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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	NRC Docket No. 50-346A
	)	
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	

MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN OPPOSITION TO APPLICANTS' MOTION FOR DETERMINATION THAT DAVIS-BESSE UNIT 1 IS "GRANDFATHERED" FOR PURPOSES OF OPERATION

INTRODUCTION

On January 8, 1976, the Atomic Safety and Licensing Appeal Board accepted for review the ruling by the Atomic Safety and Licensing Hearing Board that Davis-Besse Unit I is not "grandfathered" and that Applicants therefore may not commence operation of that unit prior to completion of antitrust review. This memorandum is submitted to address the issues raised by the appeal, and the three issues which the Appeals Board requested each party to address specifically.

The facts of this case are not difficult or in dispute. In March 1971, the Atomic Energy Commission, now the Nuclear Regulatory Commission, issued a construction permit, CPPR-80, for the Davis-Besse Unit I station. The permit contained a

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condition which made it subject to an antitrust review by the Attorney General pursuant to section 105c of the Act.

Section 105c of the Atomic Energy Act of 1954, 42 U.S.C. § 2011, et seq., was amended effective December 19, 1970 by Public Law 91-560 to give the Commission discretion in two specific instances to grant operating licenses in advance of antitrust review, subsection 105c(8). The instant application plainly fits within neither statutory exception. Instead, Applicants ask this Appeal Board to create a new exception, not enumerated by the Congress, to the requirement of prelicensing antitrust review, and further to find that Applicants' fact situation warrants application of the new exception.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 105c(8) OF THE ATOMIC ENERGY ACT DOES NOT PROVIDE FOR THE KIND OF RELIEF REQUESTED BY APPLICANTS.

Subsection 105c(8) of the Atomic Energy Act does not authorize this Commission to issue these Applicants an operating license in advance of antitrust review.

Section 105c of the Act, as amended, establishes a program of prelicensing antitrust review, */ and provides that in

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*/ The Joint Committee Report on the 1970 Amendments is captioned: "Amending the Atomic Energy Act of 1954, as Amended to eliminate the Requirement for a Finding of Practical Value, to Provide for Prelicensing Antitrust Review of Production and Utilization Facilities, and to Effectuate Certain Other Purposes Pertaining to Nuclear Facilities". H.R. Rep. No. 91-1470, 91st Cong., 2d Sess. (1970) (emphasis added).

certain specific and limited instances the Commission may deviate from this norm. Thus, Congress made it clear that prelicensing review of nuclear facilities is required, except under two circumstances, both of which are set out specifically and explicitly in subsection 105c(8), the so-called "Grandfather Clause". The issuance of an operating license for Davis-Besse Unit 1, prior to the completion of the antitrust review which is presently in progress, is not permitted by either of these exceptions.

Subsection 105c(8) provides:

> With respect to any application for a construction permit on file at the time of enactment into law of this subsection [December 19, 1970], 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.

The first explicit exception to the statutory requirement of prelicensing antitrust review concerns the issuance of construction permits and is, therefore, wholly inapplicable on its face to

Applicants' instant motion which concerns the issuance of an operating license. */

The second explicit exception contained in subsection 105c(8) concerns the issuance of a specific, limited class of operating licenses without prior antitrust review. The operating license for Davis-Besse Unit 1, clearly falls outside the class defined by Congress in this exception. This class is limited to "any application for an operating license in connection with which a written request for antitrust trust review is made as provided in paragraph (3) . . . ." Subsection 105c(3) -- the "paragraph (3)" referred to -- provides for antitrust review of a limited number of operating license applications in circumstances where (1) construction permits have been issued prior to amendment of section 105c in December 1970 and (2) persons had timely sought to intervene in the construction permit proceeding to obtain a determination of antitrust issues. **/ As noted previously,

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*/ We note in passing that Applicants, whose construction permit for Davis-Besse, Unit 1, was on file on December 19, 1970, took advantage of this exception. In March 1971, the then Atomic Energy Commission issued Applicants a construction permit for Davis-Besse Unit 1, prior to antitrust review, and conditioned the permit to allow its continuance, rescission, or amendment to include appropriate antitrust conditions (CPPR-80).

