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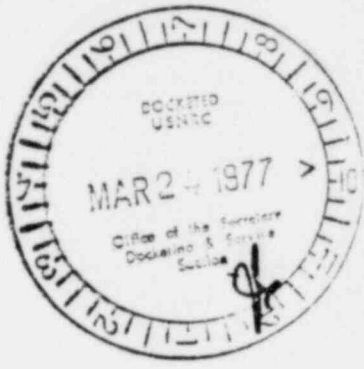

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Richard S. Salzman
Jerome E. Sharfman

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

Mr. Wm. Bradford Reynolds, Washington, D. C., argued the cause for applicants, the Toledo Edison Company et al.; with him on the briefs was Mr. Robert E. Zahler, Washington, D.C.

Mr. Terence H. Benbow, New York, N.Y., argued for applicants Ohio Edison Company and Pennsylvania Power Company.

Mrs. Janet R. Urban, Washington, D. C., argued the cause for the Attorney General of the United States; with her on the briefs was Mr. Melvin G. Berger, Washington, D.C.

Mr. David C. Hjelmfelt, Washington, D. C., argued the cause for intervenor the City of Cleveland, Ohio; with him on the briefs were Messrs. Reuben Goldberg, Washington, D. C., Vincent C. Campanella, Malcom Douglas and Robert D. Hart, Cleveland, Ohio.

Mr. Roy P. Lessy, Jr. argued the cause and filed briefs for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

March 23, 1977

(ALAB-385)

A-th

Opinion of the Board by Mr. Salzman, in which Messrs. Rosenthal and Sharfman join:

I

Before us is applicants' motion to stay, pendente lite, the effectiveness of remedial antitrust conditions in their licenses to build or operate the Davis-Besse and Perry nuclear power facilities. Those conditions were imposed by the Licensing Board following a full-dress antitrust proceeding under section 105c of the Atomic Energy Act.[1/] The applicants are five large Ohio and Pennsylvania-based electric utility companies; they comprise the "CAPCO[2/] pool" and have dominance (market share in excess of 90%) over bulk power transmission and generation in their combined service areas.[3/]

Based on the antitrust record developed before it, the Board below found the CAPCO companies to have acted "individually and collectively" to eliminate competing smaller utilities and to "preclude competition" and, further, to be currently "engaged in activities which violate" the antimonopoly provisions of sections 1 and 2 of the Sherman

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1/ 42 U.S.C. §2135(c).

2/ "CAPCO" stands for "Central Area Power Coordination Group".

3/ LBP-77-1, 5 NRC__,__ (January 6, 1977)(slip opinion, p. 11).

Act[4] and the proscription against unfair business practices of section 5 of the Federal Trade Commission Act.[5] The Board imposed the license conditions in suit after determining "that a situation inconsistent with the antitrust laws and the policies underlying those laws would be both created and maintained by the unconditioned license of the Davis-Besse and Perry nuclear stations." LBP-77-1, 5 NRC__,__ (January 6, 1977)(slip opinion, p. 251). In substance, the conditions require applicants to open CAPCO membership to the smaller electric utilities in their service areas; to sell bulk power to them free of certain anticompetitive restrictions; to interconnect (if necessary) with the smaller companies; to "wheel"[6] power to and for those companies within given limits; to sell various economical forms of power to them on terms no less favorable than offered to each other; to share reserves with those utilities; and to provide the smaller companies with access to the nuclear power plants in suit (or to power from them) as well as to

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4/ 15 U.S.C. §§1 and 2.

5/ 15 U.S.C. §45(a).

6/ For purposes of the relief ordered, "wheeling" was defined by the Board as "transportation of electricity by a utility over its lines for another utility, including the receipt from and delivery to another system of like amounts but not necessarily the same energy. Federal Power Commission, The 1970 National Power Survey, Part 1, p. I-24-8." 5 NRC at__(slip opinion, p. 255).

certain future plants, subject to stated time and capacity limitations. Id., 5 NRC at__(slip opinion, pp. 254-64).

