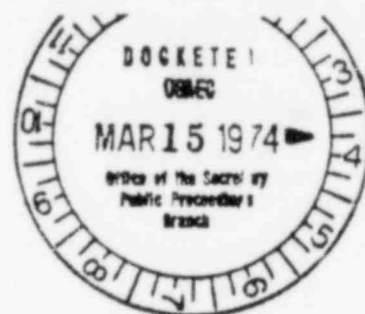


UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION



In the Matter of)
)
THE TOLEDO EDISON COMPANY and) Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY)
)
(Davis-Besse Nuclear Power Station))
)
CLEVELAND ELECTRIC ILLUMINATING) Docket Nos. 50-440A
COMPANY, et al.) 50-441A
)
(Perry Plant, Units 1 and 2))
)
DUQUENE LIGHT COMPANY, et al.) Docket No. 50-412A
)
(Beaver Valley, Unit 2))

MEMORANDUM AND ORDER

Petitions for leave to intervene and requests for hearing have been submitted by various parties in the above captioned antitrust proceedings. On January 21, 1974, the Commission issued a Memorandum and Order with respect to the Davis-Besse Nuclear Power Station (Davis-Besse) in which it also noted and discussed the above captioned proceedings for the Perry and Beaver Valley facilities.

Two petitions to intervene were submitted in the Davis-Besse proceeding; one petition by the City of Cleveland

8002180 162

M

(Cleveland), and another filed by the American Municipal Power-Ohio, Inc. (AMP-O). The Commission, inter alia, denied the petition to intervene filed by AMP-O. It ruled that AMP-O had failed to comply with the requirements of 10 CFR 2.714, and had failed to file its petition timely. In so ruling, the Commission noted that the said petition of AMP-O had been filed after guidelines in the antitrust area had been issued by the Commission; and that the petitioners were not otherwise inexperienced.

In view of several developments that had occurred after the petition was originally filed, the Commission declined to rule on Cleveland's petition pending additional clarification. The Commission designated this Board to assume jurisdiction over this proceeding, to take whatever action it deemed appropriate in order to rule on Cleveland's petition to intervene, and to conduct any hearings that may result. The Commission also directed this Board to rule on all petitions to intervene filed in the Perry and Beaver Valley proceedings, and to decide whether consolidation under the provisions of 10 CFR 2.716 is in order for all these proceedings.

The Board held conferences with all the parties expressing an interest in the proceedings, on February 19, and March 1, 1974. In accordance with the Commission's Memorandum and Order, the Board, after careful consideration of all the pleadings, comments and arguments of the parties, rules as follows:

A. Davis-Besse Nuclear Power Station

The City of Cleveland filed a petition for intervention on July 6, 1971.^{1/} The interest and standing of Cleveland are established. The nub of Cleveland's contention is that an unconditioned Davis-Besse license would allegedly increase Cleveland Electric Illuminating Company's (CEI) asserted domination of sources of low cost, bulk electricity and thereby make it more difficult for Cleveland's Municipal Electric Light Plant (MELP) to obtain low cost power and compete with CEI. Therefore, a primary issue before this

^{1/} This petition was supplemented several times and also clarified in a letter from Intervenor's Counsel to the AEC Regulatory Staff on April 19, 1973. These supplements and clarifications were included along with the original petition of Cleveland in the Board's determination.

Board concerns whether this relationship that Cleveland asserts exists between the Davis-Besse facility and the situation alleged to be inconsistent with the antitrust laws meets the requirement for nexus established by Waterford^{2/} sufficient to permit commencement of further proceedings.^{3/}

The Board finds that the petition of the City of Cleveland meets the requirements of Section 2.714 and is marginally adequate to comply with the nexus requirements specified by the Commission in the Waterford proceedings. The Board hereby requires, however, that Cleveland within 20 days of this order justify its position on nexus so that the asserted causal relationships can be more precisely stated for purposes of clarifying issues and determining scope of discovery.

In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-323, Memorandum and Order of February 21, 1973, RAI-71-2-4 and In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-323A, Memorandum and Order of September 28, 1973, RAI-71-0-319. (hereinafter, "Waterford")

3/ The Commission directed 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." See RAI-71-0-321.

