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 and 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING	)	NRC Docket Nos. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

RESPONSE OF NRC STAFF TO APPLICANTS RENEWED MOTION FOR AN ORDER STAYING, PENDENTE LITE, THE ATTACHMENT OF ANTITRUST CONDITIONS

I.

On January 14, 1977, Applicants filed with the Appeal Board their motion for a pendente lite stay of each of the ten antitrust conditions ordered by the Atomic Safety and Licensing Board pursuant to its Initial Decision (Antitrust) dated January 6, 1977. 1/ On January 17, 1977, the Appeal Board referred Applicants' motion to the Licensing Board for initial decision with instructions to decide the motion as expeditously as possible. 2/ By memorandum and order dated February 4, 1977, the Licensing Board denied Applicants' motion. 3/ ALAB-364 also authorized Applicants to renew their motion before the Appeal Board if said motion was denied by the Licensing Board. ALAB-364, however, limited additional pleadings to commenting on the reasons advanced by the Licensing Board in its decision. 4/

1/ LBP-77-1, 5 NRC ____ (January 6, 1977).

2/ ALAB-364, 5 NRC ____ (January 17, 1977).

3/ LBP-77-7, 5 NRC ____ (February 4, 1977).

4/ In its Order of February 15, 1977 the Appeal Board requested the parties to address the question of the authority of the Appeal Board to condition the grant or denial of a stay upon some undertaking such as the posting of a bond.

II.

Applicants' supplemental arguments in support of a stay, must be judged in the context of the four criteria set forth in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (1958). These criteria have been adopted by the Appeal Board [5/] for determining whether good cause exists for staying the effectiveness of an initial licensing board decision pursuant to 10 CFR §2.764. The four criteria upon which the motion is to be judged are not in controversy in this Appeal.

A. Has The Movant Made A Strong Showing That It Is Likely To Prevail On The Merits Of Its Appeal?

With respect to this criterion, Applicants' arguments center upon one matter in the Licensing Board's February 3rd Order, i.e., that the Licensing Board "failed to make any assessment as to whether competition between electric utilities in the electric utility industry is, in fact, in the public interest" (Applicants Renewed Motion, p. 16).

Applicants' contention would require each Licensing Board sitting in a contested antitrust hearing at the N.R.C., to make a generic finding as to whether competition between electric utilities is in the public interest. Failure to make a finding, in Applicants' view "is so fundamentally wrong as to render virtually every facet of the Initial Decision fatally suspect". [6/]

5/ Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, NRCI-76/7 10, 13 (July 14, 1976); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-192, 7 AEC 420; Southern California Edison Co. (San Onofre Nuclear Generting Station, Units 2 & 3), ALAB-159, 7 AEC 478).

6/ Applicants' Renewed Motion, p. 6.

Thus, Applicants argue that antitrust forums, such as the NRC have the obligation to make the generic finding. But Applicants ignore our statute. Section 105c of the Atomic Energy Act of 1954 as amended (42 USC §2135(c), hereinafter "the Act"), requires the NRC to conduct a pre-licensing antitrust review of each Applicant for a license and to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws". Thus, the NRC's statutory function under §105c of the Act is judged in the context of the Sherman Act, [7/] the Clayton Act, [8/] and the Federal Trade Commission Act. [9/] Congress has defined the statutory obligation of the NRC. Thus, Applicants reliance on cases ajudicated under regulatory schemes where there is no affirmative duty to make such a finding (of whether the licensed activities will create or maintain a situation inconsistent with the antitrust laws) but rather only the requirement to consider either public convenience and necessity "or the public interest" in fulfilling their responsibility are irrelevant here. So, for example, in Latin America/Pacific Coast Steamship Conference v. Federal Maritime Commission, 465 F.2d 542 (D.C. Cir. 1972), cert. den. ___U.S.___, 93 S. Ct. 269 (1972), under a statute conferring limited antitrust immunity

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7/ 15 USC §1 et seq. (1970).

8/ 15 USC §12 et seq. (1970).