Applicants' motion to stay the effectiveness of the antitrust conditions -- but not of the licenses -- pending completion of appellate review was strongly opposed by the other parties to the proceeding: the Attorney General (represented by lawyers from the Antitrust Division of the Department of Justice), the City of Cleveland, Ohio, and the antitrust staff of the Commission.[7] The Licensing Board assessed the motion in light of the factors initially laid down in Virginia Petroleum Jobbers Ass'n v. FPC[8], which also govern Commission stay practice:[9]

> (1) has the movant (the party seeking the stay) made a strong showing that it is likely to prevail on the merits of its appeal; (2) has the movant shown that without a stay it will be irreparably injured; (3) would issuance of a stay substantially harm other interested parties; and (4) where lies the public interest?

7/ That motion was initially filed with us; we promptly referred it to the Licensing Board for the reasons explained in ALAB-364, 5 NRC___(January 17, 1977).

8/ 259 F.2d 921, 925(D.C. Cir. 1958).

9/ Natural Resources Defense Council, CLI-76-2, NRCI-76/2, 76, 78 (1976); accord, Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420 (1974); Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-199, 7 AEC 478 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, NRCI-76/7, 10, 13 (1976).

The Board concluded that all four factors militated against granting the relief requested and accordingly declined to issue the stay. LBP-77-7, 5 NRC___(February 3, 1977). Applicants renewed their motion before us on February 14th. The other parties have responded to that renewal by reiterating vigorous opposition to the grant of any such relief.[10/]

II

One observation is in order before we reach the merits of the applicants' motion. A stay, like a preliminary injunction, is normally understood to be a device to maintain the "status quo ante litem" pending consideration of the merits of a case; it serves to keep the parties as far as

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10/ Applicants represented to us at oral argument that Unit 1 of the Davis-Besse facility was scheduled for operation on or about March 15, 1977. App. Tr. p. 7. That schedule has proven over-optimistic before. Nevertheless, with the acquiescense of all the parties, on March 9th we entered an order temporarily restraining the effectiveness of the antitrust conditions for no more than two weeks with the understanding that we would decide the stay motion within that period. App. Tr. pp. 140-41. Our order contained no implications about the merits of the request for stay; its purpose was simply to enable us to decide the matter free of distracting motions for "emergency" interim relief during this very brief period.

possible in the postures they occupied when the litigation began.[11] Here this would mean leaving applicants unfettered by antitrust conditions but also unlicensed to build and operate the nuclear power plants. The applicants concededly want more than this. They have told us expressly that they wish both to obtain and use their licenses and to be free of the antitrust conditions the Board below found necessary.[12] Thus they ask as a preliminary matter for the full relief to which they might be entitled if successful at the conclusion of their appeal. Given our status as an arm of the Commission, the cases do not hold that we

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11/ See Sampson v. Murray, 415 U.S. 61, 74 (1974); Tanner Motor Livery Ltd. v. Avis, Inc., 316 F.2d 804, 809 (9th Cir.), certiorari denied, 375 U.S. 821 (1963); Westinghouse Electric Corp. v. Free Sewing Machine Co., 256 F.2d 806, 808 (7th Cir. 1958); Flood v. Kuhn, 309 F. Supp. 793, 798 (S.D.N.Y. 1970). The cases involve applications for preliminary injunctions; the same standards obtain, however, as on a motion for a stay pending appeal. Coleman v. Paccar, Inc., __U.S.__, 47 L.Ed. 2d 67, 71 (Rehnquist, Circuit Justice, 1976); see also, Sampson v. Murray, supra, 415 U.S. at 88 n. 59.

12/ "CHAIRMAN ROSENTHAL: So in short, Mr. Reynolds [counsel for applicants], you want the best of both worlds. You want your permits and license; at the same time you want them without antitrust conditions."

"MR. REYNOLDS: That's correct, yes. And I would suggest that by applying the criteria of Virginia Petroleum Jobbers that we are entitled to, as you stated, the best of both worlds under the circumstances." App. Tr. p. 7.

lack the power to grant that relief.[13/] But they surely suggest that a party has a heavy burden indeed to establish a right to it. Bearing this in mind, we now consider the "four factors," turning first to whether applicants would be irreparably injured if the relief sought is not granted them.

