11/25/75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
The Toledo Edison Company and	)	Docket Nos. 50-346A
The Cleveland Electric Illuminating	)	50-500A
Company	)	50-501A
(Davis-Besse Nuclear Power Station,	)	
Units 1, 2 and 3)	)	
	)	
The Cleveland Electric Illuminating	)	Docket Nos. 50-440A
Company, et al.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

ANSWER OF THE CITY OF CLEVELAND TO
APPLICANTS' MOTION FOR DETERMINATION THAT
DAVIS-BESSE UNIT 1 IS "GRANDFATHERED"
FOR PURPOSES OF OPERATION

On November 4, 1975, Applicants filed their Motion For Determination That Davis-Besse Unit 1 Is "Grandfathered" For Purposes Of Operation. Applicants appear to argue, in their motion, that prelicense antitrust review is not required. that the Board has discretion to grant an operating license prior to completion of antitrust review, and that the Board should grant an operating license prior to completion of antitrust review. The City of Cleveland believes the law requires prelicensing antitrust review and opposes Applicants' Motion.[1/]

1/ Cleveland believes the motion is premature and hypothetical at this point. It is quite possible that Davis-Besse Unit 1 will not be ready for an operating license at the time now predicted by Applicants. In February, 1974, Applicants said Davis-Besse would generate power around August, 1975 (Tr. 95). In March of 1974, Staff noted that the issuance of an operating license for Davis-Besse Unit 1 was not expected until the end of 1975 saying "It has been moved up once again" (Tr. 218). The history of Davis-Besse Unit 1 teaches that any target date set for issuance of an operating license is speculative.

Applicants attempt to build an "equity" case obviously recognizing that they are weak on the law. At page 5, Applicants reiterate their earlier arguments with respect to delays -- delays occasioned allegedly by everyone except the Applicants.[2/] Without undertaking an exhaustive chronology of events in this proceeding, it is now necessary to set the record straight with regard to delays occasioned by the Applicants themselves.

On July 6, 1971, Cleveland filed its petition to intervene in Davis-Besse. On July 13, 1971, CEI requested an extension of 30 days to respond to Cleveland's petition. CEI and Toledo Edison eventually filed their answers to Cleveland's petition on October 14, 1971, some 3 months after the petition was filed. Applicants filed supplements to their answers on April 10, 1973 and May 1, 1973, thus prolonging the rounds of pleadings.

After the Commission referred Cleveland's petition to a Board for action, Applicants caused further delay by contesting the Board's Orders.

On October 23, 1974, Applicants requested an extension of 30 days in which to produce documents and answer interrogatories. Applicants failed to file any listing of documents claimed to be privileged until December 16, 1974, long after the due date for responses to document discovery requests. Applicants caused in excess of one month's delay by failing to produce documents in Washington, D. C., as required by the unobjected to terms of the discovery requests filed by the Staff and Department of Justice.

On March 20, 1975, during a conference call to set dates for filings with respect to privileged documents, Mr. Charnoff argued that he needed a 4 week delay to deliver the documents claimed to be privileged by CEI.

2/ Applicants appear to have backed off from their charge that the Commission engaged in delaying tactics.

On May 14, 1975, Applicants objected to taking depositions more than 3 days a week thus lengthening the discovery period.

On July 10, 1975, Cleveland requested a 30 day extension in the period for taking depositions with lesser extensions of other procedural dates. During a conference call on July 14, 1975, Mr. Reynolds suggested a hearing date one week later than that proposed by Cleveland.

On November 4, 1975, Applicants requested a two week delay.

On November 14, 1975, Applicants requested an additional 10 day delay.

It is obvious that under even the most conservative method of computation Applicants are directly responsible for at least 5 months of delay in bringing these proceedings to a hearing. In addition, Applicants have occasioned delay through the repetitious filing of their Motion For Summary Disposition, their insistance on filing the last piece of paper[3/] e.g., the Hauser affidavit on privilege claims filed after all briefs had been filed, and the present threat of delay occasioned by CEI's attempt to enjoin attorneys from the Department of Justice from presenting all of the true facts to the Board.

