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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-440-A
	)	50-346-A
OHIO EDISON COMPANY	)	
(Perry Nuclear Power Plant,	)	
Unit 1, Facility Operating	)	(Suspension of
License No. NPF-58))	)	Antitrust Conditions)
	)	
THE CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY	)	
THE TOLEDO EDISON COMPANY	)	
(Perry Nuclear Power Plant,	)	ASLPB No. 91-644-01-A
Unit 1, Facility Operating	)	
License No. NPF-58)	)	
(Davis-Besse Nuclear Power	)	
Station, Unit 1, Facility	)	
Operating License No. NPF-3)	)	

RESPONSE OF THE DEPARTMENT OF JUSTICE
TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Before the Atomic Safety and Licensing Board ("Licensing Board") is a motion by Applicants in this matter for summary disposition of a stipulated legal issue, which issue comprises the sole matter before the Licensing Board in the first stage of this bifurcated hearing. The "bedrock" legal issue is whether the Commission, some eight years after a presently unchallenged finding that the grant of nuclear licenses to Applicants would create or maintain a condition inconsistent with the antitrust laws unless appropriately conditioned,

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is without authority as a matter of law under Section 105 of the Atomic Energy Act to retain the antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared?

The Department of Justice ("Department") urges that the Licensing Board answer this issue in the negative, and thus conclude that the Commission does possess the jurisdiction and legal authority to retain the relevant license conditions. Applicants' attempt to pose as a matter of legal authority or jurisdiction, a question of remedy subject to the Commission's broad discretion should be rejected.

A. History of the Proceeding

Applicant Ohio Edison ("OE") is an investor owned electric utility located in Ohio and is a part owner of the Perry Nuclear Power Plant, Unit 1 ('Perry"). Applicants Cleveland Electric Illuminating Company ("CEI") and Toledo Edison ("TE") are wholly owned subsidiaries of Centerior Energy Corporation, a public utility holding company, and part owners of Perry and of the Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse").1/ The licenses for these nuclear plants

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1/ Two other investor-owned utilities, Duquesne Light Company and Pennsylvania Power Company, are part-owners of the Perry plant and were parties to the original proceedings.

contain antitrust conditions that were attached by an Atomic Safety and Licensing Board after an extensive antitrust hearing in which it was found that a grant of the licenses would "create or maintain a situation inconsistent with the antitrust laws," unless the licenses were appropriately conditioned.2/ None of the Applicants presently contest the appropriateness of the initial imposition of the license conditions.

On September 18, 1987, OE filed an application to suspend the antitrust license conditions and on May 2, 1988, CEI and TE also requested suspension of the conditions. In their petitions Applicants contended that unless ownership of the licensed nuclear plants provides a significant economic advantage of access to lower-cost power, the Nuclear Regulatory Commission ("NRC" or "Commission") is without authority to retain the anti-trust conditions attached to the nuclear plant licenses. The NRC requested the opinion of the Department of Justice on the legal issue raised by the Applicants. In a letter of June 13, 1990, the Department advised the NRC that changes in the costs

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2/ Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), LPB-77-1, 5 N.R.C. 133 (1977), aff'd as modified, ALAB-560, 10 N.R.C. 265 (1979) ("Toledo Edison Co."). The Commission declined to review the Appeal Board Decision. Two of the Applicants, Pennsylvania Power Company and Duquesne Light filed petitions for review in the Third Circuit Court of Appeals. On September 26, 1980, the petitioners submitted to the Third Circuit a stipulation to dismiss. The Third Circuit dismissed the appeal on October 8, 1980.

of operating a nuclear plant do not negate, as a matter of law, a finding that the construction and operation of that plant creates or maintains a situation inconsistent with the antitrust laws. Consequently, the Department recommended that the NRC dismiss Applicants' petitions.3/ The NRC Staff concurred with the Department and denied Applicants' petitions.4/ Applicants then requested this hearing on their Petitions.

In an Order issued after a pre-hearing conference, the Licensing Board granted the parties' request and ordered a bifurcated hearing. The first part of the hearing will resolve the "bedrock" legal issue, stipulated by the parties, and, only if the "bedrock" issue is answered in the affirmative will an evidentiary hearing be held to determine the factual contentions raised by Applicants. The Department reaffirms the legal conclusion stated in its June 13, 1990 advice letter, and thus recommends against any further proceedings in this matter.