B. Beaver Valley Power Station

On July 24, 1973, the City of Cleveland petitioned to intervene in the Beaver Valley proceedings. Thus this petition was approximately 30 days late. Cleveland states that it had expected AMP-O to intervene and represent Cleveland's interests and that AMP-O apparently failed to communicate with Cleveland when its plans changed. This appears to be, at best, a casual attitude towards pursuing its interest with respect to a most important matter, and Cleveland should not now be heard to say that AMP-O's failure somehow provides good cause and permits Cleveland a second opportunity to intervene. The Board finds that Cleveland has failed to show good cause for the intervention as required by Section 2.714.

Substantively, Cleveland's petition does not meet the Waterford nexus test. The petition asserts that CEI seeks "control" of all nuclear generation in the North Ohio area and exclusion of WGLP from access to nuclear power. It is also asserted that bulk power from Beaver Valley will make CEI's system more reliable and contribute to CEI's economies-of-scale advantages. Finally, it is alleged that

CEI will use its asserted monopoly of high voltage transmission lines to keep MELP from participating in other nuclear plants.

These petitioner assertions describe a situation that may be inconsistent in the antitrust laws^{4/} rather than alleging a nexus, in the sense of a set of causal relationships that, if proved, would show how the addition of the Beaver Valley facility to the relevant market might lead to creating or maintaining a situation inconsistent with the antitrust laws. The Commission in its Waterford order of September 28, 1973^{5/} stated:

A description of a situation inconsistent with the antitrust laws-however well pleaded-accompanied by a mere paraphrase of the statutory language, alleging that the situation would be created or maintained by the activities under the license, would be deficient. The petitioner must describe with particularity and specificity the relationship between the activities under the nuclear license and the alleged anti-competitive practices which he alleges. (See 10 CFR 2.714).

Accordingly, the Board rules that Cleveland's petition is denied.

^{4/} However, the Board notes that the Department of Justice did not consider the construction or operation of the Beaver Valley facility would create or maintain a situation inconsistent with the antitrust laws.

^{5/} See footnote 2, Supra.

C. Perry Nuclear Generating Station

1. As noted by the Commission, the Attorney General has submitted a letter of advice ^{6/} to the Atomic Energy Commission recommending an antitrust hearing on the Perry facility. Petitions to intervene in such a hearing were received from the State of Ohio; from the City of Cleveland; and from the American Municipal Power-Ohio.

The State of Ohio, through its Attorney General, petitioned the Commission for leave to intervene as a matter of right. Relying on the statutory language of Sections 189(a) and 201(1) of the Atomic Energy Act of 1954, as amended, ^{7/} the State maintained further that its interest could be protected only if it became a party under Section 2.714 of the Commission's Rules of Practice. As pointed out by the Staff in its response to the State's petition, the State of Ohio, as the site of the

6 Federal Register, January 16, 1974 (39 Fed. Reg. 2029)

7 43 U.S.C. 225(a), and 43 U.S.C. 201(1), respectively.

Perry Plant, has a statutory right to intervention under the Atomic Energy Commission's Act. However, this right is provided for and implemented by the Commission in Section 2.715(c) of its Rules of Practice, not Section 2.714.

Apart from the State's position that intervention is a matter of right, evaluating the State's petition to intervene under the requirements of Section 2.714, especially in view of its expressed intent to merely "monitor" the proceeding, the Board concludes that the petition fails to meet the requirements of Section 2.714 as further clarified with respect to public proceedings by the Commission in Waterford.^{8/} The Board does not agree with the argument that paragraph 4 of the Attorney General's affidavit meets said requirement. On this point the language relied on by the State reads as follows:

... we (the State Attorney General) have reason to believe that a situation inconsistent with the antitrust laws may be created or maintained by the issuance of a construction permit by the Atomic Energy Commission for the Perry Nuclear Power Plant...'

^{8/} See footnote 1 Supra.

The basis for this statement is the "... facts set forth in the letter of advice" from the Department of Justice to the Atomic Energy Commission. This clearly falls short of meeting the requirements of Section 2.714 and the Waterford holdings. The petitioner fails to state with particularity at least one meaningful contention and the basis therefore, nor is the nexus requirement met. Accordingly, the Board has no alternative but to deny the petition.

The Board, however, recognizes the State's interest and responsibility as a sovereign and would allow the State of Ohio further opportunity to intervene as a party under 2.714, provided the State amends its petition and submits within 20 days of this order contentions meeting the requirements of 2.714 and a statement of the alleged nexus. If the State, however, should decide to participate pursuant to Section 2.715(c), the Board expects the commitments on rights of discovery and appeal made by the Applicant and Staff^{9/} to be observed, and will so rule.

