PUBLIC POWER

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July 15, 1988

Chief
Policy Development and Technical
Support Branch
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: Docket Nos. 50-440A and 50-346A

Dear Sir or Madam:

The American Public Power Association submits the enclosed comments in response to NRC's request published in the Federal Register June 16, 1988, for comments on the antitrust issues raised in applications to suspend antitrust conditions contained in the Perry and Davis-Besse nuclear plant licenses.

Sincerely,

Anne Marie Gibbons

Anne Marie Gibbons
Legislative Representative

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UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

In the matter of:		
OHIO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1)	)	Docket No. 50-440A
CLEVELAND ELECTRIC ILLUMINATING COMPANY and TOLEDO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, and Davis-Besse Nuclear Power Station, Unit 1)	)	Docket Nos. 50-440A and 50-346A

RESPONSE OF THE
AMERICAN PUBLIC POWER ASSOCIATION
TO REQUESTS FOR COMMENTS BY THE
NUCLEAR REGULATORY COMMISSION

The American Public Power Association ("APPA") opposes requests by Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating Companies ("Applicants") that the Nuclear Regulatory Commission suspend antitrust conditions contained in the Perry and Davis-Besse nuclear plant licenses. APPA is the national service organization representing more than 1,750 publicly owned electric utilities across the country.

These comments are submitted in response to NRC's request for comments, published in the Federal Register June 16, 1988, on antitrust issues raised in Applicants' requests.

Applicants assert that the antitrust conditions were based on the premise that nuclear power would provide economic advantages to its owners sufficient to enable them to monopolize the bulk power market. Because the cost advantages forecasted for nuclear power during the 1970s have not materialized, Applicants state that the rationale for attaching antitrust license conditions to Perry and Davis-Besse has disappeared.

The City of Cleveland, Ohio, and American Municipal Power-Ohio, Inc. (AMP-Ohio), a joint action agency, have submitted extensive and thorough answers to refute Applicants' assertions as to why the antitrust conditions should be suspended. We strongly concur with the arguments made by these two intervenors. It is not APPA's intent to restate their compelling arguments. We submit these comments to advise the Commission of the crucial interest of 1,750 municipal systems in this matter and to review the reasons, still valid today, which led Congress to mandate an antitrust review and provide for license conditions to remedy antitrust problems.

I. APPA's INTEREST

APPA and its member systems vigorously fought for and testified to the need for the antitrust review and conditioning provisions contained in Section 105(c) of the Atomic Energy Act of 1970, as amended. As a result, hundreds of public power systems now rely on antitrust conditions imposed pursuant to this section to obtain wheeling, coordination, interconnection, and elimination of anticompetitive language in wholesale power contracts. These conditions allow for competition in the bulk power supply area, and without such conditions, many public power systems would be squeezed out of the utility business by large utilities using predatory practices to control access to wholesale power.

If the NRC agrees to suspend the antitrust licensing conditions of the Applicants, a dangerous precedent will be set for other private companies that will attempt to escape their antitrust obligations. The effect of such a precedent would be far-reaching. The antitrust review mandated by Congress in the Act has been applied to most of the country's major utilities. Between the years 1970 and 1976, NRC and the Department of Justice examined 69 of the 100 largest electric utilities, and found significant antitrust problems in 30 cases. As a result, license conditions to remedy these anticompetitive concerns were included in each nuclear license.

Generally, conditions imposed by NRC involved unit access, transmission services, coordination, and contractual provisions. Examples of licensing conditions include requiring that the applicant utility provide transmission service with any electric system with which the applicant is interconnected, now or in the future; prohibiting restrictive contractual provisions pertaining to interconnection or coordination agreements, or to the resale or use of the power; and requiring general commitments to coordinate planning of new generation, transmission, and associated facilities.

Such conditions benefit several hundred public power systems across the country. In Ohio alone, at least 76 locally owned electric utilities depend on the antitrust conditions contained in the Perry and Davis-Besse nuclear plant licenses. Clearly, the impact on public power systems of such a precedent-setting decision is significant.

