UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
The 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
	)	50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	
	)	

RESPONSE OF THE DEPARTMENT OF JUSTICE TO APPLICANTS' MOTION FOR AN ORDER STAYING, PENDENTE LITE, THE ATTACHMENT OF ANTITRUST CONDITIONS

1-27-77

On January 6, 1977, the Atomic Safety and Licensing Board (Licensing Board) issued an Initial Decision (Antitrust) in the above-captioned proceeding. On January 14, 1977, Applicants filed a Motion for an Order Staying, Pendente Lite, the Attachment of Antitrust Conditions with the Atomic Safety and Licensing Appeal Board (Appeal Board). By Memorandum and Order dated January 17, 1977, the Appeal Board referred Applicants' Motion to the Licensing Board and directed the parties wishing to respond to said Motion to file their responses with the

Licensing Board. The Department of Justice (Department) has been informed that responses are due no later than Wednesday, January 26, 1977.

I. The Request For Stay Misconceives The Nature Of The Licensing Board's Action And Its Relation To the Statutory Scheme

Appplicants state (Motion, p. 1) that the Initial Decision has cleared the way for issuance of the requested operating licenses and construction permits for the Davis-Besse and Perry units upon completion of the remaining environmental and safety hearings pertaining thereto. They say this may be done without the antitrust conditions prescribed by the Licensing Board becoming effective, and urge that their effectiveness be stayed pending appeal. Applicants misrepresent the nature of the Licensing Board's order.

The Licensing Board found that issuance of licenses without conditions would result in creation and maintenance of a situation inconsistent with the antitrust laws. The Board concluded that in those circumstances licenses should be issued only if accompanied by antitrust conditions. To put it another way, the Licensing Board issued a "no conditions-no license" order. Accordingly, it is preposterous for Applicants to state that the Licensing Board's action cleared the way for issuance of operating licenses and construction permits devoid of antitrust conditions.

The antitrust conditions prescribed by the Licensing Board are not to be mere appendages to the licenses, they are a predicate

for the very issuance of the licenses. It is clear that without them, the Licensing Board has not authorized the licenses to issue. Therefore, Applicants' attempt to portray the Board's order as consisting of two wholly separate and independent parts, namely, authorization for issuance of the licenses, on the one hand, and some antitrust conditions thrown in for good measure, on the other hand, is clearly inconsistent with the entire thrust of the Initial Decision.

The purpose of a stay pending appeal is to preserve the status quo until issues raised on appeal have been resolved. Here, however, Applicants seek to preserve the status quo where it may be beneficial to them, but are unwilling to accept retention of the status quo as it would adversely affect them.

The status quo is that Applicants have been granted a construction permit for one nuclear unit, Davis-Besse Unit 1. They are also engaging in serious anticompetitive behavior, as the Licensing Board has found. The antitrust conditions prescribed by the Licensing Board are designed to correct this behavior. What Applicants are asking in their Motion for Stay is not that this status quo be retained but that it be changed by granting Applicants additional licenses and permits that they have requested, without the attachment of the conditions which have been found necessary to eliminate the anticompetitive effects of those licenses. Thus, Applicants' view of retention of the status quo is a world where they may not only continue the activities which

have been held to be inconsistent with the antitrust laws, but may proceed to enhance their competitive position by the benefits of a new low cost source of power. If Applicants' request for a partial stay is granted, the harm accruing to the non-Applicant systems within the CCCT will be not only the substantial harm which the Licensing Board has found will result from maintenance of the status quo, but also the substantial new harm which will arise from Applicants obtaining nuclear units which represent major new competitive assets denied to the other systems.

A grant of stay in the instant situation would also do violance to the purposes and provisions of Section 105c. In its April 14, 1976, Decision (ALAB-323) concerning "grandfathering" of the operating license of Davis-Besse, Unit 1, the Appeal Board stated:

> As we noted, the basic premise under section 105c is that where antitrust review is necessary, its completion is a prerequisite to receiving a license for construction or operation [Slip Opinion at p. 20].

Thus, in enacting Section 105c, Congress expressed its view that the public interest requires that a determination of whether antitrust license conditions are necessary be made prior to the issuance of the license. To allow Applicants to receive what would be, in effect, an unconditioned license would circumvent the Congressional mandate of prelicensing antitrust review. This is especially true where, as here, the Licensing Board has found that a situation inconsistent with the antitrust laws would be created and maintained by the grant of unconditional licenses.

