

Reg. Files



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
The Toledo Edison Company and)	Docket Nos. 50-346A
The Cleveland Electric Illuminating)	50-500A
Company)	50-501A
(Davis-Besse Nuclear Power Station,)	
Units 1, 2 and 3))	
)	
The Cleveland Electric Illuminating)	Docket Nos. 50-440A
Company, et al.)	50-441A
(Perry Nuclear Power Plant,)	
Units 1 and 2))	

SIXTH PREHEARING CONFERENCE ORDER

Pursuant to Notice, the Sixth Prehearing Conference in this consolidated proceeding was held on September 18, 1975.* The Board first considered the petition of AMP-0 for leave to withdraw from these proceedings which motion was granted (Tr. p. 1183). Next the Board considered proposals to eliminate or curtail issues set for hearing. During this discussion, Applicants urged that the City of Cleveland (City) not be permitted to introduce any evidence in this proceeding regarding the competitive situation in the service areas of any applicants other than

* The notice of conference incorrectly referred to the September 18 hearing as Prehearing Conference No. 5. The Fifth Prehearing Conference was held on May 14, 1975.

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CEI. Applicants ground their objection on the allegation that the City does not compete in service areas of Applicants other than CEI and that in none of the three separate petitions to intervene did the City allege any conduct on the part of Applicants other than CEI.

We disagree. To disprove Applicants' allegation, we have but to refer to our Final Memorandum and Order on Petitions to Intervene and Requests for Hearing, dated April 15, 1974, wherein we recognized City's assertion of CEI's and other CAPCO members' anti-competitive practice (p. 10).^{*} Accordingly, the City will be permitted to present its case in the particulars set out in their Statement Informing Applicants of the Nature of the Case to be Presented.

The City submits that Matter in Controversy #10 should be dropped because it already was decided in the affirmative by the Atomic Safety and Licensing Appeals Board in the Wolf Creek proceedings.^{**} However, the City states that in the alternative,

* We quote from the City's petition that: "[M]embership in CAPCO has enhanced CEI's ability to construct and market power from large nuclear units and to take advantage of the economies of scale associated with such large units. At the same time, CEI and other CAPCO members have effectively shut out MELP from deriving such benefits either through participation in CAPCO or through non-CAPCO systems, thereby giving CEI a competitive advantage over MELP."

** Kansas Gas and Electric Company and Kansas City Power and Light Company, Docket No. 50-482A, ALAB-279, NRCI-75/6.

the Board retains this Matter in Controversy for hearing, the City is prepared to offer expert engineering testimony on Applicants' offer of access to nuclear facilities.

Applicants correctly point out that the Wolf Creek decision is to be narrowly construed. That decision dealt with the adequacy of the pleadings and the Commission's jurisdiction to resolve certain matters in controversy. The allegations made in the Wolf Creek pleadings were taken by the Appeal Board as true for the sake of argument. In the instant proceeding, the Applicants' policies regarding access to the nuclear facilities have been put into issue and as such must be established at the hearing. Indeed, the Nuclear Regulatory Commission Staff (Staff) and the Department of Justice (Justice) view this as a viable issue. In their Statements of the Nature of the Case to be Presented, they indicate that they will offer evidence regarding the policies of some of the Applicants. Accordingly, we retain Matter in Controversy #10 for the hearing.

The City also requests that Matter in Controversy #11 be restated. It interprets issue #11 as requiring that "each or any single matter in contentions (1) through (10) meet the nexus test." The City urges that the issue should be whether there is a nexus between the situation inconsistent with the antitrust laws and the activities under the license.

Applicants disagree; but, by way of accommodation,

offer a restatement of issue #11,

"so that it is clear that nexus is not only a relevant consideration in the context of each individual Matter in Controversy, but in addition that the party or parties alleging such nexus must also show a nexus between the overall situation that is alleged to exist . . . and the licensed activities."

Applicants' Response of September 15, 1975 at 13. See also, Tr. p. 1195-6.

The Staff has indicated that it views Matter in Controversy #11 in light of Alabama Power Company* and the Wolf Creek decisions. In its Statement of Nature of Case to be Presented, the Staff notes that it intends to demonstrate the relationship between the situation inconsistent with the antitrust laws and the activities under the license; and that after the development of the factual context, the Board will be in a position to make a determination as to the existence of a reasonable nexus.