9/ 15 USC §41 et seq. (1971).

upon the shipping industry (46 U.S.C. §§813a, 814), the Court of Appeals read into a public interest standard of the Shipping Act of 1916, a requirement that the Maritime Commission consider antitrust considerations. Similarly, in Hawaiian Telephone Company v. FCC, 498 F.2d 771 (D.C. Cir. 1974), the focus was not the application of the antitrust laws to applicant's request for certification of new telephone service, but merely the question, under the Communications Act of 1934, (47 USC §214(a)) of whether "the present or future public convenience and necessity require or will require" the new service. In Alabama Power Co. v. FPC, 511 F.2d 383 (D.C. Cir. 1974), the Court noted:

> The [FPC] Commission of course, lacks principal responsibility for the implementation of anti-trust policy . . . (511 F.2d at 393).

The Court concluded that the Commission through lacking responsibility retained an obligation to give reasoned consideration to the bearing of antitrust policy . . . (511 F.2d at 393).

Applicants also overlook the fact that the Licensing Board below carefully assessed the role of competition between electric utilities in the Combined CAPCO-Company Territories ("CCCT") within the context of the antitrust laws specified in section 105a of the Act.

For example, in assessing the role of competition in the CCCT given the existing federal and state regulatory framework, the Licensing Board concluded:

> This recognition of the imperfect nature of the regulation and the fact that approval of a particular wholesale rate structure does not necessarily eliminate the possibility of anticompetitive effects is significant to our determination to reject Applicant's argument that regulation has acted as a substitute or replacement for competition in the CCCT. 10/

In reaching its conclusion as to the role of competition in the CCCT the Board relied upon Staff's economic expert, Dr. Hughes who testified:

> In practice, coordination does not rule out a useful role for competition. Power systems can and do choose between different alternatives in putting together the overall power supply package on which they rely. For a large area, there are often many ways of developing

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10/ Slip Op. at 232.

> an efficient overall bulk power supply plan or pattern of development. The existence of a diversity of approaches and the freedom to shop for options provide a degree of competitive stimulus to search for new and better power supply alternatives. 11/

The Board also reviewed the role of competition in the CCCT in light of two relevant Supreme Court decisions, which applied the antitrust laws to the electric utility industry. Thus, the Board relied upon Cantor v. Detroit Edison, _____U.S._____, 49 L.Ed.2d 1141 (1976) for the proposition that the existence of state regulation does not subvert the Congressional directive for the NRC to consider the anticompetitive consequences of activities under the license. 12/ Further, the Licensing Board considered the teachings of Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973) wherein the Supreme Court held inter alia that the antitrust laws apply to the electric utility industry notwithstanding the existence of state and

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11/ NRC Exhibit 207, p. 41 (Prepared Testimony of Dr. William R. Hughes). Dr. Hughes' expanded upon this opinion on cross-examination:

> My own view is that what is at stake here is less a matter of encouraging wide-spread competition in electric power supply although I believe that broader licensing conditions would encourage some such competition and some of it would be constructive. But I don't think the competition encouraging aspect is perhaps as relevant as the aspect of freeing up the options of choice that power systems have and encouraging a pattern of dealing among those power systems that will tend to get them to capture the combined benefits that can be achieved so that one would have a pattern of market behavior in the State of Ohio that would be more inclusive with respect to capturing the full benefits of coordinating and integrating development." (Hughes: Tr. 3771).

12/ Slip Op. at 235.

federal regulation), and observed that regulation neither eliminated the possibility of competition nor was it intended to serve as a complete substitute for competition.[13/]

In support of its argument on appeal that a generic assessment of whether competition is in the public interest must be made in every specific NRC contested antitrust review, Applicants contend as a matter of law that private action which would otherwise be suspect under the antitrust laws may be permissible when taken in a direct furtherance of a regulatory policy. It is the Staff's position that such an argument does not survive Cantor v. Detroit Edison Co., supra. As the Court stated in Cantor:

> This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law. [14/]

Electric utilities are similarly unable to seek refuge from the antitrust laws because of F.P.C. regulation or policies. Otter Tail Power Co. v. U.S., supra.

