument centered around the theory of laches.[35/] Cleveland asserts that it has made significant financial commitments in purchasing power from alternative suppliers and that it has relied upon the antitrust conditions in making these commitments.

The fundamental flaw in all these arguments is that the commenting parties assume that, in the absence of the license conditions, OE would be unwilling to deal with them. This assumption is wholly unsupported. OE is not asking the Commission for authority not to sell wholesale power, or not to transmit power from a generating plant in Marietta to AMP-O, or not to transmit purchased power through its territory to Cleveland. All OE is requesting is that antitrust license conditions no longer appropriate be suspended.

Indeed, if the conditions are suspended and OE refuses to deal with these entities in ways that violate the antitrust laws or the Federal Power Act, the commenting parties have a ready forum to air their grievances either before the Federal Energy Regulatory Commission or in federal district court. It is simply not sufficient for the commenting parties to assert that, if the antitrust license conditions are suspended, OE will in the future violate the law.

35/ See Cleveland Br. at 82-86.

In addition, whatever action the commenting parties took in reliance on the license conditions, they did so with full knowledge that those conditions were attached to a nuclear power license and could be revoked or suspended for a variety of reasons. For example, the NRC may not have granted Perry an operating license, in which case the conditions would have terminated. Even after grant of the license, the NRC retains authority to revoke the license at any time. Moreover, given the clear Appeal Board language that the Director of Nuclear Reactor Regulation retains authority to modify these specific antitrust conditions, the commenting parties were on notice from the start that the antitrust conditions might be revoked, modified or suspended. Whatever reliance was made by the commenting parties was made at their own risk.

Finally, it is untrue as the commenting parties assert that OE has unreasonably delayed in filing its amendment application. The NRC did not issue the full-power operating license for Perry until the fall of 1986. Judicial review of that license was not completed until the spring of 1987. Perry was not placed into commercial operation until November 1987. Given this chronology of events, OE's filing in September 1987 certainly does not constitute unreasonable delay. While it is true, as Cleveland notes, that the cost of Perry was escalating throughout the 1980's, OE's application is based on the final cost of Perry and not some interim estimate. Had OE filed earlier using projected

numbers, no doubt Cleveland would have objected to the use of cost estimates. In any event, OE cannot be faulted for waiting until the final numbers were available.[36/]

For all these reasons, claims that the amendment application should be rejected on grounds of laches or equitable considerations are misplaced. OE has not unreasonably delayed in filing the amendment application. The commenting parties unjustifiably assume that, in the absence of license conditions, OE will violate the law. And if, as OE believes, the NRC lacks jurisdiction to continue imposing these conditions, then the conditions must as a matter of law be suspended regardless of the impact to the commenting parties.

VII. THE CHANGED CIRCUMSTANCES IDENTIFIED BY OE REQUIRE SUSPENSION OF THE ANTITRUST LICENSE CONDITIONS

Putting aside the procedural issues raised by Cleveland, AMP-O and Clyde, the commenting parties raise very few issues directly addressing the substance of OE's application: that the change in the relative cost of nuclear power, from an anticipated low cost to an actual high cost, is a sufficient basis for suspending the antitrust license conditions.[37/] Those matters they

---

36/ In addition, OE had a legitimate interest in waiting until all licensing action for Perry was completed, so that the pendency of this amendment application would not unduly complicate or delay the licensing of Perry.

37/ In its application, OE also identified as significant changes the cancellation and delay of large portions of the CAPCO nuclear program (OE Appl. at 72-73) and the termination of the CAPCO pool (OE Appl. at 73-76).

do address relating to this issue are either factually or legally incorrect or are particularly garbled and difficult to comprehend. Each party's substantive comments are addressed separately below.

A. Clyde's Substantive Comments

1. Clyde argues that suspension of the antitrust conditions is unwarranted and would create a dangerous precedent.[38/] While Clyde acknowledges that there "may well be circumstances when reopening the terms of a license is necessary or desirable," Clyde argues that to do so for "changed economic conditions" is inappropriate and might well "invit[e] a flood of filings."[39/] Apparently, the basis for this conclusion is Clyde's view that the conditions were imposed not only because of "prospective and optimistic projections about the economics of nuclear power," but also "because of a retrospective history of anticompetitive dealings."[40/] To be sure, it was necessary during the Perry proceeding for the non-applicant parties to establish anticompetitive behavior by the applicants. But, it also was necessary to show that licensing Perry would "create or maintain" such an anticompetitive situation. This crucial link was essentially assumed by all parties because of the recognized low cost of

---

38/ See Clyde Br. at 7-9.

39/ Id. at 8.

40/ Id.

nuclear power. Indeed, if as OE asserts the change in the cost of nuclear power is sufficient to remove this key link in the NRC's statutory mandate, then as Justice Cardozo wrote in United States v. Swift & Co. -- and cited by Clyde -- the changes "are so important" as to require a change in the license conditions.

2. Clyde also asserts that OE's "claims of economic woe" may be unjustified.[41/] The only basis for this allegation is that, during a meeting with Clyde, OE representatives noted that OE's "electric rate fuel component" was the lowest in Ohio.[42/] There is, of course, nothing inconsistent with a low fuel cost component and a high cost nuclear plant driven by high capital costs. Moreover, Clyde seems to imply that OE's economic evaluation of nuclear power was performed in a vacuum, without regard to cost changes affecting alternatives. This is not so. The basic comparison in the OE application was between nuclear and coal back in 1976 and today. That comparison directly considers the impacts on other alternatives from change during this period.

3. Clyde also makes the remarkable argument that, if nuclear power is expensive, then OE need not worry about the license conditions because market conditions will be such that no entities will seek to take advantage of the license conditions.[43/] While one would have assumed that antitrust license

---

41/ Id. at 9-10.

42/ Id. at 10.

43/ Id. at 11.

conditions attached to a nuclear plant operating license would have something to do with the nuclear plant, in fact that is not the case. Today, entities who have expressed no interest in nuclear power still request interconnections, wheeling and other services that are not affected by the high cost of nuclear power. It is for this very reason that the nuclear license, rather than being a competitive benefit, is a competitive disadvantage.