1. Likelihood of irreparable injury to the applicants if a stay is not granted.

It is a well established rule of administrative law that "a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable injury." Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968)(Harlan, J.). In this case, the assertion

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13/ See note 11, supra. The decided cases do teach that a court could not order the Commission to grant a license which it had refused: "A stay of an order denying an application would in the nature of things stay nothing. It could not operate as an affirmative authorization of that which the Commission has refused to authorize". Scripps-Howard Radio v. FCC, 316 U.S. 4, 14 (1942), quoted in Sampson v. Murray, supra, 415 U.S. at 75-76. We need not reach the interesting subsidiary question whether, with respect to a conditional license, a court would be authorized to "stay" the conditions only.

of "irreparable injury" put forward in applicants' papers[14/] is that

> the license conditions, as now framed, require a disruptive restructuring of relationships with other electric entities that will have a serious, unsettling impact on the utilities and their customers,

the cost of which applicants could not expect to recoup if they prevail; and that they would have to

> reassess all of their planning projections with respect to their existing and prospective generation and transmission facilities, [involving] an irretrievable commitment of resources

which would be better spent if delayed until the appeal is decided.

At oral argument, applicants characterized that assertion as one involving "a serious disruption and a serious planning problem posed by immediate imposition of these license conditions". App. Tr. p. 37. But when pressed for particulars, applicants acknowledged that they meant only that the CAPCO companies would have to adjust their planning to take into account future operations under the license conditions and that it would be expensive thus to restructure their operating plans (App. Tr. p. 37):

> MR. ROSENTHAL: What does that planning problem and disruption translate itself into? Money? The amount of money invested in people doing the planning?

14/ Applicants' Renewed Motion for Stay, filed February 14, 1977, pp. 16-17.

> MR. REYNOLDS [Applicants' counsel]: It translates itself into time and resources involved in the planning process.
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> MR. ROSENTHAL: So that is all we are talking about. When you come to us and tell us you will be irreparably injured, what it comes down to is that you will have to expend money and effort in circumstances where if you eventually win before us or before a court or the Commission, that money would have gone down the drain.
>
> Is that really at the bottom what your claim of irreparable injury comes to?
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> MR. REYNOLDS: At bottom it comes down to that; that is correct.

And when asked precisely how much money would be involved, applicants' counsel responded: "I do not know." App. Tr. p. 38 .

In other words, the "irreparable injury" applicants foresee is simply that they must now recast their future electric power requirements and operating plans in light of a new contingency -- the need to satisfy the antitrust conditions set by the Board below -- and this will entail, inter alia, some renegotiation of underlying CAPCO pool arrangements. We are hard put to see this as irreparable injury. To place the matter in perspective, we note the omission of any assertion by the applicants that the

challenged antitrust conditions are impossible of performance;[15] their concession that compliance needs no costly interconnections, useless if the Board's order is overturned;[16] and the absence of serious suggestion that applicants will be called upon to provide services to non-CAPCO companies without entitlement to compensation.[17]

In the best of circumstances, planning for the future in the electric utility industry is beset with imprecision. The sudden occurrence of unanticipated situations seriously affecting the demand for and the distribution of electric power is hardly unknown and needs no illustration. We have observed before that load forecasting involves "at least as much art as science."[18] Prior cases have taught us that a margin of error in planning is unavoidable and

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15/ We are inclined to agree with the staff that those conditions essentially do no more than oblige the applicants "to offer similar power supply options and access to nuclear units to non-applicants in [the CAPCO service area] as Applicants make available * * * to each other." NRC Staff Response, January 26, 1977, pp. 8-9.

16/ App. Tr. p. 46.

17/ See App. Tr. p. 97.

