5-12-75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

SUPPLEMENTAL STATEMENT OF NRC
STAFF IN OPPOSITION TO APPLICANTS'
MOTION FOR A LIMITED HEARING

I.

At Prehearing Conference #4 held April 21, 1975, Applicants filed with the Board and distributed to the parties a sixteen page pleading entitled "Applicants' Argument In Support of Its Proposal For Expediting The Anti-trust Hearing Process." Inasmuch as the NRC Staff was not prepared to respond orally to this pleading, it requested and the Board granted the Staff additional time to respond in writing. 1/

This reply by NRC Staff is intended as a supplement to the "Answer of NRC Staff To Applicants' Motion For A Limited Hearing" filed April 7, 1975. That Answer opposed Applicants' Motion for the Following reasons:

1/ In this regard Staff notes that 10 CFR §2.730(c) provides, "The moving party shall have no right to reply, except as permitted by the presiding officer..."

1. It is very probable that the new procedure proposed by Applicants would not expedite matters but would further delay this proceeding.

2. The new procedure, Applicants' claim, is based on the Commission's order in Waterford.* However, a plain reading of Waterford requires a stipulation both as to all the matters in controversy, and to nexus, as conditions precedent to a limited hearing on the question of relief. Here, Applicants are willing to stipulate to neither. In addition, in Waterford, all parties consented to the procedure. Here, no parties consent.

3. This Board has already ruled that nexus has been adequately pleaded by all parties with the possible limited exception of AMP-O. Applicants' arguments were heard with respect to nexus prior to Prehearing Conference Order #2 and before the formulation of the matters in controversy by the Board. As 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. Applicants will again have an opportunity to argue that nexus has not been proven after presentation of the case in chief.

4. In the Matter of Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2, RAI 73-285 at p. 288) the Board clearly recognized that development of the nexus requirement must await consideration and analysis' of the factual context. After this is done, the Board will ultimately determine the existence of a reasonable nexus.

---

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

5. Applicants have attempted to limit the phrase "situation inconsistent with the antitrust laws" to its voluntary and unilateral assumptions. The Farley Board, supra, rejected this same argument in ruling that Section 105a does not require the Board to determine whether the applicants "activities under the license" or any other activities are or are not inconsistent with the antitrust laws. "It is the competitive situation as a whole (with emphasis on the structure of the market, as the word "situation" clearly suggests)... which we [the Board] must measure."

6. Applicants would impose a jurisdictional limitation to the meaning of the phrase "activities under the license," (and hence the Commission's jurisdiction) to the stated bounds of a single nuclear unit. Staff will demonstrate at pp. 5-12 infra, that Congress clearly never intended such a jurisdictional limitation. Of course, with this combined docket, this proceeding does not just concern one isolated plant, but a request to establish nuclear base load by five dominant utilities through the use of a number of nuclear units, all centrally operated and coordinated. The activities under the license, Staff submits, embraces the planning, building, and operation of the plants as well as the integration of these facilities into an effective nuclear bulk power supply system.

7. Applicants unilateral proposed license conditions are virtually inadequate paragraph-by-paragraph and afford applicants the ability to completely circumvent that which Congress intended. It is Staff's position

that these license conditions would not remedy the alleged situation inconsistent with the antitrust laws, do not provide meaningful access to nuclear units, and would require of applicants substantially less than other license conditions believed by Staff to be appropriate in comparable circumstances.

8. Applicants have completely overlooked the broad power of this Board under the antitrust laws to fashion a remedy it deems appropriate after reviewing the factual situation and the need for relief. In this regard it should be pointed out that at Prehearing Conference #4, Applicants' appeared to attach great weight to the fact that there may have been certain contractual developments in a portion of the CEI service area. Reserving the right of coruse to comment as to the nature, adequacy, and cause of those developments from the standpoint of antitrust law at the appropriate time, Staff would like to point out that it is concerned with the "Combined Capco-Company Territories" as the relevant market (along with appropriate submarkets) as indicated by the Board in the Prehearing Conference Order No. 2. It is the activities in this market over the next forty (40) years which are of great concern to Staff.

