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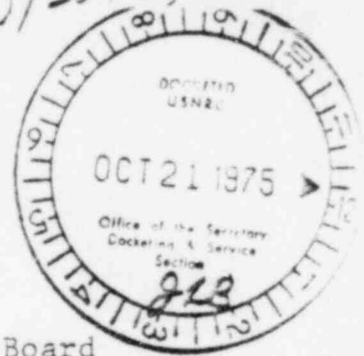

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	)	Docket Nos. 50-346A 50-500A 50-501A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A

RULING OF THE BOARD ON APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF SEPTEMBER 23, 1975

By Motion of September 23, 1975, Applicants moved for summary disposition on the issue of whether CEI's

> refusal of AMP-Ohio's request to wheel 30 mw of PASNY power now to the City of Cleveland ("City") over CEI's existing transmission facilities -- has any meaningful nexus or relationship to activities under the designated nuclear licenses.*

The City of Cleveland (City), the Department of Justice (Justice)

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* In its moving papers, Applicants incorrectly indicated that this Motion was filed "pursuant to the request of the Licensing Board" at the September 18, 1975 prehearing conference. The Board granted leave to Applicants to refile their summary disposition motion then pending against AMP-O, but did not request Applicants to do so. Tr. p. 1183-86.

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and the State of Ohio (Ohio) all have filed responses opposing the grant of summary disposition on the issue designed by Applicants. On October 6, 1975, the Staff filed an opposition to Applicants' Motion.* Applicants on October 7 filed a Motion for Leave to Reply to Oppositions to Refile Motion for Summary Disposition. The City, on October 8, 1975, filed a further reply opposing acceptance of Applicants' Motion of October 7 to file a reply. Justice filed a motion to strike Applicants' Motion as an unauthorized pleading. Applicants' Motion to file a reply is hereby granted.

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* The October 6 filing presumably was predicated on the ten days allowed by the rules for Staff reply (10 CFR Section 2.730(c)) plus three additional days for mail service. We had indicated at the sixth prehearing conference that the Staff would be allowed a ten day period prescribed by the rules in the event the Staff desired to file a reply. The additional three days based upon mail service, however, is inconsistent with our earlier ruling that local parties make hand delivery for the express purpose of reducing necessary reply time. We assume that Applicants made hand delivery of the September 23 Motion to the Staff and we remind the Staff that it is our intent, consistent with what we understood to be the desire of the parties for expedition, to eliminate waiting periods dependent upon mail service.

Applicants contend that CEI's refusal to wheel 30 mw of PASNY power now for AMP-O standing alone does not constitute a situation inconsistent with the antitrust laws and, therefore, fails to meet the Waterford nexus standard.* Applicants concede that a favorable ruling on their Motion would not bar other parties from referring to the PASNY incident as bearing on CEI's intentions or motives underlying its dealings with the City.

Applicants also argue that because the PASNY incident is isolated and because no other party has contested facts alleged to be material in Applicants' Motion, there is no genuine issue of fact, and summary disposition therefore should be granted. It is stated that because the PASNY incident was singled out by AMP-O as a situation inconsistent with the antitrust laws in and of itself, Applicants should not be deprived of the opportunity to obtain a ruling as to whether the PASNY event did constitute such a situation. Applicants state that a favorable ruling on their pending Motion may in some way foreshorten the hearing process in that the Board need not consider certain evidentiary or factual issues.

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* In the Matter of Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), Memorandum and Order of February 23, 1973, RAI-73-2 48 and Memorandum and Order of September 28, 1973, RAI-73-9 619.

We are not persuaded that if Applicants were to prevail on their Motion, the hearing process would be expedited in any way. Applicants themselves conceded at the sixth prehearing conference that evidence relating to the PASNY incident could be presented arguably in support of opposition parties' effort to prevail in certain issues in controversy. Explanations as to why a favorable ruling would somehow reduce the body of evidence to be presented are unconvincing.

Notwithstanding our inability to perceive any likelihood of expediting the hearing process, there is a fundamental reason why Applicants' Motion must be denied. The Motion for Summary Disposition properly should relate to "all or any part of the matters involved in the proceeding," 10 CFR Section 2.749(a). Although the PASNY incident in some respects may be considered a "matter" involved in the proceeding in that all opposition parties have expressed an intent to introduce evidence of the PASNY incident as bearing on an antitrust situation, we do not understand how granting the Motion might eliminate or curtail any of the issues in controversy. The PASNY incident was not

singled out by the Board as an issue in controversy so that the suggested benefits of the ruling Applicants request seem illusionary.*

Parties opposing the Motion have responded generally on the common ground that the Motion should be denied because opposition parties are required to prove only a nexus between a situation inconsistent with the antitrust laws and activities under the license. Individual elements of the situation may not be singled out and eliminated on a piece by piece basis so as to prevent a group of activities, each perhaps lawful in and of itself, to qualify as a concerted attempt to abuse the antitrust laws. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

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* This discussion concerns policy reasons for denying the Motion. This is not to say, however, that even though the Board sees no benefit through curtailment of issues or reduction of evidence in granting the Motion, it would not be granted if, as a matter of law, the Board agreed with Applicants' contentions. As will become apparent, we deny Applicants' Motion not only on grounds that the Motion serves no useful function in terms of the advancement of these proceedings, but because, as a matter of law, we hold the Motion insufficient.