4. Finally, Clyde argues that OE may have contributed to the high cost of Perry and should not be rewarded for such mismanagement.[44/] While Clyde cites to the findings by the Public Utilities Commission of Ohio ("PUCO"), which currently are on appeal, it does not cite to two separate findings by the Pennsylvania Public Utility Commission that there was no mismanagement or imprudently incurred costs at Perry. Moreover, even if the costs disallowed by the PUCO were not considered, the cost of power from Perry would still be greater than a current coal plant.[45/]

44/ Id. at 12.

45/ The OE Appl. shows that a current coal plant costs one-half what Perry costs. A 15 percent reduction in the capital cost of Perry would not significantly change that comparison.

B. AMP-O's Substantive Comments

1. AMP-O argues that Congress did not make the economic superiority of nuclear power "a condition precedent to the NRC's exercise of its [antitrust] licensing authority."[46/] This is followed by an extended legal analysis designed to demonstrate that an administrative agency may not modify statutory provisions.[47/] OE does not quarrel with AMP-O's statement that, as a general principle of law, administrative agencies may not expand upon their statutory mandate. That, however, is not the issue raised by OE's amendment application. That application seeks suspension of the license conditions because current circumstances are such that the statutory basis for imposing the conditions -- that activities under the license "would create or maintain" a situation inconsistent with the antitrust laws -- are no longer met. Thus, rather than have the NRC expand or modify its statutory mandate, the OE application merely seeks to have NRC enforce or obey the explicit directions of Congress.

As to the central issue, whether the high cost of nuclear power is such that construction and operation of a nuclear plant cannot "create or maintain" a situation inconsistent with the antitrust laws, AMP-O is entirely mute. It offers no basis for disputing or contesting OE's analysis that the perceived low cost

---

46/ See AMP-O Br. at 5-6.

47/ Id. at 6-9.

of nuclear power was the driving reason for Congress' decision to impose antitrust review on the licensing of nuclear power. Given the "create or maintain" language, OE cannot imagine anyone reaching a different conclusion.

2. While AMP-O broadly asserts that OE's "factual assertions are inaccurate," many of the claimed inaccuracies are acknowledged by AMP-O to be "not especially relevant here."[48/] The one inaccuracy alleged by AMP-O to be relevant is more an argument that OE's power sales to AMP-O are not "forced" and do not require OE's retail customers to subsidize such sales.[49/] While this claim too seems to be of marginal relevance, the fact is that the AMP-O power contract does force OE's retail customers to subsidize the wholesale customers. Nonetheless, the sales contract was better than nothing, since in its absence the wholesale subsidy would have been even greater.[50/]

48/ See AMP-O Br. at 15-16 and n.9.

49/ Id. at 16-17.

50/ As explained in the text below, the subsidy arises because OE had an obligation to plan for the needs of its wholesale customers. The ability of those entities to choose when and how much power they take allows them to shift to the retail customers some of the generation costs that properly should be placed on the wholesale customers. If OE had not accepted the power sales contract, the effect would have been to shift all of the generation and planning costs from the wholesale customers to the retail customers. This would have increased the subsidy even further. Thus, the power sales contract was the best of a bad situation. See also OE Appl. at 58 & n.123 (description of subsidy and reference to retail rate case before PUCO).

The AMP-O situation is different than the sale to PEPCO, cited by AMP-O, because in the case of the wholesale customers, OE had a public utility responsibility to provide service, if requested. This public utility responsibility required OE to plan for and construct generation. The cost of that generation should be fairly allocated to all OE potential customers, both retail and wholesale. However, through the license conditions, AMP-O can distort such planning by choosing at its option when it will or will not purchase power from OE. By contrast, OE has no public utility responsibility to provide service to PEPCO or its customers. Therefore, it did not plan for or construct generation to serve PEPCO. As a result of unforeseen circumstances, OE has additional capacity that it was able to sell PEPCO. The key difference is, of course, that there was no OE obligation to plan for PEPCO while there was such an obligation to plan for AMP-O's customers.

3. AMP-O, like Clyde, alleges that "a substantial portion of the Perry costs have been found [by the PUCO] to be a direct result of management imprudence."[51/] While AMP-O chastizes OE for not alerting the Commission to an as-then unissued PUCO

51/ See AMP-O Br. at 18. The parties' characterization of the PUCO decision is not entirely accurate. A very large part of the PUCO's proposed disallowance is not based on any alleged management imprudence. Rather, with respect to the costs associated with General Electric's so-called "new loads", the PUCO decided, as a matter of policy, that $263.6 million of deferral costs are not properly included in the reasonable original cost of Perry.

decision,[52] AMP-O mysteriously fails to inform the agency of the two contrary decisions in Pennsylvania. In any event, it is a gross misstatment to claim that the PUCO disallowed a "substantial" portion of the Perry costs. And, as noted in Section VII.A.4 above, the PUCO decision in no way alters OE's argument that the high cost of Perry (even if one ignores the disallowed costs) is a sufficient basis for suspending the antitrust license conditions.

4. AMP-O's final argument is that the relief sought by OE -- suspension of the antitrust license conditions -- is unworkable.[53] The concern expressed by AMP-O is that ever-changing economic conditions may result in suspension, reinstitution and suspension again of the conditions. AMP-O states that, in an industry like the electric utility industry where long lead times are required, this on-again, off-again nature of the conditions would be highly disruptive. OE finds it somewhat ironic that AMP-O complains about such planning disruptions, when its very conduct of choosing when and how to purchase power from OE creates similar planning problems for OE.[54]

52/ Id. at n.12.

53/ Id. at 19-21.

54/ See, for example, the FERC decison in Ohio Edison Co., 43 FERC ¶ 61,316 (May 26, 1988) (characterizing AMP-O power supply contract as giving AMP-O the right to decide how much power, up to 100 percent of its requirements, it will take from OE).

The complete answer to the AMP-O claim is that AMP-O surely overstates the variability of the license conditions under OE's proposal. The cost of Perry is today known. It is so much greater than a coal plant, that the changes in economic conditions required to make nuclear once again a low cost alternative are so great as not to occur very frequently. If OE is successful in its application, the prudent course would be for AMP-O to plan as if the conditions may never reattach.[55/] If conditions change substantially, and Perry does provide OE with a competitive advantage, the AMP-O planning assumption, like all planning assumptions, can be revised. Thus, under the OE proposal there is no need, as AMP-O suggests, for the NRC to be involved in annual reassessments of the relative cost of nuclear power.

