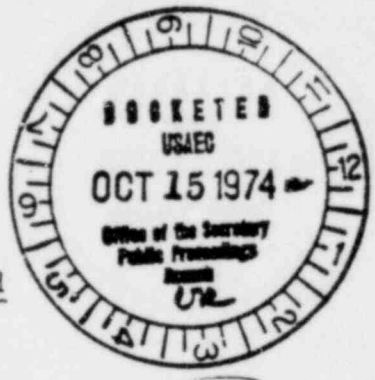

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before the Atomic Safety and Licensing Board

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

RESPONSE OF AMP-O IN OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION

On August 15, 1974, the applicant Cleveland Electric Illuminating Co. (CEI) filed a Motion for Summary Disposition with the Board seeking the dismissal of American Municipal Power - Ohio, Inc. (AMP-O) from further participation in these proceedings. After an initial dispute regarding the allowable time for response to the Motion, the Board ordered that all responses be filed on or before October 10, 1974.

Following a careful review of the applicants' motion and supporting affidavits, and a thorough analysis of its own posture in these proceedings, AMP-O strenously opposes its dismissal from further participation herein. We assert most vigorously that an appropriate nexus exists between the unlawful activities of

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the applicants vis-a-vis AMP-O and the projected activities under the license; that AMP-O is entitled to its requested relief without resort to lengthy, duplicative and exorbitantly expensive judicial proceedings; and that AMP-O can materially assist the Board in its final determinations concerning the lawfulness of the applicants' activities and the scope of the requested relief.

On February 15, 1974, AMP-O timely filed its petition to intervene in these proceedings. Thereafter, on April 15, 1974, the Board issued its "Final Memorandum and Order on Petitions to Intervene and Requests for Hearing" and specifically therein admitted AMP-O as an intervenor in the proceedings. Shortly thereafter, in order to accommodate the applicant in its desire to present written argument concerning the alleged lack of "nexus" for AMP-O, the Board stayed its April 15 Order until April 23, 1974. In the interim, the applicant presented a lengthy brief to the Board which presaged, in nearly identical language, the motion and memorandum for summary disposition which are presently before the Board.

Thereafter, on April 23, 1974, the Board dissolved its stay order, reinstated its earlier order admitting AMP-O as an intervenor, and observed that:

> While Applicants' thorough brief is appreciated, the Board is not persuaded that the Board's final Memorandum and Order should be reversed or vacated.

Thus, for what we hoped - but certainly were not convinced - would be the final time, CEI's concerted effort to remove AMP-O as a party participant in the proceedings was roundly rejected by

the Board. No different fate should befall the present motion for summary disposition.

I. AMP-O Has Met All Requirements for Intervention Set Forth by the Atomic Energy Act and Supreme Court Decisions Governing Judicial Review of Agency Action.

In order rebut the fallacious arguments set forth by the Applicants for the fifth consecutive time in these proceedings without success, AMP-O must risk the repetition of certain arguments previously presented to the Board. 1/ The Atomic Energy Act, Section 189, provides that:

> In any proceeding under this chapter, for the granting . . . of any license or construction permit, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. 42 U.S.C. Sec. 2239 (emphasis added.)

Thus, the express language of the Atomic Energy Act establishes that, upon a timely showing that one's interest may be affected by the licensing proceeding, the right to intervention and participation in the proceeding becomes absolute. Nothing in Section 105 of the Act regarding antitrust review impinges upon the right to intervention set forth in Section 189. Indeed, the non-discretionary right to participation is confirmed by the language of Section 105. See, 42 U.S.C. §3135(c)(3).

1/ We are convinced, however, that the Board can be no more wearied with AMP-O's reiteration than with the Applicants' tired and fruitless refrain.

