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

SUPPLEMENTAL BRIEF OF THE NRC STAFF IN RESPONSE TO APPEAL BOARD ORDER OF JANUARY 12, 1978

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March 13, 1978

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I. Introduction

By Order dated January 12, 1978, this Appeal Board granted leave to any party to file a supplemental brief confined to a discussion of the applicability to this appeal of the Appeal Board antitrust decision in Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC ___ (December 30, 1977) (hereinafter "Consumers Decision" or "Slip Op."). The Staff welcomes the opportunity to file such a supplemental brief.

This supplemental brief is divided into three principal parts. Part I is a discussion of generic findings and conclusions in the Consumers opinion which, by definition, directly bear on the instant appeal. Part II discusses certain case-specific holdings and conclusions in the Consumers Decision which also directly bear on the instant appeal.

Finally, Part III of this Brief covers examples of the CAPCO companies' substantial reliance in this Appeal on elements of the Consumers Licensing Board decision[1] which have been subsequently reversed or overturned by the Consumers opinion.

II. Generic Findings and Conclusions in the Consumers Opinion Which Directly Bear on the Instant Appeal

The Consumers Decision effectively disposes of the generic arguments that are the basis of an overwhelming number of exceptions filed by the Applicants to the initial antitrust decision of the Perry Licensing Board.[2]

A. Scope of Section 105; Scope of the Hearing

One of Applicants' primary arguments is that the Perry Licensing Board, in examining the anticompetitive "situation," did not correctly apply section 105c of the Atomic Energy Act of 1954, as amended. ("Applicant's Appeal Brief in Support of Their Individual and Common Exceptions...," p. 9 (April 14, 1977)). However, in Consumers, the Appeal Board clearly held that an antitrust analysis under section 105 must be measured against the background structure of the relevant market (Slip Op. p. 37), including an analysis of the actions of the applicant in that market (Slip Op. p. 30). Moreover, the Consumers Appeal Board held:

1/ Consumers Power Company (Midland Plant, Units 1 and 2), LBP-75-39, 2 NRC 29 (July 18, 1975).

2/ The Toledo Edison Company, The Cleveland Electric Illuminating Company, et al., (Davis-Besse Nuclear Power Station, Units 1, 2 and 3); (Perry Nuclear Power Plant, Units 1 and 2), LBP-77-1, 5 NRC 133 (January 6, 1977), (hereinafter "Perry").

> ...that where a series of anticompetitive actions are alleged, the entire course of conduct must be reviewed for a monopolistic pattern. (Slip Op. pp. 38-39).

These conclusions in the Consumers opinion are wholly in accord with both the analysis, and the procedures followed by the Perry Licensing Board (See, for example, 5 NRC at 145) relating to the scope of section 105c and the hearing subsequently conducted thereunder.

B. Nexus

Applicants joint exceptions 131-133, and 138 presumably present the bases for their nexus arguments contained in their Appeal Brief (at pp. 125-137), and their Reply Brief (at pp. 13-124).[3/] Applicants in essence contend that the hearing conducted by the Perry Licensing Board was not within a "meaningful framework for antitrust consideration under Section 105c" and that many of the Board's factual findings "bear no relationship whatsoever to the nuclear activities in question..." (App. Brief, p. 8). Furthermore, in their exceptions, Applicants contend that there must be a "nexus" between each such challenged activity and the "activities under the license" which latter phrase they would limit to merely throwing the switch to operate the nuclear plant. In Wolf Creek 1, the Appeal Board held that the phrase "activities under the license" should not be construed as limiting the Commission's antitrust considerations to the operation of a nuclear plant in isolation.[4/]

3/ "Applicants' Appeal Brief in Support of Their Individual and Common Exceptions to the Initial Antitrust Decision (April 14, 1977).

4/ Kansas Gas & Electric Co. and Kansas City Power & Light Co. (Wolf Creek Generating Station, Unit 1) ALAB-279, 1 NRC 559 (1975).

