UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

5/28/76

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

MEMORANDUM OF THE DEPARTMENT OF JUSTICE
IN RESPONSE TO APPLICANTS' JOINT MOTION TO DISMISS

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May 28, 1976

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On April 20, 1976, "Applicants' Motion for an Order Dismissing All Allegations Made by the NRC Staff, the Department of Justice and the City of Cleveland" (hereinafter "Motion") was filed. Applicants' Motion appears to be based solely on the following grounds: (1) anticompetitive joint action by Applicants has not been proven 1/ and, inferentially, such joint action is required to establish a "situation inconsistent with the antitrust laws", and (2) Applicants' individual or joint

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1/ Motion, pp. 6-44.

anticompetitive activities, which -- again inferentially -- constitute a "situation inconsistent," will not be created or maintained by activities under the licenses sought herein. 2/ As the Department will demonstrate in this memorandum, neither Applicants' argument on joint action nor their perennial "nexus" misinterpretation -- exhumed once again in the instant Motion -- is supported by fact or law.

I. Legal Standard

Applicants argue that the instant Motion is analogous to a motion to dismiss an action in the federal courts under Rule 41(b) of the Federal Rules of Civil Procedure. 3/ Proceeding from this assumption, their argument continues that this Licensing Board must apply a legal standard adopted by some of the courts which have ruled on motions to dismiss made pursuant to Rule 41(b).

Applicants' arguments ignore two significant, interrelated facts. First, any action taken by this Board under Rule 41(b), including the adoption of a legal standard, is wholly

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2/ Motion, pp. 6, 44-55.

3/ Motion, p. 4.

discretionary. 4/ Second, there is a well-established legal standard governing motions to dismiss in proceedings before this Commission which should be employed by the Board here. Not surprisingly, the appropriate standard in NRC proceedings differs significantly from the standard put forward by Applicants.

The Appeals Board has held that one opposing the grant of a license -- here, the grant of an unconditioned license -- need establish only a prima facie case in order to shift the burden of proof to the applicant. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station) ALAB-161, 6 A.E.C. 1003, 1018 (1973), citing Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-123, RAI-73-5, 331, 335 (1973). Clearly, the prima facie standard is the appropriate one for this Board to employ in ruling on a motion

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4/ Rule 41(b) provides in pertinent part:

> For failure of the plaintiff to prosecute . . ., a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.
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> In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. [Emphasis supplied.]

to dismiss filed by an applicant at the close of the evidentiary presentations of the parties opposing the grant of an unconditioned license.

In ruling on a motion to dismiss, the Appeals Board recently held that the minimum showing which must be made by an intervenor or the Staff is a quantum of evidence "sufficient to cause a reasonable licensing board to enquire further." Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-315, NRCI 76/2, 105, 112 (1976). This standard is satisfied by the evidence of record in this proceeding.

Applicants' Motion and argument are, however, premised on a second, fundamental erroneous assumption -- one far more serious than the choice of a wholly inappropriate burden of proof standard. Simply stated, Applicants' Motion is based on the premise that the dismissal of all allegations contained in the September 5 filings will necessarily result in the termination of this proceeding. Even if the Department, and the other opposing parties, failed to prove the existence of a single factual situation described in the September 5 filings, this Board could not terminate the proceeding if the record contained evidence which (1) fell within the scope of the Issues in Controversy set forth in Prehearing Conference Order No. 2, and (2) established a "situation inconsistent with the antitrust laws," or the policies underlying those laws which would be

created or maintained by activities under the licenses sought herein. The record is replete with such evidence. 5/

II. Joint Action

Applicants' argument appears to be based on the assumption that the Department must prove some form of joint action in order to establish a "situation inconsistent with the antitrust laws." Applicants' unstated assumption to this effect is completely unsupported by precedent and authority; indeed, it is patently unsupportable. Their emphasis on the requirements of Section 1 of the Sherman Act completely ignores the fact that a single entity, acting completely by itself, may violate Section 2 of the Sherman Act, as well as Section 5 of the Federal Trade Commission Act and substantial portions of the Clayton Act. Even the most rudimentary perusal of the antitrust laws establishes that a situation inconsistent with those laws may exist in the absence of joint action. In any event, Applicants' overly narrow perception of the antitrust laws is immaterial in this proceeding, since the record demonstrates both individual and joint action constituting a situation inconsistent with the antitrust laws.

