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GERALD CHARNOFF, P.C.

July 24, 1990

Mr. Thomas E. Murley
Director, Office of Nuclear Reactor Regulation
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Application of Ohio Edison Company to Suspend Antitrust License Corditions (Perry Nuclear Power Plant, Unit 1), NRC Docket No. 50-440A

Dear Mr. Murley:

On June 13, 1990, the Department of Justice ("DOJ") advised the NRC to dismiss the Application to suspend the antitrust conditions appended to the operating license of the Perry nuclear power plant that was filed on September 18, 1987 by Ohio Edison Company ("OE"). This letter addresses DOJ's patently erroneous conclusion that "the costs of operating nuclear plants do not negate, as a matter of law, a finding that construction and operation of a nuclear plant 'creates or maintains a situation inconsistent with the antitrust laws.'" DOJ Letter at 2.

Specifically, DOJ's position ignores the following facts:1/ (1) the legislative history of Section 105c clearly indicates that the statute was intended to assure that all utilities could share in the benefits of low-cost nuclear power; (2) as a matter of economic reasoning, a generating facility with higher costs than competing facilities cannot provide its owner with the market power necessary to engage in anticompetitive behavior; and (3) DOJ's own past practice and the NRC's regulatory interpretation of the statute both recognize that cost is a critical factor in a Section 105c analysis.

1/ We note that DOJ has mischaracterized OE's position. OE's Application is premised on the position that Perry provides no cost competitive advantage, not that the plant provides some small competitive advantage that is somehow not sufficiently "significant." See DOJ Letter at 2, 3.

Rec'd 9/7/90
Z999 Add: Joe Rutberg Ltr Encl
William Lambe " "
Darrell Nash " "
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(1) Legislative History

DOJ is incorrect in its implication that the legislative history of Section 105c fails to support OE's position. As OE illustrates at pages 7-15 of its Application, the concern triggering Congress's grant of antitrust oversight to the NRC was to assure that all utilities could share in the benefits of the new, low-cost nuclear technology. DOJ refers only to the Joint Committee Report, but ignores the remainder of the legislative history of Section 105c.[2/] In fact, the Joint Committee Report mentions the cost of nuclear power, albeit indirectly,[3/] and the other substantial legislative history is replete with statements illustrating that Congress presumed that nuclear power plants would be a primary source of low-cost power, and that access to nuclear power would significantly increase a utility's competitive advantage in the marketplace.[4/]

For example, Roland W. Donnem, the Director of Policy Planning in the Antitrust Division of the DOJ, testified before the Joint Committee that:

> With regard to the establishment of a large-scale nuclear power plant, it is necessary to first determine the extent to which such plants might afford the participants therein decisive competitive advantage over their competitors. . . . [A]ccess to this low-cost power may well be decisive in any competitive race.[5/]

2/ The Department cited the Joint Committee Report, H.R. No. 91-1470, 91st Cong., 2d Sess. (1970) (reprinted in 1970 U.S. Code Cong. and Admin. News 4981) at pp. 2 and 3 of its letter.

3/ See 1970 U.S. Code Cong. and Admin. News at 4983, 4988, and 4989.

4/ OE quoted many of these examples at pages 7-12 of its Application.

5/ Prelicensing Antitrust Review of Nuclear Powerplants, Hearings Before the Joint Comm. on Atomic Energy, Part 1, 91st

Footnote continued on next page.

