

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of

THE TOLEDO EDISON COMPANY and  
THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY

(Davis-Besse Nuclear Power Station,  
Unit 1)

THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, ET AL.

(Perry Nuclear Power Plant,  
Units 1 and 2)

AEC Dkt. Nos. 50-346A  
50-440A  
50-441A

STAFF'S ANSWER IN OPPOSITION TO APPLICANTS'  
MOTION FOR SUMMARY DISPOSITION OF AUGUST 8, 1974

Pursuant to 10 CFR §2.749 of the Commission's Rules of Practice, Staff hereby opposes applicants' motion for summary disposition in the above captioned proceeding.

In their motion for summary disposition, applicants contend that American Municipal Power-Ohio, Inc.'s (AMP-Ohio) nexus argument is factually incorrect and as a result of this failure to allege a proper nexus AMP-Ohio's intervention in this proceeding should be withdrawn. <sup>1/</sup> In setting forth its

<sup>1/</sup> In its petitions to intervene, AMP-Ohio had alleged that a refusal by Cleveland Electric Illuminating Company (CEI) to wheel 30 megawatts of PASNY power for AMP-Ohio on behalf of the City of Cleveland constituted a situation inconsistent with the antitrust laws insofar as it relates to the licensing of the Perry nuclear units. To establish a nexus between this refusal by CEI and the activities under the license, AMP-Ohio had contended, among other things, that the operation of the Perry nuclear units may impair CEI's ability to wheel PASNY power due to a possible overload on CEI's transmission lines.

In order to refute this nexus argument by AMP-Ohio, applicants now come forward with an affidavit by Dalwyn R. Davidson (Vice President - Engineering of CEI) which asserts that the construction of the Perry units will not hinder CEI's ability to wheel 30 megawatts of PASNY power.

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opposition to AMP-Ohio's intervention, applicants also contend that CEI's alleged refusal to wheel PANSY power for AMP-Ohio is not a proper matter for the Board to consider in this proceeding. <sup>2/</sup>

Staff agrees that if there is no factual dispute concerning the ability of CEI to wheel 50 megawatts of PANSY power after construction of the Perry nuclear facilities, then the impairment issue raised by AMP-Ohio may be disposed of by summary disposition. <sup>3/</sup> However, the Staff believes that CEI's alleged refusal to wheel power will remain an issue whether or not AMP-Ohio's specific nexus argument is correct. In this regard, since the interrogatories in applicants' discovery requests have directed the parties to describe their contentions and proof for their various nexus arguments, applicants will be supplied this necessary information after discovery is completed. In the meantime, however, it would be premature to summarily dispose of the issue raised by AMP-Ohio.

2/ In their August 15, 1974 cover letter to the Board applicants contend that, "It is Applicants' position that this alleged denial of access now to AMP-Ohio has no connection whatsoever with the future Perry nuclear facilities, or with any activities under the licenses requested in the captioned dockets, and therefore, it is not a proper matter for the Licensing Board to consider in the present antitrust hearing."

3/ Rule 56(c) Fed Rules Civ Proc permits any party to a civil action to move for a summary judgement upon a claim, counterclaim, or cross claim as to which there is no genuine issue of material fact and upon which the moving party is entitled to prevail as a matter of law.

The principles governing summary judgement in Federal practice are appropriate for use in determining motions for summary disposition under 10 CFR 2.749 . Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), ALAB-182, RAI-74-3, 210, 217 (March 7, 1974).

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Applicants' Motion is especially inappropriate at this time in view of the Board's recognition that third party wheeling of power from outside the service areas of the applicants is a relevant issue in this proceeding. Item (5) at page 11 of the Board's Prehearing Conference Order #2 of July 25, 1974 includes as a matter in controversy, "...whether applicants have, or could use their ability to preclude other electric entities within the CCCT from obtaining sources of bulk power from other electric entities outside the CCCT." <sup>4/</sup>

The Staff believes that AMP-Ohio has an interest in this proceeding. By refusing to wheel for AMP-Ohio, applicants through the use of their dominant position can effectively restrict a potential competitor. Applicants' dominance and misuse of its dominant position, if established, represents the type of "situation" that may be considered in a Section 105(c) proceeding.

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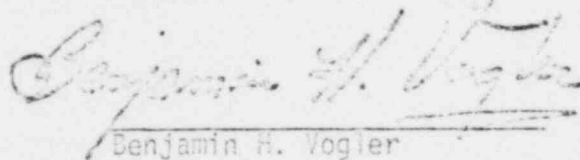
<sup>4/</sup> It is significant that Applicant cites the Louisiana Power & Light (LP&L) case, Dkt. No. 50-382A, in support of its present motion for summary disposition -- however, in the LP&L proceeding, the LP&L Board also adopted third party wheeling as a matter in controversy.