18/ Nine Mile Point, infra, ALAB-264, 1 NRC 347, 365 (1975).

that the need to readjust, on a regular basis, planned operations and power plant construction schedules is virtually endemic in the electric utility industry. See, e.g., Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, NRCI-76/10, 397, 401, 410-11 (1976), affirming LBP-74-84, 8 AEC 890 (1974), and LBP-75-34, 1 NRC 626, 629 (1975); Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 363-69 (1975); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-367, 5 NRC__,__ (January 25, 1977)(slip opinion, pp. 4-6). In our judgment, the type of planning required to meet the Board's directives is of that stripe; certainly nothing applicants have shown us suggests, much less establishes, that it would be uniquely difficult or unduly stretch their planning capabilities.

We by no means imply that satisfying the antitrust conditions imposed by the Board below will not require the investment on applicants' part of additional time and effort in planning. Neither do we intimate that this can be done without cost (albeit applicants could not tell us what it might be). But, as the court of appeals stressed in Virginia Petroleum Jobbers, "[t]he key word in this consideration is irreparable. Mere injuries,

however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." 259 F.2d at 925 (emphasis in original).

As for applicants' need to reassess their relationships with one another in light of the antitrust conditions, we have been given no reason by them -- and we know of none ourselves -- to find fault with the correctness of the analysis and conclusion of the Licensing Board in denying a stay (5 NRC at__)(slip opinion, pp. 19-20):

> Applicants' argument that compliance with license conditions would require unspecified and inarticulated costs associated with the negotiation and filing of interconnection and sales agreements is unpersuasive. Applicants routinely engage in such negotiations with their wholesale municipal customers, with each other within the confines of the CAPCO agreement, and with outside systems. No special burden, let alone irreparable injury, is foreseen by the license requirements.

In short, even were to we accept arguendo the contentions made by the applicants, they do not amount even to a showing of grievous economic injury -- much less of the type of loss which would satisfy the irreparable damage requirement. International Waste Controls, Inc. v. SEC, 362 F. Supp. 117, 121 (S.D.N.Y), affirmed, 485 F.2d 1238 (2nd Cir. 1973). See also Petroleum Exploration v. Public Service Commission, 304 U.S. 209, 222 (1938); M. G. Davis & Co. v. Cohen, 369 F.2d 360, 363-64 (2nd Cir. 1966).

To summarize, we agree with the Licensing Board on this point. The record permits the drawing of but one conclusion: the applicants have failed to establish that they will suffer irreparable injury (or for that matter any significant injury at all) in the absence of a stay of the license conditions pendente lite. Their showing falls far short of demonstrating the kind of injury settled jurisprudence requires to merit a stay pending appeal. We turn now to another relevant consideration, the consequences that a stay would entail for others.

2. Harm to other parties.

Applicants contend that issuance of the stay will not harm the other parties but if anything will be to their advantage. It is the applicants' belief that the decision below is so flawed that it is bound to be reversed eventually and, therefore, "a precipitous disruption of the status quo, rather than judicious maintenance of it, would be the most harmful course to take insofar as the other parties are concerned." To this argument, applicants add that they have always offered fair access to their nuclear power plants and continue to do so.[19/]

19/ Applicants' Renewed Motion for Stay, pp. 21-23.

The other parties dispute the likelihood of reversal of the decision below, consider applicants' access offer unsatisfactory, and complain that a stay will permit applicants to continue unlawful business practices already shown to be harmful to their small competitors.

Reserving the question of likelihood of success on appeal for later, we find that the applicants have failed to show that the issuance of a stay would not have a serious adverse effect on the smaller utilities. Virginia Petroleum Jobbers, supra, 259 F.2d at 925. The Licensing Board made a number of findings to the effect that the past practices of the CAPCO companies not only disadvantaged the smaller cooperative and municipal systems, but actually drove (or at least contributed to driving) some of them under.[20] Although we are by no means bound by the findings to this effect drawn by the Board below from the evidence before it[21], those findings merit our respect until either we have had adequate opportunity to review the record or the party seeking a stay has demonstrated their inadequacy.[22]

20/ See for example Initial Decision, 5 NRC at ___ (slip opinion at pp. 91-95, 109-113, 161-165, 252).

21/ Catawba, supra, ALAB-355, NRCI-76/10 at 402-05.

22/ See Coleman v. Paccar, supra, __U.S. __, 47 L. Ed.2d at 72; Greater Boston Television Corp. v. FCC, 444 F.2d 841, 853 (D.C. Cir. 1970), certiorari denied, 403 U. S. 923 (1971).

