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

RESPONSE BY THE DEPARTMENT OF JUSTICE TO APPLICANTS' MOTION FOR SUMMARY DISPOSITION

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TO APPLICANTS' MOTION FOR SUMMARY DISPOSITION

Pursuant to Section 2.749 of the Atomic Energy Commission's Rules of Practice, the Department of Justice (hereinafter "Department") hereby responds to Applicants' Motion for Summary Disposition (hereinafter "Motion") and urges the Atomic Safety and Licensing Board (hereinafter "Licensing Board") to deny said Motion.

Applicants have moved for summary disposition of issues relating to third-party wheeling on the ground that the pleadings of American Municipal Power-Ohio, Inc. (hereinafter "AMP-Ohio") do not, as a matter of law, sufficiently allege nexus. In support of their Motion, Applicants argue that no genuine issue of material fact remains to be determined concerning AMP-Ohio's allegations of nexus between third-party wheeling and activities under the

licenses sought in this proceeding. From this argument, Applicants leap to the unjustified conclusion that issues relating to third-party wheeling should be eliminated from consideration in this proceeding.

The Motion, at page 2, states

> Accordingly, the Licensing Board should specifically find that there is no meaningful nexus between CEI's present refusal to wheel the 30 megawatts referenced in AMP-Ohio's petition, on the one hand, and activities under the licenses requested in the captioned dockets, on the other. . . . There is, therefore, no jurisdictional basis, either in law or fact, to include in the present antitrust hearing the matters alleged in AMP-Ohio's petition to intervene . . . . (Emphasis supplied.)

In their Proposed Order Granting Summary Disposition, at page 3, Applicants suggest the following holding be adopted by the Licensing Board: "Accordingly, Applicants are entitled to summary disposition with regard to the contentions herein concerning the present refusal of CEI to wheel 30 MW of power now to the City of Cleveland."

The relief requested in the Applicants' Motion, indeed the Motion itself, is based upon two completely erroneous assumptions. The first such assumption is that a party must allege the existence of nexus between each specific anticompetitive act and the activities under the license. This is clearly false. As the Department establishes in detail below, a party is required to allege and prove only that there is a nexus between a situation inconsistent with the antitrust laws, which may be comprised in part by a refusal to wheel, and the activities under the license.

The Applicants also appear to erroneously assume that all of the contentions of the Department of Justice, the Commission Staff and the City of Cleveland concerning third-party wheeling can be eliminated merely by having the Licensing Board rule on the legal sufficiency of AMP-Ohio's allegation of nexus. The most sweeping possible action which could be taken by the Licensing Board in response to Applicants' Motion could result only in the termination of AMP-Ohio's intervention; without testing the other parties' allegations of nexus, the Licensing Board could not properly eliminate third-party wheeling as an issue in this proceeding. For the reasons set out below, the Department does not believe that AMP-Ohio's intervention in this proceeding should be terminated.

I.

There is a clear, demonstrable nexus between the situation inconsistent with the antitrust laws, comprised in part by a refusal to wheel, and the activities under the licenses sought in this proceeding.

Section 105c.(5) of the Atomic Energy Act requires the Commission (and by delegation this Licensing Board) to make "a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws." In the Commission's Order in its Louisiana Power and Light Company antitrust review proceeding, 1/ it was emphasized that there must

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1/ Memorandum and Order in the matter of Louisiana Power and Light Company (Waterford Steam Electric Generator Station, Unit 3), Docket No. 50-382A, September 28, 1973.

be a meaningful nexus between the activities under the nuclear license and the situation alleged to be inconsistent with the antitrust laws in order for those activities to be found to create or maintain the situation.

The statutory finding required here of the Board is clearly concerned with the relationship or nexus between only two things: (1) "a situation inconsistent with the antitrust laws" and (2) "activities under license." The requisite nexus is simply that the activities must "create or maintain" the situation. This is a far cry from the assumption implicit in Applicants' Motion that AMP-Ohio must allege a nexus between a specific anticompetitive act (i.e., a refusal to wheel power from a third party to the City of Cleveland) and the activities under the license. 2/

A. The Situation Inconsistent with the Antitrust Laws

As the Department has previously stated: 3/

> In order for an AEC Hearing Board to reach a conclusion that "a situation inconsistent with the antitrust laws" exists, it would be necessary that it find "dominance" in a relevant market, as well as some additional evidence that this dominance has been . . . used in an anticompetitive manner.

