UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

BRIEF IN SUPPORT OF EXCEPTIONS OF THE CITY OF CLEVELAND

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April 14, 1977

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BRIEF IN SUPPORT OF EXCEPTIONS OF THE CITY OF CLEVELAND

In accordance with the Atomic Safety and Licensing Appeal Board's (Appeal Board) Order of February 15, 1977, the City of Cleveland (City) files this brief in support of its exceptions to the January 6, 1977, initial decision of the Atomic Safety and Licensing Board (Licensing Board) in the above-captioned proceeding.

STATEMENT OF THE CASE

This proceeding is before the Appeal Board on exceptions to the Licensing Board's January 6, 1977, decision in an antitrust review proceeding pursuant to Section 105(c) of the Atomic Energy Act as amended. Exceptions to the initial decision have been filed by City and each of the

companies seeking licenses for the Davis-Besse and Perry units. This brief is filed in support of City's exceptions.

On August 1, 1969, the Toledo Edison Company (TECO) and The Cleveland Electric Illuminating Company (CEI) filed a joint application for a license to construct and operate a nuclear generating facility designated Davis-Besse Unit 1. On July 6, 1971, the City filed a Petition to Intervene in the Davis-Besse 1 proceeding and requested an antitrust hearing.

Prior to August, 1972, Applicants[1/] filed a joint application for a construction permit for a nuclear generating facility designated Beaver Valley Unit 2. On April 30, 1973, the Commission caused to be published in the Federal Register notice of receipt of the Attorney General's advice letter and setting dates for filing petitions to intervene. On July 27, 1973, less than two months after the last date set for intervention, the City filed its petition to intervene in the Beaver Valley proceeding and requested a hearing on antitrust issues. Not until six months later did the Commission refer Cleveland's Petitions to Intervene in Davis-Besse Unit 1 and Beaver Valley Unit 2 and petitions to be filed with regard to Applicants' proposed nuclear generating facilities designated Perry Units 1 and 2 to a Licensing Board. On February 13, 1974, City filed its petition to intervene

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1/ CEI, TECO, Ohio Edison Company (Ohio Edison), Pennsylvania Power Company (Penn. Power) and Duquesne Light Company (Duquesne Light).

in the Perry proceedings. By Order of March 15, 1974, City was granted intervention in Davis-Besse and Perry and denied intervention in Beaver Valley.

On August 9, 1974, Applicants filed an application for construction permits for nuclear generating facilities designated Davis-Besse Units 2 and 3. City filed its petition to intervene in the antitrust proceedings with respect to Davis-Besse Units 2 and 3 on March 13, 1975. On May 6, 1975, City was granted leave to intervene in the Davis-Besse Units 2 and 3 proceeding.

On July 30, 1975, the Commission ordered the Davis-Besse Unit 1, Perry Units 1 and 2, and Davis-Besse Units 2 and 3 proceedings consolidated for hearing and decision.

The Licensing Board's Prehearing Order No. 2, docketed July 25, 1974 set forth the issues and matters in controversy to be tried and provided for the filing of pre-trial briefs.

Hearings commenced on December 8, 1975, and continued until July, 1976. More than 70 hearing days were consumed in which a record of 12,710 pages was compiled. More than 1,300 exhibits were introduced and 48 witnesses testified.

Briefs and reply briefs were filed on behalf of Applicants, City, Department of Justice and the Staff of the Nuclear Regulatory Commission.

On January 6, 1977, the Licensing Board issued its decision finding that a situation inconsistent with the antitrust laws existed in the relevant market area and that a grant of the requested licenses would maintain

that situation. The Licensing Board also found that if no situation inconsistent with the antitrust laws had been found to exist within the relevant market area issuance of the requested licenses would create such a situation. Accordingly, the Licensing Board ordered that no licenses issue except upon conditions designed to alleviate the inconsistencies with the antitrust laws.

By motion of January 12, 1977, City requested clarification of the licensing conditions ordered attached to the licenses by the Licensing Board. The Licensing Board issued its ruling on the City's request for clarification of license conditions on February 3, 1977.

STATEMENT OF THE ISSUES [2/]

1. Whether the Licensing Board erred in failing to impose license conditions requiring Applicants to make available to non-applicant entities in the CCCT wholesale all requirements firm power.

2. Whether it was error for the Licensing Board to provide in license condition 4(d) that new members joining CAPCO are not entitled to become voting members of CAPCO until such time as that system's capacity becomes equal to or exceeds the capacity of the smallest voting member of CAPCO.