Our review thus far, although preliminary, suggests that in most cases those findings are not devoid of record support and the applicants' papers do not persuade us that we must dismiss them out of hand. The situation here is analogous to that before the court in North Central Truck Lines, Inc. v. United States, 384 F. Supp. 1188 (W.D. Mo. 1974) (three-judge court), affirmed, 420 U.S. 901 (1975). The court there denied a petition to stay pending appeal an Interstate Commerce Commission order where doing so would have freed the petitioner to resume conduct the ICC had proscribed as unlawful and harmful to the interests of others.[23/] This factor therefore weighs against a stay, for its grant would relieve applicants from a relatively insubstantial burden at the potential expense of serious injury to others interested in the proceeding.

23/ The court cogently observed that "plaintiff states that a denial of its motion for a stay 'would in effect require plaintiff to abandon a very large portion of its operations' and that it would '. . . lose substantial sums of money in prepaid expenses and capital outlays which could not be recouped if this Court's decision were reversed on appeal.' This contention is somewhat counterbalanced by the fact that the 'irreparable injury' to which plaintiff refers constitutes, in essence, the unlawful diversion of business from the intervenor-defendants and others similarly situated." 384 F. Supp. at 1191.

3. The public interest.

The public interest is essentially found in the Congressional purposes underlying the antitrust provisions (section 105) of the Atomic Energy Act. These were fully explored by us last year in an earlier phase of this litigation when we reviewed the application of the "grandfather clause" (section 105c(8)) to the grant of an operating license for the Davis-Besse facility. Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, NRCI-76/4, 331 (1976). We recently summarized that legislative purpose as one

> to establish formal procedures for the administrative review of the antitrust aspects of applications for construction permits (and in some instances operating licenses as well). And, with limited exceptions not of concern here, Congress has required that these review procedures be completed before a construction permit might issue -- with a view toward insuring that, when and if the permit does issue in response to a grant of the application, it is laden with any conditions found necessary to obviate or rectify a situation inconsistent with the antitrust laws. 24/

Given that legislative purpose, this factor obviously militates against staying antitrust conditions, particularly

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24/ Houston Lighting and Power Co. (South Texas Project, Unit Nos. 1 & 2), ALAB-381, 5 NRC ___, ___ (March 18, 1977) (slip opinion, p. 21).

so where impressed on an operating license. To be sure, as the applicants point out, the Commission has authority under section 105c(6) of the Act[25/] to license the operation of a nuclear power plant notwithstanding the anticompetitive consequences of doing so. But, as we noted in the "Grandfather" decision, "[t]he legislative history makes it very clear that the Commission was to resort to authority under section 105c(6) sparingly. It was to be invoked only in the exceptional case where the power from the plant is vitally needed and the antitrust impact of its operation cannot be otherwise ameliorated.

25/ Section 105c(6), 42 U.S.C. §2135(c)(6), provides: "(6) In the event the Commission's finding under paragraph (5) is in the affirmative [i.e., that "the activities under the license would create or maintain a situation inconsistent with the antitrust laws * * *"], the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate."

See Joint Committee Report, p. 31. See also the remarks of Senators Aiken, Metcalf and Hart in the debates on the 1970 Amendments. 116 Cong. Rec. 19254-57 (Daily ed. Dec. 2, 1970)."[26/]

In this case, the antitrust conditions certainly do not themselves preclude licensing the operation of the Davis-Besse nuclear facility. It has not been seriously argued -- or for that matter suggested -- by the applicants that they would be compelled to forego the license rather than operate under these conditions. In sum, then, public interest considerations, too, militate against staying the effectiveness of the conditions.

26/ Davis-Besse, ALAB-323, supra, NRCI-76/4 at 346 fn. 41. At the cited page the Joint Committee Report states: "While the Commission has the flexibility to consider and weigh the various interests and objectives which may be involved, the committee does not expect that an affirmative finding under paragraph (5) would normally need to be overriden by Commission findings and actions under paragraph (6). The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accommodating the other public interest concerns found pursuant to paragraph (6)." H.R. Rep. No. 91-1470 (also S. Rep. No. 91-1247), 91st Cong., 2nd Sess. (1970), p. 31.