II.

Applicants' in their April 21st pleading, make the assertion that the legislative history of Section 105c of the Atomic Energy Act of 1954, as amended (The Act) supports their attempted jurisdictional limitation of the Commission's authority. This assertion is incorrect and the Staff

will set forth fully the relevant legislative history. (Staff's analysis is based in part on "Reply of the Department of Justice..." dated June 9, 1972, In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2, Docket Nos. 50-329A and 50-330A).

A. The Statute

The statutory test of Section 105c.[2/] is "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws..." [emphasis added].

This is very clear language. If, instead, the statutory test was whether the activities under the license would be inconsistent with the antitrust laws (this excluding the word "situation"), Applicants would have some support for their contention. Or if the statutory test was whether the activities under the license would create a situation inconsistent with the antitrust laws (in this example, excluding the word "maintain"), Applicants would perhaps have some basis for the assertion that the Commission is without jurisdiction to inquire into any other activity of the Applicant. But such is not the case . These alternatives are not just hypothetical "might have beens," but rather were actively considered and rejected during Congressional consideration of the practical value amendment to P.L. 91-560. This aspect of the legislative history of P.L. 91-560 will be discussed below.

2/ Section 105c. of the Atomic Energy Act of 1954, as amended, 68 Stat. 938, 42 U.S.C. 2135, as amended by P.L. 91-560 (Dec. 19, 1970, 84 Stat. 1473, 42 U.S.C. 2135.

Section 105c is concerned with activities under the license which may maintain a situation inconsistent with the antitrust laws, i.e. an existing situation. If the activities under a license would maintain an existing anticompetitive situation, then clearly some conduct other than activities under the license must have been responsible for the already existing "situation." Accordingly, under Section 105c., where the Attorney General's antitrust advice to the Commission is that applicant's activities under the license would maintain an existing anticompetitive situation, Applicants' position that the Commission's inquiry must focus exclusively on Applicants' activities to construct and ultimately to operate the captioned units "and only those activities" is clearly erroneous. Such a position would make it impossible for the Commission to have any understanding of what the situation is which might be maintained by the licensed activities.

B. The Legislative History Confirms That The Purpose of Section 105c. was a Broad Prelicensing Antitrust Review

It is axiomatic that where the meaning of a statutue is clear on its face resort to the legislative history of the statute is unnecessary. As Mr. Justice Jackson stated, "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous." Schwegeman Bros. v. Calvert Corp., 341 U.S. 384 at 395, (see also, Soon Hing v. Crowley, 113 U.S. 703, 710). On the other hand, it may be useful to demonstrate that the legislative history of Section 105c. is not ambiguous and reveals that Congress desired a broad antitrust review. Therefore,

that there is no support for Applicants' contention that the legislative history of the statute requires a narrow review.

1. The 1954 Act

Section 105c. may be traced to the testimony of the Department of Justice before the Joint Committee during hearings on the 1954 bills to amend the Atomic Energy Act of 1946. 3/ The bills as introduced provided for no prelicensing antitrust review, but merely contained a section equivalent to what is now Section 105 a., which expressly preserves the applicability of the antitrust laws. 4/ Congressman Holifield and witnesses testifying before the committee complained that the language of Section 105 (then numbered 106) was inadequate to protect competition in the nuclear electric inductry. 5/ They pointed to the history of the "Alcoa" case, U.S. v. Aluminum Co. of America, 148 F. 2d 416 (CA 2, 1945), to show that once a monopoly has become established in an industry, it is difficult and time-consuming to eliminate it. 6/ Mr. Holifield described the bill prior to the insertion of Section 105c. as follows:

> So the whole pattern of the bill coupled with the jellyfish section is going to depend on the antitrust department, after the AEC has let the cancer grow. You go to them, and they will rub some mentholatum on the cancer of monopoly. That is what it amounts to, in place of preventing its growth to begin with.