2/ On February 7, 1977, City filed its Statement of Exceptions. On February 15, 1977, the Appeal Board issued its Order directing that three of the City's six exceptions not be briefed.

3. Whether the Licensing Board erred in failing to provide that the license conditions should apply to any construction permit or operating license granted for Beaver Valley, Unit 2.

ARGUMENT

SUMMARY OF ARGUMENT

The Licensing Board found a history of refusals by Applicants to sell all requirements firm power at wholesale. The Licensing Board also found that the availability of wholesale all requirements firm power was needed and that a refusal to make such sales would be anti-competitive. Nevertheless, the Licensing Board declined to make the availability of wholesale all requirements firm power a condition to the grant of the licenses because Applicants assured the Board such power was available. Voluntary abandonment of anti-competitive practices does not divest the Licensing Board of power to act. Where, as in this case, Applicants claim that they may lawfully resume the anti-competitive practice, the Licensing Board erred in failing to order a license condition requiring sales at wholesale of all requirements firm power.

Although the Licensing Board found that it was anti-competitive for Applicants to deny membership in CAPCO to other entities in the CCCT, it failed to provide an effective remedy. License condition 4 provides only

an illusion of relief for in effect it precludes all non-applicant entities in the CCCT from ever becoming voting members of CAPCO.

The license conditions ordered by the Licensing Board are also defective in that they are not applicable to the licenses for Beaver Valley Unit 2. All of the reasons requiring license conditions for the Davis-Besse and Perry units also require conditions on the licenses for Beaver Valley Unit 2. Applicants have stated that they would not object to application of relief ordered in these proceedings to the Beaver Valley Unit 2 licenses. Both the Licensing Board and the Appeal Board relied upon the availability to the City in these proceedings of all the relief the City sought in the Beaver Valley Unit 2 proceeding when they denied City's petition to intervene in Beaver Valley.

Accordingly the license conditions ordered by the Licensing Board should be amended, modified and made applicable to Beaver Valley Unit 2.

I

THE LICENSING BOARD ERRED IN FAILING TO IMPOSE LICENSE CONDITIONS REQUIRING APPLICANTS TO MAKE AVAILABLE TO NON-APPLICANT ENTITIES IN THE CCCT ALL REQUIREMENTS FIRM POWER.

On January 12, 1977, City filed its motion with the Licensing Board asking the Licensing Board to issue its order clarifying its initial decision by requiring Applicants to make available to non-applicant entities in the CCCT whole and partial requirements firm power. On February 3, 1977,

the Licensing Board ruled on City's request for an order clarifying license conditions denying City's request with respect to wholesale all requirements firm power but granting City's request with respect to partial requirements wholesale firm power stating (Order p. 11) "an insistence that a wholesale power sale be on an all or nothing basis would violate condition 1(b)."

City requested (Proposed Finding of Fact 42.02; Proposed Conclusion of Law 17) the Licensing Board to adopt the license conditions contained in C-162, an exhibit sponsored by Witness Mayben. Condition 13 of City's proposed license conditions provide:

> The Company will enter into arrangements with entity(ies) for the sale of firm power and energy to meet all or a portion of such entity(ies) power requirements at rates which will compensate the Company for its costs, including a reasonable return.

The Department of Justice requested similar relief (DOJ proposed finding 12.02(2) brief p. 147), as did NRC Staff (Brief Appendix pp. 9-10). The Licensing Board erred in refusing to grant the relief requested by requiring Applicants to make available wholesale firm all requirements power. No rationale for denial of the requested relief was enunciated in the Licensing Board's initial decision. However, in ruling on City's motion for clarification of license conditions, the Licensing Board explained that the requested relief was denied because at present all Applicants make wholesale all requirements power available to non-applicant entities within the CCCT (Memorandum pp. 5-8). The Licensing Board stated

(Memorandum p. 5):

> Such a license condition may have been appropriate were we convinced that its absence at this time would work to the detriment of competitive entities in the CCCT.

and, at page 8:

> We conclude that Applicants have a policy, and have represented such a policy to this Board, that they will continue to sell power at wholesale to entities within the CCCT. In an effort to impose license conditions no more restrictive than reasonable to afford the required relief, the Board has depended upon the Applicants' good faith in these representations. If we have erred in so doing to the future detriment of Applicants' competitors we would foresee a requirement that the license conditions be modified to provide specifically for wholesale power sales.