4. Applicants' showing of likelihood of success on appeal.

We have saved for last the consideration of whether applicants have made the requisite "strong showing that [they are] likely to prevail on the merits of [the] appeal."[27/] Without that showing it has been suggested that there is no right to a stay "even if irreparable injury might otherwise result".[28/] We reserved this question because, as the District of Columbia Circuit observed in Virginia Petroleum Jobbers, the degree of likelihood of success which must be demonstrated for a stay turns in no small measure on the strength of applicants' showing on the other factors. 259 F.2d at 925. Indeed, that case illustrates the point. There the court had concluded that the "petitioner has shown a probability of success on the merits of its appeal" but denied a stay because of its "inadequate showing on the remaining * * * considerations." 295 F.2d at 926. Accord, Blankenship v. Boyle, 447 F.2d 1280 (D.C. Cir. 1971); see Seabrook, supra, ALAB-338, NRCI-76/7 at 14-15.

27/ Virginia Petroleum Jobbers Ass'n. v. FPC, supra, 259 F.2d at 925.

28/ Virginian Ry. Co. v. United States, 272 U.S. 658, 672 (1926) (Brandeis, J.); but see Seabrook, supra, ALAB-338, NRCI-76/7 at 14-15.

(1) The principal error alleged in connection with applicants' motion for a stay is that the Board below made its antitrust determinations and ordered relief without making "any assessment as to whether competition between electric entities in the electric utility industry is, in fact, in the public interest".[29/] This, they contend, "is so fundamentally wrong as to render virtually every facet of the Initial Decision fatally suspect."[30/]

The applicants do not find spelled out in section 105c the obligation to assess the advisability of competition on a case-by-case basis. Rather, they have distilled it from a line of cases including FCC v. RCA Communications, 346 U.S. 86, 97 (1953). They read RCA Communications to stand for the general proposition that "[m]erely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as [the communications industry] is not enough".[31/] They also cite a series of court of appeals decisions, rendered in cases arising

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29/ Applicants' Renewed Motion for Stay, p. 5, quoting from the Stay Decision, 5 NRC at ___, (slip opinion, p. 8).

30/ Id. at p. 6.

31/ Id. at pp. 6-7.

under statutes regulating other industries, as holdings to the same effect.[32/] Applicants reason that section 105c of the Atomic Energy Act must be similarly interpreted; viz., to require the Commission, in each prelicense antitrust review, to consider whether competition with the utility seeking a license is a desirable end.

The Department of Justice, the NRC staff and the City of Cleveland all challenge the applicants' reading of the Act. Those parties point out that, unlike the agencies involved in the cases cited by the applicants, the NRC has not been given authority to regulate a line of commerce or a particular industry under a "public interest" standard, nor has it been vested with power to exempt entities or transactions from the reach of the antitrust laws.[33/] They stress that, on the contrary, the Commission has been placed

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32/ Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 777 (D.C. Cir. 1974); Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968); Latin America/Pacific Coast S.S. Conf. v. Federal Maritime Commission, 465 F.2d 542, 545 (D.C. Cir.), certiorari denied, 409 U.S. 967 (1972); S.S.W., Inc. v. Air Transport Ass'n of America, 191 F.2d 658, 661 (D.C. Cir. 1951), certiorari denied, 343 U.S. 955 (1952).

33/ Section 105a provides, inter alia, that "[n]othing in [the Atomic Energy Act] shall relieve any person from the operation of the [antitrust laws]".

under an affirmative duty to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws * * *", which they assert is an entirely different responsibility.

To applicants' contention that section 105c(6) calls upon the Commission to "harmonize both antitrust and * * * other public interest considerations" (quoting the Joint Committee Report, p. 31), the other parties' rejoinder is that such "harmonizing" is solely for purposes of remedy and is undertaken only after there has been a finding under section 105c(5) of a situation inconsistent with the antitrust laws, citing an earlier passage in the same paragraph of the Joint Committee Report that "the [Joint] committee does not expect that an affirmative finding [of a situation inconsistent with the antitrust laws] under paragraph [105c](5) would normally need to be overridden by Commission findings under paragraph [105c](6)". Ibid.