Applicants also contend, that U.S. v. Citizens & Southern National Bank, 422 U.S. 86 (1975) stands for the proposition that suspect private action is permissible when its purpose and effect is to ameliorate more restrictive regulatory policy. In that case state law, through a division of territories (markets), prevented dejure branch banking. In order to circumvent

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13/ Slip Op. at 236.

14/ Cantor, supra., ____U.S.___, 49 L.Ed.2d at 1155.

the state's competitive restraint of trade, a bank created through stock ownership, defacto branches. The Court held that this was not unreasonable under the Sherman Act, because "the defacto branching program .. has plainly been procompetitive." 424 U.S. at 119. Thus, the holding in that case was that in the banking industry, private action which is not in itself illegal, and which is adopted to ameliorate an anticompetitive state law provision, and which private action is itself plainly procompetitive, does not impose an unreasonable restraint on trade. Staff does not agree that the banking decision excuses or tempers the many examples of Applicants' abuse of dominance in this proceeding found by the Licensing Board. The Staff believes, and the Licensing Board found, that the conduct challenged in this proceeding clearly has had both an anticompetitive design and effect.

Buttressing its argument concerning the degree to which the Licensing Board failed to make the generic finding, Applicants also contend [15/] that they were denied the opportunity to address in advance issues relevant to fashioning appropriate relief. As early as April 7 of 1975 [16/] the Staff

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15/ Applicants Renewed Motion, p. 12, n.8.

16/ See Appendix A to this pleading.

had requested that witnesses during presentation of the case-in-chief be able to testify as to remedy. Staff grounded this request on the belief that a bifurcated hearing would be unduly costly and time consuming. At the prehearing conference on April 21, 1975, Staff's request was discussed (Tr. 1076-Tr. 1079). At that time the Staff suggested that including evidence as to appropriate remedy would lend clarity to the hearing and would eliminate an artificial line of demarcation between other testimony and remedy (Tr. 1076-Tr. 1077, attached hereto). At that time, counsel for Applicants stated; "we have no objection to that type of expedition ... if what is being proposed is that there be one proceeding for all matters being taken and it be resolved in one decision, we have no objection to that" (Tr. 1079).

Relying on that, the parties, including Applicants filed testimony going to appropriate license conditions.[17/] The Staff filed, in its prehearing brief, on November 4, 1975, a sample statement of the license conditions it was likely to request. As early as March of 1975, in "Applicants Motion For Expediting The Antitrust Hearing Process" Applicants filed "license conditions" in the form of "policy commitments." Such policy commitments later became App. Ex. 44.[18/] In many ways, the "License Conditions" eventually ordered by the Board relate to similar types of commitments as the license conditions contained in the Staff's prehearing brief. Not only did Applicants offer affirmative evidence on

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17/ For example, App. 190 (Prepared Testimony of Joe D. Pace).

18/ But see pages 10 to 12 infra.

appropriate relief, App. Ex. 190, and cross-examine on appropriate relief but at no time did Applicants ever object to the receipt of any evidence going to the formation of appropriate relief. It was not until virtually the very last hour of the hearing that a request to comment upon proposed relief was made by Applicants (Tr. 12,689, July 2, 1976). At that time no argument was advanced as to the grounds for such a request other than "the relief aspects must be limited or defined by the nature of the situation and that the nexus aspect, if you will, of 105 has an application in that area as well" (Tr. 12,698). In summary, the Staff believes that Applicants have not met their burden, with respect to their assessment of competition argument or any other legal argument, of demonstrating a substantial indication of probable success on the merits of appeal.

B. Has The Movant Shown That, Without Such Relief, It Will Be Irreparably Injured?

Applicants continue to make no showing that they will be irreparably injured if the requested relief is not granted and still have not specified with particularity, what harm, deemed irreparable, will result from each of the ten license conditions ordered by the Licensing Board. Such items as the need for additional system planning and possible changes in operating relationships between Applicants and others fall far short of the irreparable harm that must be shown to satisfy this criterion.