The Licensing Board recognized the importance of wholesale all requirements sales but elected to rely upon Applicants' assurances of reformed behavior rather than granting affirmative relief. Voluntary discontinuance of anti-competitive conduct does not obviate the need for strong license conditions. Diner's, Inc. v. F.T.C., 494 F. 2d 1132 (CADC 1974); Doherty, Clifford, Steers & Shenfield, Inc. v. F.T.C., 392 F. 2d 921 (CA6, 1968); Libby-Owens-Ford Glass Co. v. F.T.C., 352 F. 2d 415 (CA6, 1965); Giant Food, Inc. v. F.T.C., 322 F. 2d 977 (CADC 1963) cert. denied, 376 U.S. 967 (1964); Clinton Watch Co. v. F.T.C., 291 F. 2d 838 (CA 7, 1961) cert. denied, 368 U.S. 952 (1962); Standard Distributors, Inc. v. F.T.C., 211 F. 2d 7 (CA 2, 1954). This

is particularly true where, as in this case, Applicants claim that the voluntarily discontinued anti-competitive conduct is not illegal and may legally be resumed. C. Howard Hunt Pen Co. v. F.T.C. 197 F. 2d 273 (CA 3, 1952).

Applicants have maintained throughout that no illegality taints their refusals to sell power at wholesale. For example, it is contended in Applicants' proposed findings of fact (PFF 34.31), that CEI's reluctance to interconnect with the City was reasonable. With no interconnection there could be no sale of power at wholesale. Applicants also insist (PFF 37.48) that Dusquesne's refusals to sell power at wholesale had no anti-competitive effects.

Mr. White, President of Ohio Edison Company and Chairman of the Board of Pennsylvania Power Company (Tr. 9493) testified that he believed Ohio Edison had no public service obligation to make sales of power at wholesale to REA distribution cooperatives (Tr. 9811-12). Moreover, he testified that if requested to make such sales, Ohio Edison might refuse to do so (Tr. 9557-58). With respect to making sales of power at wholesale, the policies of Ohio Edison and Penn. Power are the same (Tr. 9650). Witness Hughes, testifying as Staff's economic witness, pointed out that the exercise of market power voluntarily discontinued can be resumed later (Tr. 4073).

The record reveals a long history of refusals by Applicants to make sales of power at wholesale to non-applicant entities in the CCCT despite

contrary representations to the Federal Power Commission (Initial Decision, hereinafter ID, pp. 190-91). Duquesne Light refused to sell wholesale power to the Borough of Aspinwall (ID pp. 105-106) and to the Borough of Pitcairn (ID pp. 93-95) as part of a well developed strategy for acquiring municipal electric systems (ID p. 95). TECO refused to sell wholesale power to the City of Waterville for anti-competitive reasons (ID pp. 183-4; DJ 504; DJ 506). It took the City of Newton Falls more than two years to negotiate a contract for the purchase of power at wholesale from Ohio Edison (Tr. Lyren pp. 2846-2950).

Among the bulk power services which should be available to non-applicant entities in the CCCT is wholesale all requirements firm power (Mozer NRC 205 p. 71).

Based upon Applicants' past record of refusing to sell all requirements firm power at wholesale and their insistence that refusing to make such sales was not unlawful, it was error for the Licensing Board to deny City's requested license condition 13.

II

NEW MEMBERS OF CAPCO WITH AT LEAST 50 MW OF CAPACITY SHOULD BE PERMITTED TO VOTE IN CAPCO

The Licensing Board found that a collateral and well understood result of the formation of CAPCO was to deny non-applicant entities in

the CCCT access to coordinated operation and development (ID p. 188). The Licensing Board found that the CAPCO agreement was an agreement in restraint of trade and that denial of membership opportunities was an act of monopolization and also constituted a group boycott in violation of Sections 1 and 2 of the Sherman Act (ID p. 194).

To remove the anti-competitive effects of the CAPCO agreement, the Licensing Board imposed license condition 4 which requires Applicants to make available membership in CAPCO to any entity in the CCCT with a system capability of 10 MW or more (ID p. 259). However, paragraph (d) of license condition 4 renders the relief supposedly provided by license condition 4 illusory.

Paragraph (d) provides (ID pp. 260-61):

> New members joining CAPCO pursuant to this provision of relief shall not be entitled to exercise voting rights until such time as the system capability of the joining member equals or exceeds the system capability of the smallest member of CAPCO which enjoys voting rights (fn. omitted).

Under the CAPCO Memorandum of Understanding (NRC 184 §1.0) Ohio Edison together with its subsidiary, Penn. Power, are considered a single entity. Thus the smallest company having voting rights in CAPCO is TECO which had a net generating capacity of 1045 MW in 1973 (ID p. 29). [3/] The largest municipal system in the CCCT, the

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3/ Penn. Power's net generating capacity in 1973 was 608 MW (ID p. 30).

