

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

THE TOLEDO EDISON COMPANY and)
THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY)
(Davis-Besse Nuclear Power Station,)
Unit 1))

NRC Dkt. No. 50-346A

THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY, ET AL.)
(Perry Nuclear Power Plant, Units)
1 & 2))

NRC Dkt. Nos. 50-440A
50-441A

ORDER MODIFYING ANTITRUST LICENSE CONDITION NO. 3
OF DAVIS-BESSE UNIT 1, LICENSE NO. NPF-3 AND PERRY
UNITS 1 AND 2, CPPR-148, CPPR-149

The Cleveland Electric Illuminating Company ("CEI") is the co-holder of an operating license for the Davis-Besse Unit 1 (License No. NPF-3) and a co-permittee of construction permits for Perry Units 1 and 2 (CPPR-148, CPPR-149) issued by the Nuclear Regulatory Commission ("NRC"). The Davis-Besse 1 operating license was issued on April 22, 1977. The Perry 1 and 2 construction permits were issued on May 3, 1977. CEI is also a co-applicant for construction permits for the Davis-Besse Units 2 & 3. An Atomic Safety and Licensing Board ordered inclusion of antitrust license conditions in the license and permits for the Davis-Besse and Perry units. Toledo Edison Co. & Cleveland Electric Illuminating Co., LBP-77-1, 5 NRC 133 (1977).

II

On January 4, 1978, the City of Cleveland ("City") requested the NRC to take enforcement action against CEI for violations of Antitrust License Condition No. 3 in its operating license and construction permits. By letter dated February 28, 1978, the Assistant Attorney General, Antitrust Division, advised the NRC of the Department of Justice's support for the City's request.

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Operating License No. NPF-3 and Construction Permits CPPR-148 and CPPR-149 each contain antitrust conditions. Antitrust Condition No. 3 in each of these

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licenses provides as follows:

"(3) Applicants shall engage in wheeling for and at the request of other entities in the CCCT:

a) of electric energy from delivery points of Applicants to the entity(ies); and,

b) of power generated by or available to the other entity, as a result of its ownership or entitlements 1/ in generating facilities, to delivery points of Applicants designated by the other entity.

"Such wheeling services shall be available with respect to any unused capacity on the transmission lines of Applicants, the use of which will not jeopardize Applicants' system. In the event Applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effected until reductions of at least 5 percent have been made in transmission capacity allocations to other Applicants in these proceedings and thereafter shall be made in proportion to reductions imposed upon other Applicants to this proceeding. 2/

"Applicants shall make reasonable provisions for disclosed transmission requirements of other entities in the CCCT in planning future transmission either individually or within the CAPCO grouping. By "disclosed" is meant the giving of reasonable advance notification of future requirements by entities utilizing wheeling services to be made available by Applicants."

This license condition was ordered to be included in all the licenses involved by an Atomic Safety and Licensing Board that concluded, after a full evidentiary hearing, that the activities under the licenses of CEI (and others) violated each of the antitrust laws specified in Section 105a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135(a), 5 NRC 133 (January 6, 1977). The Licensing Board's decision is now on appeal before the Atomic Safety and Licensing Appeal Board.

1/ Entitlement includes but is not limited to power made available to an entity pursuant to an exchange agreement." (Footnote in License Condition).

2/ The objective of this requirement is to prevent the preemption of unused capacity on the lines of one Applicant by other Applicants or by entities the transmitting Applicant deems noncompetitive. Competitive entities are to be allowed opportunity to develop bulk power services options even if this results in reallocation of CAPCO (Central Area Power Coordination Group) transmission channels. This relief is required in order to avoid prolongation of the effects of Applicants' illegally sustained dominance." (Footnote in License Condition).

CEI's motion (filed with other Applicants) for a stay, pending appeal, of the ordered antitrust license conditions, including license condition No. 3, was denied by the Licensing Board, 5 NRC 452 (1977) and subsequently by the Appeal Board, 5 NRC 621, ALAB-385 (1977).