The interests of AMP-O in the Perry licensing proceeding have been set forth with particularity in their petition to intervene of February 15, 1974, and the supplement thereto dated February 28, 1974. Essentially, AMP-O seeks access to the transmission system controlled by the license applicant (CEI) for the purpose of wheeling power to its member systems within the State of Ohio. AMP-O has alleged in its petition and supplement, and in verified statements on the record, that licensing and construction of the Perry nuclear facility will substantially alter the existing area transmission load characteristics, and will further aggrandize the competitive power of the applicant and substantially lessen, if not completely eliminate, the opportunity for wheeling power over the transmission facilities controlled by the applicant.

The fatal defect in the CEI motion for summary disposition and its supporting affidavit is the exclusive and narrow focus upon CEI's refusal to wheel 30 MW of PASNY power over the CEI transmission facilities to the City of Cleveland. While the refusal is, indeed, an important element in AMP-O's showing of nexus, it hardly stands alone as evidence of CEI's potential for anti-competitive activities under the proposed Perry license. AMP-O, by its very nature as a wheeling agent for its member municipal systems, is determined to seek additional low-cost power for its members. The refusal of CEI to wheel the initial 30 MW bloc of PASNY power represents only the first stage of a pattern of refusals which would inevitably preclude AMP-O from the opportunity to deliver large quantities of low-cost power to its members.

Thus, the impact of the Perry license upon the areawide transmission system must be viewed in a context much broader than CEI's refusal to wheel 30 MW of PASNY power. This initial refusal represents only the cutting edge of a weapon held by CEI which threatens the very existence of AMP-O as a viable wheeling entity. The Board possesses an obligation to construe the language of the Atomic Energy Act precisely and according to the Congressional intent embodied in the Act. We urge that a careful reading of AMP-O's petition to intervene and supporting statements establishes the fact that its interests "may be affected by the proceeding," and, accordingly, that its right to intervention is inviolate regardless of the standards prescribed by the Commission in Waterford. In this regard, the Waterford guidelines, while helpful in eliminating cases which are wholly devoid of a relationship between the activities under the license and the alleged anti-competitive practices, cannot be used to thwart the express language of the Act granting a right of intervention to parties whose interests "may be affected" by the proceeding.

Reference to several Supreme Court decisions regarding the question of standing to sue is particularly helpful in construing the intent of the Atomic Energy Act relative to the matter of intervention. In each of these cases the question before the Court involved the right of parties to prosecute their claims before the Federal courts. However, nothing in the decisions suggests that a more stringent standard should be applied in determining the right of access to administrative tribunals rather

than to the Federal courts. Indeed, as stated by the United States Court of Appeals for the District of Columbia in National Coal Ass'n. v. FPC, 191 F.2d 462, 467 (1951):

> We think it clear that any person who would be 'aggrieved' by the Commission's order, such as a competitor, is also a person who has a right to intervene. Otherwise, judicial review, which may be had only by a party to the proceedings before the Commission who has been 'aggrieved' by its orders, could be denied or unduly forestalled by the Commission merely by denying intervention.

In Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), the Supreme Court carefully defined the question of standing as it involves the relationship between a potentially aggrieved party and the protective reach of a Federal statute. The Court stated at 397 U.S. 153 that:

> . . . apart from the 'case' or 'controversy' test, (is) the question whether the interest sought to be protected by the complaintant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. (Emphasis added).

In the absence of more restrictive statutory language in the Atomic Energy Act governing intervention and ultimate judicial review, the standards prescribed by the Supreme Court in Data Processing should be applied in the present proceedings. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). As set forth previously herein, the language in the Atomic Energy Act is not restrictive or exclusionary since it permits intervention by all parties where interests "may be affected" by the proceedings.

Accordingly, the express statutory standards for intervention established by the Atomic Energy Act are fully consonant with the language and intent of Data Processing. Both the question of standing and of intervention should be interpreted broadly by the agencies and the courts in the absence of statutory language restricting access to the tribunals. Overton Park, supra, at 401 U.S. 410.

Under either the standards of the Act or of Data Processing, the allegations of AMP-O in their petition to intervene are sufficient to permit intervention as a matter of right. Clearly the interests of AMP-O "may be affected" by the present proceedings. Similarly, the interests which they seek to protect are "arguably within the zone of interests to be protected or regulated" by the Atomic Energy Act. Accordingly, the motion for summary disposition should be denied.