3/ Letter from Mark C. Schechter to Thomas E. Murley, (June 13, 1990).

4/ Letter from T. Murley to M. Lyster, CEI, and D. Shelton, TE (April 24, 1991) (transmitting NRC Staff Evaluation of Applications for License Amendments to Suspend the Antitrust License Conditions) and Notice of Denial of Applications for Amendments to Facility Operating licenses and Opportunity for Hearing (April 24, 1991) ("NRC Staff Denial").

B. Summary of the Department's Argument

Applicants urge the mistaken legal proposition that if, after an imposition by the NRC of license conditions to prevent the creation or maintenance of a situation inconsistent with the antitrust laws, the electricity produced by the licensed nuclear plant becomes more costly to produce than power from other sources, the NRC is automatically divested of legal authority to retain the antitrust license conditions.5/ Neither the explicit language of the Atomic Energy Act,6/ its legislative history nor the decisions of the Commission support the conclusion that the NRC must find that electricity from a

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5/ Applicants do not argue that they no longer have market power, as found in the proceedings before the NRC. Toledo Edison Co., 10 NRC at 278. Nor do they argue that they cannot exercise that market power. Prehearing Conference Transcript, September 19, 1991, at 155.

6/ Section 105 of the Atomic Energy Act of 1954, as amended in 1970, (42 U.S.C. §2135) authorizes the Commission to conduct prelicensing antitrust review of applications to construct and operate nuclear power plants. Specifically, the Commission is authorized to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105(a)." 42 U.S.C. §2135 (c)(5). The antitrust laws listed in § 105(a) include the Sherman Act, the Clayton Act and the Federal Trade Commission Act.

nuclear plant will be low cost as a condition precedent for finding that a situation inconsistent with the antitrust laws will be created or maintained. Rather, Congress intended that the Commission have broad authority to remedy any anticompetitive situation that it concludes would arise from the operation of a nuclear plant.7/ Neither the statutory language, its legislative history nor precedent support the view that Congress intended automatically to divest the Commission of the legal authority to retain lawfully-imposed antitrust licensing conditions if, with the passage of time, the licensed plant did not produce low-cost power. Administrative agencies, like courts, do not lose their legal authority because of changed conditions subsequent to the issuance of remedial orders. Instead, they retain a broad discretion with respect to enforcing or changing such orders. In the absence of clear evidence of a special

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7/ If Congress had intended a "low-cost" limitation on the NRC's antitrust jurisdiction it could, and would, have put that limitation in the legislation itself. If Congress was concerned that the NRC would interpret its jurisdiction more broadly than Congress intended it could have put a limiting explantion in the Joint Committee Report, as it did to insure that the reach of the Commission's antitrust authority did not extend to those who furnish supplies or materials to build nuclear plants.

legislative intent to deny the Commission the discretion normally accorded administrative agencies, Applicants' legal theory must be rejected.

ARGUMENT

I. The Atomic Energy Act Does Not Require a Finding That the Power From a Nuclear Unit Will be Low Cost as a Condition Precedent to a Finding of a Situation Inconsistent With the Antitrust Laws

"A basic tenet of statutory construction is that the express language of a statute is the primary source of its meaning."8/ Section 105c does not require the Commission to find that the power from a licensed nuclear plant will be low-cost before making a finding that "the activities under the license will create or maintain a situation inconsistent with the antitrust laws." More importantly for this board, the statute does not impose on the Commission a continuing obligation to find that the licensed facility produces "low cost" power as a jurisdictional requirement for retaining license conditions. The only limitation on NRC antitrust authority contained in the

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8/ Alabama Power Company v. Nuclear Regulatory Commission, 692 F.2d 1362, 1373 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983) ("Alabama Power")

statute is that the "situation inconsistent"9/ must be created or maintained by the activities under the license, at the time the antitrust conditions are imposed.10/

In contrast to the absence of limiting language in Section 105c, Congress limited the jurisdiction of the NRC where it wished to do so. Two issues that received a great deal of attention during the hearings on the 1970 Atomic Energy Act

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9/ The Commission is not required to find a violation of the antitrust laws, but only a "situation inconsistent" with those laws.