3/ 83d Cong., 2d Sess., Joint Committee on Atomic Energy Hearings on S. 3323 and H.R. 8862 to amend the Atomic Energy Act of 1946, Part II, page 712 (June 1954) [Hereinafter 1954 hearings.]

4/ 83d Cong., 2d Sess., H.R. 8862, Section 106, S. 3323, Section 106. Nor did the Committee Print of May 21, 1954 contain the language that Ultimately comprised Section 105c. of P.L. 54-703; 68 Stat. 919.

5/ 1954 Hearings, Part I, pp. 22-23, 289.

6/ 1954 Hearings, pp. 441-443; 495-98, 629, 641-642.

Of special concern was the fear that the immense public investment in nuclear technology would be captured by a few giant corporations. Following suggestions made by Department of Justice witness Lee Rankin (1954 hearings, pp. 712-713), the principle of prelicensing antitrust review and language similar to the present statutory standard were adopted in the committee rewrite. 7/ That standard, "create or maintain a situation inconsistent with the antitrust laws," has continued with minor changes, not relevant here, through the 1970 amendments. 8/

2. The 1970 Amendment

Prior to 1970, the Commission had conducted no prelicensing antitrust review as called for by the 1954 statute because all licenses issued by the Commission during that period had been issued under Section 104 providing for licensing of reactors for "medical therapy and research and development." (Only Section 103 "commercial licenses" were required to be subject to the prelicensing antitrust review procedures of Section 105). In Cities of Statesville, et al. v. Atomic Energy Commission, 441 F. 2d 962 (C.A.D.C. 1969) small electric utility systems challenged the

7/ H.R. 9757 (introduced June 30, 1954) was the committee rewrite of June, 1954 which contained the principles of prelicensing antitrust review under the test of "tend to create or maintain a situation inconsistent with the antitrust laws" ultimately incorporated in P.L. 54-703.

8/ In the 1970 amendments the words "tend to" were dropped from the statute. Prior to 1970 the operative language was "whether the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws." Also, the words "the proposed license" were changed to "activities under the license" in recognition that it would be the licensee's activities that would be under investigation rather than those of the licensing agency in granting the license.

Commission's interpretation of the law, claiming that the reactors were commercial reactors in fact. While upholding the Commission's grant of a construction permit without antitrust review on the grounds that it had not as yet made a "finding of practical value" under Section 102 of the Act, the Court of Appeals warned that when the time came to issue operating licenses on the subject reactors, the Court could very well find that antitrust issues would be relevant and must be considered. Id. at 974. Following the "warning" contained in the Statesville opinion, various bills (known collectively as "practical value bills") were introduced to establish a procedure for application of the antitrust laws to nuclear reactor licensing. Legislation in the form of P.L. 91-560 was enacted in December 1970.

The legislative history of P.L. 91-560 confirms the broad scope of prelicensing antitrust review which was contemplated and reveals that the very sort of antitrust review standard now being urged by Applicants was considered and rejected by Congress in the course of the 1970 amend-

ments. 9/

Among the "practical value" bills considered were the Aiken-Kennedy bill, S. 2564, and H.R. 13828 (H.R. 15273 identical) 90th Cong., 1st Sess., which are part of the legislative history of P.L. 91-560. Under a proposed Section 111 of the Atomic Energy Act contained in S. 2564, any licensee would have been obliged to grant

> all other interested persons . . . an opportunity to participate to a fair and reasonable extent as determined by the Commission, in the ownership of the facility for which the license is requested.

9/ According to the Joint Committee Report on the 1970 amendment (House Report No. 91-1470, 91st Cong., 2d Sess.) the legislative history of P.L. 91-560 includes, inter alia:

90th Cong., 2d Sess.: S. 2564 (Aiken-Kennedy); H.R. 13828 and H.R. 15273 (identical to S. 2564); Hearings on Participation by Small Electrical Utilities in Nuclear Power, Parts 1, 2 (1968) (After AEC's initial decision on Oconee);

91st Cong., 1st Sess.: S. 212 (Anderson-Aiken); H.R. 8289 (Joint Committee bill); H.R. 9647, see also S. 1883, (AEC bills); Hearings on Prelicensing Antitrust Review of Nuclear Power Plants, Part 1 (1969) and Part 2 (1970);

91st Cong., 2d Sess.: H.R. 18679 and S. 4141 (Joint Committee "clean" bills).