Cleveland believes it unfortunate that the time of the Board and the parties should be consumed in wrangling over who caused how many days delay. In truth all parties have at one time or another found it necessary to seek an extension of time. Any attempt to lay the blame at the door of a

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3/ Applicants undoubtedly will request leave to file a reply to the answers to their Motion For Determination That Davis-Besse Unit 1 Is "Grandfathered" For Purposes Of Operation.

single party is futile. It is particularly futile for Applicants who have been responsible for such a great amount of delay.

Applicants also suggest, without any supporting factual showing, that Davis-Besse Unit 1 power is necessary to the State of Ohio in the summer of 1976. If, in fact, Davis-Besse is available for commercial use in the summer of 1976, it will undoubtedly affect the reliability and cost of power in the CAPCO area; however, if Davis-Besse Unit 1 is not available, this Board need not fear that the lights will go out. Cleveland is informed that during the summer of 1975, ECAR reported 25% reserves, the Allegheny System 37%, Cincinnati Gas and Electric 35%, Dayton Power and Light 33%, and AEP 28%. Cleveland is unaware of any reason why sufficient power will not be available to Applicants, either from their own existing resources or purchase or both, to provide adequate power during the summer of 1976.

If, in fact, electric power will be in short supply in Ohio in the summer of 1976 and if, in fact, Applicants do have the welfare of the public in mind, why does CEI refuse to wheel 30 Mw of PASNY power and 50 Mw of power from the City of Richmond, Indiana, to Cleveland to alleviate the alleged power shortage. The answer, of course, is that for Applicants the public welfare must take second place to the private welfare of its stockholder's.

Perhaps if the Board were empowered to grant a prehearing license the foregoing matters would have some relevance.[4/] However, such is not the case for the law is clear that prelicense antitrust review must precede the grant of an operating license.

4/ Applicants allegation that the Department of Justice, Staff or Cleveland are engaged in blackmail is unworthy of response.

The provisions of the Atomic Energy Act[5] providing for antitrust review during the licensing process for nuclear power plants clearly contemplates that the antitrust review shall precede issuance of a license. The portion of House Report No. 91-1470[6] discussing the antitrust review portion of the 1970 amendments to the Atomic Energy Act is itself entitled "Clarification of Procedure for Prelicensing Antitrust Review." Moreover the House Report states "The committee is recommending the enactment of prelicensing review provisions . . . ."[7]

The statute itself sets out a scheme for conducting an antitrust review prior to issuance of a license.[8] Although providing for prelicensing antitrust review, the statute does provide for certain exceptions. For example, under Section 2135(c)(2) a prelicensing antitrust review is not required prior to the issuance of an operating license if there has been no change in circumstances since a prior antitrust review conducted with respect to a construction license for the same facility. Since there was no antitrust review with respect to the construction licenses issued for the Davis-Besse Unit 1, Section 2135(c)(2) is not applicable.

The other possible exception to the requirement for a prelicensing antitrust review is found in Section 2135(c)(8) which provides:

> With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance

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5/ 42 USC §2135.
6/ U.S. Code Congressional and Administrative News 91st Congress, Second Session 4981, 4994.
7/ Ibid, 4994.
8/ 42 USC §2135(c).

> under Section 2133 of this title, and with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: Provided, that any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect. (Emphasis added.)

House Report 91-1470 makes it clear that the exception in Section 2135(c)(8) does not permit grant of an operating license in this instance. The Joint Committee states, at pages 31-32:[9/]

> Paragraph (8) endeavors to deal sensibly with those applications for a construction permit which, upon the enactment of the bill into law, would have to be converted to applications under Section 103. In some cases, there might well be hardships caused by delays due to the new requirement for a potential antitrust review under revised subsection 105c. Paragraph (8) would authorize the Commission, after consultation with the Attorney General, to determine that the public interest would be served by issuance of a permit containing conditions to assure that the results of a subsequently conducted antitrust review would be given full force and effect. Paragraph (8) similarly applies to applications for an operating license in connec-

9/ House Report No. 91-1470, by the Joint Committee on Atomic Energy on "Amending the Atomic Energy Act of 1954 . . . To Provide For Prelicensing Antitrust Review . . ." 91st Congress, 2d Session (1970).

> tion with which a written request for an antitrust review is made as provided for in paragraph (3). (Emphasis added.)

