4-7-75

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)	)	

ANSWER OF THE DEPARTMENT OF JUSTICE IN OPPOSITION TO APPLICANTS' MOTION ENTITLED "PROPOSAL FOR EXPEDITING THE ANTITRUST HEARING PROCESS"

On March 14, 1975, Applicants filed a motion entitled Proposal for Expediting the Antitrust Hearing Process which proports to offer a method by which the present hearing could be materially shortened. Applicants' Proposal offers to concede, arguendo, the existence of certain general facts which are elements of a situation inconsistent with the antitrust laws, and to submit the issue of nexus to the Atomic Safety and Licensing Board ("Board"). Under this method, if the Board found that no nexus existed, Applicants' proposed license conditions would be imposed and the proceedings would terminate. If, however, the Board found that nexus did exist, it would not proceed to develop appropriate license conditions, but

instead, Applicants would withdraw their assumptions arguendo, and this hearing would continue.

The Department of Justice ("Department") opposes the procedure proposed by Applicants for the following reasons:

I. The proposed procedure is based upon a fundamental misconception of the nexus requirement on the structure of Section 105(c);

II. There is no authority to support adoption of the proposed procedure;

III. The assumptions arguendo are insufficient, standing alone, to establish a situation inconsistent with the antitrust laws;

IV. The Proposal eliminates any possibility of a fair hearing;

V. The proposed license conditions are inadequate to remedy virtually any situation which could be found to be inconsistent with the antitrust laws;

VI. Implementation of Applicants' Proposal will further delay this proceeding.

I. APPLICANTS' MISCONCEPTION CONCERNING NEXUS

Applicants' present Motion 1/ basically represents another effort to argue that this Commission has no jurisdiction to

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1/ Although denominated a Proposal, the operative language used by Applicants at page 11, paragraph 11 of their March 14, 1975 submission clearly requires this paper to be treated as a motion.

consider the antitrust implications of refusals to wheel power and no jurisdiction to order wheeling as one of the remedies for a "situation inconsistent with the antitrust laws." Like previous motions which Applicants have filed on this subject, it is based upon a fundamental misunderstanding of the nexus requirements and the structure of Section 105(c). See Response by the Department of Justice to Applicants' Motion for Summary Disposition, filed October 10, 1974.

In essence, Applicants are now proposing that by agreeing to certain license conditions which would remedy some of the elements of the anticompetitive situation which they have created, they would eliminate any nexus between the remaining elements of the anticompetitive situation and the "activities under the license." Thereby they confuse the issues of whether there is a "situation inconsistent" and whether that situation would be maintained by the unconditioned issuance of a licnese (the "nexus"), with the issue of the adequacy or inadequacy of particular forms of antitrust relief. In fact, the last issue can be reached by this Board only after the first two issues have been resolved in our favor.

As the Department explained in opposition to one of Applicants' previous efforts to eliminate any consideration of the wheeling issue,

> the statutory finding required here of the Board is clearly concerned with the relationship or nexus between only two things: (1) "a situation inconsistent with the antitrust laws" and (2) "activities under license." The requisite nexus is simply that

> the activities must "create or maintain" the situation. This is a far cry from the assumption implicit in Applicants' Motion that AMP-Ohio must allege a nexus between a specific anticompetitive act (i.e., a refusal to wheel power from a third party to the City of Cleveland) and the activities under the license.

In other words, there is a sufficient nexus in this case if the unconditioned issuance of the licenses which Applicants seek would "maintain" a situation inconsistent with the antitrust laws. If there is such a nexus, then the Board goes on to consider the question of what measures of relief are necessary to remedy that situation. Applicants' Motion, on the other hand, erroneously assumes that the licnese conditions which they have unilaterally expressed a willingness to accept can somehow alter the nature of the "situation inconsistent" or can alter the relationship between that situation and the activities under the licnese. A fair analogy of what they are suggesting is that a defendant in a Sherman Act Section 2 monopolization case would defeat the jurisdiction of the court to hear the case on the merits and determine what measures of relief are required by simply expressing their willingness to alter their conduct in a variety of ways which, if implemented prior to the filing of suit, would have been barely sufficient to keep their conduct from being regarded as monopolistic.