In addition to the foregoing, the following documents, which were not formally published, afford considerable insight into the considerations which influenced the final wording of, and the Joint Committee Report on P.L. 91-560:

Draft Joint Committee Report, July ___, 1970 (for Committee use only);

Proposed minority dissent on H.R. 18679, circulated by Senator Aiken, dated September 14, 1970.

Under that bill the Commission would have been further obliged to

> request the advice of the Attorney General of the United States with respect to whether or not the operation of the proposed facility by the Applicant would be inconsistent with the anti-trust laws of the United States. [Emphasis supplied]

The test under that bill would have been the antitrust effects of operation of the proposed facilities, in contrast to the test which was ultimately enacted, whether there would be an anticompetitive situation which would be created or maintained (or enhanced) by an Applicant's activities under a license. S. 2564 failed to pass and the antitrust test contained in that bill was never adopted. Accordingly, it cannot be disputed that the proper test of Section 105 c., as amended is: whether an anticompetitive situation exists or would be created to which operation of the proposed facilities would contribute. Nevertheless, Applicant urges the Board to interpret Section 105 c. as excluding any inquiry concerning an anticompetitive "situation" in which the units would be utilized. In reality, therefore, Applicant urges the Commission to adopt the test in the Aiken-Kennedy bill, the test that was rejected in favor of P.L. 91-560.

Another "practical value" bill, S. 212 (91st Cong., 1st Sess.), would have directed the Commission to reject an application or to condition a license only when there was a finding that the activities under the license would "create a situation inconsistent with the antitrust laws." While this bill would not have imposed the "maintain" test upon the Commission, it did include it within the scope of the Attorney General's advice. On April 14, 1970, Carl Horn, Esq., General Counsel of Duke Power Co., testifying on

behalf of Edison Electric Institute, urged the Joint Committee to limit both the Commission's test and the Attorney General's advice to the question whether activities under a license "would 'create a situation in violation of the antitrust laws.'" (Prelicensing Antitrust Review Hearings -- hereinafter P.A.R. Hearings -- p. 338) At the same hearing, Sherman R. Knapp, for Northeast Utilities, urged that language containing neither "situation" nor "maintain" be adopted:

> We also think that the standard for the antitrust review of commercial licenses should be simply whether the proposed license or the licensed activities would actually or prospectively violate the antitrust laws. (P.A.R. Hearings, Part 2, 398)

Both of these suggestions were also rejected.

Staff concludes that there is no question that (1) there is no support in the legislative history of Section 105c. for Applicants' proposal and (2) that Congress specifically rejected a narrow approach (as suggested by Applicants) for the Commission to conduct prelicensing antitrust review.

Similarly, Applicants' reliance on City of Lafayette, La. v. S.E.C., 454 F. 2d 941, aff. sub. nom. Gulf States Utilities Co. v. F.P.C., 411 U.S. 747 (1973) and Northern California Power Agency v. FPC, D.C. Cir., --F.2d.--, No. 73-1765 (March 6, 1975) are clearly not on point, as neither case involved statutes specifically conferring antitrust jurisdiction on the agency (See, "Response of City of Cleveland To Applicants' Argument In Support Of Its Proposal For Expediting The Antitrust Hearing Process," dated May 5, 1975, at p. 6). With respect to the prelicensing

antitrust review of the NRC, the Congressional mandate is clear, and is not delineated as Applicants suggest.

III.

Applicants initially took the position that their proposal was "suggested by" Waterford. After the parties revealed that Waterford required much more (i.e., a stipulation both as to the matters in controversy and as to nexus, a procedure that Staff is willing to adopt), Applicants have now responded that Waterford suggested not a procedure but that "initiatives" be taken to expedite the hearing process. Applicants also assert that their proposal constitutes a fair and appropriate initiative.

