UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

REPLY OF THE DEPARTMENT OF JUSTICE IN OPPOSITION TO APPLICANTS' ARGUMENT IN SUPPORT OF ITS PROPOSAL FOR EXPEDITING THE ANTITRUST HEARING PROCESS

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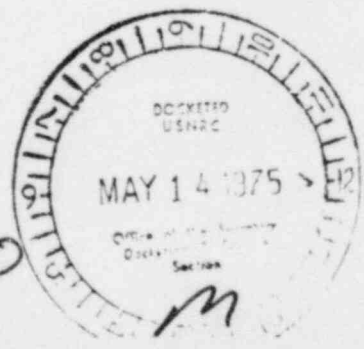

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On March 14, 1975, Applicants filed a motion entitled "Proposal for Expediting the Antitrust Hearing Process" ("Proposal") which proported to offer a method by which the present hearing could be materially shortened. The City of Cleveland ("City") by memorandum dated March 21, 1975, and the Department of Justice ("Department") and the Nuclear Regulatory Commission Staff ("Staff") by separate memoranda dated April 7, 1975, responded to Applicants' Motion. During the Prehearing Conference held on April 21, 1975, Applicants, without prior notice to anyone, submitted yet another brief in support of their Proposal entitled "Applicants' Argument in Support of its Proposal for Expediting the Antitrust Hearing Process" ("Argument"). In response thereto, all other parties were granted the opportunity to submit a written reply by May 5, 1975. Subsequently, the reply date for the Staff was extended to

May 12, 1975, and the Department filed a timely Motion which was not opposed by anyone, to file its reply on the same date as the Staff.

This is at least the fourth brief 1/ in which the Department has responded to Applicants' nexus argument. Since the subject matter has been so thoroughly covered in the other briefs, and in particular the two most recent submissions cited in footnote 1, the Department will only briefly outline its position and then respond to a few new points raised by Applicants.

I

The only certain effect of accepting Applicants' proposal for a preliminary hearing on the nexus issue would be to delay further a much delayed proceeding. Applicants would have us stop discovery, which finally is starting to move along briskly, prepare for a hearing, hold this hearing and await a Board ruling. "If the Board should decide that nexus does exist, Applicants' submission contemplates a full-blown contested hearing on the assertions of anticompetitive conduct." (Applicants' Argument, Paragraph 10) Minimum delay attending such a procedure would be

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1/ Joint reply of AEC Regulatory Staff, Department of Justice, and Intervenors to Applicants' Response to Joint Statement regarding the contentions and matters in controversy. Filed June 14, 1974; Response by the Department of Justice to Applicants' Motion for Summary Disposition, filed October 10, 1974 ("Response"); Answer of the Department of Justice in Opposition to Applicants' Motion entitled "Proposal for Expediting the Antitrust Hearing Process," filed April 7, 1975 ("Answer").

at least three to four months. Meanwhile, Applicants will have the opportunity to improve their competitive position by continuing their anticompetitive activities.

If such a request were made with respect to an issue that had never before been considered by the Board, it would perhaps merit serious consideration. However, the Board has already considered arguments on nexus on two different occasions and has not accepted Applicants' arguments either time. To stop all proceedings now to consider virtually the same proposal for a third time would merely waste additional time and delay the ultimate hearing in this case.

II

The Department has extensively argued on its position with respect to nexus in its Response which is hereby incorporated by reference. Briefly stated, the Department contends that consideration of the question of nexus requires a consideration of the relationship between only two things: (1) "a situation inconsistent with the antitrust laws" and (2) "activities under the license."

The situation inconsistent with the antitrust laws includes many activities engaged in by Applicants. Thus, Applicants' dominance in transmission facilities and refusals to wheel power for anticompetitive reasons constitute part of the situation inconsistent. Furthermore, denial of access to vital facilities as well as other practices engaged in by Applicants have contributed significantly to the situation inconsistent with the antitrust laws.

Activities under the license include the planning, building, and operation of nuclear facilities as well as the integration of such a facility into an effective bulk power supply system. Central to activities under the license is the marketing of power. The requisite nexus is simply that the activities under the license must "create or maintain" the situation inconsistent with the antitrust laws. In this case, activities under the license will maintain a situation inconsistent with the antitrust laws by giving Applicants access to low-cost, large unit, base-load nuclear power which will strengthen and expand Applicants' system.

The Department's analysis of the nexus requirement was accepted as fundamentally sound by the Hearing Board in Waterford. 2/ As we have demonstrated in prior briefs, Applicants' interpretation tortures the plain language of the statute, ignores the purposes which underlay its enactment and consistently confuses questions of whether there is a "situation inconsistent" with questions of what relief is appropriate to remedy any such situation. Since this has all been set forth in detail, the remainder of this brief deals only with the points which have some element of novelty.

III

At paragraphs 2 and 3 of Applicants' Argument, Applicants admit that the presently proposed procedure has no precedent.

2/ In the Matter of Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), Docket No. 50-328A, Memorandum and Order of September 28, 1973, CLI-73-25, RAI-73-9-619 ("Waterford").

However, Applicants go on to state that such a procedure is contemplated by Section 105c of the Atomic Energy Act and selectively quote from the legislative history thereof.