**/ Subsection 105c(3) states:

> With respect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection 104b prior to the enactment into law of this subsection, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a

[footnote continued on next page]

the Davis-Besse Unit 1 construction permit was issued in March of 1971. Thus, Applicants lack a necessary prerequisite to this exception.

In summary, subsection 105c(8) provides only two very limited exceptions to the prelicensing antitrust review norm. It reaches only so far as to permit (1) the issuance of

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[Footnote from previous page, continued]

> jurisdictional 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 the date of enactment into law of this subsection, whichever is later.

The Joint Committee Report explained this provision as follows:

> Paragraph (3) provides that with respect to any Commission permit issued under subsection 104b before enactment of the bill into law, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding to raise the prelicensing antitrust issue will have the right to obtain an antitrust review under this subsection; to do this, such person must make a written request to the Commission 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 the date of enactment into law of this subsection, whichever is later. It is the committee's intent that such potentially eligible intervenors must be persons who could have qualified as intervenors under the Commission's rules at the time of the initial attempt to intervene if prelicensing antitrust review were then properly for Commission consideration. H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., 30 (1970).

con struction permits where applications for those permits were on file on December 19, 1970, and (2) the issuance of operating licenses where construction permits had been issued prior to December 19, 1970, and where antitrust intervention by third persons had been attempted at the construction permit stage. Subsection 105c(8) does not permit issuance of both a construction permit and an operating license for the same nuclear unit prior to the completion of antitrust review.

The Joint Committee Report clearly demonstrates the absence of overlap between subsection 105c(8)'s two exceptions:

> 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 case, 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 the 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 connection with which a written request for an antitrust review is made as provided for in paragraph (3). H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., 31-32 (1970).

The first exception was intended to permit alleviation of possible hardships caused by delaying the construction of nuclear facilities for which permits had already been applied when the 1970 amendments were enacted. However, it was clearly not intended to relieve an

applicant of antitrust review by the Commission prior to issuance of both a construction permit and an operating license. */

The Joint Committee and the Congress recognized the advantages of prelicensing antitrust review, notwithstanding arguments opposing such review during the hearings leading to the 1970 Amendments, and adopted prelicensing review as a means of insuring that "the development, use, and control of atomic energy shall be directed so as to . . . strengthen free competition in private enterprise". Atomic Energy Act, § 1 (Congressional Declaration of Policy). Nothing in the statute, the Committee Report or the other legislative history evidences any legislative intent to permit any

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*/ Subsection 105c(2) further confirms the legislative intent on this matter. It modifies subsection 105c(1) (under which prelicensing antitrust review is initiated) so as to preclude a second antitrust review at the operating license stage when a construction permit has been issued for a commercial nuclear facility with antitrust review afforded under the 1970 Amendments, unless the Commission determines that such review is advisable because of significant changes in the Applicant's activities or proposed activities "subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility."

The second prelicensing antitrust review, then, may be avoided only when there has been a first review by the Attorney General and the Commission -- which presumably includes an opportunity for the Attorney General to submit to the NRC advice; a finding by the Commission as to antitrust inconsistency when required under subsection 105c(5); subsequent NRC findings under subsection 105c(6) when required; possible judicial review -- and only then issuance of a construction permit. Given this procedure, it would be inconsistent to construe subsection 105c(8) as permitting the NRC to issue an operating license prior to completion of one antitrust review "by the Attorney General and the Commission" where the construction permit was issued prior to completion of a first antitrust review.

application for a construction permit pending at the time of enactment to lead to an issued operating license unless the Commission can first make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. */

In sum, there is in fact nothing in the language of the Act, its legislative history, its policy or its administration, which would furnish the slightest justification for departing from the Act's plain language and creating a new exception.