C. Cleveland's Substantive Comments

The essence of Cleveland's argument on the merits is that factors other than cost were important in Congress' decision to impose antitrust scrutiny on nuclear power plants.[56/] Although Cleveland divides its argument into three sections, each part of the analysis merely repeats the central premise. In the first

---

55/ It is worth repeating once again that suspension of the antitrust license conditions does not mean that OE will not deal with AMP-O or the individual utilities now being served under contract with AMP-O. To the contrary, there is no reason why, in the absence of the conditions, OE and AMP-O, or the individual utilities being served by AMP-O, cannot enter into long-term arrangements that are mutually satisfactory.

56/ See generally Cleveland Br. at 87-117.

section, Cleveland argues that Congress was concerned about factors other than the low cost of nuclear power. In the second section, Cleveland argues that NRC precedent also has considered factors other than the low cost of nuclear power. And in its third section, Cleveland argues that the Licensing and Appeal Boards considered factors other than the low cost of nuclear power.

Before addressing the specific claims made by Cleveland, two significant points should be noted. First, in establishing a regime of antitrust review, Congress uniquely tied such review to nuclear plant licensing. Such review is not required for the construction of large coal-fired or hydroelectric facilities. If Cleveland is correct that concerns about construction of large-scale generation facilities (regardless of cost), or coordination services, or transmission systems were also relevant, Congress should not have limited antitrust review merely to nuclear plants. What is unique about nuclear power was the expectation that it would be particularly low cost.[57/] To accept Cleveland's argument requires one to assume that Congress irrationally chose nuclear power for antitrust review while ignoring equally

---

57/ Cleveland does quote extensively from the testimony of AEP's Philip Sporn to show that not everyone believed nuclear would be low cost. See Cleveland Br. at 91-94. Despite Mr. Sporn's testimony, the fact is that all the congressional reports consistently refer to an expectation that nuclear power would be low cost. See, e.g., OE Appl. at 7-12. Thus, it appears that Mr. Sporn's prognoses were not accepted by Congress.

applicable concerns arising from the construction of other large generating facilities. There simply is no basis for such an assumption.

Second, the Cleveland position defies all logic and readily apparent economic principles. Consider the following statement in the Cleveland Brief:[58/]

> [C]ongress recognized that in view of the large scale of a nuclear facility, and the associated transmission facilities and coordination services, operation of the facility by a utility with a dominant role in generation and transmission of electricity in a market could enhance the utility's market power. Therefore, Congress intended the NRC to impose antitrust conditions regardless of the cost of the nuclear power to ensure that neighboring utilities have access to the transmission facilities, and the associated coordination and wheeling services, which accompanied the nuclear plant. [Emphasis in original.]

If the nuclear plant is high cost, the large scale of the facility, the associated transmission lines, and the coordination services do nothing to alter the fact that the plant is high cost. When it was assumed that the plant would be low cost, these ancillary facilities and services would have allowed the plant owner to exploit the low cost of the plant. But if the plant is high cost, no amount of ancillary facilities or services can change that fact.

58/ Cleveland Br. at 90.

When Cleveland argues that the cost of the nuclear plant is irrelevant -- that Congress intended the NRC to impose antitrust conditions "regardless" of cost -- it totally reads out of the statute the "create or maintain" language. If that part of the statute is to have any meaning, then the relative cost of nuclear power must be relevant. Indeed, until OE read the Cleveland comments, it did not believe that anyone contested this point.

Certainly, the Department of Justice ("DOJ") never believed that cost was irrelevant. As noted in the OE application, DOJ advised the NRC that no antitrust hearing was necessary for the Davis-Besse 1 plant when "[i]t appear[ed] that the estimated cost of producing power at the [proposed] plant [would] be about the same as the applicant's average system costs and higher than the estimated production costs of at least one of the similar-sized fossil-fuel plants being constructed by CAPCO members."[59/] Similarly, the Licensing and Appeal Board decisions in the Perry proceeding contain numerous references to the anticipated low cost of nuclear power.[60/] It is thus apparent to OE that the Cleveland argument lacks certain basic indicia of credibility. It should be approached with great caution.

In an attempt to obfuscate the issue, Cleveland quotes from the Joint Committee Report on the broad scope of the types of

---

59/ Quoted in OE Appl. at 4-2.

60/ See, e.g., OE Appl. at 29-32.

activities under the license which need to be considered.[61/] This material is wholly irrelevant. OE is not today arguing over the scope of activities under the license covered by Section 105(c). That nexus argument was raised and lost by OE in the 1970's. The issue today is whether those activities (however broadly defined) can "create or maintain" a situation inconsistent with the antitrust laws given the high cost of nuclear power. Cleveland's quotations from the Joint Committee Report do not address this matter.

Cleveland then attempts to turn the issue upside down and argues that "an increase in nuclear costs exacerbates the anticompetitive situation to an even greater extent."[62/] Apparently, the basis for this unique claim is that if OE's rates rise because of Perry, anticompetitive practices will force competing utilities to buy this more expensive power. There is not a single shred of evidence that Cleveland can point to which would indicate that this concern was in any way of significance to Congress when it passed this legislation. In fact, the legislative history shows that it was Congress' concern over the low cost of nuclear power, not high cost, which prompted the legislation. This argument is just another example of the over-reaching in which Cleveland engages.

61/ See Cleveland Br. at 90-91.

62/ Id. at 98 (emphasis in original).

Cleveland's selected quotations from, and analysis of, prior NRC precedent is similarly unreliable,[63] and should be compared to the analysis in OE's application.[64] Suffice it to say that the Cleveland discussion contains much which is not relevant, numerous leaps of faith from the cited references to the conclusions drawn, and a generally distorted view of the applicable case law. For example, in discussing the Waterford proceeding, Cleveland quotes from a licensing board decision which starts with the observation that the "[a]pplicant has or is attempting to acquire a monopoly of large low cost electrical generating units in the relevant geographic market,"[65] and concludes that the licensing board opinion recognized 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 * * *."[66] The conclusion drawn by Cleveland is wholly unjustified.