Thus, any allegation that one or more of the Applicants possess dominance and have refused to wheel power for anticompetitive

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2/ It must be admitted that AMP-Ohio's pleadings do not draw this distinction with any great precision.

3/ Response of the Department of Justice to Order Requesting Clarification, p. 2, July 12, 1974.

reasons would be a legally and factually sufficient allegation of a situation inconsistent with the antitrust laws.

Refusals by a dominant utility to wheel power for reasons similar to those present in this proceeding were held to be violations of the Sherman Act by the Supreme Court in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), aff'g 331 F. Supp. 54 (D. Minn. 1971). Further, Applicants' refusal to allow the City of Cleveland access to the regional power exchange, in part by a refusal to wheel, must be considered a violation of the antitrust principle requiring those who control an essential resource to grant access to it, on equal and nondiscriminatory terms, to all others engaged in the given business. See e.g., United States v. Terminal R.R. Association, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945); Gamco Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir. 1952), cert. denied 344 U.S. 817 (1952).

The Licensing Board in this proceeding has designated issues relating to third-party wheeling as matters in controversy in this proceeding. 4/ Clearly, whether a refusal to wheel for anticompetitive reasons took place and whether such a refusal was part of a situation inconsistent with the antitrust laws are questions for determination in this proceeding.

4/ Prehearing Conference Order #2, p. 11, July 25, 1974; see also the September 16, 1974, interpretation of the foregoing Order by the Chairman of the Licensing Board at Tr. 739.

AMP-Ohio's initial petition 5/ clearly alleges that such a situation inconsistent with the antitrust laws presently exists. AMP-Ohio alleges in paragraph 14 of its petition that the Applicants possess and exercise dominance in the form of "monopolistic control" over most transmission facilities and the regional power exchange. In paragraph 13, AMP-Ohio alleges a refusal to wheel power by one of the Applicants for anticompetitive reasons. These two allegations taken together would, if proved, require the Licensing Board to find a situation inconsistent with the antitrust laws.

B. Activities Under the Licenses

What will be Applicants' activities under the Davis-Besse and Perry licenses? Applicants will be entitled to construct and eventually operate the units. The purpose of this construction and operation (as well as the basis upon which necessary financing is obtained) is the marketing of the electric power produced by the nuclear units. The Davis-Besse and Perry license applications are pursuant to Section 103 of the Atomic Energy Act 6/ -- i.e., the nuclear plants are to be used for

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5/ Petition of American Municipal Power-Ohio, Inc. to Intervene, February 13, 1974.

6/ Although the application for an operating license for Davis-Besse Unit 1 states that it is an application for a license under Section 104b., it is clear that since the Davis-Besse construction permit was pending at the time of the enactment of the 1970 amendments to the Act, Section 102a. requires that the Davis-Besse facility receive any operating license under Section 103 rather than Section 104b.

commercial purposes. According to Section 50.22 of the Commission's Rules, 7/ Section 103 licenses are issued to Applicants to use nuclear facilities for commercial purposes. There can be no doubt, and Applicants have never denied, that marketing power from the Davis-Besse and Perry units will be an activity under the licenses.

The Davis-Besse and Perry units will produce about 3300 megawatts of large unit, base-load, nuclear electric power for marketing over Applicants' system. This power will not and cannot be marketed in isolation; its successful marketing necessarily depends upon the reliability and economics that result from integration of the nuclear units into Applicants' systems within the regional power exchange.

Any argument that "activities under the license" do not extend to the marketing of power flies in the face of clear Congressional intent that Section 105c. prelicensing antitrust review reach the marketing of electric power. The legislative history leaves no doubt that Congress was very much concerned with the effect of nuclear generation upon competition in electric power markets. 8/

7/ 10 C.F.R. §50.22 (1973).

8/ For a comprehensive discussion of congressional intent regarding the scope of prelicensing antitrust review, see the Reply of the Department of Justice on Issues Other than Disqualification in the Matter of Consumers Power Company (Midland Plants, Units 1 & 2), Docket Nos. 50-329A and 50-330A, June 9, 1972.

