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 and	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	NRC Docket Nos. 50-346A
(Davis-Besse Nuclear Power Station)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	NRC Docket Nos. 50-440A 50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

ANSWER OF NRC STAFF TO APPLICANTS' MOTION FOR A LIMITED HEARING

On March 14, 1975, Applicants filed with the Board a motion for a limited hearing based upon two unilateral submissions. The two submissions are entitled "assumptions arguendo" and "applicants proposed license conditions" in the form of "commitments".

On March 20, 1975, this Board issued Prehearing Conference Order No. 4 which provided, inter alia, "Parties desiring to respond to Applicant's Proposal shall do so by April 7, 1975."

On March 21, 1975, the City of Cleveland filed an answer in opposition to Applicant's motion. On April 7, 1975, the Department of Justice also filed an answer in opposition to Applicant's motion.

All of the parties in this matter have expressed on the record the desire to expedite this proceeding. The Staff reiterates its position that it is willing to pursue every reasonable effort to shorten the time

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period within which an initial decision will be issued in this matter. To this end, the Staff, the Department of Justice and the intervenors have been attempting to complete the discovery process, but have been faced with one delaying tactic after another by Applicants.

For example, during the past five months there have been three prehearing conferences concerning discovery, the parties have filed various briefs and memoranda concerning discovery and some of the parties met with Chairman Farmakides in Cleveland, Ohio concerning discovery and still the Applicants have not provided the opportunity to examine a large number of the documents requested in August 1974 which are essential for the parties to complete their discovery efforts and prepare for hearing. 1/

I.

Applicant's motion, Staff submits, proposed a new procedure that is not contemplated by the Commission's Waterford opinion, 2/ (hereinafter "Waterford") other Commission decisions, or the Commission's Rules of Practice. In fact, the Staff believes that it is very probable that the procedure recommended by the Applicants would not expedite matters but would further delay the proceeding. 3/

1/ See "Brief of AEC Regulatory Staff On Its Motion To Compel Production And Delivery of Documents," pp. 1-4, filed January 2, 1975.

2/ Louisiana Power and Light Co. (Waterford Steam Electric Generation Station, Unit 3) RAI-73-9 at p. 622, September 28, 1973.

3/ See Answer of the City of Cleveland, p. 2, filed March 21, 1975.

The Applicants propose a procedure that is based on their interpretation of the Commission's order in Waterford. The Staff does not agree with the Applicants' interpretation of this order as discussed below. The appropriate Waterford language that applicants apparently rely on is as follows:

> The Applicant may, for example, wish to propose limiting the hearing to the matter of...relief...,assuming arguendo that situations inconsistent with the antitrust laws exist and would be created or maintained by activities under the license. 4/

In our view applicant's interpretation misses the mark. Waterford, the Staff submits, requires that if and when an Applicant is willing to both unequivocally assume all the matters in controversy and stipulate to nexus, then the Board could consider evidence relating to the appropriate remedy only. This procedure would then be appropriate since facts need not be proved in an evidentiary hearing.

Applicants' proposal is not in conformance with and is a far cry from Waterford. It contains none of the required stipulations as to (1) all the matters in controversy, and (2) nexus. Before a hearing can be held on the question of appropriate relief, Applicants' must first be willing to stipulate to a situation inconsistent with the antitrust laws that is created or maintained by the activities under the license to the satisfaction of all parties. Applicants' proposal clearly falls short of this. If applicants were willing to follow in fact the Waterford procedure by unequivocally assuming that a situation inconsistent with the antitrust laws

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4/ RAI-73-9, p. 622.

exists by stipulating to all of the matters in controversy and that such situation would be created or maintained by activities under the license, then, Staff would be in a position to support a hearing limited to the question of remedy, including the question of access to transmission which has been raised by applicants and the intervenors. Such a procedure should materially shorten the hearing process.

II.

In addition to Applicants' misconstruction of Waterford as a basis for their motion, Staff must also point out that the motion itself is based on several definitions, factual and legal assumptions with which Staff cannot agree.

