3/13/78

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

SUPPLEMENTAL BRIEF OF THE
DEPARTMENT OF JUSTICE

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March 13, 1978

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SUPPLEMENTAL BRIEF OF THE
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On January 12, 1978, the Atomic Safety and Licensing Appeal Board issued an Order stating that any party to the above-captioned proceeding may file a supplemental brief, not to exceed thirty pages, confined to a discussion of the relationship of the decision of this Board in Consumers Power Company, (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC _____ (December 30, 1977) 1/ to the present proceeding.

1/ Within this supplemental brief the following abbreviations have been used:

App. Brief - Applicants' Appeal Brief in Support of their Individual and Common Exceptions to the Initial Decision, filed April 14, 1977.

App. Reply Brief - Applicants' Reply Brief, filed August 4, 1977.

DOJ Brief - Reply Brief of the Department of Justice to Applicants' Appeal Brief in Support of their Individual and Common Exceptions to the Initial Decision, filed June 30, 1977.

(Footnote continued on next page)

The original deadline for filing has been extended to March 13, 1978. The Department of Justice ("Department") hereby responds.

Through the pendency of the present appeal, Applicants have conceded the similarity of the factual records in the Perry case and in Consumers, and have "more often" attributed "the conflicting results . . . to fundamental differences in legal approach." App. Reply Brief at p.2. As this Memorandum will demonstrate neither the results nor the legal approach remain in conflict.

In its Consumers decision, this Appeal Board has rejected the legal approach taken by the Consumers Licensing Board. Instead it has adopted an approach nearly indistinguishable from that used by the Perry Licensing Board. For this reason the Department submits that the Perry decision is consistent with the Appeal Board's Consumers decision and should be affirmed in its entirety.

Since hundreds of pages of briefs are already before this Appeal Board in this proceeding, there is no need to

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1/ (foonote continued from previous page)

City Brief - Brief of the City of Cleveland in Opposition to the Exceptions Filed by Applicants, filed June 30, 1977.

Staff Brief - Brief of the NRC Staff in Opposition to Applicants' Exceptions to the Initial Antitrust Decision, filed June 30, 1977.

Consumers - Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB - 452, 6 NRC ____ (1977).

Perry - Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), 5 NRC 133 (1977).

unduly burden an already heavily burdened record. Accordingly, the Department will limit this supplemental filing to a brief comparison of certain of the more significant portions of the two decisions.

The Perry Licensing Board's holding that Applicants were afforded their due process rights to notice and discovery (Perry at pp. 138-141) is fully supported by the Consumers decision. In Consumers this Appeal Board held that the "crucial factor" in determining whether due process rights have been violated "is whether the opposing party is given a reasonable opportunity to know and defend against the case as it unfolds." (Consumers at p. 265). Prior to the start of the Perry proceeding Applicants had in their possession: four Department of Justice advice letters; Petitions to Intervene; a statement of the Issues and Matters in Controversy; answers to interrogatories; extensive document production from all opposing parties; the opportunity to take as many depositions as they desired; detailed statements of the nature of the case to be presented by each of the opposing parties; a list of witnesses and a brief description of the area about which each would testify; a list of documents which the opposing parties were going to utilize in their direct cases; and prehearing briefs. See, Perry at pp. 4-6; DOJ Brief at pp. 8-14; Staff Brief at pp. 30-40. This information far exceeds that which this Appeal Board

requires opposing parties to convey to applicants in order to assure them their due process rights. The Perry Licensing Board was therefore correct when it held that Applicants' due process rights were not violated.

In both Consumers and Perry the Applicants urged that their refusals to coordinate with smaller utilities were based on the fact that the respective companies would not have received a net benefit or that there was no mutuality. 2/ Both Consumers and the Perry Applicants insist that such benefits or mutuality can result only if each coordinating party possesses the willingness and ability to engage in comparable coordinating transactions on a reciprocal basis. Consumers at pp. 322-23; App. Brief at pp. 102-105. This Appeal Board correctly rejected Consumers' argument and agreed with the Department's position when it held that Consumers would necessarily receive a net benefit whenever it engaged in a transaction which covered its costs (including a reasonable return on investment). Thus, the primary focus would be the burdens imposed rather than the benefits received. Consumers pp. 321-30, 364-82. Since the Perry Applicants have made the same argument as Consumers (App. Brief at pp. 102-105) and the Department's position remains the same (DOJ Brief at pp. 152-58), the Perry Licensing

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2/ Both sets of Applicants also relied on the testimony of the same witness, Mr. Slemmer, to substantiate this argument.

