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Section

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 (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

RULING OF BOARD WITH RESPECT TO
APPLICANTS' PROPOSAL FOR EXPEDITING
THE ANTITRUST HEARING PROCESS

I. BACKGROUND

On March 14, 1975, Applicants in the above proceeding filed a pleading entitled "Applicants' Proposal for Expediting the Antitrust Hearing Process" which included as an exhibit certain proposed license conditions for Davis-Besse Nuclear Unit 1 and Perry Nuclear Units 1 and 2. Incorporated within these pleadings was a motion for the Board to accept certain assumptions arguendo for the purpose of (a) litigating the nexus issue, and (b) determining that the initial matter for hearing is whether Applicants' offer of access to nuclear facilities as set forth in their proposed license conditions eliminates the nexus between any situation inconsistent with the antitrust laws (the "situation")

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and activities under the proposed licenses. Applicants further moved for a hearing limited to the determination of whether sufficient nexus would exist between the "situation" and the activities under the license (the "activities") if its proposal were accepted.

The Nuclear Regulatory Commission Staff (Staff), the Department of Justice (Justice) and the City of Cleveland (City) each filed objections to Applicants' motion.

The Board heard argument on Applicants' proposal during the 4th prehearing conference which was held on April 21, 1975. At that conference, immediately prior to the oral argument, Applicants submitted another document dated April 21, 1975 entitled "Applicants' Argument in Support of Its Proposal for Expediting the Antitrust Hearing Process."

Other parties to these proceedings claimed surprise and objected to the Board's receipt of this additional written argument. The Board concluded that receipt of the written argument would save time in that Applicants' counsel would not read essentially the same materials into the record during the course of oral argument. At the same time, the Board was of the opinion that the other parties would be prejudiced if they were denied the right to give a considered reply to the rather extensive argument submitted by Applicants. Accordingly, the Board gave leave to the other parties to file additional written responses to Applicants' written argument of April 21, 1975. These additional responses

have been received and considered together with all other pleadings and oral arguments relating to Applicants' proposal.

II. THE PROPOSAL

Succinctly stated, Applicants have offered limited assumptions of antitrust violations in regional power exchange transactions, pooling arrangements, bulk electrical power sales and retail electrical power sales in the CAPCO* market. Within this market, Applicants assumed arguendo that they have acted and could continue to act to preclude other electric entities from obtaining sources of bulk power from electric entities outside of the stipulated geographic market. Applicants further assumed arguendo that they jointly have prevented other electric entities within the market from achieving the same benefits of coordinated operation, coordinated development, access to the benefits of economy of size from large nuclear generating facilities, and other benefits which they achieve pursuant to agreement with each other. Applicants further assumed that the purpose of these acts has been to eliminate electric entity competitors. Applicants expressly refused to assume arguendo, however, that any of these actions is or can be related in any way to activities under the nuclear licenses requested in these proceedings.

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* Combined CAPCO-Company Territories.

Proceeding from the assumptions arguendo, Applicants have set forth certain license conditions which include access to or participation in Davis-Besse 1 and Perry 1 and 2 for entities which heretofore have made a timely request for participation.

As precedent, Applicants rely largely upon the Commission's Memorandum and Order of September 28, 1973 in the Louisiana Power and Light Company proceeding (Waterford Steam Electric Generating Station, Unit 3) CLI-73-25, RAI-73-9-619. There the Commission directed licensing boards in antitrust proceedings to consider the question of whether sufficient nexus exists between the situations allegedly inconsistent with the antitrust laws and the activities under the license under consideration. In Waterford, the Commission observed that §105(c) of the Atomic Energy Act, 41 U.S.C. §2135, does not authorize an unlimited inquiry into all alleged anticompetitive practices in the utility industry. Section 105(c) is addressed to licensed activities and not the electric utility industry as a whole. The Commission noted, however, that the statute is not limited to the construction and operation of the facility to be licensed. Rather:

> The proper scope of antitrust review turns upon the circumstances of each case. The relationship of the specific facility to the Applicants' total system or power pool should be evaluated in every case.*

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* Waterford at 621.

It was with that guidance in mind that this Board originally framed the issues in controversy in these proceedings. During the course of the argument, Applicants have contended that similarity of relief proposals in diverse antitrust proceedings indicates an intent on the part of the Boards (and the Commission) to deal with all antitrust proceedings generically, and without reference to the specifics of each individual situation (Tr. p. 1112-14). We disagree. Not only were the issues in controversy in these proceedings framed with specific reference to the allegations of the parties, but the Board has had in mind those limitations as it ruled upon the various discovery requests of the parties. Indeed, the Board rejected certain of these requests addressed to Applicants because the Board found that the documents or answers sought, while related to anticompetitive conduct generally, were overly remote from the instant proceeding.