II. The Petition to Intervene and Supporting Data of AMP-O Meet the Guidelines for Intervention Set Forth in the Waterford Decision.

As noted previously, the Board has already found as a matter of jurisdictional fact that the petition to intervene and supporting data filed by AMP-O meet the criteria set forth by the Commission in the Waterford decision. In the Matter of Louisiana Power and Light Company, Docket No. 50-328A, Memorandum and Order of February 23, 1973, RAI-73-2-48. The granting of the relief sought by CEI would constitute an unwarranted reversal of that determination, which was made following submission of additional data on the nexus issue as requested by the Board, in

addition to the petition to intervene, supplement thereto, clarifications on the record, and factual data supplied by the consulting engineers to AMP-O.

CEI asserts in its motion for summary disposition and supporting memorandum that the nexus alleged by AMP-O, and accepted by the Board, is insufficient under the Waterford guidelines. Regardless of the merits of the Waterford decision (see discussion, supra), a careful reading of the decision indicates that it is not nearly as restrictive as CEI would lead the Board to believe. In the first place, as we have pointed out hereinabove, the decision and its guidelines are limited by the express terms of the Atomic Energy Act and the relevant decisions of the Supreme Court. Second, the petitioners in Waterford were permitted to intervene and participate fully in the proceeding under factual circumstances very similar to those in the present case. Just as exists here, the petitioners in Waterford alleged a denial of access to transmission facilities constructed prior to the licensing of the nuclear facility. Just as exists presently, the staff of the Commission and the Department of Justice recommended that the petitioners be granted intervention based upon the allegations in their petitions. And, just as exists presently, the petitioners in Waterford alleged an adverse impact upon their interests because of the effect of the proposed nuclear facility and its operation upon existing areawide transmission facilities.

The full development of these issues requires far more than consideration of the excessively retricted single affidavit supplied by CEI in support of its motion for summary disposition. Full and vigorous cross-examination of the affiant Davidson is necessary to determine the nature and extent of the studies on areawide transmission to which reference is made in the affidavit, and to probe the credibility and biases of the witness. Only in the contest of live direct testimony and cross-examination is it possible to determine these matters, and to fully develop the countervailing facts which do not support the position advanced by CEI and allegedly supported by the affidavit of Mr. Davidson. This is particularly the case where the subject affidavit is restricted in scope to facts which do not constitute the entire array of disputed material facts which exist in the controversy. As stated in Moore, Federal Practice, v.6, p. 2145; 2363:

> The weaknesses of the affidavit are that the applicant is not subject to cross-examination and his demeanor is not observable by the court.
>
> * * *
>
> On the whole, affidavits are the least satisfactory form of evidentiary materials upon which to base a summary judgment.

Furthermore, as set forth in Moore, id. at 2170:

> the burden is upon the moving party to establish the lack of a triable issue of fact; 'all doubts are resolved against him, and his supporting affidavits and desposition, if any, are carefully scrutinized.' [Quoting Walling v. Fairmont Creamery Co., 139 F.2d 318, 322 (8th Cir., 1943)] 2/

We strongly submit that the previous determination of the

2/ Semaan v. Mumford, 335 F.2d 704 (D.C. Cir., 1964); Jacobsen v. Maryland Casualty Co., 336 F.2d 72 (8th Cir., 1964).

Board permitting intervention by AMP-O, combined with the factual data already submitted by AMP-O supporting their position on nexus, creates a presumption of doubt which must be resolved against CEI.

Not only does the burden of proof fall upon the moving party, but all inferences of fact from the proferred proofs must be drawn against the moving party. United States v. Diebold, Inc., 369 U.S. 654 (1962). Moreover, in order to preserve for hearing and cross-examination those issues and testimony which may be critical to the proper disposition of the controversy, the papers of the party supporting summary judgment are carefully scrutinized, while those of the party opposing summary judgment are treated indulgently in determining whether the movant's burden has been met. Bohn Aluminum & Brass Corp v. Storm King Corp., 303 F.2d 425 (6th Cir., 1962); Semaan v. Mumford, supra.