10/ This required relationship or "nexus" has been the source of much litigation before the NRC, but is not at issue here. The Commission has consistently taken a broad view of nexus, holding that the NRC is not limited to examining the operations of the nuclear plant in isolation from the other activities of the licensee. Toledo Edison Company, 10 NRC at 385, citing Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 572-73 (1975). In the only review by the Court of Appeals of a Commission decision imposing antitrust license conditions, the Court rejected Alabama Power's argument that the words "under the license" prohibit the NRC from looking beyond the antitrust implications of the activities of a license applicant other than those directly arising from the activity to be licensed. (Alabama Power at 1367) Instead, the Court held that the Commission could look both "forward" and "back" to "see if an anticompetitive climate exists and to see if the applicant has acted in an anticompetitive manner." (Alabama Power at 1367-68)

Amendments11/ were whether license applications filed prior to enactment of the 1970 amendments would be subject to the newly instituted antitrust review requirements12/ and whether there should be a second antitrust review at the operating license stage.13/ Congress responded to these issues by including specific provisions in the legislation.14/ There is no such statutory language limiting the NRC's antitrust authority to "low cost" situations, undoubtedly because Congress did not intend such a limit on that authority.

II. The Legislative History Strongly Supports the Conclusion that Congress Intended Section 105 of the Atomic Energy Act to Give the Commission Broad Antitrust Authority and Remedial Discretion, Unlimited by Applicants' Proffered Condition Precedent of Low-Cost

Despite the clear language of the Act, Applicants ask this Licensing Board to read into the Act a condition precedent for

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11/ Prior to the 1970 Amendments, the NRC (then the Atomic Energy Commission or AEC) was required to find that a nuclear facility was sufficiently developed to be of practical value before conducting an antitrust review. Joint Committee Report at 34. The 1970 Amendments eliminated this requirement.

12/ This issue is discussed in numerous places in the hearings, e.g., pp. 40, 92, 99, 321, 421, 430, 472 and 582.

13/ This issue is discussed in numerous places in the Hearings, e.g., pp. 323, 348, 355, 384, 391, 198, 481 and 583.

14/ Section 105(c)(3) specifically limits the antitrust review of a license application filed prior to December 19, 1970 and section 105(c)(4) states that there is an antitrust review at the operating license stage only where there have been changed circumstances since the issuance of the construction permit.

the continuing exercise of NRC antitrust jurisdiction--that the power from the licensed nuclear units be less costly than power from other units. Applicants seek support for their argument in the legislative history of the Act. A fair reading of the legislative history, however, provides little support for the Applicants' position. Instead, it is clear that Congress did not wish to limit the Commission's broad antitrust authority and remedial discretion in the way Applicants urge.

A. The Joint Committee Report Contains No Limitation on the Commissions Antitrust Authority and Remedial Discretion

The antitrust language in the Atomic Energy Act was adopted from the original language of the 1954 Atomic Energy Act. It was reenacted in 1970 only after extensive hearings in which the Joint Committee on Atomic Energy ("Joint Committee") carefully examined the likely effect of the retention of that language on Commission antitrust reviews under the new Section 105c. The Joint Committee issued a Report that explained its deliberations and its interpretation of the legislation.15/

15/ Identical reports were issued in the House and Senate: Joint Committee on Atomic Energy, S. Rep. No. 91-1247 and H.R. Rep. No. 91-1470, 91st Cong., 2nd Sess. (1970) ("Joint Committee Report").