Although for the above reasons, we believe that a stay would be unwarranted here, we now proceed to discuss the merits of a stay under the standards which are generally applicable to motions for such relief.

II. Applicable Standards Which Must Be Met For A Stay To Be Granted

Section 2.764 of the Commission's Rules of Practice (10 C.F.R. §2.764) states that an initial decision directing the issuance or amendment of a construction permit, a construction authorization, or an operating license shall be effective immediately upon issuance unless the presiding officer finds that "good cause" has been shown by a party why the Initial Decision should not become immediately effective, pending the resolution of an appeal. 1/

In determining whether "good cause" exists for staying the effectiveness of an initial decision under Section 2.764, the Appeal Board has applied the four criteria established in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). See Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-199, 7 A.E.C. 478 (April 29, 1974); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-192, 7 A.E.C.

1/ Applicants' contention that the Nuclear Regulatory Commission Rules give only very limited scope to an initial decision (page 6 of Applicants' Motion) is clearly contradicted by §2.764's direction that such decisions become effective immediately, i.e., without further action by any other element of the Commission, including the Commissioners themselves.

420 (April 15, 1974) and cases cited therein. These criteria are:

(1) Has the movant made a strong showing that it is likely to prevail on the merits of its appeal?

(2) Has the movant shown that without such relief it will be irreparably injured?

(3) Would the issuance of a stay substantially harm other parties interested in the proceeding?

(4) Where lies the public interest?

The Department will discuss these criteria seriatim and demonstrate that Applicants have failed to meet any of these criteria.

III. Has The Movant Made A Strong Showing That It Is Likely To Prevail On The Merits Of Its Appeal?

Initially, the movant must make a strong showing that it is likely to prevail on the merits of its appeal: mere establishment of probable grounds for appeal does not meet this standard. Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 338, 366 (W.D. Mo. 1972), aff'd 477 F.2d 1033 (8th Cir. 1973). Failure to make a strong showing of likelihood of success on appeal had been held to be sufficient to deny a motion for a stay, even if the movant has shown that irreparable harm will result in the absence of a stay. Blankenship v. Boyle, 447 F.2d 1280 (D.C. Cir. 1971).

In the present case, Applicants are not likely to prevail on appeal. The Licensing Board made a large number of findings of anticompetitive behavior and supported those findings with massive citations to the record. Even if a few of these findings are

eventually overturned, in all probability, sufficient findings antitrust laws, 2/ and to justify the relief granted.

Contrary to Applicants' assertion, there is little, if any, "ground breaking" law involved in this case. Most, if not all, of the law relating to Section 1 and 2 activities, and Unfair Trade Practices, comes from Supreme Court decisions (Slip Opinion, pages 19-28) while the findings with regard to nexus were based upon Commission decisions which were analyzed and treated in detail by the Licensing Board (Slip Opinion, pages 3, 12-13, 15-18, 31-43, 51-53, 59, 103-05, 130, 133, 173-74, 185-86, 200-02, 204-11, and 216-23).

Similarly, the Licensing Board made a very lengthy analysis of the relevant markets and Applicants' dominance therein (Slip Opinion, pages 32-34, 44-56 and 107-8), the competitive situation as it exists in Ohio and Pennsylvania (Slip Opinion, pages 58-59, 76-77, 91-93, 136-146, 161-66 and 171-72), and the legal standards and policies of the antitrust laws applicable to Applicants' conduct (Slip Opinion, pages 19-28, 61, 83, 105-08, 119-20, 124, 129, 135-36, 154-58, 166, 171 and 194).

2/ The Department of Justice's proof at the hearing need not have demonstrated violations of the antitrust laws; mere inconsistency with the policies underlying the antitrust laws would have sufficed. S. Rep. No. 91-1247, 91st Cong., 2d Sess. 14 (1970); H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., 14 (1970). Nevertheless, the Department undertook to prove and the Licensing Board held that outright violations of the antitrust laws had occurred to create the "situation inconsistent" which would be maintained by grant of unconditioned licenses. Clearly, many of the acts engaged in by Applicants would in any event be deemed anticompetitive and unfair and thus inconsistent with the policies underlying the antitrust laws.