Finally, Cleveland attempts to construct a similar argument that the Licensing and Appeal Boards in the Perry case also did not view the low cost of nuclear power as essential.[67] Rather

---

63/ Id. at 99-110.

64/ See OE Appl. at 15-26.

65/ Cleveland Br. at 102 (emphasis added).

66/ Id. (emphasis in original).

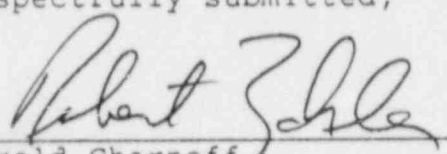
67/ Id. at 110-17.

than repeat our previous arguments, one should review the relevant portions of the OE application.[68/] In short, the entire Cleveland argument on the significance of the change in the relative cost of nuclear power from low cost to high cost is shrouded in a barrage of words that either are irrelevant or misstate the applicable principles. The Cleveland position should be rejected.

VIII. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the OE application, the Director of Nuclear Reactor Regulation should suspend the antitrust license conditions attached to the Perry operating license until such time as there is a factual basis for imposing them.

Respectfully submitted,



Gerald Charnoff
Robert E. Zahler
Deborah B. Charnoff
Margaret S. Spencer

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
Tel: (202) 663-8000

Dated: July 5, 1988

68/ OE Appl. at 29-32; see also id. at 33-47.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OHIO EDISON COMPANY
76 South Main Street
Akron, Ohio 44308,

Plaintiff,

v.

LANDO W. ZECH, JR., THOMAS M. ROBERTS, KENNETH M. CARR, KENNETH C. ROGERS, COMMISSIONERS, UNITED STATES NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555,

Defendants.

Civil Action No. 88-1695

RICHEY, J. CRR

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT

Nature of the Case

1. Plaintiff Ohio Edison Company seeks a determination by this Court of an antitrust issue. That antitrust issue is the continued imposition by the Defendants, the Nuclear Regulatory Commission (NRC), of eleven antitrust license conditions currently constraining Plaintiff's business activities.

2. This Court has jurisdiction over this case pursuant to its general federal jurisdiction (28 U.S.C. § 1331), as well as its jurisdiction over proceedings arising under "any Act of Congress regulating commerce or protecting trade and commerce

against restraint and monopolies" (28 U.S.C. § 1337). This matter is ripe for the Court's consideration because of the NRC's inability to fairly hear the case due to an extraordinary situation arising from the congressional threat to legislatively overrule the NRC should it grant Ohio Edison's application.

Parties

3. Plaintiff, Ohio Edison Company, is a public utility incorporated under the laws of the State of Ohio. Its principal place of business is in Akron, Ohio. Ohio Edison is a partial owner of the Perry nuclear power plant (Perry), which is located approximately 37 miles east of Cleveland, Ohio.

4. Defendants Lando W. Zech, Jr., Thomas M. Roberts, Kenneth M. Carr, and Kenneth C. Rogers are Commissioners of the United States Nuclear Regulatory Commission (NRC). Each of the defendants is sued in his official capacity. As used herein, the NRC also refers to those individuals acting pursuant to the Commissioners' authority.

Jurisdiction and Venue

5. The action arises under the Atomic Energy Act, Section 105 (42 U.S.C. § 2135).

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, and 1361.

7. The Court is authorized to issue appropriate declaratory relief against Defendants under 28 U.S.C. §§ 2201 and 2202. An actual and substantial controversy exists between Ohio Edison and the NRC. This matter should not be resolved by the NRC. And currently, the NRC continues to impose on Ohio Edison the restrictive business conditions which Ohio Edison believes are unlawful. In short, the parties have adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment.

8. Venue is proper under 28 U.S.C. §§ 1391(b) and 1391(e).

Statement of Facts

9. In 1977, the NRC granted the construction permit for the Perry nuclear power plant. At that time, there was a universally-held anticipation that nuclear power would place the owner of a nuclear power plant in an economically advantageous position in the marketplace as a supplier of electricity. Section 105(c) of the Atomic Energy Act (42 U.S.C. § 2135(c)) authorizes the NRC to grant licenses subject to restrictive conditions in order to avoid the likelihood of activities under the license creating or maintaining a situation inconsistent with the antitrust laws.

10. Consequently, pursuant to Section 105 of the Atomic Energy Act (42 U.S.C. § 2135), the NRC held a hearing on the antitrust aspects of licensing the Perry nuclear power plant. Following that hearing, the NRC imposed eleven conditions limiting the business activities of Perry's owners, including Ohio Edison, in order to prevent creating or maintaining a situation inconsistent with the antitrust laws.

11. The expectation regarding the competitive advantage of large nuclear power plants that would generate power at lower cost was a necessary precondition to the NRC's imposition of the Perry antitrust license conditions.

12. During the 1980's, trends in the general economy had a large and adverse impact on the costs of nuclear power plants, including Perry. These trends included high interest rates and high inflation.

13. In addition, during the 1980's, nuclear power plants, including Perry, were faced with unanticipated, extensive, frequently-changing and costly regulatory requirements imposed by the federal government.

14. Because the actual economics of nuclear power as related to the Perry plant proved to be different from those anticipated, Ohio Edison did not achieve and does not possess the

corpetitive advantage from its ownership interest in the Perry nuclear power plant which the restrictive license conditions were intended to mitigate.

15. Because the Perry nuclear power plant is not the economically superior source of energy that it was expected to be, the suspension of the restrictive conditions would not cause the licensing of the Perry facility to create or maintain a situation inconsistent with the antitrust laws.

16. Consequently, on September 18, 1987, Ohio Edison applied to the NRC to suspend the restrictive conditions.

17. On March 29, 1988, while Ohio Edison's application was pending before the NRC, Senator Howard M. Metzenbaum (D.-Ohio), the Chairman of the Subcommittee on Energy Regulation and Conservation of the Senate Committee on Energy and Natural Resources, proposed Amendment No. 1913 to Senate Bill No. 2097, the proposed Uranium Revitalization, Tailings Reclamation and Enrichment Act. Amendment No. 1913 provided in its entirety that "The Nuclear Regulatory Commission shall not suspend or modify the application of any antitrust provision contained in the Perry operating license No. NPF-58, as such provision applies to any licensee of the Perry Nuclear Powerplant, Unit 1." 134 Cong. Rec. S 3257 (daily ed. March 29, 1988) (copy attached as Exhibit A; videotape of proceedings attached as Exhibit B).