Board's rejection of the mutuality or net benefit argument is consistent with this Appeal Boards holding in Consumers. 3/

In rejecting the "Holland formula" reserve sharing method, this Appeal Board utilized three criteria which can be and were utilized by the Perry Licensing Board in rejecting the P/N reserve sharing formula of the Perry Applicants. First, as noted above, this Appeal Board agreed with the Department and found that the terms of an interconnection agreement should be based on a proportionate sharing of the burdens and not of the benefits (Consumers at pp. 376-380, DOJ Brief at pp. 152-158). Second, this Board, relying on FPC and Supreme Court decisions, found fault with the "Holland formula" because it tended to discourage small systems from building large economical units. Consumer at pp. 380-81, 388. The CAPCO P/N formula has the exact same effect. See Staff Brief at pp. 170-171. Third, benefits which this Appeal Board found would be received by Consumers from reserve sharing on an equal percentage basis would also be applicable to the CAPCO Companies. Consumers at pp. 383-388. See also DOJ

3/ In Perry there is even more reason to reject the mutuality or net berefit argument than in Consumers. In determining how to respond to requests for coordination from smaller systems, Consumers actually considered, to some degree, whether they would receive a net benefit but in Perry such justification for the refusals to coordinate did not emerge until the hearing, long after the refusals took place. See DOJ Brief at pp. 152-158.

Brief at pp. 156-158. In view of this, there is no doubt that Applicants' P/N formula must be rejected in favor of an equal percentage reserve arrangement as ordered by the Perry Licensing Board (Perry at pp. 235-236, 258).

The Perry Licensing Board found the bulk power services market (which includes both wholesale firm power and the regional power exchange market) was a relevant market in the CCCT (Perry at p. 160), while this Appeal Board, in Consumers, found that it was improper to include wholesale firm power in the same market with coordination services (which is similar to the regional power exchange) Consumers at pp. 134-164. However, this does not necessarily mean that the Perry Licensing Board erred in finding the existence of a bulk power services market. Indeed, this Appeal Board recognized that such a finding may be appropriate in the context of the factual situation in Perry. Consumers at p. 212, n. 407.

However, even if this Appeal Board finds that the bulk power services market is not a relevant market in Perry, the results would still be the same. The Perry Licensing Board found that both the retail firm power and the regional power exchange markets proposed by the Department's expert economist, Dr. Wein, constitute appropriate product markets. (Perry at pp. 60-164). These, of course, were two of the relevant markets found by this Appeal Board

in Consumers. The exclusionary activities of the Perry Applicants were designed to and had anticompetitive effects in both of these markets. Even if no additional relevant markets are found, a finding that Applicants monopolized two relevant markets is fully supported and license conditions to eliminate this would be required.

In addition, in Perry, Dr. Wein proposed a third product market, the wholesale firm power market. See Findings of Fact and Conclusions of Law of the United States Department of Justice, filed August 23, 1976, pp. 54-57; City Brief at pp. 45-46. Although the Licensing Board did not specifically adopt this market, it did not specifically reject it either. Indeed, the Perry Licensing Board found that this was a market of significance in which Applicants had monopoly power (Perry at pp. 33-34). See also DOJ Brief at pp. 73, 75. This Appeal Board may well find that wholesale firm power constitutes a relevant market in the context of Perry.

The Perry Licensing Board also utilized the same analysis as this Appeal Board did in Consumers in determining that the Applicants had market power. At p. 254 of Consumers, this Board stated that its conclusion that Consumers Power Co. possessed monopoly power stood on three legs: the permissible inference to that end from the company's predominant share of the relevant markets; the high market barriers that face any new entrant to those markets; and Consumers'

strategic dominance of generation facilities and, perhaps more importantly, the transmission network serving those markets. In Perry the Licensing Board found that the monopoly power could be inferred from the fact that Applicants possessed a predominant share of retail and wholesale firm power sales, 4/ as well as strategic dominance of generation and transmission (Perry at pp. 153-154). Applicants admit (App. Brief at pp. 45-50), that there are high barriers to entry into the electric power industry and the Perry Licensing Board alluded to this fact throughout its initial decision. Thus, the Licensing Board's finding that Applicants possess market power comports with the standards set down by the Appeal Board in Consumers.

Both Boards also rejected contentions that Applicants' anticompetitive behavior can be justified on the grounds that their competitors have tax advantages which somehow negate the effect of such behavior. Consumers at p. 261, Perry at p. 239. See also DOJ Brief at pp. 70, 105; City Brief at pp. 35-37, 62-63. Both Boards also recognized the applicability of the per se rule to certain types of anticompetitive behavior. Consumers at p. [illegible], Perry at p. 147.

Lastly, in determining that the situation inconsistent with the antitrust laws would be created and maintained by activities under the nuclear licenses the Perry Licensing Board utilized the same legal analysis as this Appeal Board

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4/ The Perry Board also correctly included captive wholesale sales in calculating the market share. Consumers at pp. 200-212, 240.

utilized in determining whether the requisite nexus existed in Consumers. (Compare Consumers, at pp. 420-28 and Perry at pp. 237-243).