In Consumers, the Appeal Board, consistent with Wolf Creek I, stated that:

> the appropriate [nexus] test is whether anticompetitive situations [are] intertwined with or exacerbated by the award of [the] license to construct or operate a nuclear facility. 5/

The Appeal Board's nexus analysis in Consumers (Slip Op. at 420-429) is consistent with similar findings of the Perry Licensing Board. Thus, the Perry Licensing Board correctly concluded that the operation of the subject nuclear units will have a substantial competitive effect upon both the supply and cost of electricity within the Combined Capco Companies Territories (5 NRC at 143).

The Perry Licensing Board further noted that extra-high voltage transmission is necessary to make the output from the five nuclear units available to the CAPCO co-owners, thus creating a discernible relationship between such transmission and the competitive stand of the CAPCO members (5 NRC at 36-37).

It is, therefore, clear that the Applicant's nexus arguments in this proceeding fall in the light of the nexus analysis in the Consumers Opinion. 6/

5/ Slip Op. p. 45.

6/ In the Staff's view, the appropriate nexus test is set forth in the Consumers opinion in the quoted language above. With respect to the Perry Board's findings of "particularized nexus" the Staff would not, however, agree that finding of a reasonable nexus between the situation inconsistent with the antitrust laws and the activities under the license requires a finding that Applicants have denied access to nuclear facilities or have imposed unreasonable restraints on the use of power from such facilities. Clearly, however, such refusals may constitute elements of the anticompetitive situation.

C. Pervasive Regulation by the Federal Power Commission

Both Consumers Power Company and the CAPCO companies argued unsuccessfully that their conduct was protected because of "pervasive regulation." Consumers contended that regulation by the Federal Power Commission precluded it from exercising monopoly power in any bulk power market (Slip Op. at 130). The CAPCO companies contend that:

> ...competition in the CCCT is precluded not through their actions but through the existence of state and federal regulatory schemes which either act to suppress competition or which prevent abuses from arising in areas where competition may be permitted (5 NRC at 244). 7/

The rejection of these similar arguments (an inevitable consequence of the Supreme Court's holding in U.S. v. Otter Tail Power Company, 410 U. S. 366 (1973)) is set forth by the Perry Licensing Board (5 NRC 244-249) and is fully discussed in the Consumers opinion at pp. 230-238. Nothing more need be said except to emphasize footnote 446 to Consumers opinion which states:

> ...where business judgment is not in the first instance supplemented by state or federal regulatory coercion, a firm is held accountable under the antitrust laws for its conduct, though its activities may be subject to the jurisdiction of a regulatory agency. United States v. Radio Corp. of America..., Cantor v. Detroit Edison Co., 428 U.S. 579, 596-98 (1977). Also see Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-90 (1976).

7/ At times, the CAPCO companies appear to also accept the Consumers Power Co. position. See, e.g., Applicants Reply Brief, p. 55 (August 4, 1977).

Both Cantor v. Detroit Edison and Goldfarb v. Virginia State Bar make it clear that whatever viability remains to the "state action" defense under Parker v. Brown, 317 U. S. 341 (1943), the activity, in the first instance must be compelled by direction of the State acting as sovereign.[8/] The fact that a state approves a private restraint of trade, even pursuant to a regulatory scheme does not constitute an antitrust immunity for the private actions. Northern Securities Co. v. U. S., 193 U. S. 197, at 332 and 344-347; Cantor, supra.

D. Monopoly Power

An issue in this proceeding is the question of the CAPCO companies' monopoly power. In the Consumers opinion, the Appeal Board has summarized three bases for its conclusion that Consumers Power Company possesses monopoly power.

