

Reg. files
7-25-74

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
THE TOLEDO EDISON COMPANY)	
THE CLEVELAND ELECTRIC ILLUMINATING)	Docket Nos. 50-346A
COMPANY)	50-440A
(Davis-Besse Nuclear Power Station))	50-441A
)	
THE CLEVELAND ELECTRIC ILLUMINATING)	
COMPANY, <u>et al.</u>)	
(Perry Nuclear Power Plant,)	
Units 1 and 2))	

PREHEARING CONFERENCE ORDER #2



A. Background

Pursuant to Notice and Order for same, the Second Prehearing Conference in this consolidated proceeding was held on June 25, 1974. Counsel for all parties were present and participated except counsel for State of Ohio, who had earlier requested, ^{1/} and the Board had granted, leave to be absent.

1/ By letter dated June 20, 1974 from Deborah M. Powell, Esq., Assistant Attorney General, incorporated herein by reference. By attachment to said letter, the State, with agreement of the parties, set forth the nature and scope of its participation under Section 2.715(c). The Board approved same.

Pursuant to Prehearing Order number 1, the Regulatory Staff of the Atomic Energy Commission (Staff), the Department of Justice (Justice) and the Intervenors, City of Cleveland (Cleveland) and American Municipal Power-Ohio (AMP-O) prepared a "Joint Statement of AEC Regulatory Staff, Department of Justice and Intervenors Regarding the Contentions and Matters in Controversy" dated May 28, 1974 (hereafter Joint Statement). The Applicants responded on June 7, 1974 and the other parties replied on June 14, 1974 to the Applicants' response. Thus, the prime purpose of the Second Prehearing Conference was to discuss the issues and matters in controversy and the scope of discovery pursuant to them.

Following said Prehearing Conference, on June 28, 1974, the Board issued an "Order Requesting Clarification", requesting each party, individually, to develop its position fully on several key issues related to discovery. The Applicants, Staff and Cleveland responded timely with helpful briefs which have assisted the Board in its attempt to clarify the issues in this proceeding and to determine the scope of discovery. Justice filed a response, which only summarized

several general conclusions.^{2/} The party AMP-0 filed no response timely; by an untimely letter dated July 16, 1974, filed after the responses of the other parties were filed, AMP-0 adopted the City of Cleveland position.^{3/}

The Joint Statement proposes broad issues and matters in controversy involving: first, the structure of various markets for electric power and Applicants' positions therein; and, second, Applicants' conduct vis-a-vis its competitors and customers in those markets. At the Second Prehearing Conference, Counsel for Staff emphasized that while the parties other than the Applicants view the case as basically one of "structure", they also believe that exploration of "conduct" matters is required. In responding to the Board's "Order Requesting Clarification", the parties further developed the issue of the relative importance of "structure" versus "conduct" and their positions concerning the need, if any, to explore allegations about Applicants' retail practices, as well as other basic questions about Section 105(c) of the Act.

^{2/} In view of the special duty and status afforded to the Department of Justice in the Atomic Energy Commission Act (Act), the Board regrets it did not have the benefit of a logical exposition of the legal standards to be applied in administering Section 105(c) of the Act with authorities and citations for Justice's position on the questions posed.

^{3/} See paragraph E, below.

B. Applicants' General Position with Respect to the Issues and Matters in Controversy

Inter alia, the Applicants have objected to the Joint Statement because they believe: (1) the issues and matters should be limited to relationships among the electric entities that are parties to these proceedings; and (2) that the Applicants' proposed stipulations eliminate most of the need for discovery with respect to whether a situation inconsistent with the antitrust laws (hereinafter "situation") may exist as contemplated by Section 105 of the Act. Each such objection will be considered in turn.

1. Limitation of Issues

The Applicants strongly urge the Board to limit the issues and matters in controversy in this proceeding, the related discovery, and any license conditions that might be imposed, to relationships among the parties. They seek to exclude any consideration given to "other electric entities."

