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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'92 DEC -8 P2:22

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

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nuclear facility's operating license where the cost of nuclear power is greater than alternative sources, all as appropriately measured and compared. OE submits that this legal determination is incorrect. In addition, the treatment of the so-called agency bias issue by the Commission and by the Licensing Board in LBP-92-32 involves procedural error that prejudiced OE's right to be heard on this issue.

I. SUMMARY OF DECISION AND STATEMENT OF ISSUES RAISED

OE is a co-owner of the Perry Nuclear Power Plant. In 1987, OE filed a license amendment request with the NRC Staff.^{1/} That request sought the suspension of the Perry license conditions that imposed antitrust restrictions on OE. A parallel request subsequently was filed by CEI and TECo.^{2/} Three years later,^{3/}

^{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).

^{3/} In the interim, relief had been sought by OE in the federal courts on certain issues of agency bias stemming from dialogue concerning the disposition of the pending application that apparently had taken place between representatives of the NRC and certain senators opposed to OE's application. See Ohio Edison Company v. Zech, No. 89-1014, slip op. (D.C. Cir. Apr. 27, 1989).

the NRC Staff denied these requests.^{4/} A hearing was convened, and summary disposition motions were filed by the parties on the dispositive "bedrock" legal issue that formed the basis for the applicants' license amendment requests.^{5/} LBP-92-32 resolves that bedrock legal issue.

OE seeks Commission review of the following question of law erroneously decided by the Licensing Board:

^{4/} Letter from T. Murley to M. Lyster, CEI, and D. Shelton, TE (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 OE in the OE Application. 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 (1991), aff'd, CLI-92-11, 36 NRC ____ (August 12, 1992), petition for review filed, No. 92-1532 (D.C. Cir. Oct. 9, 1992). OE 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.

Is the Commission 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 alternatives sources, all as appropriately measured and compared?^{6/}

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.^{7/}

OE also seeks review of the Licensing Board's sua sponte decision to dismiss the agency bias issues,^{8/} which the NRC never heard.^{9/}

^{6/} LBP-92-32, slip op. at 6. See also Tr. at 244 (bedrock legal issue read into record).

^{7/} See LBP-92-32, slip op. at 60-61.

^{8/} The agency bias issues were raised below by CE and admitted for contention by the Licensing Board. See LBP-91-38, 34 NRC at 255-58. See also Letter from G. Charnoff to Licensing Board (July 25, 1991) (containing enclosure setting forth congressional interference and staff bias contentions).

^{9/} Before the agency bias issues could be heard by the Licensing Board, the Commission sua sponte ordered that those matters be held in abeyance. CLI-91-15, 34 NRC at 271. In LBP-92-32, the Licensing Board sua sponte dismissed the agency bias issues. LBP-92-32, slip op. at 68.

II. THE LICENSING BOARD'S DECISIONS ARE ERRONEOUS

A. The Bedrock Legal Issue

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 anti-trust license conditions only where the activities of the licensed facility would "create or maintain a situation inconsistent with the antitrust laws."^{10/} 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 faulty position that the addition of a high cost facility may be competitively advantageous to an operator. Such a facility 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.^{11/}

Second, the Licensing Board has ignored the fact that Section 105(c) is not a grant of plenary authority over antitrust matters.^{12/} Other agencies, including the Department of Justice

^{10/} 42 U.S.C. § 2135(c).

^{11/} See Applicants' Motion at 57-68; Applicants' Reply at 29-39.

^{12/} See Applicants' Motion at 16-34.

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 invoked a "market power" test rather than the cost-based test applicable to Section 105(c).^{13/}

Several indicia support the position advanced by OE. 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 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.^{14/} The Licensing Board also ignored the broader context in which the amendment of Section 105(c) took place.^{15/}

The Licensing Board's decision is contrary to legal precedent. As OE argued before the Licensing Board, a number of Commission decisions and Department of Justice advice letters

^{13/} See LBP-92-32, slip op. at 39; compare Applicants' Reply at 19-29.

^{14/} See Applicants' Motion at 34-45 (reviewing legislative history); Applicants' Reply at 40-57 (reviewing legislative history).

^{15/} See Applicants' Reply at 57-62 (reviewing "practical value" legislative history).

address the critical importance of the anticipated cost advantage of nuclear power.^{16/} These cases turn upon the anticipated cost advantage of nuclear power and the potential for misuse of this cost advantage by a nuclear operator.

Finally, the Licensing Board's interpretation of the statute violates OE'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.^{17/} The 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.

B. The Agency Bias Issue

OE sought to discover and present the facts concerning the incident(s) of congressional interference and agency bias that

^{16/} 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).

^{17/} City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). See Applicants' Motion at 75-85; Applicants' Reply at 81-90.

occurred in this case.^{18/} OE not only has been denied that opportunity, but it twice has been given no notice or opportunity to address the fact that these issues would be first tabled^{19/} and then dismissed^{20/} without having been addressed at all by OE. These procedural errors violated OE's due process rights.

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 AN IMPORTANT QUESTION OF LAW AND POLICY

LBP-92-32 erroneously interprets Section 105(c) and, accordingly, should be reversed by the Commission. It also contains the procedural error of dismissing OE's agency bias contentions without providing any opportunity to OE to address either the merits of those issues or the appropriateness of their dismissal.

Moreover, the bedrock legal issue raises a substantial question 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 continued exercise by the NRC of this peripheral authority when a nuclear power plant is no longer competitively advantageous. As

^{18/} Letter from G. Charnoff to Licensing Board (July 25, 1991) (containing enclosure setting forth congressional interference and staff bias contentions). See also LBP-91-38, 34 NRC at 255-58 (admitting issues for contention).

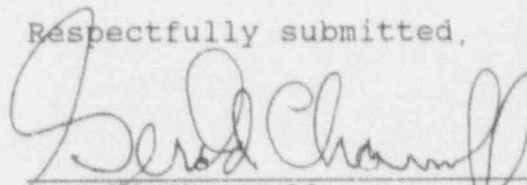
^{19/} CLI-91-15, 34 NRC at 271.

^{20/} LBP-92-32, slip op. at 68.

such, it goes to the very heart of continuing Commission authority over licensed nuclear facilities. The Commission should make a determination on this question. Furthermore, the agency bias issue should be heard on the merits and certainly should not be dismissed without providing OE any opportunity to address the procedural merits of such an action. The agency's credibility is at issue here; the issue merits the Commission's attention.

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, OE submits that the Commission is without authority to continue to impose antitrust license conditions on OE. In addition, LBP-92-32 contains procedural error. Accordingly, Commission review of the decision is appropriate.

Respectfully submitted,



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Dated: December 8, 1992

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BRANCH

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 1992, a copy of the foregoing Petition for Review was served by first class mail postage prepaid (except where otherwise indicated) on each of the following:

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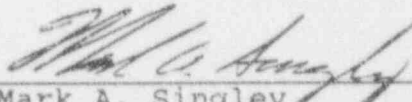
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