The Joint Committee Report contains no language that conditions either the Commission's initial or continuing jurisdiction on a finding that a licensed nuclear plant will produce or is producing low cost power. Instead, after noting that it rejected the "extreme" recommendations of having no antitrust review or having a review that would go beyond the "provisions and established policies of the antitrust laws," the committee continued:

> 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.16/

The only intended limitation on the NRC's jurisdiction was that its antitrust examination be limited to "activities under the license" and that it not go beyond the boundaries of the antitrust laws and the policies underlying those laws. The committee did not limit Commission antitrust authority or remedial discretion to situations where a nuclear unit is

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16/ Joint Committee Report at 14.

producing low cost electricity.17/ The antitrust provisions of the Atomic Energy Act reflect a Congressional concern that atomic energy, developed with government money, not be used to create or maintain a private monopoly.18/

B. Congress Could Not Reasonably Assume that the Licensed Nuclear Units Would Always Produce Low Cost Electricity

Even though Section 105(c) contains no limiting language, Applicants contend that Congress must have meant to limit the NRC's jurisdiction to situations where a nuclear unit would produce low cost electricity. This contention is based on a

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17/ Where the Joint Committee intended that the NRC's antitrust jurisdiction be limited it included language in its report explaining that limitation. For example, during the hearings, a debate arose whether the activities of suppliers of materials to build nuclear units would be within the ambit of the NRC's antitrust jurisdiction. The Joint Committee responded to this issue by directly stating that supplier relationships were not to be examined by the NRC:

> The standard pertains to the activities of the license applicant. The activities of others, such as designers, fabricators, manufacturers, or suppliers of materials or services, who, under some kind of direct or indirect contractual relationship may be furnishing equipment, materials or services for the licensed facility would not constitute "activities under the license" unless the license applicant is culpably involved in activities of others that fall within the ambit of the standard. (Joint Committe Report at 31)

No such limiting explanation exists with respect to the scope of the Commission's examination of the activities of a license applicant or its remedial discretion after license conditions are lawfully imposed.

18/ Hearings at p. 546.

purported knowledge about nuclear power costs gained by Congress in the course of congressional hearings. While legislative hearings, unlike statutory language and committee reports, are usually accorded little, if any, weight in discerning Congress' intent, the hearings relied on by Applicants do not evince the type of concensus they claim. Although government witnesses expressed confidence that the power from the nuclear units would be low cost, industry witnesses were far less certain. A Report prepared for the Joint Committee by Philip Sporn, then retired president of American Electric Power Company, explains:

> During the past two years there has taken place a remarkable and onimous retrogression in the economics of our nuclear power technology. The light-water-moderated reactor, which two years ago offered potentials for nuclear power generation competitive with fossil fuel at 22¢ to 24.8¢ per million Btu, has today lost position where it is competitive at 28¢ to 29.5¢ per million Btu fossil fuel cost.
>
> This in turn makes it difficult to accept without something more than a grain of salt the statement of the Atomic Energy Commission "the outlook for the future for nuclear power continues to be very promising (because) of the continuing economic competitiveness of nuclear power in spite of increasing costs as prices for both nuclear and fossil plants increase."

Hearings at 300 (footnote omitted).19/

Philip Sporn was not the only industry witness who was concerned about rising costs of nuclear units relative to fossil fuel units. Harrison Ward, Chairman of the Board of Commenwealth Edison Company responded to a question concerning whether there should be prelicensing review of fossil fuel plants as follows:

> The economies of scale are somewhat (but not uniquely) greater for nuclear plants, and nuclear fuel is cheaper than alternative fuels in many areas. On the other hand, the required investment per kilowatt of capacity is higher-no small consideration in times of high money costs, lead times are much longer and siting problems may be more complex. Hearings at 391.

William R. Gould, Senior Vice President of California Edison, also discounted the assumption that nuclear power plants would displace other generation technologies:

> It has also been asserted that so-called giant corporate utilities are engaged in a drive to monopolize and completely control nuclear power. This

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19/ Mr. Sporn continues to discuss this phenomenon for 10 more pages. Included in his Report is a statement of the effects that developments have had on the nuclear industry:

> It has caused cancellation of one or two previously announced projects, delay in scheduling of other units committed for; it has brought about interposition of fossil fuel units to be completed ahead of what might have been scheduled atomic units, and in some cases it has brought about plain decisions to go fossil when, if things had gone differently, atomic units would have been ordered. Hearings at 300-301.

drive has also been referred to as a "nuclear gold rush." We emphatically disagree with these assertions.

In the first place, nuclear plants generally are not economic bonanzas.

For our system, nuclear plants do not have a cost advantage on a mills per kilowatt-hour basis over fossil fuel units. Our company is now committed to build only nuclear units for major generation resources in the California south coastal basis-not because of an economic advantage-but because air pollution control considerations dictate that after 1975, under existing air pollution control regulations, large fossil-fueled generating units may not be built in this coastal basin. Hearings at 436.