To illustrate that suspension of antitrust licensing conditions has national implications, and is not simply a local concern of the state of Ohio, the APPA membership passed an antitrust licensing resolution at its annual conference in June of this year. The resolution 1) opposed suspension of

antitrust conditions in nuclear licenses as adverse to public policy and contrary to the clear congressional intent established in the amendments to the Atomic Energy Act; and 2) urged the NRC to deny requests to escape antitrust licensing conditions imposed on Perry and Davis-Besse nuclear plants, or any other nuclear plants. Thus, this policy statement of APPA, representing 1,750 public power systems, recognized the potential nationwide impact of allowing suspension of antitrust conditions in two plants. The resolution is attached.

II. APPLICANTS' RATIONALE IS WRONG

Applicants argue that antitrust conditions 1) only apply when nuclear power is inexpensive, and 2) only apply to allow access to nuclear power -- not to other sources of power.

The flip side of their assertion is that when nuclear power is expensive, municipal systems should be denied the protection of the NRC-imposed license conditions, cut off from other sources of power, and forced to buy the high-priced nuclear power. In effect, the companies are arguing that antitrust conditions should be dropped when municipal systems need them the most.

The fact of the matter is that these companies acted unlawfully in the past in attempting to destroy competition. License conditions were successful in restoring competition. Now that the conditions are being used precisely as intended, i.e., to increase competition from public power systems, Applicants want them removed.

APPA contends that the Applicants' rationale for suspension of the antitrust conditions is wrong. It is contrary to congressional intent in mandating Section 105(c) review; it is contrary to NRC's interpretation of the

Act; and it is contrary to fair treatment of public power systems which have relied on antitrust conditions.

III. CONGRESSIONAL INTENT

The legislative history of the Atomic Energy Act of 1970 (P.L. 91-560) refutes Applicants' assertion and illustrates that Congress had concerns about monopoly vs. competition in enacting Section 105(c).

APPA and its member systems were key players in supporting Section 105(c) and saw two major congressional concerns emerge in developing the antitrust mandate in the Act:

1. Congress was well aware of the public money that had been expended by the government to develop nuclear power and did not want the benefits from the expenditure of public money to accrue to unfair monopolists, unless unfair practices were stopped; and
2. Congress recognized that transmission, interconnection, and coordination services associated with a large nuclear plant would allow the nuclear utility to control access and gain or maintain monopoly control over access in the retail and wholesale power (nuclear and non-nuclear) markets.

Under Section 105(c) of the Atomic Energy Act of 1970, Congress mandated an antitrust review of nuclear license applicants to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105(a)." (Sherman Anti-Trust Act, Wilson Tariff Act, Clayton Anti-Trust Act, and the Federal Trade Commission Act.) If the NRC finds that an anticompetitive situation would be created or

maintained, the Commission has the authority to refuse to issue a license or to issue a license with appropriate conditions.

The 1970 amendment was the logical extension of the Atomic Energy Act of 1946 which prohibited atomic resources to be used "to maintain or foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises" in the field of nuclear power generation. While the Atomic Energy Commission had antitrust jurisdiction from its inception in connection with its authority to issue commercial licenses, all nuclear powerplants prior to 1970 were licensed as research and development facilities -- and not subjected to antitrust constraints.

During hearings before the Joint Committee on Atomic Energy in September, 1967, Senator George D. Aiken (R-VT) specifically made the point that public money was spent developing nuclear technology and that there should be some accommodation for small utilities to share in the benefits. He said:

> We have a rather acute situation in New England now where they have proposed, and they have already started to build, a nuclear plant in Vermont. The utilities have offered the Vermont public power people and the cooperatives the right to buy shares and to share in the ownership, of course to a relatively small degree.
>
> Now, it so happens that other public power people in New England and Massachusetts, who are located only a few miles away from the proposed site, insist that they also be permitted to share in the stock ownership and the power output of this large -- and this is not proposed to be a very large -- nuclear powerplant. Is there any legitimate objection to letting these public powerplants, shall we say the REA cooperatives, participate in the stock ownership and power output on general terms?
>
> I would not suggest that except that we all know there was a great deal of public funds that went into making these plants possible. (Joint Committee on Atomic Energy Hearing Report, September 12, 13, and 14, 1967, Part 2, p. 510.)