> In the final analysis, our conclusion that Consumers possesses monopoly power in the retail and wholesale markets stands on three legs: the permissible inference to that end from the company's predominant share of those markets; the high market barriers that face any new entrant to those markets (and serve to confirm the existence of Consumers' monopoly power); and lastly, Consumers' dominance of generation facilities and perhaps more importantly, the transmission network serving those markets. (Slip Op. at 254).

These same factors upon which the Consumers Appeal Board based its finding of monopoly power, are relied upon by the Applicants in support of the proposition that the CAPCO companies do not possess monopoly power![9/]

8/ Goldfarb v. Virginia State Bar, 421 U.S. at 790-791.

9/ Applicants argument is contained in "Applicant's Reply Brief" at pp. 47-56.

In the instant proceeding, Applicants have explicitly admitted, and stipulated that each of the Applicants dominates the generation and transmission of bulk power in their service areas.[10/] Hence, one of three pegs found in the analysis of monopoly power in the Consumers opinion is uncontested.

The CAPCO companies also contend that they do not possess monopoly power because

> ...the economic and legal barriers to entry into the wholesale for resale market in the CCCT effectively preclude actual or potential competition.... (Applicant's Reply Brief pp. 50-51).

The Appeal Board in Consumers, not only rejected a similar argument, but concluded, on the basis of Golden Grain Macaroni Co., 78 FTC 63 (1971) and United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (1953) "that the presence of high entry barriers reinforces--if not confirms--the inference of monopoly power suggested by Consumers high market shares."[11/]

While the Applicants in this proceeding do not deny that they are dominant, they contend that the existing regulatory scheme emasculates Applicants of any ability to exclude wholesale competitors or to possess or exercise market power.[12/] In support of this proposition Applicants state:

10/ See "Brief of the NRC Staff In Opposition To Applicants' Exceptions To The Initial Antitrust Decision" pp. 50-51 (June 30, 1977). Indeed the figures introduced into evidence are overwhelming. See 5 NRC 153-154.

11/ Slip Op. at 247-248, 249.

12/ "Applicant's Reply Brief" p. 51; also n.45.

> Moreover, it is less than forthright for the opposition parties to argue that Applicants have an ability to do such things as refuse to sell at wholesale, refuse to interconnect or refuse to engage in coordinated activities since the FPC undeniably controls any and all conduct of this sort by electric entities (see App. Brief at 78-82).

A similar argument was rejected by the Consumers Appeal Board (See for example, Slip Op. at 255-260).

Finally, the CAPCO companies predominate shares of the wholesale and retail markets range between 94% - 100% (See 5 NRC at 153-154). Thus, the three bases in the Consumers opinion upon which monopoly power was found to exist also are present in the instant proceeding.

III. Specific Holdings in the Consumers Opinion Which Directly Bear on the Instant Proceeding

In addition to the previous discussions, there are a number of specific holdings in the Consumers opinion which bear directly on the instant appeal.

A. Refusals to Deal: The Necessity of "Formal Requests"

One question that arises in the context of refusals to deal by dominant firms is whether a "request" was in fact refused. A significant element of the factual analysis contained in the Consumers opinion centers upon the holding that a request for wheeling need not spell out in detail all contractual terms as in a "formal request" before its refusal amounts to an anticompetitive refusal to deal (Slip Op. pp. 301-305). Although in the instant proceeding, there are a number of refusals to deal based on formal requests,[14] Applicants' defense of refusals to deal based on lack of specificity in the request was also rejected by the Perry Licensing Board. For example, as set forth on pages 124-130 of the Staff's June 30, 1977 brief in opposition

13/ "Applicants' Reply Brief," p. 51, n. 45.