Applicants' assertion that the Licensing Board failed to make an assessment as to whether competition between electric entities in the electric utility industry is in the public interest fails to take into account recent Supreme Court pronouncements which have held tnat the antitrust laws apply to the electric utility industry, Federal Power Commission v. Conway, 425 U.S. 957 (1976); Otter Tail Power Company v. United States, 410 U.S. 366 (1973), as well as findings by the Licensing Board based on testimony at the hearing which delineated the benefits of competition (Slip Opinion, pages 42, 49-51).

Applicants' remaining contentions relate to arguments which were fully briefed in three installments totalling over 950 pages, and which were rejected by the Licensing Board. Indeed, Applicants have not cited any newly found statute or case which would even remotely suggest that the Licensing Board decision should be reversed. Nor have Applicants presented any arguments which have not already been carefully considered and rejected by the Licensing Board.

In summary, Applicants' arguments are merely a rehash of old arguments which have been rejected, and amount to nothing more than a preview of the exceptions to be filed.

However, even if it is held that Applicants have made a strong showing that they are likely to prevail on the merits of their appeal, Applicants would still have to establish the other criteria in order to be entitled to a stay. Fortune v.

Molpus, 431 F.2d 799, 804 (5th Cir. 1970); Marr v. Lyon, 377 F. Supp. 1146 (W.D. Okla. 1974).

IV. Has The Movant Shown That Without Such Relief It Will Be Irreparably Injured?

The second test which must be met by a petitioner requesting a stay is that the petitioner will be irreparably injured if a stay is not granted. Virginia Petroleum Jobbers Association v. Federal Power Commission, supra. The burden of showing irreparable injury rests with the person requesting the stay. Teleflex Industrial Products, Inc. v. Brunswick Corp., 294 F. Supp. 256 (E.D. Pa. 1968); Taylor v. Board of Education of City School District of New Rochelle, 195 F. Supp. 231 (S.D.N.Y. 1961), aff'd, 294 F.2d 36 (2d Cir. 1961), cert. denied, 368 U.S. 940. Traditionally, the irreparable injury contemplated is that which will make the appeal moot. Stop H-3 Association v. Volpe, 353 F. Supp. 14 (D. Hawaii 1972); United States v. El-O-Pathic Pharmacy, 192 F.2d 62 (9th Cir. 1951); Eastern Greyhound Lines v. Fusco, 310 F.2d 632 (6th Cir. 1962), citing Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229 (1917). A court will ordinarily grant a stay only if the party seeking the stay is "presently threatened with irreparable injury." Eastern Greyhound Lines v. Fusco, supra, at 634. A stay will not be granted "against something merely feared as liable to occur at some indefinite time in the future," Eastern Greyhound Line v. Fusco, supra, at 634, citing Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931);

Teleflex Industrial Products, Inc. v. Brunswick Corp., supra. Thus, for example, prospective monetary damage is not irreparable injury. Stop H-3 Association v. Volpe, 353 F. Supp. 14 (D. Hawaii 1972); Virginia Petroleum Jobbers Association v. Federal Power Commission, supra.

Applicants have not met their burden of showing that they will suffer irreparable injury if a stay is not granted. Nowhere do Applicants claim that they will suffer present irreparable injury. Their claims of harm boil down to a fear that if the municipal systems within the CCCT take advantage of certain provisions contained within the license conditions, and those provisions are later deleted, Applicants will suffer financial injury derived from their need to engage in the negotiations and planning necessary to implement those conditions. Such a possibility of future financial harm is not sufficient to meet the legal tests of irreparable injury as set out above. Further, it is unlikely that Applicants will have to expend more than a minimum amount of funds, if any, prior to the time a final decision is reached.

The steps necessary before a municipal system could actually, i.e., physically, take advantage of a license condition are substantial and time consuming. The municipal system must first study its own electric power needs and present and future anticipated supplies in order to determine which bulk power supply options, or combination of options, it wishes to pursue. It may wish to contact other non-Applicant systems to determine whether joint

planning would be the optinum path to follow. 3/ After those decisions are reached, negotiations and joint studies with Applicants concerning the terms and conditions of an arrangement provided under the license conditions, and methods of physical implementation and financing are necessary. 4/ It is thus unrealistic to assume that the point of physical implementation of an agreement will be reached before a final decision is issued. In fact, it is likely that Applicants will be in the process of preliminary negotiations at that time. The expenditure of the funds required for such negotiations and future planning, if indeed those stages are reached, does not constitute "irreparable injury." 5/

3/ For example, a municipal system wishing to take advantage of the condition providing for wheeling (license condition 3, at page 257 of the Slip Opinion) would have to determine if purchased power or a purchaser of its excess power was available. Other license conditions (license condition 4 at page 259 and license condition 9 at page 262 of the Slip Opinion) contemplate group action on the part of municipal systems.