Finally, the credibility of the affiant and his interest in the controversy alone are enough to deny summary judgment. This is particularly true of employees and officers of the moving party such as the affiant Davidson, a Vice President of CEI. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944) ("the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.")

Accordingly, under each of the relevant considerations hereinabove discussed - burden of proof, necessity for cross-examination, careful scrutiny of the movant's papers, credibility

of the witness - the conclusion must be drawn that the motion for summary disposition should be denied.

III. The Affidavit of AMP-O's Consulting Engineer Submitted Herewith Establishes the Existence of a Genuine Controversy of Material Fact.

There is attached hereiwth the affidavit of Mr. Charles Illingworth, P.E., of O'Brien & Gere, Engineers, Inc., the consulting engineers to AMP-O. The affidavit of Mr. Illingworth specifically rebuts the affidavit of CEI's affiant Mr. Davidson, and establishes beyond question the existence of material facts in dispute between the parties.

First, the affidavit of Mr. Illingworth shows clearly the incompleteness of the studies to which reference is made by Mr. Davidson concerning transmission system capacity and stability. As stated by Mr. Illingworth (affidavit, p. 2), the affidavit of Mr. Davidson:

> does not provide sufficient data to evaluate whether the Perry Nuclear Power Plant will prevent or impair delivery of PASNY preference power to one or more member municipal utilities of AMP-O. Nor is sufficient data available in Mr. Davidson's AFFIDAVIT to evaluate whether the Perry Nuclear Power Plant will prevent or impair delivery of any other amounts of power that may be purchased by AMP-O for delivery to one or more of its member utilities.

Second, the affidavit of Mr. Illingworth establishes that the data base and computer models employed by Mr. Davidson in reaching even his narrow conclusions are unavailable for srutiny and, therefore, unverified by an independent source.

The submission of unverified - and perhaps unverifiable - data in support of the motion for summary disposition cannot comport with the strict burden of proof which is rightfully placed upon the moving party in determining the merits of a motion for summary disposition. (See discussion, supra).

Finally, and perhaps most critical, Mr. Illingworth's affidavit rebuts the results of the data upon which Mr. Davidson's conclusions are based because of their failure to fully identify and describe the simulated studies conducted on the system, and their utter failure to set forth in detail whether and how municipal generating facilities were represented in the transmission study. Such an omission is fatal to a motion for summary judgement, since the disclosure of such information and data is a sine qua non to the carrying of the burden of proof.

CONCLUSION

The motion for summary disposition must be denied for a number of reasons. First, and most important, it focuses exclusively on an extremely narrow issue in AMP-O's nexus pleadings - the refusal of CEI to wheel 30 MW of PASNY power to the City of Cleveland. The issue of nexus here, and as presented in the AMP-O pleadings, is far broader than a mere refusal to wheel 30 MW of preference power. It involves the potential wheeling of much larger increments of power over the CEI facilities and the impact which the Perry license will have upon the areawide transmission system to further aggrandize CEI's competitive position vis-a-vis AMP-O and such further deliveries of power. Second, CEI has failed to sustain its burden of proof in

establishing its right to summary relief under the relevant case authorities. Finally, the single affidavit submitted by CEI in support of its motion for summary disposition has been fully rebuted by AMP-O's consulting engineers, and clearly evidences the existence of material factual disputes which are subject to equitable resolution only through formal hearing procedures and the opportunity for full cross examination. Accordingly, the motion should be denied.

Respectfully submitted,

JON T. BROWN
Counsel for AMP-O

CERTIFIACATE OF SERVICE

I hereby certify that a copy of the foregoing Response of AMP-O in Oppostion to Applicant's Motion for Summary Disposition was served upon each of ther persons listed on the attached Service List, by first class, postage prepaid mail, on this 9th day of October, 1974.

JON T. BROWN
Counsel for AMP-O

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ATOMIC ENERGY COMMISSION

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(Davis-Besse Nuclear Power Station, Unit 1)	)	
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