18. After introducing Amendment No. 1913, Senator Metzenbaum stated in part:

> The costs of building and operating the Perry nuclear powerplant have risen far beyond anything its owners ever anticipated. Nuclear power has not turned out to be the low cost alternative that they thought it would be.

Id. at S 3257.

19. During the colloquy that followed Senator Metzenbaum's proposal of Amendment No. 1913, Senator Wendell H. Ford (D.-Ky.), a member of the Senate Committee on Energy and Natural Resources, expressed his belief that the Senate should not consider the proposed amendment until after the NRC had concluded its consideration of Ohio Edison's application. Senator Ford stated:

> If the official result is not as the Senator from Ohio wants under this amendment, then he can come back at some later date and say to his people "This is what I am going to do if the NRC does not rule as we want them to under this particular amendment." . . . .
>
> But I think we have an opportunity here to not do this subject to NRC's making the kind of judgment with the pressures being applied by the distinguished Senator from Ohio. That pressure is out there. It can be done. If NRC does not do it, then he has a right to come back and say "They did not protect my people and I want to do something about it."

Id. at S 3258.

20. Senator J. Bennett Johnston (D.-La.), the Chairman of the Senate Committee on Energy and Natural Resources, agreed that the Senate should delay action on the amendment until after the

NRC had concluded its consideration of Ohio Edison's application. Senator Johnston stated:

> I think there is a real desire to accommodate the Senator from Ohio on this committee. He is a good friend, and he is a valued member of the committee.
>
> But two of my colleagues now have spoken rather strongly on this, and the NRC has indicated that they have no intention of approving this application.
>
> With this record having been made and with our strong intention stated to help the Senator just in case the action of NRC is not successful, I wonder if the Senator would consider withholding the amendment on this bill with the understanding that the committee will help him later on in case the NRC does not.

Id.

21. At various points during the colloquy concerning Amendment No. 1913, several Senators indicated that while Plaintiff's application was pending before the NRC, Congressional and NRC staffs apparently communicated with one another regarding the NRC's intent to deny the application.

22. During the colloquy concerning Amendment No. 1913, Senator Metzenbaum stated:

> I have a hunch that somehow [the NRC is] monitoring what is going on on the floor here since it is not a private meeting since it is a matter concerning them and certainly the Congressional Record will speak to the debate, and I am saying here and now that if we can get confirmation, whether it is a final decision or not, that they do not intend to approve the application, I will join with the managers of the bill in urging that

[Amendment No. 1913] be deleted in conference.

Id. at S 3259.

23. Senator Metzenbaum later stated that he would "withdraw the amendment with the understanding that [he] will be protected to offer the amendment at a later point." Id.

CLAIM

24. The allegations of paragraphs 1 through 23 are incorporated herein and realleged by reference.

25. As a result of the congressional pressure related to the threat to legislatively overrule the NRC should it grant Ohio Edison's application, the NRC is unable to fairly adjudicate Ohio Edison's application. In fact, the appearance alone of the NRC's inability to impartially consider the application is a denial of Plaintiff's right to due process.

26. Accordingly, while this case ordinarily would be decided in the first instance by the NRC, the extraordinary circumstances that have occurred compel consideration of this matter by this Court.

27. Because the anticipated economic advantages of nuclear power did not materialize, activities under Ohio Edison's

ownership license for the Perry nuclear power plant could not "create or maintain a situation inconsistent with the antitrust laws," even if unrestricted by the eleven antitrust license conditions imposed by the NRC in 1977.

28. Consequently, Plaintiff Ohio Edison is entitled to the suspension of the restrictive conditions imposed on its license to own the Perry nuclear power plant.

WHEREFORE, Plaintiff prays that this Court:

1. Issue an order suspending the restrictive conditions to the Perry license as the conditions apply to Plaintiff, or, alternatively, issue an order directing the NRC to suspend the restrictive conditions to the Perry license as the conditions apply to Plaintiff.

2. Provide such further relief as the Court deems reasonable, just, and proper.

VERIFICATION UNDER PENALTY OF LAW

I, Russell J. Spetrino, Plaintiff's Executive Vice President and General Counsel, verify under penalty of perjury that the foregoing is true and correct. Executed on June 21, 1988.

Russell J. Spetrino

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

Dated: June 22, 1988

Gerald Charnoff Bar No. 51276

Gerald Charnoff
Robert E. Zahler
Deborah B. Bauser
Margaret S. Spencer
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

ness for the Corporation. The amendment also establishes a fund within the Corporation into which D&D costs, recovered in the Corporation's prices and charges, are to be deposited.

At this point, there is a great deal of uncertainty concerning the ultimate costs of D&D.

Applicable environmental standards are not entirely clear.

The timing of D&D is not certain.

The projected cost of particular decontamination and decommissioning actions can be projected, but not with precision.

Furthermore, the process of recovering D&D costs is not discrete. In the future, the Enrichment Corporation will be making capital investment in new plants. At the appropriate time, the D&D costs associated with these plants will have to be considered along with the D&D costs of property initially transferred to the Corporation.

In short, the process of funding the D&D costs of the Corporation's property will necessarily be an iterative one. The estimate of D&D costs that the Corporation seeks to recover will have to be periodically recalculated as provided in the amendment. At any given point, the estimated unfunded cost of D&D will constitute a prospective cost of doing business to be recovered from customers—including the Department of Energy—in prices.

Nevertheless, certain rules will apply. Section 1508 of S. 2097 provides in effect that prices to commercial customers shall be set at market levels, with the goal of recovering costs, whereas prices to the Department of Energy shall be set strictly on the basis of cost recovery. This distinction is preserved with respect to the recovery of D&D costs in the Corporation's prices.

In addition, the amendment provides that, with respect to property used in the production of low-assay separative work, the Corporation may only recover D&D costs from commercial customers and the Department in proportion to the amount of separative work that has been produced for either during the life of the property. In the case of property used solely in the production of high-assay separative work, D&D costs would only be recovered from the Department. This allocation assigns cost responsibility betwen the two customer classes according to historical benefits received—measured in terms of work performed.