III

Upon receipt of the City's request for enforcement action, the NRC Staff undertook an investigation of CEI's recently filed transmission service schedule and wheeling policies. As a result of (i) the NRC Staff investigation, (ii) an analysis of the transmission service schedule filed by CEI with the Federal Energy Regulatory Commission on January 27, 1978, and (iii) a review of CEI's Answer of March 17, 1978 to the NRC Staff's questionnaire, the Acting Director of the Office of Nuclear Reactor Regulation on June 28, 1978 issued a Notice of Violation to CEI pursuant to 10 CFR §2.201 of the Commission's Rules of Practice. The Notice also stated that, inter alia, Civil Penalties would be considered in order to assure compliance. A copy of that Notice is attached hereto as Appendix A.^{3/} On July 14, 1978, CEI responded to the Notice of Violation and generally denied that it had not complied with Antitrust License Condition No. 3 as set forth in the Notice.

Subsequently, Representatives of CEI, the City, and NRC Staff met on August 10, 1978, in an attempt to resolve problems concerning compliance identified in the Notice of Violation. At the meeting, CEI stated that many provisions of its January 27, 1978 transmission service schedule to which the City, NRC Staff, and Department of Justice objected were necessary because the transmission service schedule was meant to apply to the Combined CAPCO Company Territories (CCCT)

^{3/} Attached to the Notice of Violation as Appendix B was CEI's January 27, 1978 transmission tariff with suggested changes by the NRC Staff. Appendix B is also attached hereto.

rather than just the City. Since the City (and Painesville, Ohio) were the only entities located in CEI's service area, the Staff suggested that CEI draft a more specific transmission service schedule. On September 15, 1978, CEI submitted to the Staff a revised transmission schedule. As to the deficiencies found in the January 27, 1978 schedule, CEI drafted its new schedule so as to ameliorate some of the specific objections of the Staff and City. However, CEI's revised draft contained new anticompetitive restrictions which, in part, form the basis for this Order in that it shows CEI's intent not to comply with the license conditions. A copy of CEI's September 1978 transmission schedule is attached hereto as Appendix C. On November 28, 1978, the NRC Staff met with CEI and the City in a continuing effort to reach agreement or to narrow the issues concerning CEI's second draft transmission schedule. However, the participants were unable to agree or narrow the issues at this meeting.

IV

During the same time period that the NRC Staff was attempting to work out a mutually satisfactory transmission schedule with CEI, the Federal Energy Regulatory Commission (FERC) conducted its own inquiry of CEI's January 27, 1978 transmission schedule under FERC Docket No. ER 78-194. Evidentiary hearings were held by the FERC on December 19-20, 1978 and an Initial Decision (I.D.) was rendered by the Administrative Law Judge (ALJ) on April 27, 1979. The changes ordered by the ALJ to CEI's January 27, 1978 transmission schedule are attached hereto as Appendix D. While the ALJ noted that the FERC does not have jurisdiction to enforce NRC license conditions, the Initial Decision deals effectively with most items cited by the NRC Staff to be in violation of Antitrust License Condition No. 3. Those matters not completely covered by the FERC Initial Decision are listed as items 3 and 5 in the NRC Notice of Violation (See Appendix A).

Item 3 concerns the preemption of available transmission capacity by CEI. The FERC Administrative Law Judge said there was inadequate record

support to justify the NRC preemption requirement of a five percent reduction in transmission allocations to other CAPCO members before reducing such services to other entities. However, CEI in its separate negotiations with the NRC Staff and the FERC has expressed a willingness to comply with the NRC five percent preemption requirement.^{4/} In view thereof, the NRC Staff has determined that CEI should file an amendment to the CEI transmission tariff as modified by the FERC Initial Decision to include the five percent reduction requirement set forth in Antitrust License Condition No. 3.

In Item 5 of the Notice of Violation, the Acting Director found unreasonable CEI's requirement of filing a separate supplemental schedule for each wheeling request. The FERC Administrative Law Judge noted at pages 23-25 of the Initial Decision that such a requirement in and of itself was not unreasonable under FERC filing requirements and that the filing of contracts governing wholesale service is mandated by Section 205(c) of the Federal Power Act. However, the Administrative Law Judge found that CEI's tariff language was redundant and unnecessarily complicated and could lead to unnecessary delays in providing a requested service. The Administrative Law Judge thereupon modified and simplified the language of the supplemental schedule requirement and allowed it to remain in the tariff. In view of the modifications and simplification of the tariff language, the NRC Staff is of the opinion that its concerns set forth in Item 5 of the Notice of Violation have been satisfied. Therefore, the NRC Staff will not object to the modified requirement of filing supplemental schedules for wheeling transactions.