However, all other parties have pointed out serious doubts concerning whether Applicants' proposal would not further delay these proceedings, and the fairness of it. In order to pursue Applicants' initiative, the other parties would have to assume much more than Applicants. They would have to assume (in addition to that previously pointed out) (1) that meaningul access has been offered; (2) that the February 1974 date is meaningful, when it appears (along with nexus) to be one of the ultimate facts to be decided by the Board; (3) that the "license conditions" do constitute "policies" of each applicant; and (4) that "offers" made by one applicant to retail competitors in its service area remove the cloud of concern with respect to activities within the combined service areas of the five applicant companies not only in 1975 but for the duration of the license (40 years). In any event, the Board has set a rigorous but

realistic schedule calling for the termination of all discovery by July 1st and a full evidentiary hearing commencing in October of 1975. The Board has indicated its concern that the hearing not be lengthy. Staff has suggested a number of mechanisms which may expedite matters at that hearing.

It is Staff's position that a full evidentiary hearing in October, conducted with a concern for avoidance of delay, is the best and fairest way to expedite this proceeding.

For reasons stated above, Staff is opposed to Applicants' motion.

Respectfully submitted,

Benjamin H. Vogler
Assistant Chief Antitrust
Counsel for NRC Staff

Roy P. Lessy, Jr.
Counsel for NRC Staff

/BHV

Dated at Bethesda, Maryland
this 12th day of May 1975.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUPPLEMENTAL STATEMENT OF NRC STAFF IN OPPOSITION TO APPLICANTS' MOTION FOR A LIMITED HEARING, dated May 12, 1975, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail, this 12th day of May 1975:

Douglas V. Rigler, Esq.
Chairman
Atomic Safety and Licensing Board
Foley, Lardner, Hollabaugh
and Jacobs
Schanin Building
815 Connecticut Avenue N. W.
Washington, D. C. 20006

John H. Brebbia, Esq.
Atomic Safety and Licensing Board
Alston, Miller & Gaines
1776 K Street N. W.
Washington, D. C. 20006

Mr. John M. Frysiak
Atomic Safety & Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Melvin G. Berger, Esq.
P. O. Box 7513
Washington, D. C. 20044

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John Lansdale, Esq.
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Joseph J. Saunders, Esq.
Steven Charno, Esq.
Antitrust Division
P. O. Box 7513
Washington, D.C. 20044

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Robert D. Hart, Esq.
Department of Law
1201 Lakeside Avenue
Cleveland, Ohio 44114

John C. Engle, President
AMP-O, Inc.
Municipal Building
20 High Street
Hamilton, Ohio 45012

Donald H. Hauser, Esq.
Managing Attorney
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Leslie Henry, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Thomas A. Kayuha
Executive Vice President
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

Wallace L. Duncan, Esq.
Jon T. Brown, Esq.
Duncan, Brown, Weinberg & Palmer
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

David McNeil Olds
Reed, Smith, Shaw & McClay
Union Trust Building
Pittsburgh, Pennsylvania 15230

Frank R. Clokey, Esq.
Special Assistant Attorney General
Room 219, Towne House Apartments
Harrisburg, Pennsylvania 17105

Edward A. Matto
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

George Chuplis
Commissioner of Light & Power
City of Cleveland
1201 Lakeside Avenue
Cleveland, Ohio 44114

Deborah Powell Highsmith
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Christopher R. Schraff, Esq.
Assistant Attorney General
Environmental Law Section
361 East Broad Street, 8th Floor
Columbus, Ohio 43215

Mr. Raymond Kudukis, Director
of Public Utilities
City of Cleveland
1201 Lakeside Avenue
Cleveland, Ohio 44114

Gerald Charnoff, Esq.
Brad Reynolds, Esq.
Shaw, Pittman, Potts & Trowbridge
910-17th Street, N.W.
Washington, D.C. 20006

Richard M. Firestone
Assistant Attorney General
Antitrust Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43215

Roy P. Lessy, Jr.
Roy P. Lessy, Jr.
Counsel for NRC Staff