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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

7/12/74

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
The Toledo Edison Company and	)	
The Cleveland Electric Illuminating Company	)	AEC Dkt. No. 50-346A
(Davis Besse Nuclear Power Station)	)	
	)	
Cleveland Electric Illuminating Company	)	AEC Dkt. No. 50-440A
(Perry Plant Units 1 and 2)	)	50-441A

STATEMENT OF CLARIFICATION
BY THE AEC REGULATORY STAFF

Pursuant to the presiding Board's Order Requesting Clarification filed on June 28, 1974 in the above captioned matter, the AEC Regulatory Staff (Staff) hereby files its statement of clarification regarding the matters in controversy and the scope of discovery. In accordance with the presiding Board's request, the Staff will confine its commentary to the inquiries of the Board.

A. In view of the Atomic Energy Act, as amended, its legislative history, and applicable case law, is dominance by Applicants of a relevant market sufficient in and of itself to constitute "a situation inconsistent with the antitrust laws" under Section 105(c) of the Act? 1/

It is the position of the Staff that in this proceeding dominance alone, without a showing of how that dominance has been used, is not sufficient to constitute a situation inconsistent with the antitrust laws. Similarly,

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1/ In the Matter of Toledo Edison Company and Cleveland Electric Illuminating Company, (Davis Besse Nuclear Power Station), 50-346A, Cleveland Electric Illuminating Company, Perry Plant, Units 1 & 2, 50-440A and 50-441A, "Order Requesting Clarification", June 28, 1974.

the fact that the applicant appears willing to stipulate to dominance is not sufficient to limit discovery to remedies. While the Staff has consistently pursued a course of optimum expedition in the disposition of this case, such a limitation is unwarranted under the Staff's interpretation of Section 105c of the Atomic Energy Act (Act). 2/

It is the position of the Staff that dominance in total generation, amount and distance of transmission lines at all voltages, service area size, and customers (retail and wholesale) are characteristics common to most utilities which have applied for nuclear power permits and licenses. Often, as here, it is because of this dominant size and coordination with other large utilities in the exchange of bulk power in a given region, that the requisite economies of scale can be derived so as to allow a company, or group of companies, to build large scale nuclear power plants. Stated in the converse a non-dominant utility which is not coordinated with other dominant utilities would be the least likely applicant. However, notwithstanding the fact that most of the applications which the Staff and the Department of Justice (Department) have reviewed for licenses to construct and operate nuclear power plants have been from dominant firms, only one-fourth have received adverse advice letters from the Department. 3/

2/ Atomic Energy Act of 1954, as amended P.L. 91-560, 84 Stat. 1472, §105c, December 19, 1970. The Discovery guidelines in this proceeding are ennunciated in 10 CFR Part 2, section 2.740 b(2)(1973). The Staff recognizes that discovery will be limited to the Issues and Matters in Controversy, as delineated by the presiding Board.

3/ There were 54 applications received in the period between Sept. 4, 1971 and July 31, 1974. Of these, hearings were recommended in 13 cases. Of the remaining 41 applications, 16 required some form of license conditions.

In the last six months, the AEC has received thirteen advice letters from the Department of Justice, none of which recommended a hearing, all of which were from large firms. 4/ Thus it is clear that in the opinion of the Department of Justice and the Staff that the mere existence of dominance does not necessarily imply the potential of the existence of an inconsistency with the antitrust laws. Perhaps the sole inference that is justifiable is that an application for construction or operation of a nuclear unit will generally be submitted by a large and dominant utility or group of utilities. Ninety-seven of ninety-eight plants in operation or under construction are owned by utilities which are among the hundred largest electric utility firms in the country. Ninety of ninety-eight are owned by utilities which are within the fifty largest electric utility firms in the country. Nevertheless, the Department has only recommended hearings in those cases where the utility has either affirmatively used its dominance in an anticompetitive manner, or has failed to take necessary steps to make the benefits of nuclear power available.

Prior to analyzing remedies, the "situation" has to be examined to determine if it is in fact sufficiently connected to or related to the activities under the license.

4/ It should be noted that in 9 of these 13 applications, license conditions were affixed by agreement of the parties and no recommendations for a hearing were made.