(2) A recognized distinction exists between authority on the one hand to regulate an industry for the public convenience and necessity (which may require giving some consideration to antitrust policies) and, on the other, to enforce the antitrust laws directly. The Supreme Court has held that whether an activity "would serve the public

interest" does not present the same issue as whether "the Sherman Act [has] been violated". United States v. Radio Corporation of America, 358 U.S. 334, 350-52 (1959) (distinguishing, inter alia, FCC v. RCA Communications, Inc., supra, and holding that FCC approval of certain activities by licensed broadcasters did not immunize them from the antitrust laws). Although we are not deciding this matter finally at this preliminary stage, we are inclined to come down on the side of those contending that the Commission is called upon to decide the latter question, not the former. It is to be recalled that this Commission administers no pervasive economic regulatory scheme. It is not authorized to control entry into the various electric power markets. It regulates no rates and approves no mergers. Power over such matters -- the normal concomitant of authority for economic regulation "in the public interest" -- has been left to others.

This is not to say that we apply the antitrust laws to the electric utility industry as one would to shoe companies and toothpaste manufacturers. Far from it. Of course questions such as ease of market entry and the demands of state and federal regulators must be taken into account in determining whether a situation conflicting

with antitrust law or policy exists. The Board below appears at least to have attempted to do so.[34/] But this is not the same as having to decide whether competition is good for the electric utility industry in general or any utility in particular. That question appears to us -- at least on preliminary examination -- to have been resolved by Congress and the courts. The contention that "the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the 'public interest' standard widely enforced by regulatory agencies" has been rejected by the Supreme Court. Cantor v. Detroit Edison Co., ___ U.S. ___, ___, 49 L.Ed 2d 1141, 1152 (1976). Since that Court's decision in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), there is no longer any doubt that the federal antitrust laws are applicable to electric utility companies. And of course the fundamental purpose of the Sherman and Clayton Acts is the promotion and preservation of competition. Northern Pacific Ry. v. United States, 356 U.S. 1 (1958); United States v. Topco

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34/ See, e.g., Initial Decision, 5 NRC at ___ (slip opinion, pp. 230-37).

Associates, 405 U.S. 596 (1972).[35/]

We need not decide finally that the Board below applied the correct antitrust standard applicable under section 105c. It is sufficient for purposes of deciding the stay motion before us that the applicants have made no showing that they are likely to prevail on this point. Applicants have filed numerous other exceptions to the decision below, but have not pressed them on the stay motion. These, therefore, are also inadequate to support a finding that the appeal will ultimately be successful; the mere

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35/ In Northern Pacific Ry., the Supreme Court stated (356 U.S. at 4-5):

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination ... or conspiracy in restraint of trade or commerce among the several States'." (Emphasis supplied).

In Topco Associates the Court reiterated (405 U.S. at 610):

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

establishment of possible grounds for appeal is not in and of itself sufficient to justify a stay. Environmental Defense Fund v. Froehlke, 348 F. Supp. 338, 366 (W.D. Mo. 1972), affirmed, 477 F.2d 1033 (8th Cir. 1973). This, coupled with their failure to show that the other relevant factors point in their favor, leaves us no choice other than to deny the motion for a stay pendente lite.[36/]

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo

Margaret E. Du Flo
Secretary to the
Appeal Board

36/ At oral argument, separate counsel for the Ohio Edison Company and the Pennsylvania Power Company appeared and endeavored to urge upon us the existence of special considerations allegedly applicable to those two companies alone. The briefs filed on behalf of all the applicants had not included the points sought to be made by separate counsel. And, in the seven weeks which had elapsed between the initial decision and oral argument on the stay motion, no brief had been filed with us on behalf of those companies alone. In these circumstances, considerations of fundamental fairness to the opposing parties induced us to decline to hear argument on the new points which separate counsel belatedly sought to raise.