Finally, the amendment provides for the Corporation to enter into contract for the performance of actual decommissioning and decontamination and for the Corporation to pay the D&D costs for such property out of the fund created for such purpose. After decontamination and decommissioning is performed the Corporation conveys the property to the Secretary.

Mr. President, I think this is an improvement of the bill, and we support it.

The PRESIDING OFFICER. If there is no further debate, the question is on agreeing to the amendment.

The amendment (No. 1912) was agreed to.

Mr. METZENBAUM. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. McCLURE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. METZENBAUM. Mr. President, I thank the managers of the bill.

I ask unanimous consent that the pending amendment be temporarily laid aside, in order that the Senator from Ohio may offer an amendment which I understand will be accepted.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

AMENDMENT NO. 1913

(Purpose: To prohibit the suspension or modification of the application of antitrust provisions applicable to any licensee of the Perry Nuclear Powerplant, OH)

Mr. METZENBAUM. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The bill clerk read as follows:

The Senator from Ohio (Mr. METZENBAUM) proposes an amendment numbered 1913.

Mr. METZENBAUM. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place, insert the following new section:

SEC. . PERRY NUCLEAR POWERPLANT ANTITRUST PROTECTIONS.—The Nuclear Regulatory Commission shall not suspend or modify the application of any antitrust provision contained in the Perry operating license No. NPF-58, as such provision applies to any licensee of the Perry Nuclear Powerplant, Unit 1.

Mr. METZENBAUM. Mr. President, I am offering an amendment which prohibits the Nuclear Regulatory Commission from lifting the antitrust conditions imposed on the utilities which are licensed to operate the Perry Nuclear Powerplant in Ohio.

This amendment will protect the electricity consumers in northern Ohio from unfair rate increases due to the Perry nuclear powerplant.

Under the current terms of the Perry nuclear plant license, the utilities which own Perry are required to carry power for municipal power systems (Munis) located within their service territories.

This allows these local power supply systems to shop around for the cheapest available power, providing competition to the owners of the Perry plant, thus helping to keep rates lower.

This requirement to carry power was one of several antitrust conditions imposed on Perry's owners in 1976. It was part of the deal which Perry's owners agreed in order to obtain their operating license.

These conditions have maintained competition in the sale of electricity, forcing Ohio Edison and the other utilities which own Perry to keep rates low in order to retain municipal power systems as customers.

Ohio Edison, however, has applied to the Nuclear Regulatory Commission to be relieved of these antitrust conditions.

If it were successful, the other Perry owners would presumably follow suit—like Cleveland Electric Illuminating and Toledo Edison.

That's why the city of Cleveland has filed a motion opposing the Ohio Edison application pending before the NRC. Cleveland's municipal power system is all too aware of the potentially disastrous results which would ensue if the NRC accedes to Ohio Edison's request.

Such a decision by the NRC would essentially hold all ratepayers in northern Ohio captive to the rising rates of a few utilities that own the Perry nuclear plant, which has now turned out to be very expensive.

The costs of building and operating the Perry nuclear powerplant have risen far beyond anything its owners ever anticipated. Nuclear power has not turned out to be the low cost alternative that they thought it would be.

Now those owners want to escape the consequences of an unfortunate business decision—a bad investment. They want to transfer their burden from the shareholders to the ratepayers, by getting out from under the original terms of their license.

It is quite simply unfair to deny municipal power systems the option of supplying low cost, alternative power to their customers. And the fact is, they do provide cheaper power.

On average, Ohio's municipal power systems provide power which is substantially less expensive than that sold by investor-owned utilities.

For example, public power customers in Cleveland pay approximately 20 percent less than utility customers—those served by CEI.

And that gap will only grow as more of Perry's costs are incorporated into rates.

In fact, on a statewide basis in Ohio, municipal power systems sell power that is 20 to 30 percent cheaper than power sold by investor-owned utilities.

Twenty-one cities located in Ohio Edison's service territory could face higher rates if the Ohio Edison request is approved, including Amherst, Beach City, Brewster, Columbiana, Custar, Cuyahoga Falls, Galion, Grafton, Hubbard, Hudson, Lodi, Lucas, Milan, Monroesville, Newton Falls, Niles, Oberlin, Prospect, Seville, South Vienna, Wadsworth, and Wellington.

In sum, I believe that the owners of Perry must be held to the original terms of their license, and should not

be allowed to force ratepayers to shoulder the costs of their mistakes.

Mr. President, it is my understanding that this amendment is acceptable to the managers of the bill.

Mr. JOHNSTON. Mr. President, we are willing, with some reservations, to accept this amendment. It is one of those amendments where the result is good but the precedent is not particularly good.

Mr. President, this amendment would prohibit NRC from suspending or modifying antitrust provisions contained in the operating license for the Perry Nuclear plant. The antitrust provisions require investor-owned licensees to wheel for municipal electric systems.

One of the Perry licensees, Ohio Edison Co., has petitioned NRC to waive the wheeling requirement as to itself. The company is currently providing wheeling to its municipal customers. Ohio Edison asserts that the NRC's antitrust concerns were based on the assumption that nuclear power would be "too cheap to meter," a presumption that has not proven true.

Ohio Edison and the affected municipalities are currently in settlement negotiations concerning the case.

This is an ongoing contested, adjudicatory proceeding before a regulatory agency. Congress occasionally directs the result of agency determination in noncontested matters. Only rarely does it legislate the decision in a contested case. Generally, this would only occur as the result of a policy initiative that has had the full benefits of hearings and committee consideration.

Here with this amendment, we would be gratuitiously interfering with agency adjudication. This is a matter committed to the NRC. Without expressing any opinion as to the merits of the controversy, why don't we let the NRC decide as they are suppose to do?

Frankly, we have spoken to the NRC, and they say the result is OK. Where the result is OK and where the Senator from Ohio wants that result, and the NRC does not object, I do not think we should let the precedent of this matter interfere. This should not be a precedent in further cases. Therefore, we will not object.

Mr. McCLURE. Mr. President, I find myself in kind of an awkward position here, because, frankly, I do not like the amendment. I am not certain that I dislike it enough to take the time of the Senate and cause the difficulties that would come if we contested the amendment. We would have to go through the effort of contesting the amendment and taking the time to do so. But I am troubled not just with the precedent.

