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B-112131, Feb. 1, 1956

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B-112131, FEB. 1, 1956

TO HONORABLE LEWIS L. STRAUSS, CHAIRMAN, ATOMIC ENERGY COMMISSION:

REFERENCE IS MADE TO THE COMMISSION'S LETTER OF JANUARY 17, 1956, RECEIVED JANUARY 19, 1956, REQUESTING OUR OPINION CONCERNING A PROPOSED CONTRACT BETWEEN THE COMMISSION AND OHIO VALLEY ELECTRIC CORPORATION (OVEC) FOR A SUPPLY OF 150,000 KW OF POWER TO THE PORTSMOUTH AREA OF THE COMMISSION.

A TWENTY-FIVE YEAR POWER CONTRACT FOR 1,800,000 KW WAS ENTERED INTO BETWEEN OVEC AND AEC UNDER AUTHORITY CONTAINED IN THE SUPPLEMENTAL APPROPRIATION ACT, 1953, 66 STAT. 643, WHICH AUTHORITY SUBSEQUENTLY WAS EMBODIED IN SECTION 12 (D) OF THE ATOMIC ENERGY ACT OF 1946, AS AMENDED. SECTION 12 (D) OF THAT ACT, WITH CERTAIN ADDITIONS, BECAME SECTION 164 OF THE ATOMIC ENERGY ACT OF 1954, 68 STAT. 951. AT THE TIME THE EXISTING CONTRACT WAS MADE IT WAS CONTEMPLATED THAT THE OVEC PLANT CAPACITY WOULD BE 2,200,000 KW, OF WHICH 1,800,000 WERE TO BE FURNISHED TO AEC ON A FIRM BASIS. IT IS NOT EXPECTED THAT THE TOTAL PLANT CAPACITY WHEN COMPLETED WILL BE 2,354,000 KW, WHICH WILL LEAVE A MUCH GREATER PLANT CAPACITY AVAILABLE TO OVEC. THE CONTRACT NOW PROPOSED WOULD COVER THE FURNISHING TO AEC BY OVEC OF 150,000 KW OF THE ADDITIONAL POWER EXPECTED TO BE GENERATED, AND IS FOR A THREE-YEAR TERM, RENEWABLE FOR ADDITIONAL ANNUAL PERIODS AT RATES TO BE MUTUALLY AGREED UPON.

SECTION 6.06 (B) OF THE PROPOSED CONTRACT PROVIDES THAT OVEC MAY TERMINATE THE AGREEMENT UNLESS IT SHALL HAVE RECEIVED, WITHIN 30 DAYS AFTER THE EFFECTIVE DATE THEREOF, AN OPINION OF THE COMPTROLLER GENERAL OF THE UNITED STATES TO THE EFFECT

(1) THAT AEC HAD FULL POWER AND AUTHORITY TO ENTER INTO THE CONTRACT AND TO OBLIGATE THE UNITED STATES FOR ALL PAYMENTS TO OVEC CALLED FOR THEREUNDER,

(2) THAT ALL ACTION NECESSARY UNDER SECTION 164 OF THE ATOMIC ENERGY ACT OF 1954 TO PERMIT THE CONTRACT TO BECOME EFFECTIVE HAS BEEN TAKEN,

(3) THAT THE CONTRACT DOES NOT CONTRAVENE ANY OF THE PROVISIONS OF THE ATOMIC ENERGY ACT OF 1954, AND

(4) THAT THE CONTRACT DOES NOT AFFECT THE EXISTING POWER CONTRACT BETWEEN OVEC AND AEC IN SUCH A MANNER AS TO CAUSE THAT EXISTING CONTRACT TO CONTRAVENE ANY OF THE PROVISIONS OF THE ATOMIC ENERGY ACT OF 1954.

THE LETTER OF JANUARY 17, 1956, STATES THAT AN OPINION PRESENTLY IS REQUESTED ONLY ON POINTS 1, 3, AND 4 LISTED ABOVE, AND THAT IF OUR OPINION THEREON IS

FAVORABLE, THE CONTRACT WILL BE FILED WITH THE JOINT COMMITTEE ON ATOMIC ENERGY IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 164 OF THE ATOMIC ENERGY ACT OF 1954, AFTER WHICH THE CONTRACT WILL AGAIN BE SUBMITTED TO US FOR THE FULL OPINION REFERRED TO IN SECTION 6.06 (B).

SECTION 164 OF THE ATOMIC ENERGY ACT OF 1954 AUTHORIZES THE COMMISSION

"* * * TO ENTER INTO NEW CONTRACTS OR MODIFY OR CONFIRM EXISTING CONTRACTS TO PROVIDE FOR ELECTRIC UTILITY SERVICES FOR PERIODS NOT EXCEEDING TWENTY-FIVE YEARS, * * *"

AND PROVIDES FURTHER THAT

"* * * SUCH CONTRACTS SHALL BE SUBJECT TO TERMINATION BY THE COMMISSION UPON PAYMENT OF CANCELLATION COSTS AS PROVIDED IN SUCH CONTRACTS, AND ANY APPROPRIATION PRESENTLY OR HEREAFTER MADE AVAILABLE TO THE COMMISSION SHALL BE AVAILABLE FOR THE PAYMENT OF SUCH CANCELLATION COSTS.'