The next step in the analytical framework is to ascertain whether the "situation" which has resulted is either part of a pattern of exclusionary conduct being carried on to maintain the applicants dominance, or is otherwise an exercise of that dominance in an unreasonable or arbitrary manner, with the end result being an adverse competitive effect on other entities. If this is found to be a situation inconsistent with antitrust law or policy, then remedies must be analyzed. 5/ It is thus premature to jump to a remedy analysis now without more of a determination regarding the reasonableness of the use of the dominance.

AEC Regulatory Guide 9.1 presents a Staff position on Antitrust matters and deals with the conceptual standards of liability. It states that a determination of inconsistency with the Antitrust laws requires an analysis of existing coordination in order to assess whether there have been "...unreasonable restrictions and/or apparent discriminations... [which]... are symptomatic of the situation which is inconsistent with the antitrust laws or the policy underlying those laws." Thus, the Staff is of the opinion that it is necessary to go beyond dominance, to

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5/ It should be noted at the outset that the remedy which is fashioned need not be a direct correlative to the alleged anticompetitive activity or conduct, but rather shall relate to correcting the resulting anticompetitive effect. For example, if conduct under scrutiny reveals a refusal to grant access to a nuclear facility, it is not unlikely that the remedy would include conditions allowing for access to the facility and transmission services to allow the heretofore aggrieved entity a power supply option.

an analysis of the results, or symptoms, of the use of the dominance.

The legislative history behind Section 105c is equally devoid of an indication that dominance alone will suffice in finding an inconsistency with the law. 6/

> ...The legislation proposed by the committee provides for a finding by the Commission as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in 105(a). The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probably that the activities under license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.
>
> It is important to note that the antitrust laws within the ambit of Subsection 105c of the bill are all the laws specified in Subsection 105a. 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.'
>
> The Committee is well aware of the phrases 'may be' and 'tend to' in the Clayton Act, and of the meaning they have been given by virtue of decisions of the Supreme Court and the will of Congress--namely reasonable probability. The committee has -- very deliberately-- also chosen the touchstone of reasonable probability for the standard to be considered by the Commission under the revised 105c of the bill. (emphasis supplied.)

6/ Report, Joint Committee on Atomic Energy, No. 91-1247, 91st Congress, 2d Session p. 4981 (1970).

This section does not indicate that dominance alone is sufficient. It does indicate that methods and practices must by analyzed in conjunction with a structural study of a particular system.

It is noteworthy that a slight increase in market concentration or dominance by a firm may be sufficient to find an inconsistency. United States v. Continental Can 378 U.S. 441 (1964); United States v. Alcoa 377 U.S. 271 (1964). Also, a showing of dominance plus a showing of an intent to stabilize or increase or develop dominance is sufficient to show an inconsistency. United States v. Philadelphia National Bank 374 U.S. 321 (1963). In fact, dominance plus one of any number of varying additional factors which relate to the maintenance of that dominance, or otherwise result in an anticompetitive exclusion of another entity is sufficient to show an inconsistency with the law under Section 105c. For example, dominance plus a pricing scheme, [7] dominance used to errect a barrier to entry, [8] or even dominance plus any other conduct which "...runs counter to the public policy declared in the [Federal Trade Commission] Act," [9] all are sufficient to show inconsistencies.

Thus, the Staff takes the position that to establish a situation inconsistent with the antitrust laws, it is the size or dominance of the utility plus its use of market position vis-a-vis smaller entities that satisfy the requirements under Section 105c of the Act.

Eugene Rostow has noted that dominance, or size, is almost enough to show a violation of the law. Any use of that dominance in the

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7/ FTC v. Cement Institute 333 U.S. 683 (1947).

8/ FTC v. Brown Shoe Co. 384 U.S. 316 (1966).

9/ Atlantic Refining Co. v. FTC 381 U.S. 357, 369 (1965).

relevant market to maintain that dominance or to otherwise disadvantage any other entity completes the offense.