The full quotation, taken from the testimony of Mr. Comegys before the Senate Antitrust and Monopoly Subcommittee on May 6, 1970 reads:

> On this basis, antitrust review would consider the contractual arrangements and other factors governing how the proposed plant would be owned and its output used. We would also consider the arrangements under which it would be built and supplied. No broader scope of review is contemplated, cognizant as we are of the need to avoid delays in getting atomic electric plants into operation. We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review. 3/

The Department's position is fully consistent with Mr. Comegys' statement. We have not engaged in a wide-ranging scrutiny of general industry affairs, rather we have scrutinized conduct which is essentially connected with the plant under review. We have inquired into the specific contractual arrangements and other factors governing how the proposed plant would be owned and its output used. We have attempted to apply to particular fact situations the standard of Section 2, that of monopoly power plus the deliberate exercise of that power. The Department submits that it should be given an opportunity to prove, on all the facts that Applicants' activities under the license would significantly

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3/ Hearings on Prelicersing Antitrust Review of Nuclear Power Plants Before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess., Pt. 2, at p 366 (1969-1970).

maintain the monopoly situation which has resulted from the totality of the scrutinized conduct. To preempt the Department's opportunity to discover and present all the facts on this issue, as would be done by Applicants' Proposal, would be grossly unfair. Such a procedure was never contemplated by Section 105c, and Mr. Comegys' statement does not in any way suggest that parties be forced to demonstrate the required nexus before they are given an opportunity to gather all the facts which they can use to prove the nexus.

Applicants have cited the portion of the Waterford decision which states that "if it becomes apparent at any point that no meaningful nexus can be shown, all or part of the proceeding should be summarily disposed of." However, Applicants have taken the position that Waterford allows the question of nexus should be considered at every point in the proceeding. This is clearly a strained interpretation of Waterford. The question of nexus was taken up when this Boar framed the matters-in-controversy, and a decision thereon was reached. Nexus was also considered when the Board acted on Applicants' Motion for Summary Disposition with respect to AMP-Ohio, and another decision on that issue was reached. It is submitted that the next time nexus should be considered is when all the evidence is in. To accept Applicants' interpretation of Waterford, the Board would have to consider the issue of nexus at any time and as many times as Applicants wished to present that issue for consideration. Such an interpretation of Waterford is strained because it can lead

to extensive delays. Since Applicants have already had their arguments on this matter considered on two separate occasions, the Board had indeed followed the Waterford directive. Furthermore, Applicants will have a third hearing on this issue after all the evidence is in. To give Applicants yet another hearing on this issue goes far beyond the directive contemplated by Waterford.

IV

At paragraph 4 of Applicants' Argument, they have stated that it is appropriate for the Board to ascertain at an early stage in the hearing process whether the matters-in-controversy came within the jurisdictional parameters of the legislative grant. We submit that by drawing up the matters-in-controversy as it did, the Board decided that all matters-in-controversy could have the requisite nexus to the activities under the license to render jurisdiction in the Board. Now, it is up to the Department to prove this and all must be given a full, fair opportunity to do this on the hearing record.

In this same paragraph, Applicants cite City of LaFayette, Louisiana v. Securities & Exchange Commission, 454 F.2d 941, 953 (D.C. Cir. 1971), for the proposition that administrative hearings on allegations of anticompetitive conduct is dependent in each case upon first satisfying "the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application (pending before the particular agency)."

What Applicants have not quoted is a portion of the opinion's next paragraph which states:

> Development of this [nexus] requirement must await consideration in the first instance by the agency involved, and an analysis of the factual context. 4/

Thus, the LaFayette opinion itself makes it clear that nexus must be determined in the context of the factual situation and not in the abstract as proposed by Applicants.

The Atomic Safety and Licensing Board in Farley 5/ agreed with the LaFayette court and stated that the determination of the existence of a reasonable nexus will be undertaken only after the factual context is determined. To allow Applicants to force a hearing on the question of nexus without allowing all parties to fully develop the factual context would clearly be inconsistent with the LaFayette court and the Farley Board's approach.

V

At paragraphs 5 and 8 of the Applicants' Argument, they assert that their proposal assumes arguendo the existence of an anticompetitive situation in the relevant geographic and product markets which is equivalent to the "situation" which would have been established at an evidentiary hearing if the opposing parties

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4/ 454 F.2d at 953.

5/ In the Matter of Alabama Power Company, Joseph M. Farley Nuclear Plant, Units 1 and 2 (Docket Nos. 50-348A, 50-364A) RAI-73-285 at 88 (Feb. 9, 1973).

had been able to prove the affirmative of each of the first ten matters-in-controversy specified in the Board's Prehearing Conference Order No. 2. As noted in the Department's Answer, this is not the case. Only carefully limited portions of the matters-in-controversy have been assumed; other portions have been omitted. The Applicants have assumed their good faith in dealing with others. Discovery thus far indicates that this is not the case. Therefore, these assumptions are materially deficient.

VI

At paragraphs 11-13, Applicants again refer to their proposed license conditions. Therein, Applicants state that these proposed conditions are not designed to remedy a situation inconsistent with the antitrust laws but rather to "define" the "activities under the license."

This is the frankest revelation thus far of the basic nature of Applicants' nexus theory: that Applicants can set limits in advance upon the Commission's consideration of their prior conduct (i.e., "the situation inconsistent") simply by announcing their willingness to accept certain license conditions of their own devising. It is basically the Department's position, set forth in detail in our prior response, that the "situation" is what it is; Applicants can not make it (and this Commission's inquiry) go away by their unilateral proposal of restrictions against themselves.

VII

In paragraphs 16-18 of their argument, Applicants state that the Department has never suggested how their refusal to wheel third-party power relates to their activities under the license. This is precisely the point explicitly made in the Response by the Department of Justice to Applicants' Motion for Summary Disposition. At pages 3-9 of the referenced response, the Department explicitly details how the refusal to wheel is connected with activities under the license. In the interest of saving time, that argument will not be repeated here but shall merely be incorporated by reference.

CONCLUSION

In view of the arguments presented by the Department in its Response, its Answer and the present filing, it is submitted that Applicants' Motion be denied.

Respectfully submitted,

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