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*/ The Commission's decision in Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3) also supports this position. There, the Commission denied Louisiana Power and Light's motion for issuance of a construction permit prior to prelicensing antitrust review, and expressed its belief:

> [T]hat Section 105c of the Atomic Energy Act would not support the issuance of a construction permit at this time prior to the prelicensing antitrust review, without the agreement of all parties involved. 6 A.E.C. 48, 50, n. 2 (1973).

Subsequently, the Commission affirmed its denial of Louisiana Power and Light's motion, saying:

> Applicant further moved for reconsideration of our denial of its Motion for an Order Directing that the Issuance of a Construction Permit not be Delayed by Antitrust Considerations. We adhere to the view that section 105c would not support the issuance of a construction permit prior to a prelicensing antitrust review, without the agreement of all the parties involved. 6 A.E.C. 619, 621-22 (1973).

The Waterford 3 construction permit application did not, of course, fall within subsection 105c(8) in any respect; the Commission there was dealing with the prelicensing antitrust review of a construction permit not on file on December 19, 1970, which therefore fell outside the Act's explicit exceptions.

II. THIS COMMISSION CANNOT CARVE OUT EXCEPTIONS TO THE PRELICENSING ANTITRUST REVIEW PROCESS THAT HAVE NOT BEEN AUTHORIZED BY CONGRESS.

The language of subsection 105c(8) is plain and unambiguous. It sets out for this Commission a plan of prelicensing antitrust review and allows the Commission discretion, in two circumstances, to consider whether a license should be issued in advance of antitrust review.

In no respect does the legislative history or any rule of statutory construction warrant deviation from this clear statutory scheme. Indeed, there is every evidence that section 105c as a whole */ represents a careful balance of the need for electric power and the Congress' expressed interest in reinforcing, in the content of the Atomic Energy Act, the fundamental economic policies contained in the antitrust laws. Moreover, section 105c in effect contains instructions from Congress to this administrative body about how this body should carry out its duties. Administrative bodies are purely creatures of legislation; they do not have discretion to enlarge or diminish their powers, even when it is felt that such changes might be beneficial. Since this Commission has clearly not been authorized to broaden the exceptions contained in subsection

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*/ See, e.g., Remarks of Mr. Pastore, 116 Cong. Rec. 19253 (daily ed., December 2, 1970), emphasizing that the final legislative product represented a "carefully perfected compromise" and a "balanced, moderate framework for a reasonable licensing review procedure."

105c(8), granting of Applicants' motion would be contrary to this agency's commission from Congress.

Finally, since the facts presented by Applicants would not warrant the exercise of discretion by this Commission to "grandfather" the Davis-Besse, Unit I, even if this Commission were clearly authorized to do so by the precise Congressional language, the Commission should not reach to do so when it lacks such Congressional authorization.

A. No aspect of the legislative history indicates that Congress intended to carve more than two exceptions into the legislative scheme contained in section 105c.

There is no evidence in the legislative history that Congress intended to carve more than two exceptions in the comprehensive legislative scheme contained in section 105c. Indeed, there is every evidence that Congress was aware, when it acted, that the Courts had read the then existing statutory scheme to require the Commission to examine antitrust aspects prior to issuance of operating permits, Cities of Statesville, et al. v. Atomic Energy Commission, 441 F.2d 962 (D.C. Cir., 1969). In the Statesville case, the Court of Appeals held that, when an operating permit was requested, the Congressional scheme allowed no exceptions to a legislative plan which required antitrust review in advance of issuance of the operating permit. The Congress was aware of the Statesville decision when it deliberated the 1970 amendments to the Act, and of the "step by step" procedure

which required antitrust review in advance of issuance of an operating license. Indeed, the case was reprinted in the legislative history. Hearings on Prelicensing Antitrust Review of Nuclear Powerplants before the Joint Committee on Atomic Energy, 91st Cong., 2d Sess., at 193-253. See also, Statement of Charles A. Robinson, Jr., Staff Counsel to the General Manager, National Rural Electric Cooperative Association and subsequent exchange with Mr. Hosmer, id. at 421-22.