A. The first assumption is applicants' misconstruction of the role of nexus in an antitrust hearing.

Waterford does contain language to the effect that a party must prove and plead a nexus between the situation inconsistent with the antitrust laws and the activities under the license. With respect to pleading nexus, this Board has ruled that all parties have adequately pleaded that the requisite nexus exists with the possible limited exception of the intervenor AMP-O. Thus, Applicants' first assault on nexus took place before July of 1974 while the Board was framing the matters in controversy. The issue at that time was whether nexus had been adequately pleaded by the parties.

With respect to the proving of nexus, it is an ultimate fact to be

determined by the Board, (not by Applicants) after considering the record and the applicable law. The parties are now preparing to prove the relationship between the "situation" and the activities under the license in the course of an evidentiary hearing. Applicants will again have an opportunity to argue that nexus has not been proven after presentation of the case in chief by all other parties. This proceeding is not at that stage now. Applicants are not now making any new nexus arguments not heretofore disposed of by this Board.

In the matter of Alabama Power Company, Joseph M. Farley Nuclear Plant, Unit 1 and 2, (Docket Nos. 50-348A, 50-364A, RAI 73-285) at p. 88 (Feb. 9, 1973), the Board specifically addressed itself to the question of the role of nexus in determining the scope of an antitrust hearing. We believe that that decision is clearly applicable to the nexus issue raised by Applicants here and should be controlling. The appropriate language is:

> What Applicant does not quote [in the City of Lafayette v. S.E.C. 454 F. 2d 941, 953] is the opinion's next sentence which says: "Development of this [nexus] requirement must await consideration in the first instance by the agency involved, and an analysis of the factual context." Ibid. The development of this factual context is precisely what the Department of Justice and the intervenors are proproposing to do. When the task is completed we will determine the existence of the reasonable nexus... 5/

5/ RAI 73-285, at p. 88 (February 9, 1973).

B. Applicants' second assumption concerns the meaning of the phrase "situation inconsistent with the antitrust laws." As defined by applicants the meaning of this crucial phrase is restricted to the partial and limited assumptions arguendo proferred by Applicants. Thus, Applicants' could unilaterally control the all important definition of the "situation" because no other issues or facts could be considered by the Board. Staff submits that the definition of the "situation" if it exists is determined by proof of the market structure, acts, practices, structural interrelationships, refusals, and anticompetitive devices in the existing markets and in light of the issues framed by the Board or by a full stipulation to all the matters in controversy pursuant to Waterford.

The question of the definition of the "situation" was considered by the Board in Farley:

> The purpose of receiving such evidence...would be to permit this Board to understand what the "situation" in the appropriate market is, so that the "situation" can be measured against the antitrust laws specifically enumerated in Section 105a of the Act to make a determination as to (1) whether the situation is, or may become, "inconsistent with those laws," and (2) if so, whether the "activities under the license" would "create or maintain" said situation. It should be emphasized that the statute does not require us to determine whether the Applicants "activities under the license" or any other activities of Applicant are or are not "inconsistent" with these laws. It is the competitive "situation" as a whole (with emphasis on the structure of the market, as the word "situation" clearly exists), not particular individual parts thereof, which we must measure. This responsibility has been given by Congress to this Commission and to no other agency. 6/ (emphasis supplied).

6/ Ibid., p. 86.

Accordingly, Staff submits that the assumptions arguendo relied upon by the applicants in the motion are inadequate to establish a "situation" to enable the Board to measure that "situation" against the antitrust laws enumerated in §105(a) of the act so as to determine the appropriate relief.

C. Applicants' third assumption is based on a definition of the phrase "activities under the license." In their motion, applicants attempt to limit the definition of this crucial phrase (and thereby the scope of appropriate relief) to Applicants unilaterally proposed license conditions together with the authority to operate the nuclear plant. Staff cannot agree with this definition. The Staff views "activities under the license" "to embrace the planning, building, and operation of a nuclear facility as well as the integration of such a facility into an effective bulk power supply system." 7/ The Staff submits that applicants cannot restrict the meaning of this phrase to their proposed and unilateral "committments" in the form of license conditions.