Thus, each Board initially determined the relevant markets and established that the respective Applicants possessed monopoly power in each (Consumers at pp. 105-239; Perry at pp. 153-154, 159-165). Each Board then examined the behavior of each Applicant and found that each had abused its monopoly power. 5/ In Consumers the abuse of monopoly power took the form of refusals to wheel (Consumers at pp. 299-319), denial of access to nuclear units (Consumers at pp. 389-402), refusals to coordinate with smaller systems (Consumers at pp. 330-357), refusal to share reserves on an equal percentage basis (Consumers at pp. 358-389), excluding smaller utilities from the Michigan power pool (Consumers at 402-412) and interconnecting on unreasonable terms (Consumers at pp. 412-417). Similarly, in Perry the Licensing Board found that monopoly power had been abused by refusals to wheel (Perry at pp. 173-175, 178, 195-198

5/ In finding that Consumers and all of the Perry Applicants had abused their monopoly power, both Boards rejected the argument (App. Brief at pp. 83-84) that regulation by the Federal Power Commission (now the Federal Energy Regulatory Commission) precluded exercise of such power. Consumers at pp. 230-238; Perry at pp. 229-237. See also DOJ Brief at pp. 81-84.

217-221), denial of access to nuclear units (Perry at pp. 175-176, 178-179, 232-235), refusals to coordinate with smaller systems (Perry at pp. 180-182, 185, 198-200, 204-208, 221-223), development of a reserve sharing formula which discriminated against small utility systems (Perry at pp. 235-237), excluding smaller utility systems from the CAPCO power pool (Perry at pp. 223-232) and interconnecting on unreasonable and unfair terms (Perry at pp. 167-173, 177-178, 182-185). 6/ In addition, both Boards found that the respective companies had a history of acquiring smaller competing systems and desired to continue to acquire such systems in the future. Consumers at pp. 287-298; Perry at pp. 166, 169, 177, 179-180, 188-190, 211-213.

With this backdrop of anticompetitive behavior established, each Board sought to determine whether the requisite nexus existed. The Appeal Board reasoned that "fair access to efficient, dependable and economical baseload generation is at the heart of the competitive situation" before it and that because of Consumer's anticompetitive activities, access to such generation has been denied smaller systems. "The result," this Board concluded, "is to give Consumers a competitive

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6/ The Perry Board also found other anticompetitive practices such as territorial agreements (Perry at pp. 177, 190-195, 200-203, 214-217) and a price squeeze (Perry at pp. 208-211).

edge over the small utilities -- an edge attributable not to that Company's efficient operations but to its exercise of monopoly power." Consumers at p. 422.

This Appeal Board continued at pp. 422-24:

> Now Consumers wishes to increase its efficiency by installing large nuclear powered generating units. Manifestly, this will exacerbate the anticompetitive situation. What we said at the beginning of this opinion bears repeating at the end: the tremendous costs of developing the technology underlying nuclear plants was borne by the Treasury and, as the Commission emphasized in Waterford, Congress did not intend that public expenditure to benefit only the few; one of the reasons for its amending section 105c to its present form was the desire to prevent the foreclosing of the advantages of nuclear power to all but the very largest electric utilities. But unless we step in, that is precisedly what will happen in this case: Consumers will have successfully used its monopoly power to retain the benefit of nuclear-powered baseload generation for itself, to the disadvantage of its 'landlocked' smaller competitors.
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> * * *
>
> Having held that Consumers has previously used the 'opportunity for abuse' that its size affords, we cannot turn a blind eye to the further opportunity it will have to do so through its activities under the Midland licenses. That possibility is heightenedd by the fact that the Midland units represent substantial growth in Consumers' size and overall capacity. (footnotes omitted).

Further, this Board noted that due to the uncertain future availability of fossil fuels and the increased expense of utilizing the fossil fuels that remain,

the Midland plants represent a means of perpetuating a monopoly and a threat to the continued existence of competitors. Finally, the Board concluded: "[the above] situation amply satisfies the needed link between the activities sought to be licensed and the situation inconsistent with the antitrust laws."

The Perry Board, after going through the same type of analysis, reached the same conclusion. In view of the Consumers decision the Perry Licensing Board's decision is unassailable.

There are many other holdings which this Appeal Board made in Consumers which comport with holdings made by the Licensing Board in Perry. The Department is not aware of any holding in Consumers which unequivocably conflicts with any portion of the Perry decision. In view of this the Department submits that

the Consumers decision virtually mandates affirmance of the Perry decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of SUPPLEMENTAL BRIEF OF DEPARTMENT OF JUSTICE have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand this 13th day of March 1978.

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