UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
TOLEDO EDISON COMPANY AND	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	Docket Nos. 50-346A 50-500A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	)	50-501A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket Nos. 50-440A
(Perry Nuclear Power Plant, Units 1 and 2)	)	50-441A

ORDER AND MEMORANDUM RULING ON APPLICANTS' OBJECTION TO THE SIXTH PREHEARING CONFERENCE ORDER

By papers filed October 8, 1975, Applicants object to and request modification or clarification of portions of the Sixth Prehearing Conference Order.

First, Applicants restate their request for an order to the effect that "The City should not be permitted to introduce any evidence in this proceeding regarding the competitive situation in the service areas of any Applicants other than CEI." Applicants correctly would not exclude evidence regarding other applicants if it concerns alleged anticompetitive conduct affecting the City. Second, Applicants seek clarification of the Board's modification of Matter-in-Controversy #11 relating to nexus.

1. In our order permitting City to present the case set out in its Statement Informing Applicants of the Nature of the Case to be Presented, we rejected the Applicants' earlier efforts to limit City in its proof.

We have reconsidered that ruling. The Board now believes that unlimited participation by City is not essential to a full and complete record and that the Board should be guided in this respect by Northern States Power Company (Prairie Island Units 1 and 2) ALAB 244, RAI 74-11, 857, 863 et seq.

In its Statement of the Nature of its Case, City materially enlarges upon its three petitions to intervene and now refers to activities outside CEI's service area which have no apparent direct relevance to City's interests as set forth in those petitions. City contends that such evidence relates to a possible conspiracy and thus falls within its petitions.[1/] We do not believe that a fair reading of the City's petitions support its contention. In any event, City recognizes that Justice and the Staff intend to produce such evidence. The Board is confident that Justice and Staff will

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1/ At the Sixth Prehearing Conference, City responded to a patently incorrect statement by Applicants concerning the scope of City's petitions to intervene as they relate to Applicants other than CEI. (Tr. 1199-1202) City has not responded to Applicants' objections of October 8, 1975 upon which we now rule.

competently pursue the additional areas of concern to City. City will therefore be limited in its case-in-chief to contentions set forth in its petitions to intervene as those contentions have been particularized in its Statement of the Nature of its Case.[2/]

2. Applicants request a clarification of the Board's Modification of Matter-in-controversy #11 relating to "nexus." This request is apparently generated by a concern that the Board does not fully understand Applicants' position on this vital issue. Applicants may be assured that this Board does understand their position. Applicants' fear that they may be "...deprived of the opportunity to develop fully at the evidentiary hearing their nexus position...", (p. 7), is unwarranted.

The Board has reread the relevant portion of the Sixth Prehearing Conference Order and appreciates why Applicants seek to be assured that their positions have been understood. The statement on page 5 of the Sixth Prehearing Conference Order that "we find the parties to be in substantial agreement

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2/ The effect of this ruling is minimal. City's right to cross-examine within the ambit of its broadest interests are preserved and it may offer affirmative evidence on issues which may be raised by the Board sua sponte. (Northern States, supra.)

in their appraisals of Matter-in-controversy #11" (underlining added) was not intended to mean that Applicants agree with their adversaries, but that all parties understand the issue.

Further, the Board observes that there have been two separate concepts advanced by the parties concerning the cumulative effect of separate practices.

ALCOA and IBM[3/] have been cited for the authority that separate practices, legal or illegal, regardless of "nexus", may be "bundled" to describe a larger anticompetitive scheme. A "situation" may be comprised of a number of events or incidents, each legal in and of themselves, but collectively illegal or inconsistent with the policies underlying the antitrust laws. This does not meet the thrust of Applicants' position.

In respect to nexus, we perceive Applicants' position to be that the overall situation inconsistent with the antitrust laws must have a significant nexus to the licensed activities and that each individual practice relied upon to

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3/ United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945). United States v. International Business Machines, U. S. District Court, Southern District of New York, No. 69 Civ. 200 (DNE).

describe the overall inconsistent situation must also be shown to have a direct nexus to the licensed activities.

The parties adverse to the Applicants recognize, as they must, that the overall situation inconsistent with the anti-trust laws must have a substantial nexus to the licensed activities, but argue that they are not required to establish a direct nexus between each individual practice and act contributing to the overall inconsistent situation and the activities under the license. The issue has been briefed repeatedly, thoroughly and expertly and it is clear that Applicants understand the Board's view of this issue. Quite simply, the Applicants have lost this argument and the case will proceed on the Board's modification of Matter-in-controversy #11 which requires no clarification.

Applicants also seek a modification to provide for supplementing witness and document lists. The Board intended by its Sixth Prehearing Conference Order to require identification of witnesses and documents proposed to be offered as of the due date for filing prehearing briefs. (Dates subsequently modified to November 24, 1975 for parties other than Applicants and December 1, 1975 for Applicants.) For good

cause, the Board will permit each party to supplement its witness and document lists. (See Tr. 1275-76)

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING BOARD

John M. Frysiak by I.W.S.
John M. Frysiak, Member

Ivan W. Smith
Ivan W. Smith, Member

Douglas V. Rigler by I.W.S.
Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 19th day of November 1975.