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'92 DEC -8 P4:14

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of )

OHIO EDISON COMPANY )

(Perry Nuclear Power Plant, Unit 1, )  
Facility Operating License )  
No. NPF-58) )

THE CLEVELAND ELECTRIC ILLUMINATING )  
COMPANY )

THE TOLEDO EDISON COMPANY )

(Perry Nuclear Power Plant, )  
Unit 1, Facility Operating )  
License No. NPF-58) )  
(Davis-Besse Nuclear Power Station, )  
Unit 1, Facility Operating License )  
No. NPF-3) )

Docket No. 50-440-A  
50-346-A

(Suspension of  
Antitrust Conditions)

ASLBP No. 91-644-01-A

PETITION FOR REVIEW

Pursuant to 10 CFR § 2.786, The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TECo") respectfully request that the Nuclear Regulatory Commission ("Commission" or "NRC") review LBP-92-32, the November 18, 1992 Atomic Safety and Licensing Board decision in the above-captioned matter. In granting summary disposition in favor of the NRC Staff and intervenors and against CEI, TECo and the other applicant, Ohio Edison Company ("OE"), the Licensing Board

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erroneously determined that, as a matter of law, the Commission retains authority under Section 105(c) of the Atomic Energy Act to impose antitrust license conditions on a nuclear facility's operating license where the cost of nuclear power is greater than alternative sources, all as appropriately measured and compared. CEI and TECo submit that this legal determination is incorrect.

I. SUMMARY OF DECISION AND STATEMENT  
OF ISSUES RAISED

CEI and TECo are co-owners of the Davis-Besse Nuclear Power Station and, together with OE, Pennsylvania Power Company, and Duquesne Light Company, are joint owners of the Perry Nuclear Power Plant. In 1987, OE filed a license amendment request with the NRC Staff.<sup>1</sup> That request sought the suspension of the Perry license conditions that imposed antitrust restrictions on OE. CEI and TECo subsequently filed a parallel request seeking suspension of the Perry and Davis-Besse antitrust license conditions.<sup>2</sup> Three years later,<sup>3</sup> the NRC Staff denied these

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1/ See Application to Amend the Perry Operating License to Suspend the Antitrust Conditions Insofar as they Apply to OE (Sept. 18, 1987) ("OE Application").

2/ See Application to Amend the Perry and Davis-Besse Operating Licenses to Suspend the Antitrust Conditions (May 2, 1988) ("CEI and TECo Application").

3/ In the interim, OE sought relief in the federal courts on certain issues of agency bias stemming from dialogue concerning the disposition of the pending application. See Ohio Edison v. Zech, No. 89-1014, slip op. (D.C. Cir. Apr. 27, 1989). CEI and TECo do not join in OE's allegations regarding agency bias.

requests.<sup>4</sup> A hearing was convened, and summary disposition motions were filed by the parties on the dispositive "bedrock" legal issue that formed the basis for applicants' license amendment requests.<sup>5</sup> LBP-92-32 resolves that bedrock legal issue.

CEI and TECo seek Commission review of the question of law decided by the Licensing Board:

Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain the antitrust license if it finds that the actual cost of electricity from the licensed nuclear power plant is

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4/ Letter from T. Murley to M. Lyster, CEI, and D. Shelton, TECo (Apr. 23, 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 (Apr. 24, 1991). See also Notice of Denial of Applications for Amendments to Facility Operating Licenses and Opportunity for Hearing, 56 Fed. Reg. 20,057 (May 1, 1991).

5/ The issue of law raised in the bedrock legal issue was first raised by CEI and TECo in their Application. See CEI and TECo Application at 4-17, 46-49. After counsel for the various parties agreed on its formulation, the bedrock legal issue was incorporated into the Licensing Board's Prehearing Conference Order. LBP-91-38, 34 NRC 229, 258-59, aff'd, CLI-92-11, 36 NRC \_\_\_\_\_, 1992 NRC LEXIS 36 (August 12, 1992), petition for review filed, No. 92-1532 (D.C. Cir. Oct. 9, 1992). CEI and TECo filed two briefs addressing the bedrock legal issue, Applicants' Motion for Summary Disposition (January 6, 1992) ("Applicants' Motion"); Applicants' Reply to Opposition Cross-Motions for Summary Disposition and Responses to Applicants' Motion for Summary Disposition (May 7, 1992) ("Applicants' Reply"), and argued the bedrock legal issue before the Licensing Board at oral argument. See Transcript of June 10, 1992 Argument before the Licensing Board ("Tr.") at pp. 251-305, 397-437 (Ms. Charnoff, counsel for OE, speaking on behalf of all Applicants) and Tr. at 305-24 (Mr. Murphy, counsel for CEI and TECo, speaking on behalf of all Applicants).

higher than the cost of electricity from alternative sources, all as appropriately measured and compared?<sup>6</sup>

The Licensing Board answered the issue in the negative, and found that as a matter of law the Commission has authority under Section 105(c) to retain antitrust license conditions even if the actual cost of electricity from a licensed nuclear power plant is higher than the cost of electricity from alternative sources.<sup>7</sup>

## II. THE LICENSING BOARD'S DECISION IS ERRONEOUS

The Licensing Board's holding on the bedrock legal issue is erroneous and should be reviewed by the Commission. LBP-92-32 is based on an incorrect interpretation of Section 105(c) of the Atomic Energy Act. That statute allows the imposition of antitrust license conditions only where the activities of the licensed facility would 'create or maintain a situation inconsistent with the antitrust laws.'<sup>8</sup> The Licensing Board has ignored the "particularized regime" of antitrust review established by Section 105(c).

First, the Licensing Board's decision is based on the fallacious position that the addition of a high cost facility may be competitively advantageous to an operator. Such a facility

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<sup>6/</sup> LBP-92-32, slip op. at 6. See also Tr. at 244 (bedrock legal issue read into record).