I have been told that it is quite likely that this amendment may accomplish what NRC probably would have done in the absence of the amendment. But I am concerned about two things.

First, I do not want any implication that I approve the result, because I am not at all certain that this Senator approves the result. This deals with some questions that really ought to be litigated between parties, some of whom have already made an application before the NRC to have their rights protected in the NRC. We are short-circuiting that process, in which the people would have the opportunity, in an open forum, to present their views, present their case, and seek a resolution of it. What we are doing, instead of allowing that process to be done in the open processes before the NRC, is to step in by legislation and mandate the final result.

As I said, this very well might be what NRC would ultimately decide to do; but all the parties would have had their say in court; they would have had their opportunity to present the issue; they would have had their opportunity to debate the issues. They would have had an opportunity to have a reasoned resolution of the issues by the tribunal which we have established by law to handle those kinds of issues. There are some issues involved here.

So, to say that if we accept the amendment offered by the distinguished Senator from Ohio, we can well say this is a precedent—I would certainly wish to say that, but for the Senator from Idaho it is not a precedent. As a matter of fact, I do not like the result, or at least I am not sure I like the result. I certainly do not like the process of trying to mandate a result before the parties have had their opportunity and their day in court.

I think it is bad for us to do that, and I am more than a little bit concerned about the form of the final resolution, because I think there are some questions with respect to whether or not this is the proper resolution.

The PRESIDING OFFICER (Mr. DASCHLE). The Senator from Kentucky.

Mr. FORD. Mr. President, I state on the RECORD that this Senator will not consider this as a precedent in making his decision as it relates to this subject matter in the future.

I have very, very serious reservations about the procedure here. I agree with my distinguished friend. The distinguished Senator from Louisiana said we are concerned about the precedent. It would be my judgment that this amendment could be laid out there.

If the official result is not as the Senator from Ohio wants under this amendment, then he can come back at some later date and say to his people "This is what I am going to do if the NRC does not rule as we want them to under this particular amendment."

That would be one suggestion I might have, but we are getting into an area here that we have argued a long time and the distinguished Senator from Idaho and I spent sleepless nights here trying to work out something as it related to wheeling. Here now we are saying to NRC we are going to abandon or reduce wheeling or whatever, and it is a problem I wish would not have to be made on this bill.

I yield to my friend and distinguished chairman and ask what he prefers in this particular case because he has a lot of weight with his responsibility and if his decision is approve it, then fine.

But I think we have an opportunity here to not do this subject to NRC's making the kind of judgment with the pressures being applied by the distinguished Senator from Ohio. That pressure is out there. It can be done. If NRC does not do it, then he has a right to come back and say, "They did not protect my people and I want to do something about it."

Now, the procedure is going to be eliminated, and I am worried about the procedure in the future.

The PRESIDING OFFICER. The Senator from Louisiana.

Mr. JOHNSTON. Mr. President, I think there is a real desire to accommodate the Senator from Ohio on this committee. He is a good friend, and he is a valued member of the committee.

But two of my colleagues now have spoken rather strongly on this, and the NRC has indicated that they have no intention of approving this application.

With this record having been made and with our strong intention stated to help the Senator just in case the action of NRC is not successful, I wonder if the Senator would consider withholding the amendment on this bill with the understanding that the committee will help him later on in case the NRC does not.

Mr. METZENBAUM. Might I make a countersuggestion to my friend who is a chairman of the committee and the ranking member? I would like to ask whether he would be willing to accept the amendment between now and the time the matter gets to the conference committee, and I will assume there will be a conference committee, that I perhaps may be in a position to obtain some confirmation from the NRC as to how they intend to dispose of the pending matter, and if I am concerned, and I am frank to say to the Senator I am concerned, about highly escalating rates in the northern Ohio sector. I am concerned further that there was a commitment made originally by the powerplant, and I am suggesting that he take the amendment and let me see if we cannot get some confirmation from the NRC.

The Senator just indicated that the NRC has stated to him that they do not intend to approve the application.

Mr. JOHNSTON. Not to me, but to staff.

Mr. METZENBAUM. To staff. That is even better, and that being the case, perhaps I can get them to confirm it to a Senator as well, that being me.

and under those circumstances I wonder if we cannot work it out.

If the Senator will accept it and see if I can get that confirmation.

Mr. JOHNSTON. Mr. President, I am advised that this has the status of a strong rumor and not an actual statement.

Mr. McCLURE. Mr. President, if the Senator will yield, I guess the major reservation I would have with this suggestion the Senator from Ohio has made is that oftentimes when there is action pending in the Congress, particularly if it is passed in a committee or in one body of the Congress, an administrative agency will suspend any further proceedings with respect to the applications that are before it. I do not think that is what the Senator from Ohio is suggesting either.

Mr. METZENBAUM. No, just the opposite. I am suggesting that they move forward with dispatch.

Mr. McCLURE. I am not certain how we best get that accomplished because if we passed an amendment they may very well stop proceedings rather than speeding up.

Mr. METZENBAUM. I have a hunch that somehow they are monitoring what is going on on the floor here since it is not a private meeting since it is a matter concerning them and certainly the CONGRESSIONAL RECORD will speak to the debate, and I am saying here and now that if we can get confirmation, whether it is a final decision or not, that they do not intend to approve the application, I will join with the managers of the bill in urging that it be deleted in conference.

Mr. JOHNSTON. Mr. President, I think I probably misspoke myself earlier by stating as a fact that we had such confirmation from the NRC.

Staff advises me that it is more in the nature of a judgment and rumors rather than confirmation because indeed in a pending case they simply will not tell you what they are going to do.

They have not told my staff, my staff has now advised me, and they would not tell even us. We can pretty well figure out what they are going to do. I would not want to make the withdrawal of the amendment dependent on getting the NRC to say what they are going to do in a pending case because they will not tell us.

Mr. METZENBAUM. Does the manager of the bill have any idea as to when the NRC will be acting?

Mr. JOHNSTON. The staff does not know.

Mr. METZENBAUM. In a matter of this kind would it be within a week, a month, or a year?

Mr. JOHNSTON. I do not know.

Mr. McCLURE. I wonder if the Senator from Ohio could accommodate us to this extent and that would be to withdraw the amendment with the right to offer it again before we conclude the consideration of this bill on the floor, and that will give us until sometime tomorrow to perhaps run a check.