During those same hearings, the Joint Committee also heard from APPA that it would be contrary to the public interest to allow the federal investment to only benefit a few private companies. Larry Hobart, then Assistant General Manager of APPA, said:

> Nuclear power is a technology which was initiated, fostered, and developed through use of Federal funds. The achievement of commercial nuclear power was conceived of by Congress as an important national goal, and was supported through a multibillion-dollar federally financed program. In 1962, AEC estimated that approximately $1,275 million in Federal money had been expended specifically on the civilian power program, including $275 million for the development, construction, and operation of Commission-owned reactors on utility grids, and $37 million for development assistance on utility-owned installations. The annual rate of expenditure to promote nuclear power was estimated at about $200 million a year. It would be clearly contrary to the public interest to find that the result of this investment was to secure a de facto monopoly of the end product for a few large privately owned electric utilities. (JCAE Hearing Report, September 12, 13, and 14, 1967, Part 2, p. 536.)

The widely held interpretation of the reason for the antitrust review was reiterated by the Department of Justice in remarks to the ALI-ABA, November 12, 1971. Milton J. Grossman, of the Antitrust Division, reviewed the legislative history of the Act and said, "the enormous Government investment in developing the technology of nuclear reactors did justify a special concern that competitive conditions prevail in the commercial use of that technology. Thus whatever decision might ultimately be made about licensing and antitrust review for other types of electric power generation, there were unique reasons for wanting 'widespread participation in the development and utilization of atomic energy' throughout the electric utility industry of the United States."

NRC in its 1973 Waterford decision pointed to congressional concerns that nuclear power, a product of public funds, should not be permitted to develop into a private monopoly:

> The Commission's antitrust responsibilities represent inter alia a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds.

> It was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible. The Commission is determined strictly to enforce this Congressional intent . . . to assure that AEC-licensed activities accord with the antitrust laws and the policies underlying those laws. (Louisiana Power and Light Company [Waterford Steam Electric Generating Station, Unit 3], CLI-73-25, 6 AEC 619, 620 [1973].)

With respect to the issue of monopolizing access, the Joint Committee heard testimony from Alex Radin, former General Manager of APPA, in June, 1968. Mr. Radin said, "One hundred of the largest systems in the country account for about 89 percent of the generation, so that while there are a great number of small utilities, relatively few large ones really dominate the generating capacity of the country at the present time, and the number of power companies actually is diminishing." (JCAE Hearing Report, June 11, 12, and 13, 1968, Part 2, p. 1070.)

During the same hearing, Rep. Chet Holifield (D-CA), addressing Robert H. Gerdes, President of Edison Electric, the association representing privately owned electric utilities, and Chairman of Pacific Gas and Electric Company, talked about the frustration of public power systems and cooperatives in obtaining access to power. Mr. Holifield said:

> . . . Another thing that is very clear on the record is that many of these cooperatives and municipalities are very much alarmed about their future access to power.
>
> They see the so-called 20-percent-80-percent special pattern that exists now to be a dwindling percentage on their side and an increasing percentage on the private power side.
>
> What is your solution, for instance, to a municipality in your distribution area that now possesses its own generating and transmission capacity but which is experiencing load growth within that city and now finds itself needing more power -- or anticipates it will need more power in the very near future -- and yet is faced with these tremendous plants which are now being considered in the nuclear field -- and in the conventional field, so far as that is concerned -- which they feel they are shut out from because their particular operation is so small that they can't participate in this new generating supply?