C. The Nexus: The Activities Will Maintain the Situation

The activities under the Davis-Besse and Perry licenses would maintain -- i.e., continue, carry on, support, sustain, uphold, keep up, -- and indeed exacerbate the anticompetitive situation described above. Thus, the nexus required by Section 105c. is clearly present in this proceeding.

The activities, as we have seen, necessarily include the integration of about 3300 megawatts of nuclear power into Applicants' systems for marketing in the Combined CAPCO Company Territories. That 3300 megawatts of nuclear power -- supported by the tying of Applicants' systems into the regional power exchange -- will be the cheapest available power to serve new and growing loads.

The low-cost, large unit, base-load nuclear power to be supplied by Davis-Besse and Perry units will strengthen and expand Applicants' systems and the regional power exchange of which they are a part. This strengthening and expansion will increase Applicants' future ability to install and obtain low-cost power from large units. Yet, concurrent with Applicants' action of installing and planning to operate the Davis-Besse and Perry units to strengthen and expand their systems and the regional exchange, the Applicants continue to refuse reasonable use of their facilities by their actual and potential competitors in the wholesale and retail power markets. They thus deny these competitors the low-cost power they will need to compete with Applicants' Davis-Besse and Perry power in supplying the

rapidly growing electric requirements of the area, and to support their own subsequent competitive installations of large generating units. Construction and operation of the Davis-Besse and Perry units and marketing of the power from those units through integration into Applicants' systems and the regional power exchange demonstrably furthers Applicants' monopolization of the wholesale and retail power markets -- thus maintaining and exacerbating a situation clearly inconsistent with the anti-trust laws. 9/

It is therefore clear that, whatever its disposition of AMP-Ohio's intervention, the Licensing Board cannot make the finding sought by the Applicants' motion "that there is no meaningful nexus" between the refusal to wheel alleged by AMP-Ohio, on the one hand, and activities under the licenses in this proceeding, on the other. As demonstrated above, such nexus clearly exists and those issues relating to third-party wheeling will be developed to the extent necessary by the Department at hearing.

9/ The nexus here asserted by the Department, that is, that the marketing of Davis-Besse and Perry power will affirmatively maintain the antitrust-inconsistent situation consisting of Applicants' misuse of dominance in generation and transmission, should not be confused with the concept that power from the subject units must be commingled with power from the remainder of the Applicants' systems. It is not contended that the latter fact alone establishes the necessary nexus in this proceeding.

II

Should the Licensing Board find that AMP-Ohio's pleadings, construed in the broadest fashion possible 10/, do not sufficiently allege nexus, AMP-Ohio should be allowed to amend its pleadings since such nexus clearly exists in this proceeding. 11/

At the outset, it should be noted that the courts have uniformly held that summary judgment procedures should be used sparingly in complex antitrust litigation. Poller v. Columbia Broadcasting System Inc., 368 U.S. 464, 473 (1967). It is similarly well established that parties to an action before the Federal Courts should be freely given the right to amend their pleadings since pleadings are merely a means to allow the proper presentation of a case and are designed to assist, not deter, the disposition of litigation on its merits. 12/ The Supreme Court stated in Conley v. Gibson, 355 U.S. 41, 48 (1957):

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel

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10/ When dealing with a motion for summary judgment in the Federal Courts, the pleadings of the party against whom the judgment is sought are always to be liberally construed. Machinery Center, Inc. v. Anchor National Life Ins. Co., 434 F.2d 1 (10th Cir. 1970); Ando v. Great Western Sugar Co., 475 F.2d 531 (10th Cir. 1973); Smoot v. Chicago, R.I. & P. R.R. Co., 378 F.2d 879 (10th Cir. 1967); Durate v. Bank of Hawaii, 287 F.2d 51 (9th Cir. 1961), cert. denied 366 U.S. 972. In addition, all favorable inferences which may be deduced from pleadings so construed should be accorded the party against whom the judgment is sought. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1967).

11/ Prior to discovery, the Department is not in a position to comment upon the specific factual allegations contained in Applicants' Motion. The question of factual accuracy is, however, rendered moot by the existence of an actual nexus as outlined in Section I of this Response

12/ 3 Moore's Federal Practice ¶15.02[1].