Mr. Donnem's views, expressly stated by the DOJ to be "the views of the antitrust division,"6/ included the following:

> [T]he conclusion that all sectors of the electric utility industry should have adequate access to low cost power is, I think, compelled by the policy of the antitrust laws. . . . .
>
> Whatever participation device is employed, two basic principles should be observed. First, the small and municipally owned companies must be afforded the same opportunity to receive the low cost power for the same uses as the larger participating systems. For example, if the larger participants use the low cost power for existing requirements, then it must be available to all for that use. . . . . Only in this way are the competitive opportunities equalized and decisive competitive advantage avoided.7/

Similarly, Walker B. Comegys, Acting Assistant Attorney General, Antitrust Division of the DOJ, was quoted in the Farley licensing board decision as follows:

> We have not wished to take the position that where competitive policies require that smaller firms have access to a large low-cost power facility the access must always be furnished by ownership share in the new plant. . . . . We do think that adequate access implies the same opportunity to receive low cost power for the same uses as

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Footnote continued from previous page.

Cong., 1st Sess. 9 (1970) (hereinafter "Joint Committee I") (emphasis added). OE quoted this statement on p. 8 of its application.

6/ Joint Committee I at 118.

7/ Id. at 10 (emphasis added).

> those who have the unique low cost facility.8/

Sounding the same theme, AEC General Counsel Hennessey told the Committee that:

> The problem centers on the very large plants that do provide the most economical source of energy . . . and an opportunity for the small publicly owned utilities to have access to that newly available cheap source of power.9/

And again, S. David Freeman, Director of the Energy Policy Staff of the U.S. Office of Science and Technology, testified to Congress that nuclear power's

> growth will be due primarily to the fact that it offers low-cost power to utilities. . . . . Since nuclear plants come only in large sizes, it is particularly important that preconstruction antitrust review be implemented to assure that smaller utilities are not frozen out of the generation end of the power business. . . . . [T]he question of fair and reasonable access to the benefits of low-cost power is not universally satisfied by wholesale purchases.10/

In sum, the legislative history of Section 105c clearly demonstrates that the linchpin underlying the need for NRC antitrust oversight was the universal assumption that there were competitive advantages available from low-cost nuclear power.

(2) Economic Reasoning

Appended to this letter is an affidavit by Dr. Joe D. Pace, an economist with National Economic Research Associates and an

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8/ Id. at 128 (emphasis added).

9/ Id. at 75 (emphasis added). OE quoted Mr. Hennessey's statement on p. 9 of its application.

10/ Id. at 106 (emphasis added); quoted on p. 11 of OE's application.

expert in utility antitrust matters. Dr. Pace explains why DOJ's advice makes no sense from an economic perspective. Dr. Pace concludes that DOJ's "Advice Letter [is] devoid of economic reasoning. It misses the mark by failing to consider whether control of a high-cost nuclear unit could ever logically be said to create or maintain a situation inconsistent with the antitrust laws and thus create a basis for NRC-imposed license conditions."11/

(3) DOJ and NRC Past Practices

DOJ has itself clearly indicated that the cost of nuclear power is pertinent to the analysis of the antitrust implications of granting a nuclear license. 12/ Prepared by the NRC in consultation with DOJ, Appendix L of 10 C.F.R. Part 50, "Information Requested by the Attorney General for Antitrust Review [for] Facility License Applications," requires an applicant for a nuclear license to disclose specific cost information, including "the most recent average cost of bulk power supply experienced by applicant" (item II.11), and "the most recent estimated cost of applicant's bulk power supply expansion program of which the subject unit is a part" (item II.12).

Furthermore, DOJ has used the cost information required by Appendix L to conclude that absent an economic advantage resulting from low-cost nuclear power, anticompetitive conduct by a licensee is not subject to NRC oversight. For example, DOJ's initial conclusion that an antitrust hearing was not required in connection with the licensing of Unit 1 of the Davis-Besse

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11/ It is telling that the DOJ letter, while it concludes that cost is not a determinative consideration, does not indicate what factors it does consider significant in evaluating whether, at this point in time, Ohio Edison's ownership interest in Perry would tend to create or maintain an anticompetitive situation.