5/ For example, Applicants' out of time production of documents resulted in the introduction and receipt of evidence (Exhibits DJ 513, 533-540) demonstrating the existence of territorial allocation agreements between Ohio Edison Company and Toledo Edison Company, and between each of these Applicants and other electric utilities. Such agreements constitute a "situation inconsistent" -- misuse of dominance, individually and together with others, which prevents coordinated operation and development by non-CAPCO entities within the CCCT. This conduct falls directly within "Broad Issue A."

For example, the 1967 agreement establishing the CAPCO Pool, standing alone, establishes a situation inconsistent with the antitrust laws. This agreement demonstrates utilization of dominance 6/ in generation and transmission in a manner which forecloses access by competitors 7/ to the benefits of coordinated operation and development -- benefits which are available to Applicants by virtue of their membership in CAPCO. The agreement requires unanimity in any decision by Applicants concerning modifications of the allocations of generation and transmission capacity by the CAPCO Pool (NRC 184, pp. 4-10, App. A). Since admission of a new member would require such a modification, the agreement effectively gives each of the Applicants the power to veto the admission of one of its competitors as a member of CAPCO. 8/ Such a contract and combination constitutes a restraint of trade on its face. It is unnecessary to inquire into the agreement's implementation or past effect. Associated

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6/ The record demonstrates that Applicants possess dominance and market power, both individually and as a group (Dr. Wein: DJ 285; Dr. Hughes: Tr. 3640).

7/ Applicants' Motion does not take issue with the fact that Applicants are in actual and potential competition with municipal systems located within the CCCT.

8/ Mr. Williams' testimony during Applicants' direct case concerning provisions for compulsory arbitration (Tr. 10470-72) is in conflict with the provisions of Exhibit NRC 184 which do not provide for arbitration. Thus, the Memorandum of Understanding, without more, was an exclusionary device inconsistent with and violative of the antitrust laws. There is no evidence of record which would tend to show that Applicants' exclusionary policy has been abandoned.

Press v. United States, 326 U.S. 1, 12 (1945); Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484, 488-89 (1st Cir.), cert. denied, 344 U.S. 817 (1952).

Two additional facts conclusively establish that Applicants' exclusion of competitors from membership in CAPCO is inconsistent with the antitrust laws. First, Applicants' competitors have available no feasible alternative by which they may secure similar benefits of coordinated operation and development. The record is clear that small utilities, acting alone, cannot install large-scale generation. The record also demonstrates that such large-scale nuclear generation can only be effectively utilized in the context of a large interconnected network. 9/ Indeed, in at least one instance, a competing municipal system was informed that access to individual CAPCO nuclear units, absent pool membership, was not to be permitted. 10/ Second, it is clear in the record that Applicants, before entering upon their restrictive contract and combination, were fully aware of the interest of

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9/ See, e.g., Exhibit DJ 450, pp. 23-26. Dr. Wein has demonstrated that the nuclear units which are the subject of this proceeding are unique facilities (DJ 285, 511).

10/ Exhibit NRC 17, pp. 5-6. Examination of the Memorandum of Understanding (NRC 184) indicates that Applicants may not take individual action inconsistent with the Memorandum. Since allocation of a portion of a specific nuclear unit to a non-CAPCO utility would contravene the provisions of the Memorandum, each Applicant could veto such an allocation of nuclear capacity to its competitor by virtue of the unanimity requirement.

competitive municipal systems in engaging in coordinated operation and development. Indeed, this interest on the part of the municipals was a repeated subject of discussion by Applicants during the negotiations leading to the agreement (DJ 278, DJ 279, DJ 568, C46, C48). The adoption of an agreement giving each of the Applicants a veto over the access of any competitor to the benefits of coordinated operation and development is clearly inconsistent with the antitrust laws under these circumstances.