Mr. METZENBAUM. That is all right.

Under those circumstances, I am certainly pleased to be accommodating. The Senator is trying to accommodate me. I will withdraw the amendment with the understanding that I will be protected to offer the amendment at a later point.

Mr. McCLURE. I thank the Senator.

Mr. METZENBAUM. I thank the Senator.

Mr. President, I withdraw the amendment.

The PRESIDING OFFICER. The amendment is withdrawn.

AMENDMENT NO. 1465

Mr. JOHNSTON. Mr. President, the pending amendment, which is amendment 1465, puts back into the bill that portion dealing with charges for the use of foreign uranium which were taken out of the bill in order to satisfy the jurisdictional objections of the Finance Committee.

What it does is it creates a schedule of charges for the use of foreign uranium in domestic reactors not for the importation but for the use of the foreign uranium. Charges are incurred for the use of foreign uranium in excess of 37½ percent. In other words, the first 37½ percent of enriched uranium may be used in reactors without a charge, and above the 37½ percent there is a sliding fee depending upon the percentage of foreign uranium to be used.

Most of the existing contracts for the use of foreign uranium are grandfathered and the 37½-percent exemption is valid until 1994 and it is 50 percent thereafter. The charges expire in 2001. It creates rules for what we call flag-swapping between different lots of uranium and that is where uranium is foreign owned but may not physically move. So it is a complicated system that is dealt with under what we call flag-swapping.

It deletes section 161v of the Atomic Energy Act which limits enrichment of foreign uranium. That is the provision I referred to earlier that requires that we maintain a viable domestic uranium mining industry. And that provision, of course, 161v is presently in litigation.

So, Mr. President, I think that adequately explains the amendment.

Mr. President, for the benefit of Senators, I think the following is a plan that the Senator from Idaho, Mr. McCLURE, and I would like to follow. Senator McCLURE would like to make a brief speech, maybe 10 minutes, on the pending amendment. Then we would like to put the matter over until tomorrow, subject, of course, to the majority leader's concurrence, and perhaps in the meantime lay down the Bradley-Evans amendment which has a 3-hour time agreement and start that in the morning about 9:30.

If we could do that, that would mean we would have not votes on this bill tonight and would start afresh on the Bradley-Evans amendment tomorrow.

Mr. EVANS. Mr. President, has the Domenici amendment been laid down?

Mr. McCLURE. Amendment No. 1465 has been laid down.

Mr. EVANS. The Senator from Idaho would like to make a brief speech on the opening of that.

We can lay down the amendment tonight if you wish. We were going to wait until some of the debate had occurred on behalf of the Domenici amendment or amendment 1465, but it does not make very much difference as far as we are concerned as to when we lay it down.

Mr. JOHNSTON. If the Senator would yield, I think that, frankly, all of the debate could occur on the Bradley-Evans amendment tomorrow and there are 3 hours provided on that.

Mr. McCLURE. Will the Senator yield?

Mr. JOHNSTON. Yes.

Mr. McCLURE. I am trying to ascertain now whether the Senator from New Mexico also wants to make a statement on it tonight.

Mr. EVANS. That would be perfectly all right.

Would the Senator from Louisiana like us to lay down our amendment at this time or wait?

Mr. JOHNSTON. Perhaps if we could ask that you lay it down at the end of such debate as we would have tonight, so we could start afresh on it tomorrow.

Mr. EVANS. Assuming that the debate and action would not be extensive.

Mr. JOHNSTON. Of course, there is a time agreement anyway.

Mr. BRADLEY. Will the Senator yield?

Mr. JOHNSTON. Yes.

Mr. BRADLEY. So it would be your intention to discuss the Domenici amendment that is now pending, time would expire on that, and the amendment of the Senator from Washington and the Senator from New Jersey would be laid down and debate on that would occur tomorrow?

Mr. JOHNSTON. Yes, that would be our desire.

Mr. BRADLEY. That is fine.

Mr. EVANS. That is fine.

Mr. JOHNSTON. We have sent for the majority leader. If he blesses our agreement, we can tell Senators there will be no further votes tonight.

Mr. McCLURE. But he has not yet done so.

Mr. JOHNSTON. That is right; he has not yet done so.

I yield the floor.

Mr. McCLURE. Mr. President, I want to speak very briefly with respect to the pending amendment and recognize that this is only the opening salvo in the longer debate which will occur when the Evans-Bradley amendment is offered.

We have in this Nation a uranium industry that is down for the final

July 5, 1988

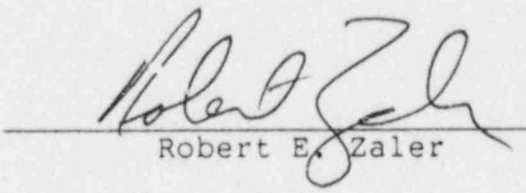
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, NUCLEAR REACTOR REGULATION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Response of Ohio Edison Company to Comments on its Antitrust License Amendment Application" were served upon the parties on the attached Service List this 5th day of July, 1988, by deposit in the United States mail, first-class, postage prepaid.



Robert E. Zaler

July 5, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, NUCLEAR REACTOR REGULATION

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

SERVICE LIST

Joseph Rutberg, Esquire
Benjamin H. Vogler, Esquire
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Janet Urban, Esquire
United States Department of Justice
Antitrust Division, Room 9816 JCB
555 4th Street, N.W.
Washington, D.C. 20001

Gregg D. Ottinger, Esquire
John P. Coyle, Esquire
Duncan, Allen and Mitchell
1575 Eye Street, N.W.
Washington, D.C. 20005

Mr. Nelson E. Summit
City Manager
222 North Main Street
Clyde, Ohio 43410

Reuben Goldberg, Esquire
Kenneth M. Albert, Esquire
Goldberg, Fieldman & Latham, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005

Marilyn G. Zach, Esquire
Director of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114

David R. Straus, Esquire
Spiegel & McDiarmid
1350 New York Avenue, N.
Washington, D.C. 20005

John Bentine, Esquire
Bell & Bentine
33 South Grant Avenue
Columbus, Ohio 43215

Russell J. Spetrino, Esquire
Ohio Edison Company
76 South Main Street
Akron, Ohio 44308

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Chief, Docketing and Service Section