Although the Board considers the Justice opposition correctly to set forth the law applicable to decide this Motion, we refer in addition to a recent decision by Judge Edelstein in the IBM litigation.* In a ruling made August 6, 1975,** the Court denied partial summary disposition in circumstances which closely parallel the rationale or the argument advanced by Applicant. Defendant IBM moved for summary disposition on the basis that the Government conceded that defendant's so-called bundling practices do not constitute a violation of law. Thus, since there remained no genuine issue of fact, defendant argued that the portion of the complaint relating to IBM's bundling practices as violating Section 2 of the Sherman Act should be dismissed. The Government responded that the issue was not whether bundling in and of itself was legal, but whether it was engaged in by IBM as part of a scheme of

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* United States v. International Business Machines, U.S. District Court, Southern District of New York, No. 69 Civ. 200 (DNE).

** 1975 CCH Trade Cases ¶60,495.

monopolization. The Court ruled that there existed a genuine issue of fact because:

> Plaintiff's contentions about bundling raised issues other than the legality of those practices in and of themselves. Indeed, the gravamen of those paragraphs is that those practices were engaged in as part of an illegal scheme of monopolization; such an allegation raises questions of the defendant's intent, i.e., the purpose for which IBM engaged in bundling.

The Court continued:

> The Government in a monopolization case . . . need not prove that each practice of the defendant is in itself illegal.

The same principles seem fully applicable to the situation before us.* Applicants are incorrect in asserting that irrespective of the legality of the PASNY incident, it had no direct or material bearing on the monopolization issues set forth in the issues in controversy adopted by this Board.

Additionally, Applicants' Motion fails because it is predicated upon an inadequate and irrelevant factual basis. It should be recalled that two theories of the relevance of wheeling PASNY power have been advanced. The principal theory, shared by Justice, Ohio, Staff, City and, initially by AMP-O, is that the refusal to wheel

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* See, also, United States v. IBM, also issued August 6, 1975, denying defendant's Motion to Dismiss based on a failure to state exclusionary conduct constituting the willful acquisition or maintenance of monopoly power in 1975 CCH Trade Cases ¶60,494.

PASNY power is related to a larger monopolization issue, or that the refusal to wheel, notwithstanding physical capacity, independently constitutes a situation inconsistent with the antitrust laws. The second theory, advanced by AMP-O alone was that Perry nuclear generation would directly diminish the capacity to wheel PASNY power by overloading transmission facilities. This contention, made in its Supplemental Petition to Intervene, was clearly an effort by AMP-O to introduce a direct physical nexus between the activities under the license and the availability of PASNY power. None of the other parties urge this contention. The Board reservedly admitted AMP-O as an intervenor under this theory subject to later clarification of technical, economic and marketing relationships.

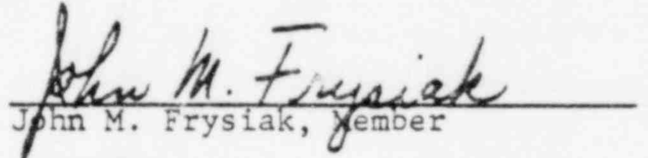
Applicants' Motion for Summary Disposition dated August 15, 1974, was limited to the factual issue of overloading transmission capacity. Applicants sought to dismiss AMP-O as an intervenor. As required by 10 CFR 2.749(a), Applicant submitted a Statement of Material Facts simply acknowledging the refusal to wheel, but asserting that there is now and will be ample transmission capacity to wheel PASNY power. The attached Davidson affidavit was similarly limited to statements of transmission capacity.

Applicants' renewed motion filed August 18, 1975, contained no additional factual grounds for summary disposition.

In its present motion, Applicants seek a resolution of the entire issue of nexus between the refusal to wheel and activities under the license. Applicants seemingly try to broaden their arguments to include the entire antitrust consideration of refusal to wheel and the contentions advanced by Justice, Staff, Ohio and City. However, Applicants continue to rely solely upon their original Statement of Material Facts and upon the Davidson affidavit. Applicants' Statement of Material Facts, required under 10 CFR 2.749(a), does not bear upon refusal to wheel as that contention is made by the surviving adverse parties or bear upon our view of that issue under the principles of ALCOA and IBM, *supra*. Even if the Board were to find it expeditious to rule for the Applicants, the most that would result would be a determination that Cleveland Electric Illuminating Company can now wheel and later will be able to wheel PASNY power but that it refuses now to do so. As we stated above, there would remain genuine and triable issues of material fact.

MOTION DENIED.

ATOMIC SAFETY AND LICENSING BOARD



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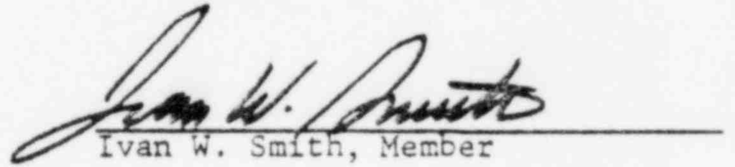

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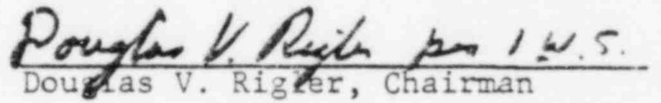

Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland

this 20th day of October 1975.

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NUCLEAR REGULATORY COMMISSION

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CLEVELAND ELECTRIC ILLUMINATING	)		50-440A
COMPANY	)		50-441A
	)		
(Davis-Besse Nuclear Power	)		
Station, Unit No. 1; Perry	)		
Nuclear Power Plant, Units 1&2)	)		

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
21st day of Oct 1975.

Peggy A. Dworias
Office of the Secretary of the Commission

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NUCLEAR REGULATORY COMMISSION

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TOLEDO EDISON COMPANY, ET AL	)	Docket No.(s)	50-346A
(Davis-Besse Unit 1)	)		
CLEVELAND ELECTRIC ILLUMINATING	)		50-440A
COMPANY, ET AL.	)		50-441A
(Perry Units 1 and 2)	)		
TOLEDO EDISON COMPANY, ET AL.	)		50-500A
(Davis-Besse Units 2 and 3)	)		50-501A

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