

4/3/73

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE COMMISSION

ANTITRUST

In the Matter of)	
THE TOLEDO EDISON COMPANY AND)	AEC Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING)	
COMPANY)	
(Davis-Besse Nuclear Power Station))	

SUPPLEMENTAL ANSWER OF THE AEC REGULATORY STAFF
TO PETITION OF THE CITY OF CLEVELAND TO INTERVENE
AND FOR A HEARING

Pursuant to 10 CFR, Part 2, Section 2.714 of the Commission's Rules of Practice, the AEC Regulatory Staff (Staff) hereby files a supplemental answer to the above captioned Petition to Intervene and request for an antitrust hearing.

On July 9, 1971 the Attorney General, pursuant to Section 105c of the Atomic Energy Act of 1954, as amended (Act), advised the Commission that an antitrust hearing would not be required in this matter. A construction permit was issued on March 24, 1971, subject to section 105c(8) of the Act, the grandfather provision which permits subsequent antitrust review.

In a petition dated July 6, 1971, and amended July 27, 1971, the City of Cleveland, Ohio (petitioner), requested permission to intervene herein as a full party in interest and requested an antitrust hearing. In its petition the petitioner alleged that it:

1. Is surrounded by the Cleveland Electric Illuminating Co. (CEI);
2. Has tried unsuccessfully to obtain other sources of power;
3. Has been unable to negotiate an interconnection agreement with CEI because of CEI's delaying practices;

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4. Has been unable to negotiate bulk power purchases from others because of the lack of an interconnection with CEI; and
5. Is unable to participate in the CAPCO (Central Area Power Coordination Group) pool because of its isolation.

Petitioner stated that it is interested in an allocation of power from Davis-Besse and is willing to pay its proportionate share in order to obtain power from the facility.

CEI has denied all of the applicant's allegations. In addition, CEI states that petitioner is precluded by the Constitution of the State of Ohio from participating in an ownership arrangement of Davis-Besse and, even if permitted by Ohio law to participate, petitioner is financially unable to do so. The filings in this matter reflect that petitioner's first request to participate in the Davis-Besse facility with CEI was made in its petition to intervene.

On February 7, 1972, the staff advised the Commission that petitioner's allegations raised antitrust questions. The staff also advised that petitioner had filed a complaint before the Federal Power Commission (FPC) requesting, inter alia, a permanent interconnection with CEI and alleging antitrust violations against CEI similar to the allegations filed in this matter. In view of this development, staff recommended that:

"...since a construction permit has already been granted under the exemption authorized in Section 105c(8), any hearing held in this matter be postponed until the Federal Power Commission issues a final decision on the question of interconnection By following this procedure, the

record in the Federal Power Commission proceeding and the conclusions reached therein should be available. This could obviate duplication of efforts and materially assist the Commission in considering the antitrust contentions raised in this matter."

Since that time the FPC has conducted a full evidentiary hearing on the matters raised by petitioner under FPC Dkt. No. 644. On January 11, 1973, the FPC issued an opinion that ordered an emergency power interconnection between CEI and petitioner. The Commission's opinion affirmed the Administrative Law Judge's decision that petitioner's evidence did not support a finding of anticompetitive practices or antitrust violations. The FPC opinion stated that, inter alia:

"According to the Initial Decision, the internal memorandum [relied upon by petitioner to support its allegation of anti-competitive activity] of CEI does not support a finding of anticompetitive practices or antitrust violations. Nor does CEI's effort to collect the excise tax constitute an anti-competitive practice. The Administrative Law Judge felt that the Cities' past inability to furnish reliable dependable service on the MELP [Municipal Electric Light Plant] System has been due primarily to incompetent management and inefficient operations."

On March 9, 1973, the FPC denied the City of Cleveland's request for a rehearing and stay of the Order in FPC Dkt. No. 644.

A review of the antitrust aspects of the FPC proceeding by the Staff has not revealed any evidence concerning anticompetitive practices or anti-trust conduct by CEI. The Staff is also unaware of any proposal by the petitioner concerning the type or nature of access it needs to the Davis-Besse facility, despite written requests from CEI seeking such proposals.

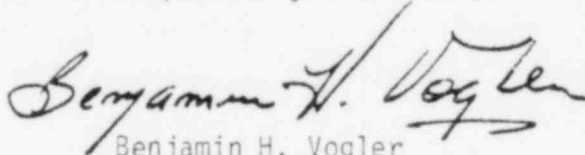
In addition, it must be noted that the dispute between petitioner and CEI does not involve in any manner the majority shareholder and operating utility of the Davis-Besse facility, the Toledo Edison Company. In view of the foregoing the Staff is inclined to agree with the Attorney General's view of the competitive situation in the area of concern that there is apparently no anticompetitive situation for the Commission to consider.

However, on January 29, 1973, counsel for petitioner in a conversation with Staff counsel reiterated petitioner's intention to pursue its antitrust allegations and request for a hearing in this proceeding. In an effort to determine and possibly resolve the differences between the parties, the Staff on March 1, 1973 conducted a meeting with all of the parties herein. As a result of the meeting it has been determined that petitioner desires some form of access to the Davis-Besse nuclear unit and that Section 6, Article VIII, of the Constitution of the State of Ohio prohibits partial ownership of the Davis-Besse nuclear unit by petitioner.^{1/} Additional information is necessary, however, before a determination can be reached on whether petitioner's requests are within the proper ambit of this proceeding. It is believed that the additional information required herein can best be obtained and evaluated by an Atomic Safety and Licensing Board. Therefore, the Staff recommends that this matter be noticed for an antitrust hearing and that the petitioner be required to come forward at the outset of

^{1/} Section 6, Article VIII of the Constitution of the State of Ohio provides, inter alia: "No laws shall be passed authorizing any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association..."

the proceeding with a particularization of its contentions, the relief it deems appropriate and the relationship of the contentions and the relief to the alleged activities under the license. In the event the Board determines that a full antitrust hearing is required herein the Staff also recommends that petitioner be required to come forward with the evidence in support of its allegations and requested relief.

Respectfully submitted,

A handwritten signature in cursive script that reads "Benjamin H. Vogler". The signature is written in dark ink and is positioned above the typed name and title.

Benjamin H. Vogler
Assistant Antitrust Counsel
for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 3rd day of April 1973.

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CERTIFICATE OF SERVICE

I hereby certify that copies of SUPPLEMENTAL ANSWER OF THE AEC REGULATORY STAFF TO PETITION OF THE CITY OF CLEVELAND TO INTERVENE AND FOR A HEARING, dated April 3, 1973, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or airmail, this 3rd day of April 1973:

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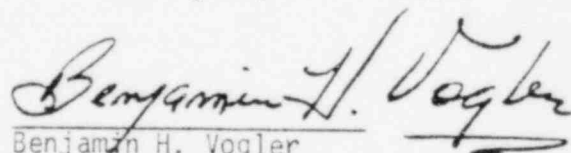
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