Adhering to the Commission's guidance in Waterford that the relationship of the specific nuclear facility to the Applicants' total system or power pool should be evaluated in every case, we find ample nexus at this stage of the proceedings.* Allegedly, Applicants have combined to give each other the benefits of coordination, reserve sharing, and sale or exchange of power while denying those advantages to their competitors. The degree

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* We recognize that without Applicants' assumptions arguendo, no "situation" has been established. The burden of demonstrating a "situation" rests upon opposition parties at the hearing stage.

of competition among and between Applicants is not established, but it may develop that they are willing to offer these advantages only to entities which are not perceived as competitive threats to any one of them. Given the assumptions arguendo that Applicants' conduct has been directed toward the elimination of competitors, the propriety of wide-area pooling arrangements to which the Davis-Besse and Perry units will be important energy sources is an appropriate issue for further consideration by this Board.

Applicants contend, however, that access to the nuclear facilities which licenses herein are sought obviates other antitrust issues.* This is far from clear. The limited assumptions arguendo which Applicants offer appear, in part, to beg the question. On one hand, Applicants will concede for purposes of argument that their multi-system activities are anticompetitive in nature and specifically directed to the elimination of competitors. On the other hand, they contend that nuclear units within this system and in particular, the Davis-Besse 1 and Perry units, would not contribute to the maintenance of the "situation" they have assumed, provided access to these units is granted. But these nuclear units do not exist in splendid isolation. Part of Applicants' announced purpose in the joint

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* Tr. p. 1101. Applicants argued that by offering access "we are giving them [intervenors] everything that any other of us get from the nuclear plant." There appears to be an obvious nexus between this factual assertion and elements of the "situation" which would be covered by the assumptions arguendo.

construction of these plants is to provide for system-wide needs. Applicants anticipate that the plants will be used to enable them to pool, to sell power to one another and to share reserves. These benefits of the specific nuclear plants under consideration may not be available to other electric entities even according to the stipulation offered by Applicants. Thus, the relationship between these plants and the assumed "situation" is discernible. Accordingly, the Board sees no current benefit in suspending progress toward an evidentiary hearing in order to conduct a separate hearing on Applicants' proposal.

III. RELIEF

Applicants also contend that even postulating the existence of a "situation", the Board should examine the relief offered in their proposal to determine if it so isolated the "activities" as to require termination of further proceedings. In effect, the other parties would be deprived of any opportunity to argue for modification of the proposed relief.

Justice and the other parties urge that the issue of nexus is not divisible, one part dealing with whether a "situation" inconsistent with the antitrust laws would be created or maintained, the other with whether a relief proposal is adequate to alleviate any "situation" found to exist. We agree that the nexus to which the Commission referred in its Waterford opinion is the connection between a "situation" inconsistent with the antitrust

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.* Arguments by the Staff, Justice and intervenors as to what constitutes appropriate relief should be considered by the Board in conjunction with any relief proposals submitted by Applicants.

IV. CONCLUSION

Opposition parties still face the not inconsiderable burden of proving their allegations relating both to the "situation" and to the "activities." However, we are not persuaded that Applicants' proposal offers a reasonable opportunity to foreshorten these proceedings. The basic assumptions arguendo insulating as they do any assumptions relating to the effect of operating the nuclear facilities for which license is sought from other system-wide activities creates an artificial demarcation.

Applicants' suggestion that even if a "situation" exists, the Board should consider only the specific relief which they assert will either (1) alleviate the "situation", or (2) separate the "situation" from the "activities" under the license, seems based on an incorrect premise. If the Board is satisfied

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* Of course, the relief must be reasonably related to the activities which affect the situation.

that there is a nexus between the "situation" and the "activities", then the Board is required to fashion relief "with such conditions as it deems appropriate." 42 U.S.C. §2135(c)(6). In determining what constitutes appropriate relief, the Board cannot be bound by the terms of a particular proposal suggested by Applicants or, indeed, any other party or combination of parties. It is the Board's responsibility to determine what constitutes appropriate relief and there is no statutory provision for delegation of that responsibility. Faced with a "situation" which affects "activities" under the license, the Board must be satisfied that any relief proposed by the parties is appropriate. Louisiana Power and Light Company (Waterford Unit No. 3), LBP-74-78, RAI-74-10-718, 719, 721-23 (October 24, 1974).

For the foregoing reasons, Applicants' proposal and motion is DENIED.

ATOMIC SAFETY AND LICENSING BOARD

John H. Brebbia, Member

John M. Frysiak, Member

Douglas V. Rigler, Chairman

Issued this 30th day of June, 1975 at Bethesda, Maryland.

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NUCLEAR REGULATORY COMMISSION

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CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	50-440A
	)	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
30th day of June 1975.

Eugenia M. Pleasant
Office of the Secretary of the Commission

*1. Minutes of Conference Call of 6/26/75
2. Ltr Rigler to Charno, Jessy, Goldberg, Reynolds dtd 6/30/75
3. Ruling of Board with respect to Applicants' Proposal for Expediting the Antitrust Hearing Process

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COMPANY	)	50-441A
	)	
(Davis-Besse Nuclear Power	)	
Station, Unit No. 1; Perry	)	
Nuclear Power Plant, Units 1&2)	)	

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