> "When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown. The actual elimination of small competitors is unnecessary.... Parallel action, price leadership, a reliance on advertising rahter than price competition as a means of inducing changes in each seller's share of the market, and above all, size-- the market position of a small number of large sellers or buyers--these are now key points to be proved in a case of monopoly, or of combination in restraint of trade. From such evidence inferences of combination will be drawn, if cautious pleaders rely on Section 1 as well as on Section 2. But the content of an antitrust case has been enormously limited and simplified, under Section 1 as well as Section 2. Painstaking search for scraps of evidence with a conspiratorial atmosphere are no longer necessary. There need by no parade of small business men as witnesses, to testify that they have been driven from the trade, and their lives ruined, by the ruthless squeeze of monopolistic pressure. Under the Tobacco case, the economic fact of monopoly is very close to being the legal proof of monopoly. The decisive elements are the power to assert a degree of control over price and output in the market as a whole; and the power to deter or discourage potential competition -- even, as Judge Hand said, by embracing 'each new opportunity as it opened,' and facing 'every new comer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.' "
> (A National Policy For The Oil Industry, Yale University Press (1948) at p. 1361

Under the Sherman Act, [10] dominance plus the use of such dominance constituted the traditional elements of a Sherman Act §2 violation. United States v. Griffith [11] suggests that monopoly power, lawfully or unlawfully acquired, may be a sufficient wrong to constitute a violation. The Griffith case infers that dominance plus any other one factor, such as showing the mode of acquisition or retention thereof, is sufficient. In this proceeding, it may be sufficient to show dominance plus sole possession of a unique or essential resource, such as the CEI high voltage transmission system, in order to constitute an inconsistenty with the antitrust laws.

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[10] 15 U.S.C. §1 & 2 (1970).

[11] 334 U.S. 100 (1948).

> The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility. (A.D. Neal, The Antitrust Laws of the U.S.A. Cambridge University Press (1960) at p. 67.

Thus, the answer to the presiding Board's inquiry "A" is "no"; dominance alone is not sufficient, but instead requires an additional showing that the dominance has had an exclusionary effect on any other entities ability to compete. It is this combination that creates the inconsistency, and not dominance alone.

In the Alcoa case, 12/ the court held that dominance in the relevant market plus the power and intent to maintain that dominance, however displayed, was sufficient to violate the law. Commentator Joseph S. Bain, in referring to this "dominance plus" theory has maintained that the "plus" factor could "...be inferred from a course of market action, devoid of express predatory or exclusionary tactics, which is evidently designed to secure and perpetuate the pre-eminent market position." 13/ Bain further maintains that "... predominant occupancy [dominance] together with normal and prudent business practices which effectively create and maintain it [the dominance] is sufficient to offend the law. 14/

12/ United States v. Aluminum Co. of America 148 F2d 416 (2nd Cir., 1946)
13/ J. S. Bain Industrial Organization (Wiley and Sons, 1959) at p. 510.
14/ Supra, at note 10.

Clearly, any form of overtly exclusionary conduct coupled with dominance is sufficient to find an inconsistency under Section 105c of the Act. Additionally, the Staff is of the opinion that this extra factor can be satisfied by certain inaction, e.g. the failure to take a necessary measure such as refusing to make available on reasonable terms or interest in a nuclear reactor.

B. 1. If the answer to Question A is "yes," then need anything else be alleged and proven under Section 105(c) to permit an Atomic Safety and Licensing Board to condition a license?

2. Could such conditions provide other electric entities with access to Applicants' generating facilities by means of ownership shares, or unit power sales?

3. Could such conditions provide other electric entities with access to Applicant's transmission system by means of "wheeling"? 15/

As the answer to inquiry "A" was "no", only brief comment appears in order for inquiry "B". Regarding the kinds of conditions that can be drawn from a showing of dominance plus use or abuse thereof, the Staff, in Broad Issue III and the Matters in Controversy thereunder,16/ has determined what relief initially appears appropriate. Since this is the beginning of this case, a definitive statement of relief is not possible prior to discovery and analysis of the situation inconsistent with the antitrust laws. Certainly, conditions can be drawn to allow other generating entities access (B(2)) and added necessary transmission services (B(3)) once it has been shown that applicants have abused their market position.

15/ Supra, at F.N. 1.

16/ See Joint Statement of Contentions and Matters in Controversy, filed by the Staff, Department, and Intervenors, on May 28, 1974.

Dominance plus a refusal to "wheel", or dominance plus a refusal to grant access to essential generation and transmission facilities are sufficient to constitute a situation inconsistent with the law, and would allow for the conditions suggested in B(2) and (3). In addition, if discovery reveals that aforementioned refusals have occurred, then the other remedies listed in our Broad Issue III would be necessary. It is further the position of the Staff that it is not necessary to equate each item of proposed relief with specific conduct. The Staff believes that this is not inconsistent with the position that remedies must, at the least, cure the specific wrongs which become apparent in the proceeding.