In a situation analagous to the facts in the present proceeding, the Supreme Court held that restrictive provisions of similar purport violated the antitrust laws. Associated Press v. United States, supra. In that case, the question before the Court was whether provisions of an association's by-laws, which gave individual members the power to veto the admission of their competitors to membership in the association, violated the antitrust laws. The Supreme Court found that admission to membership in the association was a prerequisite to obtaining the benefits available to members of the association (326 U.S. at 12), and ruled that the exclusionary by-laws violated Sections 1 and 2 of the Sherman Act. The Court held:

> The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victor of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the

> Sherman Act or with practical, everyday knowledge be attributed to individual "enterprise and sagacity", such hampering of business rivals can only be attributed to that which really makes it possible -- the collective power of an unlawful combination. 326 U. S. at 15.

See also Otter Tail Power Co. v. United States, 410 U. S. 366, 380 (1973); Gamco, Inc. v. Providence Fruit & Produce Bldg., supra.

As previously discussed, the benefits of coordinated operation and development available to CAPCO members are not available to their competitors except through CAPCO membership. Clearly the provisions of the CAPCO agreement which give Applicants the power to veto admission of their competitors to CAPCO falls within the logic of the Associated Press decision. It is equally clear that such conduct cannot be immunized from antitrust attack by an assertion of "business justification". Otter Tail Power Co. v. United States, 410 U. S. at 375.

III. Nexus

In response to Applicants' most recent repetition of their nexus position, the Department here adopts by reference its prior argument concerning nexus 11/ and notes that

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11/ Department filings dated November 26, 1975; September 29, 1975; July 12, 1975; April 7, 1975; October 10, 1974; and June 14, 1974.

Applicants' legal argument is at odds with Commission precedent 12/ and has already been specificallly rejected by this Board. 13/

The respective Applicants' individual anticompetitive conduct 14/ has created (in part), maintained, and increased their individual dominance in generation and transmission, as well as their individual market power in the retail and wholesale relevant markets. This individual dominance and market power has contributed to and has been perpetuated by Applicants' collective dominance and market power in all of the relevant markets. Applicants' collective dominance and market power has been and will be further enhanced, secured and maintained by the benefits of coordinated operation and development resulting from their membership in the CAPCO Pool. Applicants' dominance and market power, both individual and collective, have been misused to foreclose access by Applicants' competitors to these same benefits of coordinated operation and development.

12/ Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3) CLI-73-7, 6 AEC 48 (1973); Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3) CLI-73-25, 6 AEC 614 (1973); Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1) ALAB-279, NRCI-75/6. 559 (1975).

13/ Ruling of the Board on Applicant's Motion for Summary Disposition of September 23, 1975, dated October 21, 1975.

14/ See, for example, the anticompetitive conduct discussed in "Memorandum of the Department of Justice in Response to Applicants' Individual Motions to Dismiss", filed May 17, 1976.

The Department submits that Applicants' individual and collective misuse of market power constitutes a "situation inconsistent with the antitrust laws" within the meaning of Section 105c. It is clear that this situation will be exacerbated by further increases in Applicants' individual or collective market power. The record shows that Applicants' activities under the licenses sought herein, including the marketing of nuclear power 15/ which will represent a substantial part of Applicants' combined generating capacity (DJ 450, p. 50-51), will strengthen Applicants' individual and collective market power by providing them with a significant competitive advantage derived from the economies (DJ 450, p. 52; DJ 581, p. 38) of their nuclear generation.

IV. Conclusion

For the foregoing reasons, the Department of Justice urges this Hearing Board to deny Applicants' Motion.

Respectfully submitted,

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May 28, 1976

15/ Applicants will not market nuclear power in isolation from power generated by other sources (DJ 450, p. 51).

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CERTIFICATE OF SERVICE

I hereby certify that copies of MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN RESPONSE TO APPLICANTS' JOINT MOTION TO DISMISS have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand this 28th day of May 1976.

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