Finally, in a dialogue with George H.R. Taylor, Secretary of the AFL-CIO Staff Committee on Atomic Energy and Natural Resources, Senator Pastore expressed his opinion that without "built-in" subsidies nuclear power would not be competitive.20/

Based on the information before it, Congress correctly could have concluded that the power generated by nuclear units would not necessarily be lower cost than that generated by fossil units. Certainly these hearings do not provide an adequate basis to conclude that Congress intended to limit the jurisdiction of the NRC to impose and maintain antitrust license conditions to low-cost nuclear plants.

20/ Hearings at 551.

III. Commission Precedent Does Not Require a Finding that the Electricity Produced by a Licensed Nuclear Unit Be Low Cost As a Condition Precedent to a Finding of a Situation Inconsistent

The NRC has never interpreted the Atomic Energy Act to include a finding that the electricity from a licensed unit must be low cost as a condition precedent to a finding of a situation inconsistent with the antitrust laws.21/ Neither can such a condition precedent reasonably be inferred from language in prior Commission decisions that discussed access to nuclear facilities.

In some licensing proceedings the anticipated cost benefit from a nuclear unit was a factor in the Commission's affirmative findings under Section 105c. However, cost was never the only

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21/ Applicants point to several Advice Letters issued by the Department of Justice and assert that even the Department viewed the cost issue as the "sine qua non of Section 105(c)." Applicants' Motion at 64. The Department held no such view. The Advice Letters show only that in some cases the Department viewed unit cost and access as a concern in its antitrust review. The letters do not, however, support an assertion that the Department believed the cost of a unit was an essential element to a finding of a situation inconsistent with the antitrust laws. The Advice Letter on the Davis-Besse unit was the first of three Advice Letters concerning units owned by these Applicants: The second and third letters raised numerous competitive concerns beyond unit cost and access.

factor in any Commission decision and never a condition precedent to an affirmative finding.22/

IV. The Existence of Other Agencies With Antitrust Jurisdiction Does Not Justify Suspending the Antitrust License Conditions

Applicants argue that because the Department of Justice, as well as other agencies, has antitrust enforcement authority, the license conditions should be suspended. Applicants assert that because of this overlapping jurisdiction the electric systems that are affected by the antitrust relief contained in these conditions will not be left "unprotected".23/ But Congress

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22/ If the increased cost of nuclear power has lessened Applicants' competitive ability, their incentive to handicap their rivals may now be even greater than it was originally. Applicants, who may still have market power in high voltage transmission, regardless of the cost of nuclear power, may have an increased incentive to prevent their wholesale customers from using Applicants' high voltage transmission lines to purchase power from more competitive suppliers. Given that Applicants were found by the NRC to have engaged in anticompetitive activities when their costs were "low", it would be logically inconsistent to believe that these activities, if not constrained by the antitrust conditions, would diminish with increases in Applicants' costs of generating power.

23/ Applicants' Motion at p. 30.

was not content to leave such matters to the courts. Instead, it expressly chose to make the Commission "the first line of defense" against anticompetitive practices in the nuclear electric power industry. Gulf States Utility Co. v. Federal Power Commission, 411 U.S. 747, at 764 (1973). That another agency or the federal courts may be able to remedy any anticompetitive behavior by the Applicants does not negate the NRC's clear authority to fashion its own relief. The conditions were lawfully imposed, and the NRC continues to possess the jurisdiction to maintain them.

CONCLUSION

Applicant's assertion that the NRC is without jurisdiction to retain antitrust license conditions if it finds that the electricity from a nuclear unit is not "low-cost" is without merit. The plain language of the Atomic Energy Act does not require such a condition precedent, and the legislative history does not support an alternative interpretation of the Act.

For these reasons the Department of Justice urges that the Licensing Board resolve the bedrock legal issue in the negative, and thus conclude that the Commission does possess the legal authority to retain the license conditions here at issue.

Respectfully submitted,

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March 9, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 1992, a copy of the foregoing Notice Of Appearance was served upon each of the following by first-class mail:

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