THE PAYMENTS REQUIRED TO BE MADE TO OVEC AND AEC UNDER THE PROPOSED CONTRACT CONSIST OF A MONTHLY DEMAND CHARGE OF $1.361 PER KW, AND A MONTHLY ENERGY CHARGE BASED ON THE CHARGES TO OVEC ACCOUNT 703 (FUEL) OF THE UNIFORM SYSTEM OF ACCOUNTS FOR THE CONTRACT DEMAND OF 150,000 KW, PLUS OUT-OF-POCKET COSTS FOR ANY SUPPLEMENTAL OR BACK-UP ENERGY FURNISHED. THE CONTRACT ALSO PROVIDES FOR CERTAIN PAYMENTS TO BE MADE BY AEC IN THE EVENT THE CONTRACT IS TERMINATED BY AEC BEFORE THE END OF THE CONTRACT TERM. ESSENTIALLY, TWO YEARS' NOTICE OF TERMINATION BY AEC IS REQUIRED, AND DURING SUCH NOTICE PERIOD AEC IS OBLIGATED TO CONTINUE TO PAY THE MONTHLY DEMAND CHARGE WHETHER ENERGY IS USED OR NOT.

IN VIEW OF THE ABOVE-QUOTED PROVISIONS OF SECTION 164 OF THE ATOMIC ENERGY ACT OF 1954, WE ARE OF THE OPINION THAT THE COMMISSION HAS FULL POWER AND AUTHORITY TO ENTER INTO THE PROPOSED CONTRACT AND TO OBLIGATE THE UNITED STATES FOR ALL PAYMENTS REQUIRED TO BE MADE TO OVEC PURSUANT TO THE PROVISIONS OF THE CONTRACT.

IT IS OUR OPINION, ALSO, THAT THE PROPOSED CONTRACT WILL NOT CONTRAVENE SECTION 165 (WHICH PROHIBITS DIRECT REIMBURSEMENT OF FEDERAL INCOME TAXES) OR ANY OTHER PROVISIONS OF THE ATOMIC ENERGY ACT OF 1954.

THE LAST POINT UPON WHICH OUR OPINION IS REQUESTED CONCERNS THE EFFECT OF THE PROPOSED CONTRACT FOR ADDITIONAL POWER UPON THE EXISTING POWER CONTRACT. UNDER THE INTERPRETATION PLACED ON SECTION 2.04 OF THE EXISTING CONTRACT BY THE LETTER OF INTERPRETATION PROPOSED TO ACCOMPANY THE NEW CONTRACT, IT IS OUR UNDERSTANDING THAT TOTAL PLANT GENERATING CAPACITY, INCLUDING CAPACITY SOLD UNDER THE NEW CONTRACT IF NECESSARY, WILL BE APPLIED FIRST TOWARD OVEC'S OBLIGATIONS UNDER THE EXISTING CONTRACT. THIS BE SO, SINCE OVEC WILL ASSUME UNLIMITED RESPONSIBILITY TO SUPPLY 150,000 KW UNDER THE NEW CONTRACT, UNLESS EXCUSED BY FORCE MAJEURE, IT MEANS THAT OVEC'S TOTAL POTENTIAL RESPONSIBILITY FOR RESERVE POWER WILL BE INCREASED BY 150,000 KW. ONE EFFECT ON THE EXISTING CONTRACT THEN WILL BE THAT EXCESS GENERATING CAPACITY NOT NEEDED TO FULFILL OVEC'S OBLIGATIONS UNDER THE EXISTING CONTRACT WILL NO LONGER, TO THE EXTENT OF 150,000 KW, BE AVAILABLE TO OVEC FOR DELIVERY TO THE SPONSORING COMPANIES UNDER PRESENT CONTRACTUAL ARRANGEMENTS. OF COURSE, AGREEMENT OF THE SPONSORING COMPANIES TO GUARANTEE THIS INCREASED RESPONSIBILITY ON THE PART OF OVEC AND TO RELINQUISH THEIR EXISTING ENTITLEMENT TO THE EXCESS GENERATING CAPACITY WILL HAVE TO BE SECURED. THE LETTER OF INTENT TRANSMITTED WITH THE PROPOSED CONTRACT STATES THAT THIS WILL BE DONE. IT IS UNDERSTOOD THAT THE PROPOSED CONTRACT, THE

LETTER OF INTERPRETATION, AND THE LETTER OF INTENT ARE TO BE SUBMITTED TO THE JOINT COMMITTEE ON ATOMIC ENERGY. VIEW OF THIS, WE DO NOT BELIEVE THAT THE EFFECT OF THE PROPOSED CONTRACT ON THE EXISTING CONTRACT WILL BE SUCH AS TO CAUSE THE EXISTING CONTRACT TO CONTRAVENE ANY OF THE PROVISIONS OF THE ATOMIC ENERGY ACT OF 1954.

THIS OPINION IS, OF COURSE, LIMITED TO THE SPECIFIC QUESTIONS PRESENTED, AND DOES NOT PURPORT TO PASS ON THE NECESSITY OR DESIRABILITY OF THE PROPOSED CONTRACT, WHICH ARE MATTERS FOR ADMINISTRATIVE DECISION.