

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
The Toledo Edison Company and)	Docket No. 50-346A
The Cleveland Electric Illuminating)	
Company)	
(Davis-Besse Nuclear Power)	
Station, Unit 1))	
)	
The Cleveland Electric Illuminating)	Docket Nos. 50-440A
Company, et al.)	and 50-441A
(Perry Nuclear Power Plant, Units)	
1 and 2))	

ANSWER OF THE CITY OF CLEVELAND
IN OPPOSITION TO APPLICANTS' MOTION
FOR SUMMARY DISPOSITION

On August 15, 1974, Applicants filed a Motion for Summary Disposition pursuant to Section 2.749 of the Commission's Rules of Practice. The City of Cleveland (Cleveland) opposes the Applicants' Motion.

Applicants have seized upon the device of a Motion for Summary Disposition to reiterate all of the arguments regarding nexus which they have raised at each and every prehearing conference held in this case. Those arguments have been continually rejected by the Board. ^{1/} To the extent that Applicants now offer new or more detailed arguments in opposition to AMP-O's showing of nexus, they neglect entirely to offer any explanation for their failure to assert those arguments in a timely fashion. If this case is to proceed to an expeditious conclusion, matters once laid to rest by Order of the Board must remain at rest. There must be a point at which the Applicants can no longer require the other parties to reply again and again to their oft-repeated and rejected arguments.

^{1/} Final Memorandum and Order on Petitions to Intervene and Requests for Hearing, docketed April 16, 1973; Memorandum and Order, docketed August 31, 1974.

*Anti-Law
H-3*

The nexus of CEI's refusal to wheel the 30 mw of PASNY power to Cleveland for AMP-O must, by now, be clear even to Applicants -- not only in terms of engineering which AMP-O has clearly stated, but in terms of economics as well. AMP-O is a bulk power supply competitor of CEI for sales of bulk power to the City of Cleveland. Currently, CEI is the only bulk power supplier which has access to transmission facilities required to deliver bulk power to the City of Cleveland. If CEI were to agree to deliver the PASNY power for AMP-O to Cleveland, CEI would lose the opportunity to sell that amount of power and energy to Cleveland.

The growth of CEI's own loads would eventually exhaust CEI's bulk power supply requiring it to cease bulk power sales to Cleveland. In that event, CEI would be removed from the bulk power supply market and would have no incentive to deny access to that market to AMP-O. However, the additional bulk power generation which will be available to CEI from the Davis-Besse and Perry plants, as well as Beaver Valley, will permit CEI to continue to make bulk sales to Cleveland so long as the City needs to purchase such power. Accordingly, CEI refuses to wheel PASNY power to protect a market, which it now monopolizes, for the sale of power from its own nuclear generating units. If, to do this, it must turn its back on the public interest of the people of Cleveland to have available to them 30 mw of low cost PASNY power, CEI is prepared to do so.

PASNY power, if it were ever allowed to reach the City of Cleveland, would be marketed at retail in direct competition with Davis-Besse and Perry power being marketed by CEI. Again, if CEI did not anticipate increasing its own supply of power for sale in the retail market, it would have no objection to AMP-O's delivering PASNY power to Cleveland for resale to customers which CEI could not serve in any event. It is the availability of nuclear power from the Davis-Besse and Perry plants which makes it desirable for CEI to deny low cost PASNY power to the people of Cleveland.

Donald Hauser, Corporate Solicitor for CEI, in an August 30, 1973, letter to Wallace Duncan, one of the Attorneys for AMP-O, made it very clear that CEI was simply unwilling to compete for sales with PASNY power sold by Cleveland, saying:

As you may know, the Illuminating Company competes with the Cleveland Municipal Electric Light Plant on a customer-to-customer and street-to-street basis in a sizeable portion of the City. This competitive situation is clearly unique. Economic studies indicate

an arrangement to transmit the PASNY power would provide the Municipal system electric energy at a cost which would be injurious to the Illuminating Company's competitive position.

In his affidavit, Mr. Davidson points out (p. 3) that CEI plans to construct a 345 kv transmission line from Perry 345 kv switchyard to the Erie West 345-115 kv substation of Pennsylvania Electric Company in Erie County, Pennsylvania. Applicants note in their Statement Of Material Facts As To Which There Is No Genuine Issue To Be Heard that PASNY power would be wheeled, if wheeled at all, from Pennsylvania Electric Company to Cleveland. Thus, there is a direct nexus not only between the marketing of the power produced from the nuclear plants, but with the transmission facilities constructed in conjunction with those plants.