4/ The record in this case shows that the time involved for studies and negotiations necessary to reach an agreement is not minimal. For example, on August 29, 1973, the Federal Power Commission approved a settlement agreement providing for a joint power supply study between the Wholesale Customers of Ohio Edison (WCOE) and Ohio Edison. On July 3, 1975, WCOE's study of the options available was completed (Exhibit NRC 44).

5/ See Griggs v. Cook, 272 F. Supp. 163 (N.D. Ga. 1967), aff'd 384 F.2d 705 (5th Cir. 1967). In that case, the District Court refused to enjoin the erection of a school on a certain site and denied a motion to stay the denial of the injunction pending appeal. The District Court held that because of the time required for condemning the property and building the school "if reversal follows, it will probably occur in ample time to prohibit operation of the school, to which this suit is mainly directed. In the meanwhile, the [school] board is entitled to planning time, and the stay is refused." (272 F. Supp. at 170).

V. Would The Issuance Of A Stay Substantially Harm Other Parties Interested In The Proceeding?

As with Criterion 1 and Criterion 2, Applicants have the burden of establishing that other parties interested in the proceeding will not suffer substantial harm if a stay is granted. Kansas City Royals Baseball Corporation v. Major League Baseball Players Association, 409 F. Supp. 233, 268 (W.D. Mo. 1976); In the Matter of Southern California Edison Company (San Onofre Nuclear Generating Station), supra at 481. Further, it has been held that Criterion 3 need not even be considered unless movements have made a successful showing of irreparable injury and likelihood of prevailing on the merits of their appeal. Belcher v. Birmingham Trust National Bank, 395 F.2d 685, 686 (5th Cir. 1968). Since, as discussed above, the Department believes that Applicants have not made such a showing, it is unnecessary to consider whether other parties would suffer substantial harm. However, for the sake of completeness, we will discuss this criterion.

The "substantial harm" test of Criterion 3 is a less strenuous standard than the "irreparable injury" test of Criterion 2. A showing of substantial damage does not require that there be permanent damage. Friends of the Earth v. Armstrong, 360 F. Supp. 165, 198 (D. Utah 1973), vacated on other grounds, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974). Moreover, in measuring whether substantial harm will result, it is necessary to view the harm which will result from not applying the relief,

rather than the harm occurring if the status quo remains. See Fortune v. Molpus, 431 F.2d 799, 804-5 (5th Cir. 1970); Kansas City Royals Baseball Players Association, supra, at 268; North Central Truck Lines, Inc. v. United States, 384 F. Supp. 1188 (W.D. Mo. 1974), aff'd, 420 U.S. 901 (1975). Applicants' assertion that the injury is independent of the harm shown to exist in the event the stay is denied, and that it centers around whether there is something unique about maintaining the status quo that would work to the disadvantage of parties other than movant, finds no support in the cited cases. Indeed, Applicants have cited no case save Virginia Petroleum Jobbers, supra, to support their contention. In Virginia Petroleum Jobbers, supra, however, the court did not engage in a lengthy discussion of this point since it found that "[t]he question of harm to others if a stay were granted is not really before us", Virginia Petroleum Jobbers, supra, at 926.

The Licensing Board has found that Applicants have:

> the ability, acting individually, together, or together with others to prevent or hinder (1) other electric entities from achieving access to the benefits of coordinated operation either among themselves, or with Applicants; and (2) other electric entities from achieving access to the benefits of economy of size of large electric generating units by coordinated development, either among themselves or with Applicants [Slip Opinion, page 251].

Further, the Licensing Board found that

> Applicants' ability has been used, is being used and may be used to create and maintain a situation

> or situations inconsistent with the antitrust laws or the policy underlying those laws [Slip Opinion, page 252].

A stay of the license conditions would result in the non-Applicant systems in the CCCT continuing to operate within the restraints of Applicants' anticompetitive activities. These systems would remain without the important bulk power supply and competitive options made available by the relief granted. Thus, these systems will continue to suffer substantial harm if a stay is granted.