> What is your solution now? Yours is a big company and you furnish electricity to a lot of people in California. While I understand these are competitors of yours, nevertheless you are given a monopoly franchise in California for a certain area.
>
> Where there is an existing cooperative or a newly formed cooperative, or a municipality that is already in existence, and which has its own transmission and generating capacity, what is your solution to this undoubted need that they are going to have? (JCAE Hearing Report, June 11, 12, and 13, 1968, Part 2, p. 823.)

Although Mr. Gerdes said he would treat municipal systems in a nondiscriminatory and fair manner, Mr. Holifield referred to testimony in the record from Mr. Donald F. Turner of the Department of Justice which called attention to the fact that large utilities were denying access to public power systems. Turner said:

> First, a number of the complaints have arisen from the refusal of large utilities participating in a variety of joint projects to offer a wholesale service to municipal distribution companies, cooperatives, etc. The Federal Power Commission's rate regulation powers are of no avail here, and it is still unsettled whether other statutory powers of the Commission authorize it to enter orders requiring such utilities to establish wholesale service and supply the needs of would-be customers. Even where the smaller utility is already a wholesale customer of the larger company, conventional rate regulation may not permit the establishment of a "favorable" wholesale rate, i.e., a rate which provides that small utility with some of the benefits of nuclear generation economies. (JCAE Hearing Report, June 11, 12, and 13, 1968, Part 2, p. 824.)

The Joint Committee heard testimony from a number of public power systems and state and regional associations about the need for access to transmission. The mayor of the City of Santa Clara, California, speaking on behalf of Santa Clara's municipal electric system, told the Committee:

> . . . the citizens of Santa Clara were denied the ability to reap considerable savings in power costs because the Pacific Gas and Electric Company would not allow the Bureau of Reclamation to provide service to Santa Clara after the city had received an allocation of withdrawable power from the Bureau. It took a year and a half of strenuous effort on the part of the city of Santa Clara, and the hire of special counsel to Santa Clara here in Washington, before we were finally able to reap the benefits of this low-cost power that had been allocated to us, and then to reduce rates to our citizens. (JCAE Hearing Report, June 11, 12, and 13, 1968, Part 2, p. 1112.)

Clearly, the statutory language of Section 105(c) does not limit the activities to be reviewed to only nuclear antitrust abuses as Applicants contend. The 105(c) language requires a finding as to whether activities under the license would "create or maintain a situation inconsistent with the antitrust laws." The finding is to be made concerning activities by companies prior to obtaining a license.

The Joint Committee report explained:

> It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws. (House Report 91-1470, 91st Congress, Second Session, p. 14.)

Thus, review of the legislative history of the Act illustrates that Congress did not intend antitrust conditions to apply only when nuclear power is low-cost and only to allow access to nuclear power.

IV. NRC's INTERPRETATION

The NRC's interpretation of Section 105(c) also demonstrates that Applicants' rationale is wrong. The NRC's decisions reflect an interpretation that anticompetitive companies should not be rewarded with a nuclear license unless abuses are corrected; antitrust provisions do not only apply to access to nuclear power; the cost of nuclear power is not a consideration in determining antitrust conditions.

In carrying out the mandate of Section 105(c), the NRC applies the antitrust review and imposition of conditions to a whole gamut of activities, not simply the company's activity with respect to nuclear power.

In the Waterford decision cited earlier, the Commission said that the activities to be examined to determine whether the license would create or maintain an anticompetitive situation is not "automatically limited to the construction and operation of the [nuclear] facility to be licensed. . . . The relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case." Thus, cost of the nuclear power was not a primary consideration in determining antitrust conditions.

The license conditions imposed on Davis-Besse and Perry demonstrate the NRC's recognition that granting a nuclear license provided the companies with new opportunities for coordinated antitrust abuses with respect to transmission services.

In discussing the companies' application for a license, the NRC Appeal Board noted the finding by the Attorney General that

> The Applicants' refusals to wheel power, to interconnect and to engage in coordinated operation with smaller utilities raise problems which should be considered in the perspective of their monopoly control of the transmission facilities surrounding the smaller systems of their competitors. . . . Granting the license applied for without adequate antitrust conditions will generate new opportunities for the Applicants to engage in coordinated operation with each other and will provide them with a new source of relatively low-cost power and energy at the time they are effectively foreclosing any possibility of their competitors sharing in the benefits of coordinated operation and development. (40 Fed. Reg. 8395-96 [February 27, 1975].)