12/ Indeed, if cost is not relevant, this would raise an equal protection issue, in that there would be no rational basis for distinguishing between utilities owning nuclear power plants and those that do not, or between Ohio Edison and the owners of Davis-Besse and Zimmer. See discussion, below, of the DOJ's 1971 Advice Letter regarding Davis-Besse Unit 1, and its 1972 Advice Letter regarding Zimmer.

nuclear plant was based upon a finding that the plant would not provide its owners with a significant cost advantage:

> [B]ased on data submitted to us by Toledo Edison and CEI, it appears that the estimated costs of producing power at the Davis-Besse plant will 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. Davis-Besse, therefore, will apparently not give Toledo Edison or CEI a significant cost advantage which could then be used to impose a price squeeze on wholesale customers.

36 Fed. Reg. 17888, 17889 (Sept. 4, 1971).

Similarly, DOJ's antitrust advice letter concerning the Zimmer nuclear plant indicated that no antitrust hearing would be necessary unless the municipalities requesting such a hearing made a prima facie showing that it would be more economical to purchase delivered unit power from Zimmer than it would be to purchase firm interconnection power from the utilities owning that plant. "The critical question . . . is whether the Zimmer unit should be regarded as an . . . 'essential resource' -- that is whether, as a matter of factual analysis, the municipal systems seeking access to it have no reasonably comparable alternative for meeting their bulk power requirements." 37 Fed. Reg. 14247, 14248 (July 18, 1972). Thus, DOJ's most recent advice regarding OE's Application represents an abrupt and inexplicable departure from its prior position. In addition, NRC has also supported the conclusion that cost is the essential inquiry in a Section 105c proceeding. In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-452, 6 N.R.C. 892 (1977), the Appeal Board

> agree[d] with the Department of Justice that "The advantage accruing to Applicant from its ability to integrate low-cost nuclear generation is manifest. Its average cost is reduced and to the extent Applicant is able to do this while denying its competitors the

> same advantage, its competitive position vis-a-vis these systems improves."13/

In short, DOJ's position, as set forth in its June 13, 1990 letter to NRC, is inconsistent with its own prior analyses, as well as with pertinent NRC case law.

* * * * *

In summary, there is no merit to the DOJ analysis, as set forth in its June 13, 1990 letter. In contrast, OE's Application stands on its merits, and OE urges that it be granted. If, however, the NRC Staff is not so inclined, OE hereby requests a hearing, to be held in two stages. Stage one would address only the following legal issue:14/

> If the Perry Nuclear Power Plant does not afford OE a lower average cost of bulk power supply than would non-nuclear generation options OE could have exercised in the same time frame (see App. L), can OE's ownership share of Perry create or maintain an anticompetitive situation such that NRC is authorized to impose or retai.. antitrust license conditions?

Should this issue be resolved in OE's favor, the remaining issue would be whether Perry's actual costs are such that the plant does not afford OE a lower average cost of bulk power supply than would non-nuclear generation options OE could have exercised in the same time frame. This issue should be resolvable by

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13/ Midland, 6 N.R.C. at 1008 (quoting the Department of Justice's Reply Brief on Appeal) (emphasis added).

14/ Cf. Memorandum and Order Granting Petition to Intervene, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit No. 1), LBP-90-15 (June 11, 1990), slip op. at 8 (finding that 10 C.F.R. § 2.714 permits contentions to raise purely legal issues, and that under § 2.714(e) such contentions are to be decided on the basis of briefs and oral arguments).

stipulation, since it is beyond dispute that the costs for Perry are far higher than the costs would have been for a contemporaneously built coal plant.

Finally, because this matter has been pending for a very long time, we respectfully request the NRC's expeditious disposition of the matter at this time.

Sincerely,

Gerald Charnoff/MSS

Gerald Charnoff
Counsel for Ohio Edison Company

Enclosure

cc: Anthony J. Alexander, Esq., OE
Hon. James F. Rill, DOJ
Alison L. Smith, Esq., DOJ
Mark S. Schechter, Esq., DOJ
Janet Urban, Esq. DOJ
Joseph Rutberg, Esq., NRC

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