City of Cleveland, had a net demonstrated capacity of only 180 MW in 1976 (Mayben dt c-161 p. 8). Other municipal systems in the CCCT with generation, as of January 1, 1974, are Painesville 38 MW, Orrville 89 MW, Oberlin 12 MW, Newton Falls 8 MW, Bryan 24 MW, Napoleon 22.5 MW (Wein dt DJ 587 pp. 65, 69, 73). The 19 municipal electric systems composing WCOE (Wholesale Customers of Ohio Edison) have a combined projected demand of 211 MW in 1975 and 455 MW in 1985 (NRC-44 p. III-2).

Even if City of Cleveland successfully acquired all of CEI's facilities inside the corporate boundaries (it now serves approximately 20% of the city) and through competition with CEI were able to secure additional customers outside of the city equal to 50% of its load, the city's electric system would be only slightly larger than TECO (Wein dt DJ 587 p. 126).

It is doubtful if any single non-applicant entity or group of non-applicant entities would ever be able to vote in CAPCO under license condition 4(d). In light of the substantial obligations which any entity joining CAPCO would assume (Williams Tr. 10, 369-71), no entity would be willing or should be required to join CAPCO without some form of voting rights. The effect is to deny non-applicant entities reasonable access to CAPCO membership. Applicants' expert witness on power pooling, Mr. Slenmer, testified the small public utilities should not be denied opportunities to engage in pooling (Tr. 9053).

The record does not indicate that size was the criteria utilized in selecting the initial members of CAPCO. Rather the criteria appears to

have been whether a system was privately or publicly owned (Lindseth deposition DJ 568, pp. 26-28; Besse deposition DJ 559, pp. 126, 132-33; Mansfield deposition DJ 572, pp. 10-11).

City suggests that if there is to be a size limitation associated with voting rights that voting be limited to systems sized at 50 MW. Mr. Smart testified that a 50 MW system would make a significant impact on CAPCO (Tr. 10, 134). A 50 MW cutoff point would permit the cities of Cleveland, Cuyohoga Falls, Orrville and the group of cities comprising WCOE to become voting members of CAPCO.

The Licensing Board explained its restriction on voting rights for new members in CAPCO stating "our objective is to prevent impediments to the operation and development of an area-wide power pool through the inability of lesser entities to respond timely or to make necessary planning commitments." There is no evidence to support a finding that the size of a member has any relationship to its ability to respond or make necessary planning commitments. To the contrary, there is evidence that even the present CAPCO members often take several months to reach agreement (Williams Tr. 10, 385). Indeed, at the close of the record, some 9 years after the formation of CAPCO, Applicants had yet to conclude a Generating Agreement!

It is at least necessary to modify condition 4(d) to permit any system as large as 50 MW to become a voting member of CAPCO, if license condition 4 is to be made effective.

III

THE LICENSE CONDITIONS APPROVED IN THESE PROCEEDINGS SHOULD BE MADE APPLICABLE TO BEAVER VALLEY UNIT 2

The Licensing Board ordered the license conditions attached to licenses for the Davis-Besse 1, 2 and 3 and Perry 1 and 2 nuclear units (ID p. 264) thereby rejecting the City's request that any license conditions ordered be made applicable to Beaver Valley Unit 2 also (City's Proposed Findings of Fact and Conclusions of Law and Brief In Support Thereof p. 106). The Licensing Board's decision contains no discussion of the City's request.

The City's request to intervene in the Beaver Valley Unit 2 proceedings was untimely by two months. During the hearings before the Licensing Board and Appeal Board to rule on the City's petition to intervene, one important factor relied upon by all other parties in arguing for denial of intervention to City in Beaver Valley and the Licensing and Appeal Boards in denying intervention was the right of the City to obtain full relief including license conditions for Beaver Valley Unit 2 in the Davis-Besse and Perry proceedings.

At the very first pre-hearing conference held in these proceedings Mr. Charnoff, then lead counsel for the Applicants, informed the Licensing Board that the City would lose no remedy if its petition to intervene in Beaver Valley were denied because Applicants would not raise any procedural or jurisdictional objection to full relief including access to Beaver Valley

Unit 2 being granted in the Perry proceeding (Tr. 151-155, 168-170). Mr. Popper, staff counsel, agreed that the issues the City wished to raise in Beaver Valley could be raised in Perry (Tr. 156). The matter was the subject of further discussion between Mr. Popper and the Licensing Board at the second day of the pre-hearing conference (Tr. 219-223). The Licensing Board Chairman recognized that the same remedy would be applicable to the Davis-Besse, Perry and Beaver Valley units (Tr. 236).