Both the NRC's Licensing Board and Appeal Board found the Applicants used their generation and transmission to monopolize the retail and wholesale power markets and coordination services. They refused to provide wheeling on their transmission lines, which provided the only interconnection with other suppliers. They imposed restraints on public power systems' ability to resell power bought from them, especially to industrial customers. They charged

wholesale rates to municipal systems that were higher than rates charged to industrial customers, thus creating unlawful price squeezes.

After these findings of pervasive antitrust violations, the Appeal Board approved the imposition of license conditions. The Board rejected a proposal to restrict the conditions to wheeling and coordination only for nuclear customers. The Board said such a limit would undermine the position of utilities that did not buy nuclear power and would be inconsistent with the "message conveyed by Sec. 105(c) of the Act that 'Congress did not want nuclear plants authorized in circumstances that would create or maintain anticompetitive situations without license conditions to address them.'" (10 NRC at 291.)

Thus, the NRC's previous decisions reject the Applicants' interpretation that antitrust conditions should be applied only when nuclear power is cheap and only to allow access to nuclear power.

In addition to rejecting the Applicants' reasoning concerning license conditions, NRC's previous opinions have also concluded that there are statutory limits on the Commission's authority to modify antitrust conditions. In two 1977 cases, South Texas and Florida Power, the NRC noted that its authority is limited to the construction permit or operating license proceeding.

In South Texas, 5 NRC 1303 (1977), the NRC considered the extent of its authority and said:

> Some of the parties' arguments would assign to us a broad and ongoing antitrust enforcement role; they envision that we would have a continuing policing responsibility over the activities of licensees throughout the lives of operating licenses. As we shall show, we believe that the Congress envisioned a narrower role for this agency, with the responsibility for initiating antitrust review focused at the two-step licensing process. (5 NRC at 1309.)

NRC reviewed the legislative history of the antitrust review requirements and recognized that Congress put limits on its ability to reopen antitrust provisions to ensure that utilities could rely on NRC licensing decisions.

In the Florida Power proceeding, municipal electric utilities requested an antitrust hearing after the NRC had issued an operating license to Florida Power. The cities pointed to anticompetitive activities undertaken by the company after the issuance of the license. The NRC Appeal Board rejected the cities' petition with a finding that the Commission lacked authority to reopen the antitrust proceeding.

In Florida Power, the Appeal Board noted the South Texas decision, saying "it manifested the judgment in no uncertain terms the NRC's supervisory antitrust jurisdiction over a nuclear reactor license does not extend over the full 40-year term of the operating license but ends at its inception."

The cities appealed to the D.C. Circuit, which denied their petition and affirmed NRC's decision. (Ft. Pierce Utilities Authority v. NRC, 606 F.2d 986 [D.C. Cir.], cert. denied, 444 U.S. 842 [1979].)

Clearly, the NRC's previous decisions indicate the Commission lacks jurisdiction to modify or suspend Applicants' antitrust conditions as requested here.

V. FAIR TREATMENT OF MUNICIPAL SYSTEMS

The simple equity of the matter makes a compelling argument against agreeing to the Applicants' request to suspend antitrust conditions. Licensing conditions subject to the whims of nuclear pricing amount to no conditions at all.

If NRC can suspend conditions according to pricing cycles of nuclear power, public power systems would not be able to rely on licensing conditions. In fact, however, public power systems have relied on these conditions. Many, like AMP-Ohio, have bought into generating facilities and need transmission services to transport the power to their service areas. Others have relied on the conditions to gain access to low-cost power. If these transmission and interconnection services are now pulled away, there will be tremendous disruption in the ability of public power systems to serve their customers. Many public power systems would be squeezed out of the utility business by the large private companies that control access to wholesale power.