Applicants have again raised the "red herring," their Exhibit A-44, and again contend that imposition of the conditions contained therein would adequately protect the other entities in the CCCT from substantial harm. The glaring deficiencies of Exhibit A-44 were revealed at the hearing, Mozer Tr. 3326-35, Hughes Tr. 4094-97, Kampmeier Tr. 6142-48, Mayben Tr. 7600-13, with the Licensing Board concluding that the application of the policy contained therein "would neither prevent nor eliminate anticompetitive activities under the license" (Slip Opinion, page 251). Thus, if Exhibit A-44 were adopted and imposed upon Applicants while the Licensing Board conditions were stayed, other entities in the CCCT would still suffer substantial harm.

Even if the Licensing Board were to adopt Applicants' argument that the substantial harm must be based upon the harm that would result from maintenance of the status quo, Applicants would still not meet their burden. MELP, for example, would continue to suffer financially and would fall deeper and deeper in debt

to CEI. Continuation of the status quo would also permit CEI to maintain the competitive advantage of greater system reliability that it gained through the benefits of coordinated operation and development with other utilities, which benefits it refused to make available to MELP (Slip Opinion, page 58, finding 31; page 59, finding 33; pages 60-83, findings 34-63).

VI. Where Lies The Public Interest?

The party requesting the stay has the burden of establishing that the requested stay will not be harmful to the public interest. Associated Securities Corp. v. Securities and Exchange Commission, 283 F.2d 773 (10th Cir. 1960); Hamlin Testing Laboratories v. United States Atomic Energy Commission, 337 F.2d 221 (6th Cir. 1964). The question is not whether a party believes the public interest would be served by a continuation of the status quo, but whether an appropriate showing can be made that the granting of the stay would do no harm to the public interest. Kansas City Royals Baseball Corp. v. Major League Baseball Players Association, 409 F. Supp. 233, 269 (W.D. Mo. 1976). Under Section 105c of the Atomic Energy Act (42 U.S.C. §2135), the Nuclear Regulatory Commission is required to consider the public interest in making its determination as to whether and what kind of license should issue. As stated by the District Court in Virginia Petroleum Jobbers, supra:

> Where lies the public interest? In litigation involving the administration of regulatory

> statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes [259 F.2d at 925].

Applicants have made no showing that the public interest requires a stay of the license conditions pending appeal. Applicants' main argument, that the parties opposed to an unconditioned license are engaged in "nuclear blackmail," is wholly without merit. 6/ Under Section 105c, the Attorney General is charged with rendering advice concerning the competitive effects of an applied for nuclear license. In every case, the Department renders its advice based only on its determination of whether an unconditioned license will create or maintain a situation inconsistent with the antitrust laws. In the majority of the applications examined (approximately 60 out of 97 applications which involved over 150 utilities), the Department has rendered "no hearing" advice without requesting that the Applicant agree to any conditions. This can hardly be considered "nuclear blackmail." Nor can it be considered "nuclear blackmail" when the Department negotiates a settlement rather than requiring an Applicant to go through a prolonged antitrust hearing. While we are not privy to the thinking of the utilities whose applications the

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6/ Applicants' argument that the Licensing Board has conducted a full blown antitrust inquiry without regard to nexus is simply a restatement of Applicants' contention that they will prevail on appeal. This contention is fully discussed in Part III, above.

Department has reviewed, it is reasonable to assume that their decisions to settle upon conditions without a hearing are based to a very large extent on an evaluation by competent counsel of the merits of the Department's allegations. The outcome of the current proceeding does not support a conclusion that the Department is pursuing unfounded claims of antitrust violations for the purposes of "nuclear blackmail."

The public interest will not be served by allowing Applicants to continue to engage in practices which have been found to be anticompetitive. Rather, the public interest will be served, and confidence in government enhanced, by showing the public that once a decision has been reached, it will be enforced.

CONCLUSION

For the foregoing reasons, the Department of Justice urges the Atomic Safety and Licensing Board to reject Applicants' Motion for an Order Staying, Pendente Lite, the Attachment of Antitrust Conditions.

Respectfully submitted

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January 27, 1977

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CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF THE DEPARTMENT OF JUSTICE TO APPLICANTS' MOTION FOR AN ORDER STAYING, PENDENTE LITE, THE ATTACHMENT OF ANTITRUST CONDITIONS have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or hand this 26th day of January 1977.

Janet R. Urban

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