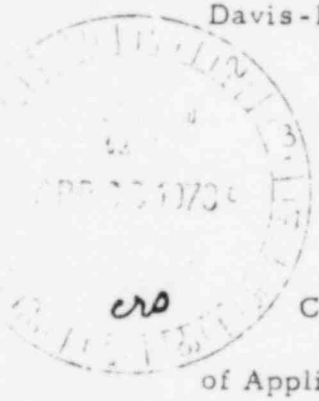
UNITED STATES OF AMERICA
BEFORE THE ATOMIC ENERGY COMMISSION

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



RESPONSE OF CITY OF CLEVELAND TO
SUPPLEMENTAL ANSWER OF APPLICANTS TO
CITY OF CLEVELAND'S PETITION TO INTERVENE

City of Cleveland (City) hereby responds to the Supplemental Answer of Applicants to the City's Petition to Intervene.

I

Applicants state that the Attorney General has advised the Commission that an antitrust hearing would not be required (Supp. Ans. Par. No. 1). This is not quite an accurate statement of the Attorney General's advice letter to the Commission.

In his letter of advice dated July 9, 1971, the Attorney General said:

> In these circumstances, we presently are of the view that an antitrust hearing would not be required pursuant to the reservation of authority contained in the Commission's construction permit. (emphasis supplied)

The "circumstances" to which the Attorney General referred were the City's application to the FPC for a permanent interconnection with Cleveland Electric Illuminating Company (CEI) and to CEI's stated willingness to enter into an arrangement for such an interconnection. It appears from the Attorney General's advice letter that he was of the impression that the function and purpose of the interconnection was to give the City of Cleveland's Municipal Electric Light Plant (MELP) access to coordinated development and planning, the economies of scale associated with large-scale generating units, reserve sharing, and other types of economic benefits which the Attorney General recognized as bearing on competition for load growth at the retail level. Under "these circumstances," it is not surprising that the Attorney General was of the view, "presently," that an antitrust hearing would not be required to protect the City. Contrary to the Attorney General's impression, however, the interconnection involved in the FPC proceeding and which, by FPC Opinion No. 644, was directed to be established for the limited primary term of five years, may be used only "to supply emergency service to the City" and does not provide the benefits envisioned by the Attorney General.

Fully informed of the limited nature of the emergency interconnection and that MELP would continue to be excluded from the benefits of coordinated development and planning that CEI and its CAPCO associates (Central Area Power Coordination Group) have made their exclusive domain, the Attorney General's recommendation would clearly have been for a hearing.

In sum, the Attorney General's advice to the Commission was not unqualified. It was based upon certain invalid premises, which if they ever did obtain, clearly do not obtain today.

II

Applicants quote from the Staff's Supplemental Answer, in which Staff stated that:

> A review of the antitrust aspects of the FPC proceeding by the Staff has not revealed any evidence concerning anticompetitive practices or antitrust conduct by CEI.

Applicants also quote the statement of the Staff that it 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."

As already noted, the Attorney General's conclusions were based upon invalid premises. The Staff's conclusion in its Supplemental Answer is similarly based on invalid premises.

We do not know whether Staff reviewed the total record before the FPC or some selected portions. If Staff reviewed the whole record then it is aware that the question of CEI's anticompetitive conduct, although put into the proceeding by the City, was never really pursued. Thus, the Presiding Administrative Law Judge observed from the Bench (FPC Record in Docket No. E-7631, p. 453):

> This may be a pro forma issue, but I don't detect any sign at this stage in the proceeding that it is being pressed as a genuine issue of fact.

Simply put, the allegations of anticompetitive practices were not pursued because they were superfluous to the specific request for the relief sought from the FPC.

Moreover, denial of a license or issuance thereof with appropriate conditions by the Commission is not dependent upon proof of violation of the antitrust laws. The Commission is not required to find that CEI's activities under the license will constitute a full-fledged violation of the antitrust laws. It is sufficient that the Commission find that there is a reasonable probability that CEI's activities would run counter to the policies underlying these laws. Report by the Joint Committee on Atomic Energy to accompany HR 18697, enacted as P. L. 91-560. Consequently, any FPC finding on antitrust violation by CEI is not decisive of the Atomic Energy Commission's responsibilities under Section 105c of the Atomic Energy Act. Under Section 105c, if a situation inconsistent with the antitrust laws or the policies underlying these laws will be created by the issuance of an unconditioned license to CEI and Toledo Edison, it is immaterial that a situation inconsistent with the antitrust laws had theretofore not been maintained. Further, as was stated in S. Rep. No. 91-1247, 91st Cong., 2d Sess., at p. 14:

> It is important to note that the antitrust laws within the ambit of Subsection 105(c) of the Bill are all the laws specified in Subsection 105(a). These include the statutory provisions pertaining to the Federal Trade Commission, which normally are not identified as antitrust law. Accordingly, the focus for the Commission's finding will, for example, include consideration of the admonition in Section 5 of the Federal Trade Commission Act, as amended, that 'Unfair methods of competition in commerce, and unfair and deceptive acts in commerce, are declared unlawful.'