And again it was urged that City's petition to intervene in Beaver Valley be denied because City could obtain a remedy in Perry (Tr. 237-245) Mr. Charnoff stated at Tr. 245:

> Now if the other alternative were that the Board denied the petition of Beaver Valley but granted it in Davis-Besse and Perry, it is my view that the Board need not grant it in Davis-Besse for all--and should not for the meritorious arguments we have given before.
>
> We would, however, accept that condition in Beaver Valley which would be that it can be conditioned upon the outcome of the Davis-Besse-Perry proceeding.

And the Chairman reiterated his belief that City could obtain a full remedy in Perry at Tr. 271:

> Here I would feel the Intervenor does have a forum, a remedy, in that the remedy in Perry, as I understand it, would accommodate the Intervenor's interest.

In its Order denying City's petition to intervene in Beaver Valley, the Licensing Board said (Final Memorandum and Order on Petitions To

Intervene and Requests For Hearing pp. 7-8):

> Furthermore, a key point in assessing the weight to be given to a question of untimeliness is Cleveland's ability to protect its interests without a Beaver Valley hearing. ... If Cleveland shows in these two proceedings that relief is in order, Cleveland may then request the same type of remedy it seeks in Beaver Valley. (fn. omitted).

In responding to City's request for certification to the Commission of its petition to intervene, Applicants reiterated their agreement to permit license conditions ordered in Davis-Besse and Perry to attach to the Beaver Valley license and their waiver of procedural objections (Applicants' Response To The City of Cleveland's Objections To The Licensing Board's Memorandum and Order, Dated March 15, 1974, and To The City's Request For Certification Of Certain Matters To The Commission p. 4 fn. 5).

The Staff in its Brief in Opposition To The City's Appeal from the Licensing Board's denial of its petition to intervene argued that denial of City's petition to intervene cleared the way for issuance of a construction permit in Beaver Valley and that City's interest was still protected (Staff Brief pp. 6, 10, 14).

Applicants, in their brief in opposition to City's appeal from the Licensing Board's denial of City's petition to intervene in Beaver Valley, argued that no damage would result to the City from denial of its petition (pp. 23-24) because the City could protect itself in Perry and Davis-Besse (p. 22).

The Appeal Board in its decision [4/] affirming the denial of the City's petition to intervene stated that it found particularly persuasive the fact that the remedies sought by the City, including access to Beaver Valley Unit 2, could be obtained in the Davis-Besse and Perry proceedings (Slip. Op. pp. 20-23).

There have been several requests for access to Beaver Valley Unit 2. A request made by the Borough of Pitcairn was denied by Duquesne Light in 1968 (ID p. 92). American Municipal Power Ohio, Inc. (AMP-O) also requested access to Beaver Valley Unit 2 (Tr. 2435) as did the City (ID p. 206, 208). In each instance access to Beaver Valley Unit 2 was denied. Such denials were anti-competitive (ID p. 204).

The Licensing Board specifically accepted Dr. Hughe's testimony found at NRC 207 p. 30 (ID p. 223):

> Where nuclear generation is the superior base load choice, the cummulative effect on market power of a sequence of nuclear plants will be greater than the impact of any one plant alone, because each successive nuclear addition will confer incremental advantage.

City sought access to each of the Davis-Besse and Perry units and Beaver Valley Unit 2 because splitting its allocation among several units coming available at different times allows the City to more closely match power supply with load growth (Hinchee Tr. 2707; Mayben Tr. 7734-35).

4/ ALAB 208

All of the reasons which lead the Licensing Board to order license conditions for the Davis-Besse and Perry units also require that those license conditions apply to licenses for Beaver Valley Unit 2. Furthermore, Applicants' oft repeated assurances that the City would receive complete relief even if its petition to intervene in Beaver Valley were denied, require that the license conditions attach to licenses for Beaver Valley Unit 2.

CONCLUSION

The Appeal Board should amend and modify the license conditions ordered by the Licensing Board to require Applicants to make wholesale all requirements firm power available to non-applicant entities in the CCCT and to at least permit new members of CAPCO to participate as voting members when their system capacity equals or exceeds 50 megawatts. The license conditions as amended and modified should be made applicable to Beaver Valley Unit 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing "Brief in Support of Exceptions of the City of Cleveland" has been made on the following parties listed on the attachment hereto, this 14th day of April, 1977, by depositing copies thereof in the United States mail, first class postage prepaid.

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