9/ Tr. pp. 273, 269-290.

2. The petition of the City of Cleveland as to the proposed Perry facility meets the requirements of Section 2.714, albeit, marginally. The Board hereby grants said petition, but will require that Cleveland, within 20 days of this order, clarify its position on nexus so that the asserted causal relationships can be more precisely stated for purpose of clarifying issues and determining the scope of discovery.

3. The Board is disposed to rule that the petition to intervene of the American Municipal Power-Ohio, Inc. as to the proposed Perry facility fails to meet the requirements of Section 2.714, as further clarified by Waterford. The petitioner seems to be saying that the sole nexus involved here is that the Perry plant would merely affect the "wheeling" capacity of AEP's transmission system. If so, such a position would appear to be insufficient as a nexus under the Commission's guidelines in Waterford.

Because the other requirements of 2.714 have been satisfied, the Board will afford the petitioners AMP-O an additional period not to exceed 20 days from the date of this

order to provide the Board with a clarification of AMP-O's position vis-a-vis a showing of the nexus of its contentions to the Perry facility. The Board will issue its final ruling as to AMP-O's petition as soon as possible thereafter.

D. Consolidation

The parties supported consolidation of all three proceedings. Since the petition to intervene in the Beaver Valley stands denied, only the two remaining will be considered for consolidation. To eliminate waste of time, and in order to reduce cost and duplication of effort, the Board agrees that consolidation should be effected, and hereby declares that the proceeding identified as "In the Matter of Toledo Edison Co. and the Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station) Docket No. 50-346A" will be consolidated with the proceeding identified as "In the Matter of Cleveland Electric Illuminating Company, et al., Perry Nuclear Power Plant, Units 1 and 2, Docket Nos. 50-440A, 50-441A."

Accordingly, those parties common to both the Davis-Besse and Perry proceedings are directed to confer as soon as possible before March 29, 1974, and to report to the Board or a joint statement for effecting such consolidation, including the procedure to be followed, commencing with pretrial through trial and to decision. If the parties are unable to agree on a joint statement, then each party will submit, within the time indicated, its individual statement of the procedure to be followed in effecting such consolidation.

F. Procedure

In preparation for a pre-hearing conference in the Davis-Besse and Perry proceedings, the Board is directed to call the Board at an early date, in addition to the requirements of paragraph D above, each of the parties are hereby directed to confer with each other and:

report to the Board at the pre-hearing conference the results of such conference. If settlement is not achieved, the parties will prepare either a joint or separate statement(s) setting forth, under topical headings, a concise statement of the essential facts and a recital of the contested issues of fact and of law.

- (b) prepare a joint written stipulation or statement of the uncontested facts;
- (c) prepare a joint written statement regarding the nature and scope of discovery required to be undertaken, and indicating the length of time required for completion of such discovery.
- (d) if joint statements or stipulations are not forthcoming under (b) or (c), the parties are directed to submit such stipulations or statements on an individual basis.

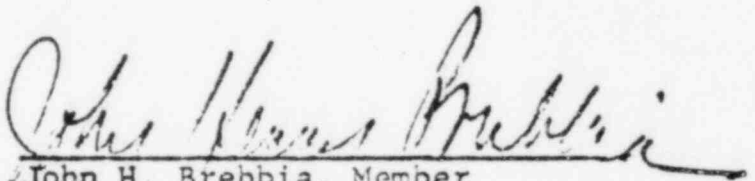
7. In addition to determining the particular factual and legal issues brought before it, the Board will also consider questions addressed to:

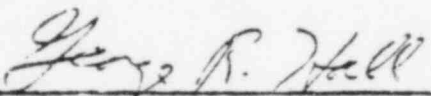
- (a) the receipt of advice of the Attorney General; or
- (b) the manner of the AEC staff to the various petitions.
- (c) simplification of issues;

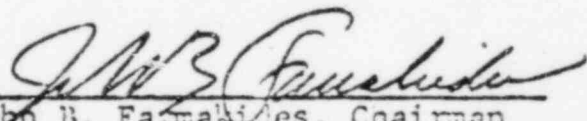
- (c) reduction in the amount of proof to be offered and number of expert witnesses;
- (d) and such other matters as may aid in the disposition of the proceeding.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD


John H. Brebbia, Member


George R. Hall, Member


John B. Farnham, Chairman