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October 21, 1991

Marshall E. Miller, Chairman  
Charles Bechhoefer, Administrative Judge  
G. Paul Bollwerk, III, Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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

Gentlemen:

Ohio Edison Company would like to direct the Licensing Board's attention to a factual error contained in the Licensing Board's Prehearing Conference Order, LBP-91-38 (Oct. 7, 1991), and to ensure that there is no misunderstanding on the part of any of the parties with respect to the filing by the Applicants of a single dispositive motion for summary disposition.

In LBP-91-38, the Board indicated that in its initial Application, Ohio Edison had placed in issue the competitive behavior of the Applicants. Specifically, in footnote 98 of LBP-91-38 at page 53, the Board stated,

In their applications, both OE and CEI/TE initially argued that suspension of the Perry and Davis-Besse antitrust license conditions would be appropriate because the competitive environment and their competitive behavior had changed from what was found to exist at the time the conditions were imposed. See Tr. 152-55, 166-67. Both, however, no longer rely on such assertions as a basis for the relief they seek. Id.

This statement is incorrect as to Ohio Edison. At no point in this proceeding has Ohio Edison argued that suspension of the

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Perry conditions would be appropriate because of changes in Ohio Edison's competitive behavior. Rather, in its initial September 18, 1987 Application, Ohio Edison made clear that the issue of competitive behavior was not relevant to its amendment request:

[T]he NRC's factual predicate for imposing antitrust license conditions on OE was that it was anticipated that the construction and operation of Perry, in fact, would create or maintain a situation inconsistent with the antitrust laws. There were two elements to this conclusion. First, that a situation inconsistent with the antitrust laws existed in the OE service area for which OE was responsible. . . . As to the first element -- dealing with the situation inconsistent with the antitrust laws -- for purposes of this license amendment application, OE will assume *arguendo* that the Licensing and Appeal Board findings are correct and that the situation is unchanged from the mid-1970's.

Ohio Edison Application (Sept. 18, 1987) at 28 (emphasis added).

This position was confirmed most recently at the September 19, 1991 Prehearing Conference:

We assume, *arguendo*, and I can refer you to a page in our application, that our competitive behavior hasn't changed at all -- that it makes no difference what our competitive behavior is or what the situation is in the marketplace. That is not a necessary finding, nor is it a relevant finding to resolution of the issue that we put forward in our application.

Preh. Conf. Tr. (Sept. 19, 1991) at 155 (counsel for Ohio Edison); see also *id.* at 149 (competitive issues are not relevant to Ohio Edison's Application).

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Thus, Ohio Edison's position in this case was set forth in September, 1987 and has not changed in the four years that have elapsed since that time. Issues of competitive behavior are and always have been irrelevant to Ohio Edison's Application.

Finally, Ohio Edison would like to respond briefly to the Licensing Board's unanticipated directive to the Applicants to submit a joint motion for summary disposition. While we have no objection to proceeding in this fashion, we do request that this action not preclude the possibility of our proceeding separately at any oral argument that might be set in this matter, nor that this procedure necessarily apply to any other subsequent matters, e.g., the litigation of the issue of costs. In addition, it is important that the submittal of a joint brief by the Applicants not be misconstrued by any of the parties as altering the approach that Ohio Edison has taken in this proceeding from the beginning, which has been to proceed independently from Cleveland Electric Illuminating Co. and Toledo Edison Co.

Sincerely yours,

*Deborah B. Charnoff/H.B.K.*

Deborah B. Charnoff

cc: Samuel J. Chilk  
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