Applicants also contend (p. 18, n.12) that if they are required to exchange power outside the CCCT, with a reciprocal expectation that they will be able to repurchase like capacity, that this will be "harmful".[19] The simple answer, given by Applicants own expert on power pooling is that such transfers become sales of capacity and energy and that dollars can be adequately used as payment for interchange energy and emergency service (Slemmer: Tr. 8977-8988; Tr. 9000; Tr. 9021). Thus, this demonstrates not only no irreparable harm, but no harm at all.[20]

C. Would The Issuance Of A Stay Substantially Harm Other Parties Interested In The Proceeding?

The Board concluded in its February 3, 1977 Order[21] that if the existing situation inconsistent with the antitrust laws is allowed to continue unabated this will have a devastating effect not only upon competition in the CCCT, but on the continued existence of smaller systems in the CCCT. Thus, the issuance of a stay would substantially harm the non-Applicant electric systems in the CCCT.

19/ Note, Applicants do not contend that this would be irreparably harmful.

20/ Applicants contend in the same footnote that the expectation of mutuality "is fully supported by an NRC Staff study." The transcript clearly demonstrates (Tr. 7258-Tr. 7265) that the document in question was not a Staff Study, was not relied upon by the Staff or by the Department witness utilizing it, and did not represent a Staff position. It was an attachment to a letter by an individual Staff economist. Moreover, the document was not received in evidence for any other purpose than for evaluating the testimony of the Department's economic witness, Dr. Wein (Tr. 7265). Finally, this exhibit does not generally support Applicants' intended use, for it indicates that in 1973, for example, Toledo Edison received 61 kwh of energy from Ohio Power but delivered 3117, Ohio Edison received 1,465,418 kwh but delivered 2,035,420 to Ohio Power and Duquesne Light delivered zero to Ohio Power but received 1,695,061.

21/ Memorandum And Order On Applicants Motion For An Order Staying ... Antitrust Conditions, pp. 29-30 (February 3, 1977).

Davis-Besse 1, a 906 MW nuclear unit, according to the latest information is currently scheduled for commercial operation by the end of May 1977. It is significant to note the conclusion of the Board on page 30 of its February 3rd Order that App. Ex. 44, their "so-called policy commitments ... was not revealed to those entities which had expressed an interest in access to Davis-Besse or Perry."

The evidentiary record clearly established that these proposed license conditions were never offered to non-Applicant entities within the CCCT and further do not represent policies "observed" by each Applicant. (McCabe: Tr. 1718 (Duquesne); Pandy: Tr. 3158 (CEI); Hillwig: Tr. 2409-10 (TE); Lyren: Tr. 2030 (OE).[22/] The Board also found that Applicants individually and jointly denied access to the subject nuclear units to entities who had requested access.[23/]

Further, the record clearly established that even if the most limited provisions contained in Applicants' Ex. 44 had been offered, its provisions were materially inadequate. For example, with respect to the general language of the license conditions, the Department's engineering expert,

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22/ Indeed, the testimony and writings of Applicants' own witnesses confirm that these license conditions were not offered or discussed with any non-Applicant CCCT entities at anytime. (Hauser: Tr. 10,870, 10,872-73 (CEI)). NRC 44 contains OE's offer policies in the form of two letters from Mr. Firestone to WCOE representatives dated 2-28-75 and 6-17-75. (See Proposed Findings of Fact 1.195 to 1.201 supra.) In August of 1975, almost six months after App. 44 was allegedly "offered," Mr. Smart told TE's wholesale customers "that they would be crazy to want to buy into high cost generation" when wholesale power was available and that "we may very well be coming to you in the future" with regard to participation." (Smart: Tr. 10,097-99 (TE)). He never established whether subsequent to August 1975, TE came back and offered access.