It would plainly defeat the remedial purposes of Section 105 if Applicants could limit the Commission's scrutiny of their complete pattern of anticompetitive conduct or could frustrate the normal remedial jurisdiction of the Commission simply by unilaterally imposing conditions on themselves.

II. APPLICANTS' PROPOSAL IS NOT AUTHORIZED BY THE COMMISSION'S RULES OR DECISIONS

Applicants have cited no authority, whatsoever, to support the adoption of the procedure they are proposing to this Board. There is none.

Applicants cannot utilize Section 2.749 of the Commission's Rules of Practice (10 C.F.R. 2.749), the Summary Disposition procedure, if only because the submissions in support of their Proposal are materially deficient. Applicants have not filed a statement of undisputed material facts, which is required before a Motion for Summary Disposition may be entertained. The assumptions arguendo cannot be regarded as a substitute for such a statement, since Applicants themselves have explicitly reserved a right to dispute the validity of these assumptions.

Applicants have attempted to analogize their present proposal to the procedure adopted by the Commission in Waterford (Louisiana Power and Light Company, CLI-73-25, RAL-73-9, September 28, 1973), but there is little or no similarity between the instant situation and that in Waterford. In Waterford, it was assumed, arguendo, that a situation inconsistent with the antitrust laws existed and that it would be maintained by activities under the license; the Board was therefore able to directly consider the question of the adequacy of the proposed remedy. In the present case, Applicants are only offering to assume certain general facts related to the existence of a situation inconsistent with the antitrust laws; they would require the other parties to this proceeding to prove

the remaining unassumed facts necessary to establish the situation inconsistent, as well as the further facts necessary to establish nexus.

Furthermore, in Waterford the proposed license conditions were accepted as being sufficient to remedy the situation inconsistent by the Department and the NRC Staff. The sole question before the Board there was the adequacy of agreed-upon conditions to remedy the situation and to protect an intervenor. In the present proceeding, no one has accepted the offered license conditions as being sufficient to provide such a remedy. Indeed, the Department will take this opportunity to note our substantive rejection of the Applicants' proposed conditions. Thus, it is clear that the Applicants' proposed procedure is not truly comparable with the Waterford procedure.

III. THE ASSUMPTIONS ARGUENDO ARE INSUFFICIENT TO ESTABLISH A SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

The Department submits that Applicants' assumptions arguendo, standing alone, are insufficient to establish a situation inconsistent with the antitrust laws. As noted at pages 2-3 in the "Answer of the City of Cleveland in Opposition to Applicants' Proposal For Expediting the Antitrust Hearing Process", Applicants' assumptions are insufficient to constitute even an admission of a bare bones statement of issues. For example, the Applicants' assumptions contain the repeated assertion that they recently modified their conduct in a pro-competitive manner; the Department disputes this assertion. It is clear that, under

Applicants' Proposal, the other parties will be required to make lengthy and detailed factual presentations in this proceeding. If Applicants are unhappy with the result, they will simply withdraw their assumptions and we can all begin again.

IV. APPLICANTS' PROPOSAL DENIES THE DEPARTMENT ALL RIGHT TO A FAIR HEARING

Applicants' Proposal is yet another attempt to obtain a determination as to whether or not a sufficient nexus exists to allow the Board to condition Applicants' license. However, before the Board can determine whether a sufficient nexus exists, the factual basis for the situation inconsistent with the anti-trust laws must be established. Applicants' Proposal affords the other parties to this proceeding absolutely no opportunity to present the underlying factual basis of a situation inconsistent. Since nexus can only be determined when a clear detailed picture of the situation inconsistent is present, depriving a party of the opportunity of presenting facts relating to the existence of such a situation deprives that party of a fair hearing on the nexus issue.