> may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Recognizing that the philosophy underlying litigation before the Federal Courts requires controversies to be decided on their merits, the courts have not been hesitant to allow amendments for the purpose of presenting the real issues of the case, where the amending party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed. 13/ Most commonly, the cases in which leave to amend has been granted are those wherein the amendment is to correct an insufficient claim or defense. 14/

The idea of freely and liberally allowing amendments to pleadings has been held to the particularly appropriate in response to motions for summary judgment in antitrust cases. Thus, the court in Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785, 788 (10th Cir. 1967), a case under Section 2 of the Sherman Act, stated:

> We realize, as did the trial court, that summary disposition of all litigation, especially antitrust cases, is not favored and that amendments should be freely and liberally granted to the end that all cases are decided on their merits. See Nationwide Auto Appraiser Service v. Association of Casualty & Surety Companies, et al. (10 CA decided Sept. 1, 1967) 382 F 2d 925; Travellers Indemnity Co. v. United States of America for the use of Construction Specialties Co. (10 CA decided Aug. 30, 1967) 382 F.2d 103; Bushman Const. Co. v. W. S. Conner Const. Co., 10 Cir., 307 F.2d 838.

13/ Id. at ¶15.08[2].

14/ Id. at ¶15.08[3].

The Court then went on to vacate the trial court's summary judgment and remand the case to allow amendment of the pleadings and supplementation of the proof in support thereof.

Similarly, in Lloyd v. United Liquors Corp., 203 F.2d 789 (6th Cir. 1953), an antitrust action, the Court reversed and remanded the trial court's grant of summary judgment on the ground that plaintiff should have been liberally allowed to amend his complaint. The Court reached this conclusion notwithstanding the fact that the proposed amendments were only offered after oral argument of a motion for summary judgment and that Appellants' attorney had not complied with the Court's request that any amendment be presented before the argument. In addition, at the beginning of argument, Appellant's attorney stated that he did not intend to amend the complaint.

In Tripoli Co. v. Wella Corp., 425 F.2d 932 (3rd Cir. 1970), cert. denied 400 U.S. 831, still another antitrust case, the appellate court, in stating the basis for its affirmance of the trial court's grant of summary judgment, noted that the lower court had considered the merits of plaintiff's contentions even though these contentions were not pleaded and no motion to amend the pleadings had been made.

Furthermore, in Sherman v. Hallbauer, 455 F.2d 1236 (5th Cir. 1972) the appellate court reversed the trial judge's grant of summary judgment to defendant and remanded the case to allow amendment of the pleadings to overcome an existing defect. In doing so, the Court noted that plaintiff's lawyer had consumed no small amount of time in insisting upon an improper theory and

that only in the waning moments of the pretrial proceedings, in a memorandum filed in response to the motion for summary judgment, did the plaintiff finally advance a legally acceptable theory.

In perhaps one of the broadest statements concerning liberality of amendment of pleadings in the Federal Courts, the court in MDC Data Centers, Inc. v. International Business Machines Corp., 342 F. Supp. 502 (E.D. Pa. 1972) held that although defendant's motion for summary judgment should be granted, the admonition by the Supreme Court in Poller v. Columbia Broadcasting System, Inc., supra, to the effect that summary judgment should be used sparingly in antitrust cases, required the trial court to allow plaintiff additional time in which to amend its complaint to state a cognizable claim even though the court could not, from the record before it, discern if any cognizable claim existed.

Allowing amendment of AMP-Ohio's pleadings in this proceeding would have no adverse effect upon any party. There has been no suggestion that AMP-Ohio has been guilty of bad faith or has acted for the purpose of delay. There can be no possible basis for any assertion that the Applicants will be unduly prejudiced by allowing amendment. Finally, there can be no doubt that hearing on the issues in this proceeding will not be unduly delayed nor prolonged by allowing amendment. This proceeding will not be simplified to any meaningful extent by granting Applicants' Motion because elimination of AMP-Ohio as a party will not eliminate any issue in this case. All of the allegations

made by AMP-Ohio with respect to a situation inconsistent with the antitrust laws have been set forth in the Department's advice letters.

For the foregoing reasons, Applicants' Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE BY THE DEPARTMENT OF JUSTICE TO APPLICANTS' MOTION FOR SUMMARY DISPOSITION have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class or airmail, this 10th day of October 1974.

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