It is important to distinguish between the Board's responsibility for determining, first, whether a "situation"

exists, and, second, if such a "situation" does exist, what is the appropriate remedy. At this stage of the proceeding, the Board is concerned only with whether a "situation" exists. Resolving the disputes among the parties as well as insuring the protection of the public interest may require consideration of non-party competitors or customers in the relevant markets, i.e., "other electric entities". Should the remedy stage be reached, it may or may not be appropriate to limit the remedy to the parties that have participated in the proceedings.

2. Applicants' Proposed Stipulations

Applicants' proposed stipulations allegedly would obviate the need for extensive discovery. During the Second Prehearing Conference, Counsel for Applicants stated that its proposed procedure was equivalent to the assumption arguendo procedure outlined by the Commission in its second Waterford Memorandum and Order.^{4/} However, during the course of the

^{4/} In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-382A, Memorandum and Order of September 28, 1973, CLI-73-25, RAI 73-9-619, at 622

conference, the Board concluded that, with one exception,^{5/} this was not the case and that Applicants' proposed stipulation dealt with the question of remedies, and not a "situation". In effect, Applicants appear willing to offer license conditions that they allege will satisfy the remedy requests of the other parties.^{6/} However, the other parties consider such license conditions to be inadequate and there is no record established by evidence, assumptions arguendo or "situation" stipulations that would permit the Board to adjudicate properly Applicants' offer. As the Commission has stated in its Catawba Memorandum and Order, in the absence of a resolution of the "situation" issue, a stipulation as to remedy is not sufficient to obviate a full hearing under Section 105(c).^{7/}

^{5/} Applicants have stipulated that each is "dominant" in its respective service area with regard to transmission and bulk power generation facilities in the CAPCO area. By "dominance", Applicants refer to percentage shares of ownership. The stipulations do not extend to such matters as the definition of "relevant markets" or to "control" and other legal elements necessary to resolve the question of whether or not there may be created a situation inconsistent with the antitrust laws.

^{6/} Except for the "wheeling" remedy that AMP-0 desires.

^{7/} In the Matter of Duke Power Company, Catawba Nuclear Station, Units 1 & 2, CLI-74-14, RAI 74-4-307, at 309. See also, In the Matter of Louisiana Power & Light Company, Waterford Unit 3, CLI-73-7, RAI-73-2-48, at 50, fn 2, and CLI-73-9, 25, RAI-9-619, at 621-622.

Since the record does not contain appropriate assumptions or stipulations as to "situation", the Board must consider what evidentiary record is required with respect to the situation that the Staff, Justice, and Intervenors assert is inconsistent with the antitrust laws and, therefore, what discovery is appropriate.

C. Dominance and the Issues and Matters in Controversy

The Board considered at length the question of whether, within the context of an AEC licensing procedure, dominance alone, in the sense of large market shares, is sufficient in and of itself under Section 105(c) of the Act to constitute a situation inconsistent with policies underlying the anti-trust laws.^{8/} If so, these proceedings could be materially simplified and discovery substantially shortened. If, however, a showing of the exercise of monopoly power is required in addition to dominance, then the scope of discovery must be expanded. After considering all pleadings and views of the parties on this question, the Board has determined not to limit discovery to the subject of dominance only. However, the parties should be mindful that the Board considers

^{8/} 10 CFR, Part 2, Appendix A, Section X, Paragraph (1)

the contentions to relate primarily to structure, and only incidentally to conduct. Accordingly, any discovery directed to conduct should be limited and clearly designed to develop whatever evidence of conduct is needed beyond structure to demonstrate the "situation" referred to herein.

D. The Issues and Matters in Controversy

The following Issues and Matters in Controversy, as finally formulated by the Board, and based on the joint stipulation and record to date, are admitted as issues in the proceeding for purposes of discovery:

BROAD ISSUE A

Whether the structure of the relevant market or markets and Applicants'^{9/} position or positions therein gives them the ability, acting individually, together, or together with others, to hinder or prevent:

^{9/} Applicants are the five participants in the Davis-Besse and Perry nuclear units: Cleveland Electric Illuminating (CEI), Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company and Toledo Edison Company. The Applicants are also the five members of CAPCO, referred to below.

- (1) Other electric entities ^{10/} from achieving access to the benefits of coordinated operation ^{11/} either among themselves, or with Applicants:
- (2) Other electric entities from achieving access to the benefits of economy of size of large electric generating units by coordinated development, ^{12/} either among themselves, or with Applicants:

BROAD ISSUE B.