It is established principle that the insertion of an exception in a statute is an affirmation that its provisions are generally applicable to all other cases not excepted.[10/] In antitrust cases there is a heavy presumption against implicit exemptions.[11/]

In providing a limited exception for construction permits in Section 2135(c)(8) Congress intended to alleviate a hardship resulting solely from the timing of the passage of the amendment and was meant only to alleviate a hardship imposed on those with pending applications for permits.[12/] The fact that Congress chose to impose prelicensing antitrust review on all other construction permit applications[12a/] clearly demonstrates that Congress' chief concern was not that the grant of licenses or permits generally should be delayed because of antitrust proceedings. Congress was aware that some delay might be occasioned by prelicensing antitrust review and with that knowledge chose to impose the prelicensing review requirement.

It is also important that Section 2135(c)(8) chiefly deals with the grant of permits in certain exceptions. The Atomic Energy Act clearly differentiates between construction permits and operating licenses. Con-

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10/ Addison v. Holly Hill Fruit Products, 322 U.S. 607 (1944); Bend v. Hoyt, 13 Pet. 263 (1839).

11/ There is also an exception for operating licenses which is not relevant to this case.

12/ Louisiana Power and Light Company (Waterford Unit 3), 6 AEC 48 (1973).

gress must be understood to have used the word "permit" with knowledge of the distinction between construction permits and operating licenses.

Indeed the wisdom of requiring prelicense antitrust review is borne out by this very case. It is only when, by grace of Congress, Applicants have been permitted to construct a plant prior to review that Applicants can use the specter of a nuclear plant sitting idle to try to stampede the Commission into granting an operating license without antitrust review. 13/

In paragraph 20, of their motion, Applicants argue that nothing in the conditions attached to the construction permit warned Applicants that prelicensing antitrust review were required. Failure to include such a condition in Applicants license could not abrogate the requirements of the statute. Surely Applicants do not intend this Board to understand that Davis-Besse would not have been constructed had Applicants been told about the Atomic Energy Act. Or perhaps Applicants are telling the Board that, had they only known about prelicensing antitrust reviews, they would not have caused in excess of 5 months delay in these proceedings. 14/ There is no basis for any sort of estoppel argument in this case.

In paragraph 6, Applicants claim that a similar issue is pending in the Farley case and that therefore the Board may wish to certify the question.

13/ Applicants previously argued that Cleveland should be denied a right to intervene in Perry and Beaver Valley so that construction permits could issue without delay. At that time Applicants argued that prelicense review in Davis-Besse would adequately protect the City (Tr. 238-240).

14/ Counsel for Applicants addressed the probability that Davis-Besse Unit 1 would not be "grandfathered" for the operating license on February 19, 1974, at the very first prehearing conference held in these proceedings. At that time Applicants' counsel admitted that there was a "larger than substantial" body of opinion that an operating license could not issue before hearing on antitrust issues in the circumstances present in this case (Tr. 141).

The issue is raised in Farley in a much different posture. In Farley the Board is considering the appropriateness of consolidation of the Barton case with the Farley case. Applicants in Farley argued that consolidation would cause delays which would jeopardize issuance of an operating license for the Farley Units. Accordingly, the Board invited the parties to submit memoranda regarding the possible "grandfathering" of the Farley Units. The Board was not called upon to make a ruling with respect to "grandfathering" and merely desired guidance in ruling on the issue of consolidation. Subsequently, Applicants admitted that an operating license for the Farley Units would not issue until sometime in 1977 in any event. Thus, the matter in Farley is moot as it is doubted that even Alabama Power can delay the Farley hearing into 1977.

WHEREFORE, for the foregoing reasons Cleveland prays that the Board determine that no operating license can issue for Davis-Besse Unit 1 until antitrust review has been completed and that the matter not be certified to the Appeal Board.

Respectfully submitted,

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November 28, 1975

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Answer Of The City Of Cleveland To Applicants' Motion For Determination That Davis-Besse Unit 1 Is "Grandfathered" For Purposes Of Operation, has been made on the following parties listed on the attachment hereto this 28th day of November, 1975, by depositing copies thereof in the United States mail, first class or air mail, postage prepaid, or by hand delivery.

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