The applicants in connection with their assumption have included therein certain proposed license conditions which they assert as representing policies observed by each applicant. Applicants rely upon these proposed license conditions as being appropriate under the circumstances, if adopted, to dispose of this proceeding (Applicants'Motion, page 5, paragraph 7). The Staff cannot agree that these license conditions are appropriate or adequate to remedy the alleged situation inconsistent with the antitrust laws which is created or maintained by the activities under the license. In this regard,the Staff believes as follows:

7/ Regulatory Guide 9.1, Section C (December 1973).

1. It is prejudicial and premature for Applicants to submit unilateral "license conditions" to this Board at this stage of the proceeding, when the other parties have not had an opportunity to submit their views on the scope of appropriate relief.

2. Applicants' unilateral license conditions are inadequate in that they would not remedy the alleged situation inconsistent with the antitrust laws in this proceeding and they would require of applicants substantially less than other license conditions believed by Staff to be appropriate in comparable circumstances.

Staff does not intend to demonstrate at this time all the material omissions and inadequacies in the proposed unilateral license conditions filed by applicants. Staff is prepared to do so at the Board's request. Since Applicants do not intend to withdraw the unilateral license conditions (Applicant's Motion, page 5, note 3), Staff for purposes of the evidentiary hearing, proposes to treat inadequacies contained in those license conditions as admissions against interest.

III.

In addition to the above discussion concerning "activities under the license" Applicants have completely overlooked the broad powers of this Board in order to fashion an appropriate remedy once a situation inconsistent with the antitrust laws is established. Section 105(c)(6) of the Atomic Energy Act of 1954, as amended states:

> On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

One of the express omissions of Applicant's proposed unilateral license conditions is the general requirement that a licensee engage in third party wheeling without limitation.

While the Supreme Court has determined that the refusal of an electric utility to wheel third party power may constitute a violation of the Sherman Act, 8/ the Staff believes that the question of third party wheeling in this proceeding is an issue that will have to be considered in connection with remedy. This is so regardless of whether or not the refusal to wheel is also a situation inconsistent with the antitrust laws that will be created or maintained by activities under the license.

In a very recent decision in connection with a petition to intervene this issue was set forth very clearly. 9/

> Contention No. 1, relating to limitations on the right of the Cooperatives to the use of wheeling and transmission facilities of the applicant, is adequate to state antitrust implications sufficient to require development at an evidentiary hearing.
>
> Meaningful access to nuclear generated power on reasonable terms and conditions may well be denied the Cooperatives by limiting transmission to the extent they have wheeled out a portion of their share of the generated power. If the need for supplemental power, including peaking, intermediate or emergency power, can only be met by purchases from the

8/ Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973).

9/ In the Matter of Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1). Docket No. 50-482A, Memorandum and Order Granting Petition of Kansas Electric Cooperatives, Inc. For Leave To Intervene And For An Antitrust Hearing, p. 7 (March 27, 1975). RAI 75- .

applicant, this could result in a practical foreclosure of the Cooperatives' options of obtaining bulk power from another utility, or from their own generation facilities.

The Board may wish to fashion its relief, after the facts have been presented, upon the ground that relief in an antitrust case must be "effective to redress the violation" and "to restore competition." 10/ It has long been recognized that independent regulatory commissions have discretion as to the choice of remedy. 11/ Staff is prepared to develop a record at the evidentiary hearing, concerning the factual, economic, and legal necessity for generalized third-party wheeling as appropriate relief in the matter at hand. To this end, the Staff is ready to expeditiously proceed with this matter.

10/ Ford Motor Company v. U.S., 405 U.S. 562 (1972).

11/ L. G. Balfour v. FTC, 442 F. 2d 1 (1971); Jacob Siegal Company v. FTC, 327 U.S. 608 (1946); Ecko Products Company v. FTC, 347 F. 2d 745, 753 (7th Cir. 1965); FTC v. Sperry and Hutchinson Company, 405 U.S. 233 (1972).

Conclusion

For the reasons discussed above, Staff is opposed to Applicant's motion.

Respectfully submitted,

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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 7th day of April 1975.

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CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER OF NRC STAFF TO APPLICANTS' MOTION FOR A LIMITED HEARING, dated April 7, 1975, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or airmail, this 7th day of April 1975:

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