If the answer to Broad Issue A is yes, has Applicants' ability been used, is it being used, or might it be used to create and maintain a situation or situations inconsistent with the antitrust laws or the policies underlying these laws.

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- 10/ "Other electric entities" refers to commercial firms, (other than the five Applicants), cooperatives, governmental units or similar organizations that generate, transmit or distribute electric power within the relevant market(s).
 - 11/ "Coordinated operation" includes but is not limited to such activities as reserve sharing, exchange or sale of firm power and energy, deficiency power and energy, emergency power and energy, surplus power and energy, and economy power and energy.
 - 12/ "Coordinated development" includes but is not limited to joint planning and development of generation and transmission facilities.

MATTERS IN CONTROVERSY UNDER BROAD ISSUES A AND B

- (1) Whether the Combined CAPCO-Company Territories (CCCT)^{13/} is an appropriate geographic market for analyzing the possible creation or maintenance of a situation inconsistent with the antitrust laws or the policies underlying those laws.
- (2) Whether there are any relevant geographic sub-markets, and, if so, what are the boundaries.
- (3) Whether any or all of the following are relevant product markets for analyzing the possible creation or maintenance of a situation inconsistent with the antitrust laws or the policies underlying those laws:
 - (a) Regional power exchange transactions within power pooling arrangements involving exchanges and/or sales of electric power for resale.

^{13/} The Combined CAPCO Company (Central Area Power Coordination Group) Territories (CCCT) refers to the region bounded by the outer perimeters of the geographic territories of the five CAPCO members, as shown on the map submitted by CEI as Exhibit F to Information Requested by the Attorney General for Antitrust Review in connection with the Perry Nuclear Power Plant Units 1 & 2. (The map is entitled "Principal Facilities of CAPCO as of October 31, 1969" and was prepared by Duquesne Light Co.)

- (b) Bulk power transactions involving individual contracts for sale-for-resale of firm electric power or for emergency, deficiency or other types of wholesale power.
 - (c) Retail power transactions involving sales of electricity to ultimate consumers.
- (4) Whether Applicants' stipulated ^{14/} dominance ^{15/} of bulk power transmission facilities in the CCCT gives them the ability to hinder or preclude competition in the transmission of bulk power.
- (5) Assuming the answer to (4) is yes, whether Applicants have, do or could use their ability to preclude any other electric entities within the CCCT from obtaining sources of bulk power from other electric entities outside the CCCT.
- (6) Assuming that the answer to (4) is yes, whether Applicants have exercised, are exercising, or intend to exercise, their ability to prevent other electric entities in the CCCT from achieving:

14/ Transcript pp. 448-451; 473; 483-484

15/ Dominance here and below refers to percentage shares of 75% or more in relevant service market areas

- (a) the benefits of coordinated operations either among themselves or with Applicants.
 - (b) access to the benefits of economy of size from large nuclear generating facilities.
 - (c) any other benefits from coordinated development either among themselves or with Applicants.
- (7) Assuming the answer to (6) is yes, has this ability to hinder or preclude competition been exercised for the purpose or effect of eliminating one or more of the other electric entities in the CCCT.
- (8) Whether Applicants' stipulated ^{16/} dominance of bulk power generation in the CCCT gives them the ability to hinder or preclude competition in one or more relevant markets.
- (9) Assuming the answer to (8) is yes, whether Applicants have exercised control over bulk power facilities to deny to other electric entities in the CCCT:
- (a) access to the benefits of coordinated operation, either among themselves, or with Applicants.

- (b) access to the benefits of economy of size of large electric generating units.
 - (c) assess to any other benefits from coordinated development, either among themselves or with Applicants.
- (10) Whether Applicants' policy or policies with respect to providing access to their nuclear facilities to other electric entities in the CCCT, that are or could be connected to Applicants, deprives these other electric entities from realizing the benefits of nuclear power.
- (11) Whether there are logical connections between the activities under the proposed licenses for the nuclear facilities and each of the matters in contention (1) through (10) that meet the nexus test established by the Atomic Energy Commission. ^{17/}

The Board will not address issues and matters in controversy with respect to remedy until a situation

17/ In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-382A, Memorandum and Order of February 23, 1973, RAI-73-2-48 and In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-382A, Memorandum and Order of September 28, 1973, RAI-73-9-619.

inconsistent with the antitrust laws or underlying policies thereof has been established. Consequently, at this time, no discovery specifically directed to potential remedies is appropriate.