CEI has, as City will prove at the hearing on antitrust review, employed unfair methods of competition and unfair and deceptive acts against the City in an effort to destroy the City as a viable competitor. Such methods and acts have included harassment and coercion of MELP's customers until they agreed to discontinue taking service from MELP and switch to CEI; disconnecting MELP's service facilities to customers without authorization and substituting CEI's services; making of cash payments by CEI to induce existing and potential customers of MELP to take service from CEI, and generating of lawsuits to jeopardize MELP's ability to maintain a competitive stance.

III

Applicants refer to the fact that at a meeting on March 1, 1973, with the Commission's Staff, the City was requested to submit within three weeks a statement of the specific relief it sought. Applicants state that no such submission has been made by the City. They contend that this "failure" is "more impressive" because City had made no response to a letter from CEI dated April 11, 1972, in which it requested a statement from the City of its proposal for participation in the Davis-Besse plant. Applicants argue that under these circumstances the Staff's recommendation for an antitrust hearing and appointment of a Board is unwarranted.

It is true that the City of Cleveland did not within three weeks respond to the Staff's request made at the March 1, 1973 meeting. It

is equally true, however, that the City communicated with counsel for CEI and the Staff and secured agreement to enlargement of the time for response. For a number of reasons, including the City's employment of new special counsel, additional time was required for response, and in this connection it should be observed that the Staff's request was for the City to state its view of the "nexus" between the anticompetitive activities of CEI, of which the City complains, and the joint ownership and operation of the Davis-Besse Nuclear Power Station by CEI and The Toledo Edison Company, from which the City has been excluded by the Applicants.

Furthermore, a submission has been made in response to the Staff's request under date of April 19, 1973. This submission has been served upon counsel for the Applicants. Among other things, it specifies the relief requested, which was never obscure to the Applicants and had been previously stated.

IV

Applicants contend that an antitrust hearing and creation of a Board is not warranted because "as the Staff points out, the dispute between petitioner and CEI 'does not involve in any manner the majority shareholder and operating utility, The Toledo Edison Company'".

The fact that there is a partner in the ownership of Davis-Besse that may or may not be involved in anticompetitive conduct vis-a-vis the City does not make inapplicable to the project the provisions of Sec-

tion 105c of the ...omic Energy Act where one of the partners has engaged in anticompetitive conduct, and it does not immunize the project from a finding that unconditioned licensing thereof would maintain or create a situation inconsistent with the antitrust laws or the policies underlying such laws. Additionally, the assumption is incorrect that Toledo Edison is not involved in the review of antitrust conduct. Part of that antitrust conduct is the exclusion by CAPCO of the City from the benefits of coordinated operation and planning. Toledo Edison is a member of CAPCO, and the benefits of Davis-Besse are restricted by action of Toledo Edison and CEI to CAPCO members only.

V

With respect to Applicants' contention that an antitrust hearing and the submission of the issues to a Board are unwarranted on the ground that the City cannot be a joint owner in the nuclear plant, that contention is without merit. The City seeks participation either through ownership or the purchase of unit power. There is no legal bar to the purchase of unit power by the City. Moreover, even if the City itself may not lawfully share in the ownership of the Davis-Besse station, there is no legal impediment to an ownership arrangement through American Municipal Power of Ohio, Inc. (AMP-O), as is evident from the fact that, unlike the Applicants in this case, the Applicants for the Zimmer Nuclear Plant license, Dayton Power and Light Co. and Cincinnati Gas and Electric Company, have offered ownership participation in that plant to AMP-O.

VI

Finally, Applicants contend that it "clearly is not the function of this Commission to compel owners of nuclear units to supply energy in any manner to another merely because of its inability to supply itself". Assume this premise to be true -- it has nothing to do with the present case. The City is requesting participation in the nuclear station on the ground that exclusion of the City from participation is a violation of the requirements of the Atomic Energy Act. If the City sustains its burden of proof, which it fully expects to do at a hearing, Section 105c of that Act requires conditioning of the license, if one were to be issued, to provide for participation in the nuclear unit by the City, together with such other conditions as are necessary to make such participation a reality.

WHEREFORE, for each and all of the reasons stated, Applicants' objections to Staff's recommendation in Staff's Supplemental Answer are invalid and should be disregarded.

Respectfully submitted,

CITY OF CLEVELAND

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April 19, 1973

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