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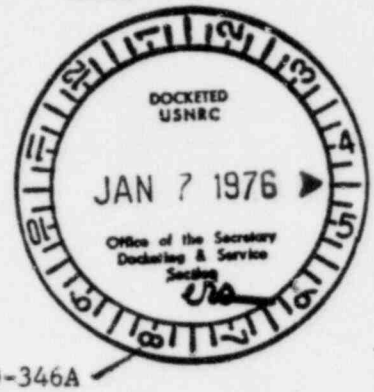

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

MEMORANDUM AND ORDER OF THE BOARD ON APPLICANTS' MOTION FOR DETERMINATION THAT DAVIS-BESSE UNIT 1 IS "GRANDFATHERED" FOR PURPOSES OF OPERATION

By Motion of November 4, 1975, Applicants moved this Licensing Board "to enter an order affirming the authority of the Commission to issue a license authorizing the operating of the Davis-Besse Nuclear Power Station, Unit 1, prior to the completion of the antitrust review presently in progress."[1/]

1/ By Motion of November 4, 1975, Applicants also moved the Appeal Board to direct the Licensing Board to certify the question presented in the Motion now before this Board. By Order of November 5, 1975, the Appeal Board denied Applicants' Motion because it believed certification pursuant to Section 2.718(i) to be inappropriate unless and until the Licensing Board has been afforded reasonable opportunity to consider and decide the question sought to be certified. The Appeal Board perceived no compelling circumstances warranting any exception to that rule.

By Order of November 6, 1975, this Board set a briefing schedule in which parties opposing the grant of Applicants' Motion had until November 28, 1975 to file responses. Briefs in opposition to Applicants' Motion now have been received from the Department of Justice (Justice), the NRC Staff (Staff) and the City of Cleveland (City).

In March 1971 the Atomic Energy Commission, now the Nuclear Regulatory Commission, issued a construction permit, CPPR-80, for the Davis-Besse Unit 1 station. That permit contained the following condition:

> "This permit shall be subject to an antitrust review by the Attorney General pursuant to Section 105 c of the Act. The applicants shall furnish to the Commission such information as the Attorney General determines to be appropriate for the conduct of this review and the rendering of his advice with respect to this permit. The Commission may hold a hearing on antitrust matters on the recommendation of the Attorney General or at the request of any person and, on the basis of its findings made after such hearing, the Commission will continue, rescind, or amend this permit to include such conditions as the Commission deems appropriate. The applicants shall comply with any order or license condition made by the Commission pursuant to Section 105 c of the Act with respect to the licensed activities."

Section 105 c of the Atomic Energy Act of 1954, 42 USC §§2011, et seq., was amended effective December 19, 1970 by Public Law 91-560 to provide in §§105 c (8) that:

> (8) 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 under Section 103, 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.

It is Applicants' position that the application for construction of the Davis-Besse Nuclear Power Station Unit 1, which was filed on August 1, 1969 by the Toledo Edison Company and the Cleveland Electric Illuminating Company, is "grandfathered"--subject to post licensing completion of antitrust review--under that provision of Section 105 c (8).

There is no dispute that, with respect to post 1970 applications for operating licenses in connection with which a written request for antitrust review is made properly, no operating permit may issue until the completion of the antitrust review. In the case of a contested proceeding, a Safety and Licensing Board must render its findings before

an operating license can become effective. The question before us is whether the status of these proceedings prior to December 19, 1970 made available to Applicants the provision for post licensing review relief rather than mandating prior completion of antitrust review as required under the amended law.

A careful reading of the language of Section 105 c (8) indicates clearly that the relief sought by Applicants is not available under Section 105 c (8). The relief encompassed by 105 c (8) relates to two types of applications. First, it applies to applications for construction permits on file at the time of enactment into law of that subsection which permit would be for issuance under Section 103. This condition does not apply to the instant proceeding. Second, it applies with respect to any application for an operating license in connection with which written request or antitrust review is made as provided for in paragraph 105 c (3).[2/] At the time of enactment

2/ "With respect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection (b) of section 2134 of this title prior to December 19, 1970, any person who intervened or who sought by timely written notice to the Comission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdicational basis for such determination shall have the right, upon a written request to the Commission, to obtain an antitrust review under this section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or December 19, 1970, whichever is later."

into law of subsection 105 c (3), no such application for an operating license was pending. Accordingly, the operating license for the Davis-Besse Unit was not "grandfathered" by the terms of 105 c (8).

