DOCKET NUMBER
PROD. & UTIL. FAC. 50-346A

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

10-14-71

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

SEPARATE ANSWER OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY TO PETITION TO INTERVENE OF THE CITY OF CLEVELAND AND TO AMENDMENT TO PETITION TO INTERVENE OF THE CITY OF CLEVELAND

I

On July 6, 1971, the City of Cleveland, Ohio (Petitioner) filed a "Petition to Intervene" requesting a grant of intervention and that the Atomic Energy Commission (Commission) hold a hearing on antitrust considerations associated with the activity authorized under construction permit No. CPPR-80 authorizing construction of the Davis-Besse Nuclear Power Station (Davis-Besse) by The Toledo Edison Company (TE) and The Cleveland Electric Illuminating Company (CEI).

By a letter dated July 9, 1971, the Attorney General, pursuant to Section 105(c). of the Atomic Energy Act of 1954, as amended, advised the Commission that an antitrust hearing would

not be required in this proceeding. The letter of advice stated that the Petitioner and CEI were presently in negotiations which could settle the differences between CEI and the Petitioner.

Subsequently, the Petitioner filed an amendment to its Petition to Intervene dated July 27, 1971.

Pursuant to 10 CFR Section 2.102 (d) of the Commission's "Rules of Practice", the Attorney General's advice was published in the Federal Register the 4th day of September, 1971.

CEI admits that it supplies approximately 80% of the retail electric customers in Cleveland and that the Petitioner, through its Cleveland Municipal Electric system, supplies approximately 20% of the retail electric customers in Cleveland. CEI admits that Petitioner owns the facilities described in the Petition to Intervene.

CEI admits that it supplies power to Petitioner for resale through Petitioner's distribution system at five locations since February, 1970, most of the time without remuneration, and that these loads are isolated from the municipal system which itself is presently operated on an isolated basis, since the municipal system

as a whole is not so constructed to permit parallel operation with the system of CEI.

CEI admits that it generates, transmits, and distributes power along the shore of Lake Erie in Northeastern Ohio, and that it has generating capacity of approximately 3,235 megawatts and is interconnected with Ohio Edison Company, Ohio Power Company, and Pennsylvania Electric Company, and is a member of the CAPCO Power Pool.

CEI admits that Petitioner filed a complaint against CEI with the Federal Power Commission May 13, 1971, docketed as the City of Cleveland, Ohio vs. The Cleveland Electric Illuminating Company, No. E-7631; that said Complaint requests an Order of the Federal Power Commission directing a permanent interconnection between Petitioner and CEI and requests the Federal Power Commission to fix the terms and conditions of coordination of power supply between the systems and that no hearing has yet been held on this matter by the Federal Power Commission. CEI alleges, however, that this proceeding is still pending before the Federal Power Commission which has jurisdiction to resolve the issue of interconnection should negotiations between the parties not result in an agreement.

CEI denies that it has denied or refused to negotiate with Petitioner a permanent interconnection between CEI and the municipal electric system of Petitioner. CEI has advocated for many years a permanent interconnection with the municipal electric system and it was not until April of 1971 that Petitioner made a complete about face and showed any interest in such an interconnection. CEI states that it is willing to make such an interconnection provided it is compensated for the costs of the interconnection and for the past load transfer services it has rendered to Petitioner, and provided Petitioner installs the equipment necessary to permit parallel operation of the systems. CEI also confirms that is is ready and willing to immediately continue discussions of a permanent interconnection as soon as Petitioner has made payment of undisputed amounts now owing to it for the temporary load transfer service it has provided to the municipal electric system from February, 1970, to date. The total amounts due and owing to September 1, 1971 were $1,515,000, despite the efforts of CEI and the numerous discussions it initiated with various representatives of Petitioner to secure an understanding and commitment to pay for the services rendered. In addition, Petitioner owes CEI $103,959.10 for services provided in September 1971. No payment of any current or delinquent amounts owing was made by Petitioner between July 2, 1971 and October 4, 1971. On September 16, 1971 an understanding was reached with the Mayor and Law Director of Petitioner that it would pay all monies it owed to CEI except that amount

which Petitioner contends is in dispute because of conceptual issues between the parties. On October 4, 1971, Petitioner made a payment of $400,000 in partial payment of the undisputed amount due and owing to CEI.

CEI denies that Petitioner has made any requests whatsoever to it to participate in the ownership of the Davis-Besse station except by means of the Petition to Intervene or the Amendment thereto in this proceeding, neither of which is a formal request to CEI for participation nor a formulation of the terms of such a proposal.

Further answering CEI denies each and every allegation of the Petition to Intervene and the Amendment thereto not herein expressly admitted to be true.

II

As a separate defense, CEI alleges that Petitioner is precluded by Article VIII, Section 6, of the Constitution of the State of Ohio and the law of Ohio from participating in the ownership

of Davis-Besse and from paying a proportionate share for the construction, operation, maintenance, and all other capital and operating costs of the Davis-Besse Plant. In addition, the financial condition of Petitioner is such that aside from its legal disability, it is without funds or the ability to raise such funds for such purposes.

III

As a further defense, CEI says that the claim of Petitioner that it must obtain the "advantages of scale such as will be achieved by the Davis-Besse Plant" to remain a competitor of CEI in the business of electric power supply is wholly wrong for the following reasons:

A. As heretofore stated, CEI is ready and willing to supply power to Petitioner from the CEI system on reasonable terms, either as agreed and approved by, or as directed by, the Federal Power Commission. The cost of such power to Petitioner will be less than the cost of power which might be obtained from Davis-Besse. Under such circumstances, particularly where Petitioner has already invoked the jurisdiction of the Federal Power Commission, this matter should be remitted to said Commission in order to give effect to Sections 271 and 272 of the Atomic Energy Act.

B. Any allocation of power out of Davis-Besse will be available only at times when the station is in operation, and in instances of restriction to less than full power operation, only in proportion to total output. A nuclear station will regularly be closed down about once a year for a period of about one month for fuel reloading and may be expected to be down for maintenance for other periods. Petitioner's demand for an allocation from Davis-Besse would provide no backup to supply power when Davis-Besse was down or operating at a reduced rate and Petitioner has stated no facts showing the existence of such backup capacity on its system. It follows that the demand of Petitioner does not relate to obtaining power of a kind suitable to its electric system.

IV

As a further defense, CEI says that the construction and operation, as authorized under the AEC construction permit and prospective operating license, of CEI's share of Davis-Besse, will not in any way create or maintain a situation inconsistent with the antitrust laws, and contrary to the requirement of Section 2.714 (a) of the Commission's Rules of Practice, the amended petition for leave to intervene fails to set forth any contention

relating the "activities under the license" to the creation or maintenance of a situation inconsistent with the antitrust laws. Under Section 105c (5) of the Atomic Energy Act of 1954 as amended (the Act), the only antitrust matter within the jurisdiction of the Commission is "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" as specified in subsection 105a, and accordingly the Commission has no jurisdiction to grant the prayer of Petitioner.

WHEREFORE The Cleveland Electric Illuminating Company respectfully requests that the Commission deny the Petition to Intervene and the Amendment thereto, and that it determine that such Petition and Amendment be dismissed as a matter of law without any hearing.

Respectfully submitted,

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Counsel for The Cleveland Electric Illuminating Company

Dated: October 14, 1971