23/ Slip Op. at 204-211, 52, 81-83, 89-90, 103-106, 130-136 and 185-187. These denials were either absolute refusals or denials based on the imposition of unreasonable and anticompetitive terms and conditions.

Roland Kampmeier observed:

> Applicants 44 contains a lot of language which would need to be tightened up very considerably ... there is a lot of room for ambiguity, plus room for doubt as to who does the interpreting, who makes the determinations when parties fail to agree, and so on (Kampmeier: Tr. 6143-44).

In addition, the record established that the reserve sharing provision, would not likely provide for the sharing of reserves. As Mr. Kampmeier noted, "there is no reserve sharing," (Kampmeier: Tr. 6144-45); this section is totally unacceptable to a small system (Kampmeier: Tr. 6147).

Further, the license conditions do not require interconnections between Applicants and other entities unless such entity is in Applicants' sole view (i) financially responsible, (ii) operating electrical facilities in good faith, and (iii) participating in the ownership of or power output from Davis-Besse 1 and Perry 1 and 2. (App. Ex. 44, "Definitions", and "Commitment 2".) Accordingly, under these proposed conditions, Duquesne for example would not have been required to interconnect with Pitcairn unless Pitcairn met all of the above stated conditions. Thus, the entity must "participate" in a nuclear unit before it has the interconnection permitting it to do so. That requirement would appear to be neither possible nor, more importantly, capable of being financed.

In addition, the license conditions do not provide for any transmission services (wheeling) except for delivering to the small system the power it purchases from the nuclear unit, or power for replacement thereof. It does not even provide for wheeling out of excess nuclear power. (Kampmeier: Tr. 6143).

III.

In its Order dated February 15, 1977, the Appeal Board asked the parties to address "the question of the explicit or inherent authority of this Board to condition the grant or denial of a stay upon some undertaking, such as the posting of a bond." As noted supra, on page 2, the criteria upon which a motion to stay the effectiveness of an initial decision pursuant to 10 CFR §2.764 are not in controversy in this Appeal. The regulation itself has likewise not been challenged. 24/

While the regulation describes the authority of the presiding officer to delay the effectiveness of an initial decision, no regulation provides for the authority to condition the grant or denial of a stay upon an undertaking, such as the posting of a bond. Similarly, the Atomic Energy of 1954, as amended, does not expressly confer such authority.

The question becomes, what additional undertakings can the presiding officer require, in aid of its jurisdiction, as a condition of the grant or denial of a stay? Clearly, pursuant to the Commission's Regulations, (see note 24), the presiding officer can for example, require an Applicant to conduct additional tests or to minimize adverse environmental impacts, as a condition to the grant or denial of a stay. Absent express authorization, however, the authority in aid of jurisdiction would not include in Staff's view, the power of the Commission in the context of a stay to require the purchase and filing

24/ Indeed Sec. 161(b) of the Atomic Energy Act of 1954, as amended (42 USC §2201(b), for example, grants the Commission broad authority to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of .. nuclear material .. as the Commission may deem necessary or desirable to provide the common defense and security or to protect health or to minimize danger to life or property." Sec. 161(p) of the Act 942 USC §2201(p) grants the Commission authority to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act."

of a financial security, such as a bond. The authority to impose such a requirement does not clearly emanate from the express delegations to the Commission under the Act. Moreover, the Staff is not aware of any precedent under Administrative law approving the inference of such authority by an agency. If the Board inferred or otherwise concluded that it had such authority, it would also have to infer or otherwise conclude that it has the authority (in the case of a bond) to (i) determine the amount of the bond, (ii) to hold the security as a fiduciary, (iii) to assess claims of monetary damage thereunder, and (iv) distribute funds therefrom. Such inferences, in Staff's view, would carry us far beyond the provisions of the Atomic Energy Act.

CONCLUSION

For the reasons stated above, it is the Staff's position that the Appeal Board should affirm the denial by the Licensing Board of Applicant's Motion for a stay, pendente lite.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 2nd day of March 1977.