

Reg Files
UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION
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SECRET EXEMPT
PROD. & UTIL. EAG. 50-346A
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PROD. & UTIL. EAG. 50-412A
SECRET EXEMPT
PROD. & UTIL. EAG. 50-440A, 441A

COMMISSIONERS:

Dixy Lee Ray, Chairman
Clarence E. Larson
William O. Doub



Docket No. 50-346A

In the Matter of

THE TOLEDO EDISON COMPANY AND
THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY

(Davis-Besse Nuclear Power Station)

Messrs. Reuben Goldberg, Arnold Fieldman, David C. Hieinfeld,
Judge Herbert R. Whiting, Robert D. Hart, for petitioner
City of Cleveland.

Mr. Phillip P. Ardery, for petitioner American Municipal
Power-Ohio, Inc.

Messrs. Bruce W. Churchill, and Jay E. Silberg, for the
applicants.

Mr. Benjamin H. Vogler, for the AEC Regulatory Staff.

MEMORANDUM AND ORDER

Petitions for leave to intervene and requests for a hearing in this antitrust proceeding have been submitted by American Municipal Power-Ohio, Inc. (AMP-O) and by the City of Cleveland (Cleveland). The applicants have urged that both petitions be denied; the regulatory staff has recommended that AMP-O's request be rejected, but that additional information be required prior to a final ruling on Cleveland's petition. The Attorney

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General's letter of advice, which was published in the Federal Register (36 F.R. 17888), concluded that "we presently are of the view that an antitrust hearing would not be required ..."

Upon consideration of the complete record to date, the Commission agrees with the staff that the AMP-0 petition must be denied, both because it was not timely submitted and because it otherwise fails to comply with the provisions of 10 CFR 2.714. The deadline for filing petitions, established in the Commission's Federal Register notice, was October 4, 1971; AMP-0's petition was submitted on April 4, 1973. Moreover, petitioner failed to state any "good cause," under 10 CFR 2.711 and 2.714, for the inordinate delay -- in fact, no reason whatsoever was given.

Substantively, the petition at most can be construed as a statement of petitioner's "interest" in this proceeding. Section 2.714(b) of the Commission's "Rules of Practice" additionally requires a petition to set forth "how that interest may be affected by the results of the proceeding, and any other contentions of the petitioner including the facts and reasons why he should be permitted to intervene ..." AMP-0 clearly has failed to meet these requirements. Accordingly, the petition is denied, both as untimely and, separately, for failure to comply with the cited provisions of 10 CFR 2.714.^{1/}

^{1/} Under special circumstances, such as a petition submitted pro se (see Virginia Electric Power Co., Docket Nos. 50-338, 50-339, ALAD-146), or submitted prior to any agency guidance in a new area of Commission jurisdiction (see Louisiana Power and Light Co., Docket No. 50-132A, RAI-73-2, p. 48), petitions have been approved even though only marginal compliance with the regulations was demonstrated, or petitioners have been permitted an opportunity to supplement their requests. In the circumstances of this case, where petitioner is represented by counsel who until April, 1973, represented Cleveland in this very proceeding, and where petitioner has had many months to seek to supplement its original request, we do not believe that non-compliance with stated requirements can be excused.

With respect to Cleveland's petition, the Commission believes that additional clarification is necessary prior to a final ruling. Several significant developments have occurred since the petition originally was filed: two Commission decisions establishing benchmarks for assessing petitions in antitrust proceedings have been issued (Memorandum and Order dated February 23, 1973, and Memorandum and Order dated September 28, 1973, in Louisiana Power and Light Co., supra, RAI-73-2, p. 48, and RAI-73-9, p. 619); an FPC proceeding involving some of the same parties and subject matter has been concluded (City of Cleveland v. Cleveland Electric Illuminating Company, FPC Docket Nos. E-7631, E-7633, E-7713); additional negotiations have been conducted among the parties; and Attorney General antitrust advice -- recommending a hearing -- has been received concerning the proposed Perry facility, which is referred to in several of the pleadings in this case and which involves several of the same companies and issues.^{2/} Both here and in a preliminary pleading in the Perry proceeding, Cleveland's general complaint appears to be that it is being improperly deprived of access to the projected benefits of the proposed Davis Besse and Perry facilities.

The Commission believes that the Cleveland petition can best be evaluated against this background by an Atomic Safety and Licensing Board. Accordingly, it has designated a Board, pursuant to section 191 of the Atomic Energy Act and 10 CFR 2.721, to assume jurisdiction over this proceeding, consisting of the following members: John B. Farmakides, Esq., Chairman, John H. Brebbia, Esq., and Dr. George R. Hall. The Board shall promptly take whatever

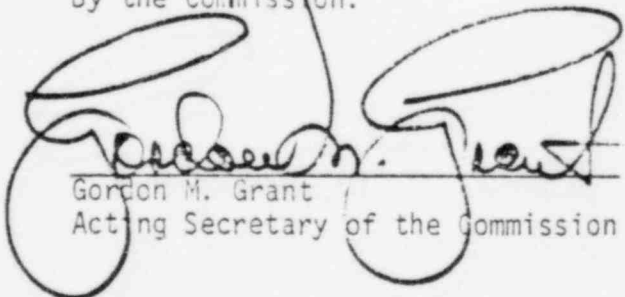
^{2/} The Attorney General's letter of advice concerning the Perry facility was published in the Federal Register on January 16, 1974 (39 F.R. 2029). The accompanying Commission notice permits any affected person to submit a petition to intervene by February 15, 1974.

action it deems appropriate, including meeting with the parties if necessary, to permit it to rule on Cleveland's petition to intervene and request for a hearing, and shall conduct any hearings which may ensue.

Essentially the same matters and companies as are involved in this case are also involved in two other proceedings. First, as already noted, Attorney General antitrust advice has recently been received concerning the proposed Perry facility (In the Matter of Cleveland Electric, et al., Docket Nos. 50-440A, 50-441A). Cleveland has already expressed its intention to seek to intervene in that proceeding. Second, in a petition filed nearly two months late, Cleveland has also requested to intervene In the Matter of Duquesne Light Company, et al., Docket No. 50-412A. Against this background, we deem it appropriate to now designate the licensing board named above to also preside over the Perry and Beaver Valley proceedings. Inter alia, the Board shall rule on any petitions filed in the Perry case and on the Cleveland petition in the Beaver Valley proceeding, shall determine whether consolidation of the proceedings is appropriate under 10 CFR 2.716, and shall take all necessary action to effectuate consolidation if this is warranted. Hearing notices, if any, and any other required public notices, shall be published in the Federal Register.

It is so ORDERED.

By the Commission.



Gordon M. Grant
Acting Secretary of the Commission

Dated at Washington, D.C.

this 21st day of January, 1974.