<sup>7/</sup> See LBP-92-32, slip op. at 60-61.

<sup>8/</sup> 42 U.S.C. § 2135(c).

would increase the cost of the operator's power, necessarily allowing its competitors greater competitive freedom to take advantage of the operator's higher costs to attract new customers.<sup>9</sup>

Second, the Licensing Board has ignored that Section 105(c) is not a grant of plenary authority over antitrust matters. Other agencies, including the Department of Justice and FERC, have continuing authority to review the competitive implications of actions taken by operators of nuclear facilities. In contrast, the Commission's authority under Section 105(c) is limited to the competitive impact of the licensed nuclear facility. Review under Section 105(c) is not the same as a plenary antitrust review, and the Licensing Board was mistaken when it applied a "market power" test rather than the cost-based test applicable to Section 105(c).<sup>10</sup>

Several indicia support the position advanced by CEI and TECo. First, contrary to the "interpretation" of the Licensing Board, a fair and objective review of the legislative history of Section 105(c) discloses that the record is replete with

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<sup>9</sup>/ See Applicants' Motion at 57-68; Applicants' Reply at 29-39.

<sup>10</sup>/ LBP-92-32, slip op. at 39; compare Applicants' Reply at 19-29. The Licensing Board spends substantial time addressing the allegedly anticompetitive conduct undertaken by CEI over a decade ago. See LBP-92-32, slip op. at 34-38. That conduct was reviewed closely by a jury which exonerated CEI of all antitrust violations in that action. See City of Cleveland v. Cleveland Edison Illuminating Co., 734 F.2d 1157 (6th Cir.) (affirming the jury's findings), cert. denied, 469 U.S. 884 (1984).

statements by witnesses and legislators addressing the need for the imposition of Section 105(c) antitrust review because of the anticipated low cost of nuclear power.<sup>11</sup> The Licensing Board also ignored the broader context in which the addition of Section 105(c) took place.<sup>12</sup>

The Licensing Board's decision is also contrary to legal precedent. As CEI and TECo argued before the Licensing Board, a number of Commission decisions and Department of Justice advice letters address the critical importance of the anticipated cost advantage of nuclear power.<sup>13</sup> These cases turn upon the anticipated cost advantage of nuclear power and the potential misuse of this cost advantage by a nuclear operator.

Finally, the Licensing Board's interpretation of the statute violates CEI's and TECo's right to equal protection as guaranteed under the Due Process Clause of the Fifth Amendment. A statute must be rationally related to a legitimate government objective to satisfy equal protection requirements.<sup>14</sup> The

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<sup>11/</sup> See Applicants' Motion at 34-45 (reviewing legislative history); Applicants' Reply at 40-57 (reviewing legislative history).

<sup>12/</sup> See Applicants' Reply at 57-62 (reviewing "practical value" legislative history).

<sup>13/</sup> See Applicants' Motion at 45-68 (reviewing NRC cases and DOJ advice letters); Applicants' Reply at 62-70 (reviewing NRC cases); see also Applicants' Motion at 68-76 (other factors have no significance under Section 105(c) in the absence of a low-cost facility).

<sup>14/</sup> City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

Licensing Board's interpretation of Section 105(c) violates this requirement. If the cost of nuclear power is not competitively advantageous when compared with other sources of electricity (such as coal and oil), there is no rational basis for continuing to impose restrictive antitrust license conditions not imposed on identically-situated operators of non-nuclear facilities.

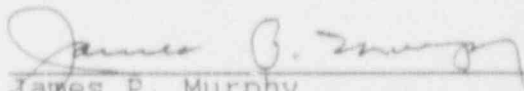
III. THE COMMISSION SHOULD EXERCISE ITS POWER TO REVIEW THE LICENSING BOARD'S DECISION BECAUSE THE DECISION IS CONTRARY TO LAW AND ESTABLISHED PROCEDURE, AND BECAUSE THE BEDROCK LEGAL ISSUE RAISES IMPORTANT QUESTIONS OF LAW AND POLICY

LBP-92-32 erroneously interprets Section 105(c) and, accordingly, should be reviewed and reversed by the Commission. The bedrock legal issue raises substantial questions of law and policy. Antitrust matters are not the fundamental business of the NRC. This case raises an important question about the legality, propriety, and, indeed, reasonableness of the NRC's continued exercise of this peripheral authority when a nuclear power plant is no longer competitively advantageous. As such, it goes to the very heart of continuing Commission authority over licensed nuclear facilities. The Commission should make a determination on this question.

In summary in LBP-92-32, the Licensing Board has erroneously interpreted Section 105(c) of the Atomic Energy Act by ignoring the fundamental underpinning of the statute - the anticipated cost advantage of nuclear power. Without that



advantage, CEI and TECo submit that the Commission is without authority to continue to impose license conditions on CEI and TECo. Accordingly, Commission review of the decision is appropriate.

  
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Dated: December 8, 1992



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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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OHIO EDISON COMPANY	)	Docket No. 50-440-A
(Perry Nuclear Power Plant, Unit 1,	)	50-346-A
Facility Operating License	)	
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THE CLEVELAND ELECTRIC ILLUMINATING	)	
COMPANY	)	ASLBP No. 91-644-01-A
THE TOLEDO EDISON COMPANY	)	
(Perry Nuclear Power Plant,	)	
Unit 1, Facility Operating	)	
License No. NPF-58)	)	
(Davis-Besse Nuclear Power Station,	)	
Unit 1, Facility Operating License	)	
No. NPF-3)	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition  
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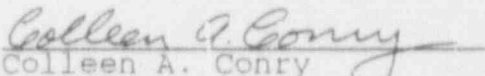
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