14/ See, e.g., 5 NRC at 173-175.

to Applicants' exceptions, the defense of lack of specificity was utilized by Ohio Edison in the WCOE negotiations. At first, for a period of two years, Ohio Edison refused to answer requests for wheeling by its wholesale customers, and then flatly refused to provide any form of third party wheeling, 5 NRC 195. OE defended these refusals on the grounds of lack of specificity.[15/] Ohio Edison's refusals to wheel for Orrville, were also defended on this ground (See Staff's June 30th Brief, pp. 127-128). But in each of these attempted utilizations of the lack of specificity defense by OE, the refusal to wheel was first proceeded by either a refusal to answer a wheeling request and/or a general refusal to wheel. In addition, the record supported the Licensing Board's findings that the requests were indeed specific (5 NRC 197, F.F. 123).[16/]

Lack of specificity was an attempted defense in the instant proceeding in a context involving requests for nuclear access. For example, the Borough of Pitcairn had requested access from Duquesne Light Company to the Beaver Valley nuclear unit. The Licensing Board rejected an asserted defense that the request lack specificity and concluded in addition that a denial of a request for nuclear access to a particular unit could by the breadth of its (general) terms be applicable to other similar but subsequent nuclear plants, especially where there is no reliable evidence of any change in company policy (See e.g., Staff's June 30th Brief, pp. 162-163).[17/]

15/ See "Brief of the NRC Staff in Opposition to Applicants' Exceptions to the Initial Antitrust Decision," p. 125 (June 30, 1977).

16/ Toledo Edison also defended refusals to wheel on the ground of lack of specificity in the request, 5 NRC at 217-222.

17/ Cf. Slip Op. at 303, concerning Consumers general policy against wheeling for small utilities. If a refusal to deal is couched in general terms, "...one would expect the smaller utilities to be aware of it and not waste time on useless negotiations...."

B. Remedies

A major issue in any proceeding under section 105c is a determination of the appropriate relief. In Consumers, the Appeal Board began its discussion of this issue with a quote from the legislative history of section 105c:

> The Joint Committee on Atomic Energy instructed, in its report on the bill enacted into section 105c, that a finding of a nexus between an anticompetitive situation and a proposed nuclear plant calls for Commission-imposed conditions [on the nuclear license] to eliminate the concerns evaluated in [that] finding (Slip Op. p. 429).

Thus, the relief ordered in a 105c hearing should bear a reasonable relationship to the anticompetitive situation found to exist. Indeed, the ordered Relief must:

> ...be with a view towards insuring that, when and if the permit does issue...it is laden with any conditions found necessary to obviate or rectify a situation inconsistent with the antitrust laws. 18/

However, in remanding the case to the Licensing Board to formulate appropriate relief in light of both the opinion and current circumstances, the Consumers Appeal Board cautioned against license conditions having the effect of "restructuring" the electric utility industry. (Slip Op. at 432).

The relevant question for purposes of the instant case becomes one of whether the relief ordered by the Perry Licensing Board eliminates the anticompetitive concerns found to exist in the Combined Capco Company Territories, in a reasonable or unreasonable manner.

18/ Houston Lighting and Power Co., (South Texas Project, Unit Nos. 1 and 2), ALAB-381, 5 NRC 582, 592 (March 18, 1977).

The ordered license conditions, which are presently attached to the Davis-Besse 1 Operating License and the Perry 1 & 2 Construction Permits, require Applicants to deal with smaller electric systems in their service area on a non-discriminatory basis, i.e., as they would any other electric utility regardless of relative size or form of ownership. These conditions, now in effect, have previously been summarized by the Appeal Board:

> 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" power to and for those companies within given limits; to sell various economical forms 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 certain future plants, subject to stated time and capacity limitations. Id., 5 NRC at 255-260. 19/

The ordered license conditions do require Applicants to reconsider their planning and operations as to include, as an assumption, that they must now deal with smaller entities in their service areas.[20/] Applicants are not called upon to provide services to non-CAPCO companies without entitlement to compensation.[21/] With respect to the ordered license conditions, the Appeal Board, in the context of Applicants' motion for a stay, has adopted as correct the conclusion of the Perry Licensing Board (5 NRC at 462) that the ordered license conditions create "no special burden"

19/ The Toledo Edison Company, the Cleveland Electric Illuminating Company, ALAB-385, 5 NRC 621, 624 (March 23, 1977).