As noted earlier, the conduct used to prove a situation inconsistent with the antitrust laws is not the sole conduct that will be addressed in license conditions. Once a finding is made under section 105c of the Act of inconsistency, the necessary relief may go to areas outside of those involved in the "conduct" portion of the case-in-chief of the government, so long as it can be shown that the relief is necessary to alleviate the anticompetitive problems in the relevant market.

Finally, assuming arguendo that the applicants were to stipulate to the fact that there is a situation inconsistent with the antitrust laws, the Staff would support limiting the remainder of this proceeding to issues of relief. (See: Louisiana Power and Light Company, (Waterford Steam Electric Generating Station, Unit 3) Dkt. No. 50-382A, CLI-73-25, RAI - 73 - 9, "Memorandum and Order of September 28, 1973", at p. 622).

C. If the answer to Question A is "no," then what showing is necessary, in addition to the showing of dominance, in order to reach a conclusion that there is "a situation inconsistent with the antitrust laws" under Section 105(c)? 17/

Inquiry "C" can be briefly answered by reference to the answer to inquiry "A", along with the following explanation. The conclusion of "inconsistency" can be reached once a showing of dominance (or a stipulation thereof) is combined with a use of that dominance as described above. The extra factor in the formula: dominance plus x, = inconsistency, is neither a burdensome or necessarily time consuming factor. As noted earlier, the plus factor can be shown in any number of forms, e.g. refusal to grant access to an operating or a planned nuclear facility on reasonable terms, refusal to provide transmission services for necessary alternative source of generation, prior and present refusals to enter into coordinated development or coordinated operation, 18/ or any other traditional anticompetitive practice, e.g. tying arrangements, price fixing, conspiratorial agreements between dominant utilities, "unfair practices" of any type and to any degree that would satisfy the requirements of Section 5 of the Federal Trade Commission Act, 19/ any other similar patterns of conduct or inaction calculated to, or with the effect of, lessening or inhibiting competition and any other conduct which enhances the applicant's market position. 20/

"Competition" here must be defined as actual or potential. In the context of this case, it is both actual and potential competition which are allegedly restrained by the conduct of the applicant, necessitating discovery at both levels. An inquiry into potential competition at

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17/ Supra, at note 1.

18/ Coordinated development and operation are defined at p. 2 of the Joint Statement, see f.n. 8.

19/ Federal Trade Commission Act 15 U.S.C. 41-58, 38 stat. 717 (1914).

20/ The inarticulated premise in the dominance plus formula ennunciated herein is that the requirement of nexus is satisfied before relief can be granted.

wholesale is fully warranted, both from the standpoint of the fact that the licensed activity will create over 1000 mw of increased load which can be used in numerous manners, and from the legal standpoint. (See Otter Tail Power Co. v. United States 410 U.S. 417 (1973) and Penn-Olin Chemical Company v. United States 378 U.S. 158 (1964)).

As far as actual competition is concerned, there have been serious allegations regarding predatory practices allegedly carried on by the Applicants in retail competition in the City of Cleveland in the advice letter of the Department in this proceeding, and in the petitions of the intervenors to warrant discovery in this regard.

Thus, the showing required in inquiry "C" in addition to dominance could take any number of forms. 21/ Any broad spectrum limitation on discovery at this time without complete information on what has actually occurred or will occur if the licenses is issued without conditions would raise serious problems.

Respectfully submitted,

Andrew F. Popper
Counsel for AEC Regulatory Staff

Dated at Bethesda Maryland,
this 12th day of July 1974.

Benjamin H. Vogler
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21/ This is especially true in light of §105a of the Act which designates all major antitrust legislation as being within the appropriate scope of AEC consideration in determining an inconsistency with the law.

UNITED STATES OF AMERICA
ATOMIC ENERGY 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)	)	AEC Docket No. 50-346A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A
	)	
DUQUESNE LIGHT COMPANY, ET AL. (Beaver Valley Power Station, Unit No. 2)	)	Docket No. 50-412A

CERTIFICATE OF SERVICE

I hereby certify that copies of STATEMENT OF CLARIFICATION BY THE AEC REGULATORY STAFF, dated July 12, 1974, in the captioned matter have been served upon the following by deposit in the United States mail, first class or air mail, this 12th day of July 1974:

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