In Paragraph 11 of its Memorandum In Support Of Motion For Summary Disposition, Applicants advance a most astonishing argument. There it is stated:

Yet, the future activity to which AMP-Ohio makes reference in its second nexus argument is transmission instability, due either to a loss of Perry generation or to a system fault in Perry-associated transmission -- and that activity can relate to the delivery of PASNY power, if at all, only to the extent that CEI had already granted the access that AMP-Ohio requested. So long as CEI continues to refuse to wheel PASNY power -- for whatever reason -- the stability or instability of the CEI system after installation of the Perry generation and transmission facilities concerns activities under the license which have absolutely no relevance to the PASNY situation being challenged by AMP-Ohio.

In other words, Applicants can shield their unlawful refusal to wheel PASNY power from antitrust review by this Board through the simple expedient of persisting in that unlawful activity. Merely stating the proposition exposes its inherent absurdity.

WHEREFORE, and for the foregoing reasons, the Applicants' Motion For Summary Disposition should be denied.

Respectfully submitted,

CITY OF CLEVELAND, OHIO

By David C. Hjelmfelt
David C. Hjelmfelt
Its Attorney

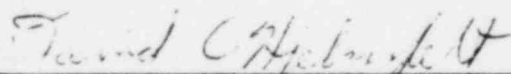
Reuben Goldberg
David C. Hjelmfelt
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006
Telephone (202) 659-2333

Herbert R. Whiting
Director of Law
Robert D. Hart
Assistant Director of Law
City of Cleveland
City Hall
Cleveland, Ohio 44114
Telephone (216) 694-2717

October 10, 1974

Certificate of Service

I hereby certify that service of the foregoing "Answer of the City of Cleveland in Opposition to Applicants' Motion for Summary Disposition" has been made on the following parties listed on the attachment hereto, this 10th day of October, 1974, by depositing copies thereof in the United States mail, postage prepaid.



David C. Hjelmfelt

Attachment

ATTACHMENT

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

Mr. Frank W. Karas, Chief
Public Proceedings Branch
Office of the Secretary
U. S. Atomic Energy Commission
Washington, D. C. 20545

John B. Farmakides, Esq.
Chairman
Atomic Safety and Licensing Board
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

Douglas Rigler, Esq.
Atomic Safety and Licensing Board
Hollabaugh & Jacobs
Suite 817, Barr Building
910 17th Street, N. W.
Washington, D. C. 20006

Benjamin H. Vogler, Esq.
Joseph Rutberg, Esq.
Office of the General Counsel
Regulation
U. S. Atomic Energy Commission
Washington, D. C. 20545

Robert J. Verdisco, Esq.
Office of the General Counsel
Regulation
U. S. Atomic Energy Commission
Washington, D. C. 20545

Abraham Braitman, Esq.
Office of Antitrust and Indemnity
U. S. Atomic Energy Commission
Washington, D. C. 20545

Jon T. Brown, Esq.
Duncan, Brown, Weinberg & Palmer
Suite 777
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

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

Melvin C. Berger, Esq.
Joseph J. Saunders, Esq.
Steven Charno, Esq.
Antitrust Division
Department of Justice
Post Office Box 7513
Washington, D. C. 20044

William T. Clabault, Esq.
David A. Leckie, Esq.
Department of Justice
Post Office Box 7513
Washington, D. C. 20044

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

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

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

David McNeil Olds, Esq.
John McN. Cramer, Esq.
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

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

Pennsylvania Power Company
1 East Washington Street
New Castle, Pennsylvania 16103

Lee C. Howley, Esq.
Vice President and General Counsel
The Cleveland Electric Illuminating Co.
Post Office Box 5000
Cleveland, Ohio 44101

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeals Board
U. S. Atomic Energy Commission
Washington, D. C. 20545

Dr. John H. Buck
Atomic Safety and Licensing Appeals Board
U. S. Atomic Energy Commission
Washington, D. C. 20545

Dr. Lawrence K. Quarles
Atomic Safety and Licensing Appeals Board
U. S. Atomic Energy Commission
Washington, D. C. 20545

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

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

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

Donald H. Hauser, Esq.
Corporate Solicitor
The Cleveland Electric Illuminating Co.
Post Office Box 5000
Cleveland, Ohio 44101

Richard S. Salzman, Chairman
Atomic Safety and Licensing Appeals Bd.
U. S. Atomic Energy Commission
Washington, D. C. 20545

William C. Parler
Atomic Safety and Licensing Appeals Bd.
U. S. Atomic Energy Commission
Washington, D. C. 20545

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeals Bd.
U. S. Atomic Energy Commission
Washington, D. C. 20545

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