Every statement made concerning the provisions of 105c(8) reinforces the finding that Congress intended just what it set forth in the statute -- to grant this Commission the discretion or "flexibility" to make two exceptions to prelicensing review, where the underlying facts warrant. Indeed, this conclusion is reinforced when one reads the statement of Mr. Hosmer, who noted that paragraph (8) enabled the Commission "to avoid delaying the issuance of licenses in certain cases, pending the antitrust review". (Emphasis added.) 116 Cong. Rec. 9446.

If Congress had intended other exceptions to prelicensing antitrust review, it could have placed the power in the Commission to act accordingly. It did not. Moreover, Congress tempered the exceptions which it did grant so that, far from being automatic or required exceptions, they are grants of discretion in this Commission to weigh two competing policies when the need for electric power is placed in sharp conflict

with a delay in the antitrust review process. Neither of these conditions pertain here, as Section III of this memorandum shows.

B. No rule of statutory construction allows this Commission to engraft further exceptions onto subsection 105c(8).

Applicants argue that, despite the clear language of the statute, this Commission should engraft a third exception on the statute. They argue that the exceptions contained in subsection 105c(8) are of a remedial nature, which should be broadly construed and liberally applied, and that the Commission should read exceptions into the statute when necessary to effectuate its purpose.

Applicants' argument flies in the face of the legislative history, discussed above, and asks this Commission to depart from well understood rules of statutory construction.

It is a commonplace of statutory construction, and good sense, that "[t]he enumeration of exclusions from the operation of a statute indicates that it should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law, and enumeration weakens it as to things not expressed. [Footnote omitted]" 2A Sutherland Statutory Construction § 47.23 (4th ed. 1972). Judge Weinfeld rejected an argument similar to that made here by Applicant, in Herzberg v. Finch, 321 F. Supp. 1367, 1369 (S.D. N.Y. 1971), stating in language applicable to the question presented to this Board:

> However compelling the facts may be in the instant case, the court does not have the power to amend the legislative act in order to rectify the alleged Congressional 'oversight.' To do so requires the court to legislate and not to interpret a statute which is clear and unambiguous. . . . As a general rule, '[w]here a statute makes specific exceptions to its general provisions, it is generally safe to assume that all other exceptions were intended to be excluded [Footnote omitted].' As this court has stated, while 'the Act is to be construed so as not to defeat its intended objectives . . . this does not mean the courts are empowered to define the language of the Act so as to legislate where Congress has failed to do so [Footnote omitted.].'

Applicants' argument before this Appeal Board is based not on specific Congressional language, but in some vague notion that it would have been better policy if Congress had authorized a third exception. But if the Commission does not have the power to make the exception, "the fact that it might be beneficial is immaterial," Blatz Brewing Co. v. Collins, 88 Cal. App. 2d 430, 199 P.2d 34, 42 (1948).

Moreover, we are presented here with a statute which sets out the boundaries of the power which this agency may exercise. Administrative bodies should be particularly cautious when asked, as here, to exercise powers which have not been specifically authorized. Administrative bodies are creatures of statute; they have no common law powers and possess only such powers as may be conferred upon them by the legislature. See, e.g., Gardner v. Ewing, 88 F. Supp. 315, 321 (E.D. Ohio), aff'd, 185 F.2d 781 (6th Cir. 1950), modified on other grounds, 341 U.S. 321 (1951).

The authority claimed by Applicants for the broad proposition that the generally recognized rules of statutory construction, which have been quoted, are "under attack" and should be discarded, National Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672 (D.C. Cir.), cert. denied, 415 U.S. 951 (1973), in fact illustrates the caution with which courts approach legislative grants of power to administrative bodies. Deciding whether the Federal Trade Commission had authority to promulgate trade regulation rules, Judge Wright took a hard look at the F.T.C.'s authorizing legislation, and found specific Congressional authorization for the powers claimed by the agency, in a section allowing the F.T.C. to make rules and regulations to carry out its other duties. Moreover, the court examined the practices of other agencies with similar statutory provisions to find previous Supreme Court approval of closely analogous claims, 482 F.2d at 678. Here, in contrast, Applicants can point to no direct or analogous statutory authority, and hang their argument instead on arguments about what ought to be and broad language unrelated to the actual holding of the case they cite.