This Board has recognized that evidence of nexus might be obtained during the discovery process and that the parties might utilize such evidence to support their allegations of nexus. (Order on Applicants' Motion for Summary Disposition, p. 3). To abruptly halt the discovery process, as proposed by Applicants, would deprive the Department of any further opportunity to gather

additional evidence of nexus, and would deprive the Department of the opportunity to present its case.

V. THE PROPOSED LICENSE CONDITIONS ARE INADEQUATE TO REMEDY A SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

The Department submits that the proposed licnese conditions are insufficient to resolve this proceeding, because they are wholly inadequate to remedy virtually any situation which could be found to be inconsistent with the antitrust laws.

Initially, we note that the Department has taken the position that licence conditions cannot be framed at all until the detailed nature, scope and anticompetitive effect of a situation inconsistent have been determined. Only then can an appropriate remedy be framed (See Motion by the Department of Justice for a Protective Order filed September 9, 1974, pages 6-7). This Board has agreed with this position (October 11, 1974, Order on Objections to Interrogatories and Document Requests, paragraph 146, pages 45-46). In the present situation, since discovery is still in progress, since depositions have not been taken and since all of the requested documents have not been produced, it is impossible to formulate appropriate license conditions.

Furthermore, the proposed license conditions could not possibly remedy any situation inconsistent with the antitrust laws that may exist in this case. Even a cursory analysis of the proposed conditions reveals that they provide a basis for the perpetuation of a situation inconsistent, rather than providing a remedy for it. Thus, for example, wheeling is conspicuously

absent from the proposed conditions, leaving the Applicants in monopoly control of the vital transmission network. Applicants' proposed access commitment (Commitment 1) grants access only upon "mutually agreed-upon" terms. Applicants' past offers of access, however, have been upon clearly unreasonable terms. Since Applicants could continue to deny access by merely continuing their present behavior, this commitment is totally meaningless. Other commitments suffer from similar deficiencies, i.e., they would not remedy any situation inconsistent.

VI. IMPLEMENTATION OF APPLICANTS' PROPOSAL WILL FURTHER DELAY THIS PROCEEDING

The Department submits that implementation of Applicants' proposal will further delay this proceeding. To date, Applicants have caused a virtual standstill in the discovery phase of this case on at least two occasions. On December 2, 1974, they failed to produce documents and answer interrogatories pursuant to the Board's October 11, 1974 Order. Even now, they have failed to screen, list and provide information concerning the vast majority of documents for which CEI claims privilege, despite the fact that they were ordered by this Board to do so on or before December 2, 1974, the day privilege had to be claimed. Certainly, Applicants should have done so at some time during the three and one-half months between December 2, 1974 and the middle of March 1975 when the Department requested production of privileged documents before a special Master.

Now Applicants are attempting to further disrupt discovery by seeking the complete suspension of discovery in order to engage in the clearly futile exercise of considering their present Proposal.

We submit that another delay in discovery is completely uncalled for, especially since Applicants advanced substantially the same arguments regarding nexus in opposing AMP-Ohio's petition to intervene and in Applicants' Motion for Summary Disposition of AMP-Ohio. Since the proposed process would constitute the third time the nexus issue has been raised by Applicants and ruled upon by this Board, it is clear that adoption of Applicants' Proposal would only serve to delay, not expedite, this proceeding.

VII. CONCLUSION

For the foregoing reasons, the Department urges that Applicants' Motion be denied.

Respectfully submitted,

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April 7, 1975

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CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER OF THE DEPARTMENT OF JUSTICE IN OPPOSITION TO APPLICANTS' MOTION ENTITLED "PROPOSAL FOR EXPEDITING THE ANTITRUST HEARING PROCESS" have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class or airmail, this 7th day of April 1975.

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