Justice, in its Response to Applicants' Interrogatories and Requests for the Production of Documents at page 13, notes that it does not

"contend that each of the above activities must be and is inconsistent with the antitrust laws. An aggregate of all such activities which are relevant, together with any other appropriate facts, may comprise a situation inconsistent with the antitrust laws."

* In the Matter of Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-73-5, RAI-73-2, p. 85.

We find the parties to be in substantial agreement in their appraisals of Matter in Controversy #11. Indeed, the parties' "restatements" are similar to our statement in our June 30, 1975 Ruling of Board with Respect to Applicants' Proposal for Expediting the Antitrust Hearing Process wherein we state at pages 7 and 8:

"We agree that the nexus to which the Commission referred in its Waterford opinion is the connection between a 'situation' inconsistent with the anti-trust laws and 'activities' under the license. If the Board determines that a 'situation' exists which is related to the 'activities,' then the Board must proceed to the question of appropriate relief. Nexus already will have been established."

Accordingly, Matter in Controversy #11 should be read as relating to aggregate activities necessary to define a "situation" and not as limited to individual nexuses between Matters #1 - 10 and the activities under the license.

By Motion of September 12, 1975, Justice moved to further amend the schedule of activities set forth in Prehearing Conference Order No. 4. After consideration of the viewpoints of the various parties to these proceedings at the Prehearing Conference of September 18, 1975 (Tr. p. 1226-1247), the Board approved the following schedule to supersede the schedule established by Prehearing Conference Order No. 4:

(1) Each party, other than Applicants, shall file the direct written testimony of its expert witnesses no later than October 18, 1975.

(2) Applicants shall file the direct written testimony of their expert witnesses no later than October 25, 1975.

(3) Each party shall file a trial brief no later than November 10, 1975.

(4) Each party shall file a list of intended fact witnesses with a general statement of the subject area of the testimony of each no later than November 10, 1975. The Board will entertain a motion by the NRC Staff for a protective order covering its fact witnesses. If filed, the Staff's motion shall include a proposed form of order. Such an order may provide that the Staff identify its fact witnesses only to attorneys who have filed and have not withdrawn Notices of Appearances under Section 2.713 of the Rules of Practice. The order also may provide that these attorneys may not reveal the identity of such witnesses to any other person prior to the appearance of such witnesses at the evidentiary hearing without express prior leave of the Board. The Board also will entertain, if filed, a motion by the Department of Justice for an appropriate protective order for its witness referred to at Tr. 1258.

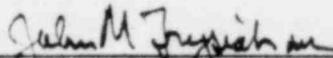
(5) No later than November 10, 1975, each party shall file a list of exhibits currently proposed to be offered into evidence. Each document shall be separately numbered and identified by date, author and, where applicable, any addressee.

(6) The parties shall continue to make hand deliveries by messenger of each filing required by this order on or before the document due dates except for service by and upon the State of Ohio.

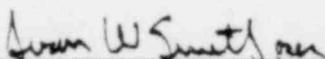
(7) The evidentiary hearing shall commence November 20,
1975.

IT IS SO ORDERED.

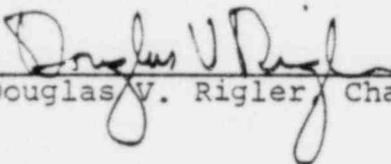
ATOMIC SAFETY AND LICENSING BOARD



John M. Frysiak, Member



Ivan W. Smith, Member



Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 2nd day of October 1975.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
THE TOLEDO EDISON COMPANY, ET AL.) Docket No.(s) 50-346A
CLEVELAND ELECTRIC ILLUMINATING) 50-440A
COMPANY) 50-441A
)
(Davis-Besse Nuclear Power)
Station, Unit No. 1; Perry)
Nuclear Power Plant, Units 1&2)

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 Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
3rd day of Oct 1975.


Office of the Secretary of the Commission

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NUCLEAR REGULATORY COMMISSION

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(Davis-Besse Unit 1))	
CLEVELAND ELECTRIC ILLUMINATING)	50-440A
COMPANY, ET AL.)	50-441A
(Perry Units 1 and 2))	
TOLEDO EDISON COMPANY, ET AL.)	50-500A
(Davis-Besse Units 2 and 3))	50-501A

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