The correct rules in this regard have been set out by the Hearing Board, which relied on Addison v. Holly Fruit Products, 322 U.S. 607, 617 (1944). The language of Justice Frankfurter in that case, interpreting the Fair Labor Standards Act, controls here:

In short the Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.

III. APPLICANTS DO NOT PRESENT THIS BOARD A FACT SITUATION OF SUFFICIENT URGENCY TO WARRANT THE CONSIDERATION OF POSSIBLE POST LICENSING ANTITRUST REVIEW.

Although Applicants have made allegations of great urgency in setting this issue before the Appeals Board, upon examination, these allegations prove to be highly speculative. In fact, this Board is not even confronted with a fact situation which presents a clear conflict between the antitrust review process and the urgency of making electric power available to consumers. Thus, even if one assumed, as the Department of course does not, that the statute permits the Commission to formulate further exceptions to the prelicensing antitrust review norm, the Board certainly should not consider formulating such an exception or applying it to the Applicants on the basis of the undeveloped fact situation here presented.

A. The facts presented this Board are not sufficiently ripe to provide a basis for formulation of any further exceptions.

The facts which underlie Applicants' motion indicate that at some time, presumably seven months in the future, Applicants anticipate that the Davis-Besse plant Unit I, will be ready for fuel

loading. Between the time these memoranda are being filed and the projected date for fuel loading, there exists the real possibility that the antitrust review may have run its course. If it has not, Applicants are free to renew their motion at a time when the conflicts between the need for power and the statutory requirement of prelicensing antitrust review are drawn more sharply into contrast. At this time, however, the problem which has been presented this Board is neither real and present nor imminent, and Applicants would be hard pressed to show that their interests are subjected to or imminently threatened with substantial injury. */

This Board should not reach to formulate exceptions to an unambiguous, plainly worded statute defining an instance of regulatory discretion to deviate from a clearly set forth scheme of antitrust review, when the issues are still nascent and not sufficiently clarified and when, in the course of the regulatory process, it may never be necessary to face this question, cf. Rescue Army v. Municipal Court, 331 U.S. 549 (1947).

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*/ This is the standard for ripeness enunciated by the Supreme Court in such cases as Public Utilities Commission v. United States, 355 U.S. 534 (1958); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1952); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Compare Applicants' statement that "[t]he undesirable delay will occur, however, if upon completion of the construction of Davis-Besse Unit 1 and before completion of antitrust review, a grandfathered operating license is not granted by the Commission." Applicants' Memorandum at p. 25. (Emphasis added.)

There is no need for this Board to take such action with all the implications this decision will have for other licensing proceedings in the future, in the content of a case which does not even present sharply the dual public policies involved: the imminent need for electric power and the fundamental national interest in economic competition. If Applicants in this case were to receive a favorable interpretation of the statute on the basis of the facts here presented, it is not difficult to imagine "grandfathering" motions being presented at earlier and earlier stages in licensing proceedings, on the strength of unsubstantiated allegations of dates for fuel loading. Such motions would undercut the licensing procedure by reducing applicants' incentive to expedite pre-hearing procedures and would slow the hearings themselves. A decision to grant, or even entertain such motions, would clearly fly in the face of the statutory scheme, which anticipates that even where the need for power is strong, "there may be situations where the Commission might conclude that the public interest would be better served by delaying the issuance of a license until antitrust problems are solved." 116 Cong. Rec. 9449 (daily ed., September 30, 1970) (Remarks of Mr. Price of Illinois). The Department urges that this Board defer answering its Question (c) until such time as it is presented with a factual presentation which puts these questions more sharply into issue.