As a practical matter, public power systems will not be able to plan adequately for future supply if transmission and interchange services are dependent on the changing costs of nuclear power. If carried to its logical conclusion, Applicants' reasoning would tie decisions of public power systems directly to the future of nuclear power.

As a practical matter, it makes no sense to pull away from licensing conditions when the public power systems need such conditions the most. When nuclear power is expensive, public power systems should not be denied the benefits of the NRC-imposed conditions, cut off from other sources of power, and forced by lack of transmission access to purchase high-cost nuclear power. This is the ultimate absurdity. Rather than promote competition, such action will actually stifle competition.

Last, the imposition of conditions was a bargain struck and agreed to by the utilities. NRC found the Applicants guilty of antitrust violations. NRC said in accordance with its congressional mandate that a nuclear license would not be awarded unless these violations were stopped. The Applicants agreed to

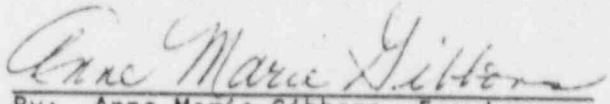
conditions to stop these violations and to prevent future violations. Now that these conditions are working to the benefit of the public power systems, Applicants want the conditions suspended.

That is not fair. Applicants made a deal in order to get the licenses. Now that they have the licenses, they want to be relieved of their obligations.

VI. CONCLUSION

The congressional mandate in imposing 105(c) review, the NRC interpretation of the law, and fairness to public power systems which rely on antitrust conditions require that the Applicants' request be denied.

Respectfully submitted,



By: Anne Marie Gibbons, Esquire
Legislative Representative

AMERICAN PUBLIC POWER ASSOCIATION
2301 M Street, N.W., Third Floor
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Dated: July 15, 1983

ANTITRUST LICENSING CONDITIONS IMPOSED ON NUCLEAR POWERPLANTS

WHEREAS, Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating Companies have filed requests with the NRC to suspend antitrust conditions contained in the Perry and Davis-Besse nuclear plant licenses, and

WHEREAS, these antitrust provisions are conditions of the licenses, requiring these private utilities to wheel, coordinate, and interconnect with public power systems in their area, regardless of whether these public power systems use nuclear or other sources of power, and

WHEREAS, Congress mandated in the Atomic Energy Act of 1970 an antitrust review of past and present conduct of nuclear license applicants, and authorized the NRC to impose antitrust licensing conditions on nuclear utilities in order to prevent the creation or continuation of anticompetitive practices, and

WHEREAS, under this antitrust mandate, between 1970 and 1977 the NRC and the Justice Department examined 69 of the 100 largest utilities, and found significant antitrust problems in 30 cases, which resulted in license conditions to remedy anticompetitive concerns, and

WHEREAS, AMP-Ohio, a joint action agency with 76 member systems, relies on antitrust conditions contained in the Perry and Davis-Besse nuclear plant licenses, and most recently, in reliance on these conditions, has entered into an agreement to buy its own electric generating station, and

WHEREAS, allowing Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating Companies to escape antitrust license conditions could mean dramatic rate increases for residential and industrial customers in 76 public power communities in Ohio and could renew the threat of anticompetitive and monopolistic behavior toward these local public power systems, and

WHEREAS, suspending antitrust provisions would have profound public policy implications, would set a dangerous precedent for other private utilities which might attempt to escape antitrust licensing obligations, and would have significant impact on hundreds of public power systems which rely on antitrust conditions for wheeling and interconnections and coordination;

NOW, THEREFORE, BE IT RESOLVED: that the American Public Power Association opposes suspension of antitrust provisions in nuclear licenses as adverse to public policy and contrary to the clear congressional intent established in the amendments to the Atomic Energy Act of 1970, and

BE IT FURTHER RESOLVED: that the American Public Power Association urges the NRC to deny requests to escape antitrust licensing conditions imposed on the Perry and Davis-Besse nuclear plants, or any other nuclear plants.