^{4/} See The Cleveland Electric Illuminating Company, FERC Docket No. ER 78-194, Initial Decision on Proposed Transmission Tariff, Slip Op., p. 12, (April 27, 1979). Letter from William Bingham, Principal Rate Engineer, CEI, to Jerome Saltzman, Chief, Antitrust & Indemnity Group, Nuclear Reactor Regulation, dated March 17, 1978.

Another matter raised by the FERC Initial Decision pertains to wheeling of power for or among entities within the Combined CAPCO Company Territories (CCCT). Although the FERC Administrative Law Judge clarified the extent of the transmission service requirement with respect to the municipals and cooperatives within the CCCT, he did not include other entities or other delivery points as required by the NRC license conditions. NRC License Condition No. 3 requires CEI to wheel power for other entities in the CCCT from delivery points of applicants to the entities and to delivery points of applicants designated by the other entities. Further, entity is defined as any electric generation and/or distribution system or municipality or cooperative with a statutory right or privilege to engage in either of these functions. Thus, the NRC Staff has determined that the CEI should file an amendment to the CEI transmission tariff, as modified by the FERC Initial Decision, to expand the transmission services to include deliveries for all entities within the CCCT as required by Antitrust License Condition No. 3.

V

From the foregoing, the Staff has determined that CEI has been in non-compliance with Antitrust License Condition No. 3 of its operating license and construction permits at least since January 27, 1978, in that CEI has maintained and engaged in a policy and practice of noncompliance with Antitrust Condition No. 3 of its license and permits. CEI has approached its responsibility to file a wheeling schedule for the City as if it had not been required as a condition of its operating license and two construction permits to comply with Antitrust License Condition No. 3. In view of this, and the public interest, the Director of Nuclear Reactor Regulation has determined that, pursuant to 10 CFR §2.204, License No. NPF-3 and Construction Permit Nos. CPPR-148 and 149 shall be amended

effective immediately to require CEI to file the transmission tariff ordered by the FERC (Appendix D) and an attached amendment thereto identified as Appendix E ^{5/} with the Federal Energy Regulatory Commission within twenty-five (25) days after the Order and so file this tariff in conformity with applicable FERC filing requirements.

Accordingly, pursuant to the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR Parts 2 and 50, IT IS HEREBY ORDERED THAT:

Antitrust License Condition No. 3 of License No. NPF-3 and Construction Permit Nos. CPPR-148 and 149 shall be amended with the following language added as paragraph (3)c):

The Cleveland Electric Illuminating Company shall file within twenty-five (25) days of the Order of the Director of Nuclear Reactor Regulation dated June 25, 1979, the transmission service tariff and amendment attached as appendices D and E to the Order in conformity with the applicable filing requirements of the Federal Energy Regulatory Commission.

In view of the matters discussed herein, the Director of Nuclear Reactor Regulation has determined that the public interest requires this Order be made effective immediately, pending further order of the Commission.

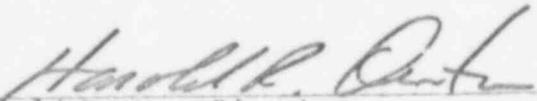
CEI may, within twenty (20) days after the receipt of this Order, request a hearing with respect to all or any part of this Amendment. However, any request for a hearing will not stay the immediate effectiveness of this Order. If a hearing is requested, the Commission will issue an Order designating the time and place of hearing. In the event a hearing is requested, the issues to be considered at such hearing shall be:

^{5/} Appendix E is CEI's January 27, 1978 draft transmission schedule as modified by the FERC on April 27, 1979 in Docket No. ER 78-194 and further modified by the NRC to implement requirements set forth in Antitrust License Condition No. 3.

(1) whether CEI has been in noncompliance with Antitrust License Condition No. 3 since January 27, 1978, the date it filed its first transmission tariff with FERC; and

(2) if so, whether this Order should be sustained.

FOR THE NUCLEAR REGULATORY COMMISSION



Harold Denton, Director
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland
this 25th day of June, 1979

Enclosures:
Appendices A-E