B. The facts presented by Applicants do not present a situation of sufficient urgency to require "grandfathering," even if Applicants otherwise fit within the statutory class entitled to such an exception.

Moreover, even if these Applicants had shown that they clearly fit within one of the two clear statutory exceptions to prelicensing antitrust review, issuance of an operating permit prior to review would by no means be automatic. Subsection 105c(8) only provides that in certain instances the Commission may, "upon determination that such action is necessary in the public interest to avoid unnecessary delay," act. Thus, even when the conditions of that subsection are met, the Commission must still make a determination that post licensing review is in the public interest, a finding that must be set into the context of the concerns facing Congress when it enacted this section. When Congress acted, the nation was faced with brownouts and blackouts which indicated that there was insufficient electric power to serve the nation's demand. Manifestly, the Congress envisioned the possibility of a conflict between the need for power and delays in the antitrust review. Subsection 105c(8) placed in the Commission a certain "flexibility"; further, the sponsors of the provision expressed the Congress' hope that it would be "benevolently and sensibly used to help avoid unnecessary delays in the scheduling of needed power plants." 116 Cong. Rec. 9446 (Remarks of Mr. Hosmer.) Mr. Hosmer went on to state that, "[w]hat the committee is talking about here is things that might delay or

impede bringing necessary and desirable power to the utility system." In short, the Congress was concerned about a clear conflict between the immediate provision of electric power and the antitrust review process.

No such conflict is presented to this Appeal Board. As we have noted in Section IIIA above, Applicant alleges that the plant in question will be ready for the loading of fuel in September 1976. This is the latest in a series of projected dates for fuel loading readiness. Even assuming that Applicants are able to meet this latest projected date, it is still more than a half year away. By the time the plant is ready for fuel loading, moreover, the antitrust review proceeding may well have been completed. Indeed, the Hearing Board itself anticipates that the hearing will be completed in May and Applicant alleges a May-June date. The hearing can easily be completed and an opinion issued by the end of the summer. */

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*/ As noted by the Hearing Board in its Order issued January 7, 1976, any decision that post licensing review would be appropriate in this case could not be reached without first satisfying the statutory proviso that an operating license so issued contains interim conditions sufficient to insure that subsequent findings and orders "will be given full force and effect." (Order at p. 7, n. 3). The Hearing Board further noted that no acceptable interim conditions have been proposed and that there is presently no record upon which such conditions could be based. When the Hearing Board issues its opinion, an adequate evidentiary record upon which to base interim conditions will have been compiled. Indeed, any conditions formulated by the Hearing Board could well be employed on an interim basis if it was then felt necessary to issue the operating license for Davis-Besse, Unit 1, prior to the termination of this proceeding.

Applicants are, in effect, asking this Appeal Board to anticipate the Hearing Board's decision, as well as its timetable for decision, when it asks at this stage that an operating permit be allowed to issue in advance of antitrust review. */

In sum, even if Applicants were members of the class for which the exceptions were fashioned in section 105c(f), as of course they clearly are not, the facts of this case would not warrant this Commission to exercise its discretion to grant an exception to prelicensing antitrust review at this very premature stage.

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*/ Applicant argues that this Hearing Board's timetable is not possible, and points to the Consumers case. It should be noted that one member of the Hearing Board in that case died during deliberations. A good deal of the delay in that proceeding can be attributed to that unusual circumstance. In any case, the evidence is that this Hearing Board is meeting its schedule.

CONCLUSION

For the foregoing reasons, the Department urges the Appeal Board to affirm the Order of the Hearing Board, of January 7, 1976.

Respectfully submitted,

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February 17, 1976

CERTIFICATE OF SERVICE

I hereby certify that copies of MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN OPPOSITION TO APPLICANTS' MOTION FOR DETERMINATION THAT DAVIS-BESSE UNIT 1 IS "GRANDFATHERED" FOR PURPOSES OF OPERATION have been served upon all of the parties listed on the attachment hereto either by deposit in the United States mail, first class or airmail, or by hand delivery, this 17th day of February, 1976.

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