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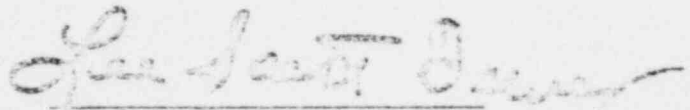
Conclusion

For the above stated reasons, Staff recommends that the Board deny the applicants' motion for summary disposition.

Respectfully submitted,



Benjamin H. Vogler  
Assistant Antitrust Counsel  
for AEC Regulatory Staff



Lee Scott Dewey  
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland  
this 10th day of October 1974.

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(Perry Nuclear Power Plant,	)	50-441A
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF'S ANSWER IN OPPOSITION TO APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF AUGUST 8, 1974, dated October 10, 1974, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail, this 10th day of October 1974:

John B. Farmakides, Esq., Chairman  
Atomic Safety and Licensing Board  
U. S. Atomic Energy Commission  
Washington, D. C. 20545

Docketing and Service Section  
Office of the Secretary  
U. S. Atomic Energy Commission  
Washington, D. C. 20545

John H. Brebbia, Esq.  
Atomic Safety and Licensing Board  
Alston, Miller & Gaines  
1776 K Street, N. W.  
Washington, D. C. 20006

Joseph J. Saunders, Esq.  
Steven Charno, Esq.  
Antitrust Division  
Department of Justice  
Washington, D. C. 20530

Dr. George R. Hall  
Atomic Safety and Licensing Board  
U. S. Atomic Energy Commission  
Washington, D. C. 20545

Reuben Goldberg, Esq.  
David C. Hjelmfelt, Esq.  
1700 Pennsylvania Avenue, N. W.  
Washington, D. C. 20006

Atomic Safety and Licensing  
Board Panel  
U. S. Atomic Energy Commission  
Washington, D. C. 20545

Frank R. Clokey, Esq.  
Special Assistant Attorney General  
Room 219, Towne House Apartments  
Harrisburg, Pennsylvania 17105

John Lansdale, Esq.  
Cox, Langford & Brown  
21 Dupont Circle, N. W.  
Washington, D.C. 20036

Herbert R. Whiting, Director  
Robert D. Hart, Esq.  
Department of Law  
1201 Lakeside Avenue  
Cleveland, Ohio 4-114

John C. Engle, President  
AMP-O, Inc.  
Municipal Building  
20 High Street  
Hamilton, Ohio 45012

George B. Crosby  
Director of Utilities  
Piqua, Ohio 45350

Donald H. Hauser, Esq.  
Managing Attorney  
The Cleveland Electric  
Illuminating Company  
55 Public Square  
Cleveland, Ohio 44101

Leslie Henry, Esq.  
Fuller, Henry, Hodge & Snyder  
300 Madison Avenue  
Toledo, Ohio 43604

John R. White, Esq.  
Executive Vice President  
Ohio Edison Company  
47 North Main Street  
Akron, Ohio 44308

Thomas J. Munsch, Esq.  
General Attorney  
Duquesne Light Company  
435 Sixth Avenue  
Pittsburgh, Pennsylvania 15219

Wallace L. Duncan, Esq.  
Jon T. Brown, Esq.  
Duncan, Brown, Weinberg & Palmer  
1700 Pennsylvania Avenue, N. W.  
Washington, D. C. 20006

David McNeil Olds  
Reed, Smith, Shaw & McClay  
Union Trust Building  
Pittsburgh, Pennsylvania 15230

Dwight C. Pettay, Jr.  
Assistant Attorney General  
Chief, Antitrust Section  
30 East Broad Street, 15th Floor  
Columbus, Ohio 43215

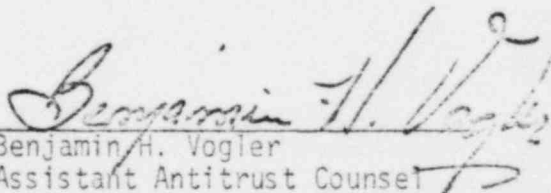
George Chuplis  
Commissioner of Light & Power  
City of Cleveland  
1201 Lakeside Avenue  
Cleveland, Ohio 44114

Deborah Powell Highsmith  
Assistant Attorney General  
Antitrust Section  
30 East Broad Street, 15th Floor  
Columbus, Ohio 43215

Christopher R. Schraff, Esq.  
Assistant Attorney General  
Environmental Law Section  
361 East Broad Street, 8th Floor  
Columbus, Ohio 43215

Mr. Raymond Kudukis, Director  
of Public Utilities  
City of Cleveland  
1201 Lakeside Avenue  
Cleveland, Ohio 44114

Gerald Charnoff, Esq.  
Brad Reynolds, Esq.  
Shaw, Pittman, Potts & Trowbridge  
910-17th Street, N.W.  
Washington, D. C. 20006

  
Benjamin H. Vogler  
Assistant Antitrust Counsel  
for AEC Regulatory Staff

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