E. Clarification of AMP-O's Contentions

In its Memorandum and Order of April 15, 1974, the Board required AMP-O to explain more fully the mechanisms and relationships that it believed would result in operations under the licenses for the Davis-Besse and Perry plants injuring AMP-O. This requirement was held in abeyance pending the development of the Joint Statement. The Joint Statement did not provide the information the Board seeks, and consequently, such requirement is hereby reinstated. AMP-O's statement shall be filed within 10 days of this Order. In any event, since AMP-O's contentions were limited to wheeling, its discovery shall also be so limited.

The Board notes that AMP-O has not filed the proposed schedule requested and did not file timely a response to the Board's Order requesting clarification. Henceforth, the Board will not accept an untimely filed pleading unless it is

supported with ample good cause. In addition, any party not filing a response to a Board Order or one required by the Rules will be deemed to have waived all rights in regard thereto. A continuing failure to thus participate in the proceeding will lead to an order to show cause why that party should not be dismissed from the proceeding.

F. Schedule

All Parties, except AMP-0, have submitted proposed schedules for the future milestones in this proceeding. After considering these proposals and the discussion at the Second Prehearing Conference, the Board sets the following schedule:^{18/}

Final Date:	For:
August 1, 1974	Discovery begins.
August 26, 1974	Discovery requests (other than admissions).
September 9, 1974	Written objections to discovery requests.
September 13, 1974	Hearing on objections, if needed.

^{18/} Cleveland's motion dated July 17, 1974, for leave to file an untimely, supplemental brief in support of its proposed schedule is hereby denied in view of our earlier rulings on such "supplementary" filings. As stated, absent a showing of substantial good cause -- not found here -- rulings will be strictly adhered to.

December 15, 1974	Completion of all pretrial discovery.
January 10, 1975	Statements on ultimate issues to be heard
January 20, 1975	Responses to Statements on ultimate issues.
January 25, 1975	Prehearing Conference No. 3
February 20, 1975	Written Testimony (Justice, Staff, Intervenors)
March 12, 1975	Written Testimony, Applicant
April 2, 1975	Filing of any Motions for Summary Disposition.
April 14, 1975	Filing of any responses to Motions for Summary Disposition.
April 18, 1975	Prehearing Conference No. 4
April 30, 1975	Filing of Pre-trial Briefs
May 14, 1975	Hearing Commences

30 days following final
hearing date.

Filing of rebuttal testimony.

20 days following filing
of rebuttal testimony.

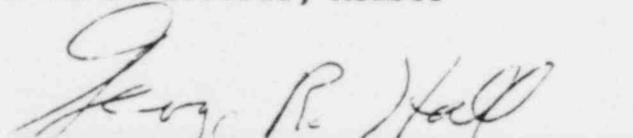
Hearing on rebuttal.

IT IS SO ORDERED.

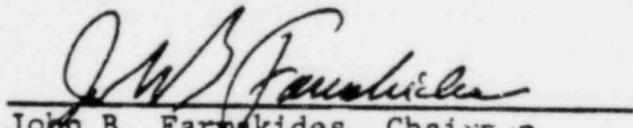
ATOMIC SAFETY AND LICENSING BOARD



John H. Brebbia, Member



George R. Hall, Member



John B. Farnakides, Chairman

Issued at Bethesda, Maryland,
this 25th day of July 1974

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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TOLEDO EDISON COMPANY, ET AL.)
CLEVELAND ELECTRIC ILLUMINATING)
COMPANY)

Docket No.(s) 50- 346A
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document (s*) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Atomic Energy Commission's Rules and Regulations.

Dated at Washington, D. C. this
25th day of July 1974.

ROSAMARY HILL
Office of the Secretary of the Commission

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