Applicants argue that notwithstanding the lack of express authority within the written language of 105 c (8), it is necessary to construe that statute as holding that the Davis-Besse Unit 1 is "grandfathered" in order that the statute be given the effect intended by Congress. To do so, however, would be to rewrite the statute, for no such expression of Congressional intent is to be inferred from the language of the statute. Addison v. Holly Hill Fruit Products, 322 U.S. 607 (1944). Neither does the legislative history support Applicants' position.

Applicants' argument essentially is equitable in nature in that they rely upon what they assert to be inordinate delay in processing the application as a basis for widening the boundaries of 105 c (8) to include the Davis-Besse 1 station. Congress granted the Commission no such authority nor has there been pointed out to us any indication that Congress intended the statute to be construed in the fashion Applicants suggest. Since the language of the statute is to us unambiguous, there is no need for us to become engaged in the practice of statutory interpretation as urged by Applicants:

> "Judicial construction should be used not to create doubt, but only to resolve one. Where there is no doubt, there is nothing to construe . . . . We should not under the guise of 'construction' rewrite the statute . . . ." U.S. v. Concentrated Phosphate Export Ass'n., 273 F. Supp. 263 (S.D.N.Y. 1967)

Two cases cited by Applicants seem inapposite or insufficiently supportive of the propositions for which they are advanced. Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971) emphasizes the importance of federal antitrust policy and suggests that exemptions to that policy (while Applicants do not argue for exemption in the instant motion, they do argue for deferral of the consequences of that policy) are to be found only upon an express statement of congressional intent. Montana Power Commission v. FPC, 445 F.2d 739 (D.C. Cir. 1970) concerns judicial interpretation of legislative intent where the subject of the controversy was not specifically addressed by the legislative body. In Section 105 c (8), however, Congress did address with particularity which license applications would be subject to special "grandfathered" treatment.

The situation before us is not unlike that considered in Unexcelled Chemical Corp. v. U.S., 345 U.S. 59 (1953) in which the result of explicit congressional consideration of a problem area was challenged as inconsistent with the legislative intent. There, where the precise language of the statute in question applied specifically to three causes of action, the Court was persuaded that:

> "Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final--save for questions of constitutional power which have not even been intimated here." 345 U.S. at 64.

Similarly, where Congress in Section 105 c (8) specifically considered the circumstances under which license clauses were to be "grandfathered" it is not our role to assume that Congress had in mind other unspecified circumstances. 3/

Applicants have requested certification of this issue in the event their motion is denied. It is apparent that absent Appeal Board consideration our denial would constitute a final determination in the context of the instant motion. Appeal Board review only upon completion of the antitrust hearing now in progress would frustrate the grant of effective relief in the event we are reversed. Accordingly,

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3/ Even if we were to accept the argument that Section 105 c (8) provides authority for post licensing review, we could not grant the relief Applicants seek. Applicants fail to demonstrate that such licensing would be appropriate in this case. Before such authority could be exercised, we would be required first to satisfy the proviso that an operating license so issued must contain conditions appropriate to assure that subsequent findings and orders "will be given full force and effect." Applicants have not proposed interim conditions, nor is there a record upon which this Board may now determine which if any conditions might be appropriate. We are now well into the evidentiary hearing on the ultimate issues. To interrupt the hearing to receive evidence relating to appropriate interim conditions could frustrate the asserted purpose of invoking Section 105 c (8), which is to avoid unnecessary delay.

immediate certification pursuant to §2.718(i) of the Commission's rule is appropriate and is hereby granted.

MOTION DENIED AND CERTIFIED.

ATOMIC SAFETY AND LICENSING BOARD

John M. Frysiak, Member

Ivan W. Smith, Member

Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 7th day of January, 1976.