20/ 5 NRC at 627.

21/ Id.

on the Applicant companies.[22] The electric services that Applicants are required to make available under the ordered license conditions are thus reasonable, and appropriate in the light of a detailed history of Applicants' joint and several refusals to provide such services to small electric systems.

IV. Applicants' Misplaced Reliance on the Consumers Power Licensing Board Decision

In the table of cases contained in Applicants "Brief in Support of its Exceptions" Applicants have marked with an asterisk, those cases that they have "chiefly relied upon." Indeed, the Consumers Licensing Board decision, now reversed, is their most often cited authority. It should be noted that Applicants have previously commented that the Perry proceeding is "...remarkably similar in many respects"[23] to the Consumers proceeding (as well as the Farley proceeding) involving

> ...virtually the same laundry-list of charges, namely: acquiring adjacent municipal electric systems, entering into territorial or customer allocation agreements, refusals to engage in bulk power transactions, refusals to provide general wheeling services, denials of nuclear access, and depriving smaller electric systems of the benefits of coordinated operation and development. [24]

22/ Id., p. 628.

23/ "Applicants Reply Brief, p. 3"

24/ Id.

Following is a summary demonstrating Applicants substantial reliance in this Appeal on the Consumers licensing board decision as authority which has subsequently been reversed.

Page of "Applicants Brief in Support of Exceptions"	Applicants Reliance on the Consumers Licensing Board Decision
8, 134	The Perry Licensing Board improperly engaged in eleventh-hour maneuverings 25/ by defining the antitrust "situation" 26/ in a manner not solely limited to the nuclear facilities viewed in isolation. Moreover, a nexus must exist as to each anticompetitive act. Staff Comment: These arguments were rejected by the Consumers' Appeal Board, (Slip Op. at 35-46; Also see 420-428).
15-16	An essential ingredient (sic) to participatic by non-CAPCO systems in the CAPCO power pool are: (1) All parties must be capable of contributing to bulk power reliability and economy. (2) All parties must share in dual responsibilities in proportion to to the benefits to be derived therefrom. (3) So that each contracting party realizes a net benefit in its own right and the pooling operation as a whole also derives a net benefit. Staff Comment: The Consumers Appeal Board has rejected this argument, See Slip Op. at 321-330; Also see NRC Staff Brief, pp. 66-7.

25/ See "Brief of the NRC Staff in Opposition to Applicants' Exceptions..."; pp. 30-40.

26/ See "Brief of the NRC Staff"; pp. 6-8.

119 n.138	While defending their utilization of the P/N reserve sharing formula, (a formula which the Licensing Board properly found was designed for the purpose of discriminating against small systems) Applicants quote with approval from the Consumers Licensing Board to the effect that equal percentage reserves may be unfair and impractical. Staff Comment: The P/N formula is perhaps more onerous than the Holland Formula which the Consumers Appeal Board concluded was unreasonable (Slip Op. at 376-389). Applicants' reliance on the Consumer's Licensing Board's discussion of the equal percentage reserve formula is in great jeopardy because the Consumers Appeal Board has concluded that "... Consumers would benefit by sharing reserves on an equalized basis with small utilities." (Slip Op. at 387).

V. Conclusion

The issuance of the Consumers opinion serves to greatly reinforce the view of the Staff that Applicants' joint and individual exceptions to the initial Perry Licensing Board decision should be rejected as being without foundation in fact or law.

Respectfully submitted,

Roy P. Lessy, Jr.

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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 13th day of March 1978.

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CERTIFICATE OF SERVICE

I hereby certify that copies of SUPPLEMENTAL BRIEF OF THE NRC STAFF IN RESPONSE TO APPEAL BOARD ORDER OF JANUARY 12, 1978 in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or air mail, or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 13th day of March 1978.

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