UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
The Toledo Edison Company and	)	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	)	Docket Nos. 50-440A
Company, et al.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

ANSWER OF CITY OF CLEVELAND
IN OPPOSITION TO MOTION OF APPLICANTS
FOR STAY OF LICENSE CONDITIONS
1-26-77

On January 6, 1977, the Atomic Safety and Licensing Board (Licensing Board) issued its decision in this antitrust proceeding. The Licensing Board found that the Applicants were the dominant electric entities in the relevant markets and that Applicants had acted to entend their dominance. The Licensing Board said (Slip Op. pp. 14-15):

> Certain of the actions employed by Applicants to increase their dominance in and of themselves constitute violations of the antitrust laws. These include territorial allocations, attempts to fix prices, refusals to deal and group boycotts.

The Licensing Board concluded (Slip Op. p. 16):

> . . . that Applicants have a prolonged history, both individually and collectively, of misuse of their dominant position

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> within the CCCT and their respective service areas to achieve anticompetitive results and what to us is a clear nexus between activities under the license and the anti-competitive situation Applicants have nurtured within the CCCT convinces us that the imposition of license conditions is necessary to effect the statutory purpose of Section 105(c).

On January 12, 1977, City of Cleveland (City) filed its motion with the Licensing Board seeking clarification of licensing conditions. On January 13, 1977, Applicants filed a motion for an extension of time for filing exceptions and briefs with the Atomic Safety and Licensing Appeal Board (Appeal Board). Under Applicants' proposed schedule, the final briefs would not be filed until July 19, 1977, approximately the date Applicants now say Davis-Besse Unit 1 will go commercial. On January 14, 1977, Applicants filed their motion for a stay of licensing conditions with the Appeal Board. City opposes Applicants' motion for a stay.

Applicants filed their motion with the Appeal Board claiming that the Licensing Board had rejudged the issues raised in their motion against Applicants. Any suggestion that the Licensing Board would not fairly apply the criteria of Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (1958) is belied by the record of these proceedings. It must be remembered that although the Licensing Board found that Squire, Sanders and Dempsey should be disqualified from representing CEI in these proceedings, it stayed its order pending appeal. There is nothing whatsoever in the record to suggest that this Licensing Board cannot or will not fairly consider Applicants' motion requesting a stay in this instance also.

By order of January 17, 1977, the Appeal Board referred Applicants'

motion to the Licensing Board for decision and directed that all answers to Applicants' motion be filed with the Licensing Board.

APPLICANTS HAVE FAILED TO SHOW GOOD CAUSE FOR GRANTING A STAY

A. Applicants Have Failed To Show A Likelihood Of Prevailing On Appeal

Applicants have failed totally to make the showing required by Virginia Petroleum Jobbers Association. At pages 7-10 of their motion, Applicants attempt to meet the requirement that they make a strong showing that they are likely to prevail on the merits of their appeal. Applicants do no more than list exceptions they may take on appeal. Aside from a few general allegations such as that the Licensing Board's treatment of nexus was "simplistic and overly-glib", there is no offer of evidence or law as to wherein the Licensing Board erred. Mere allegations of error can in no way constitute a strong showing of likelihood to prevail on the merits. The burden here is on the Applicants to make a substantial showing of probable success on appeal. Virginia Petroleum Jobbers, supra.

Applicants have failed to make a substantial indication of success with respect to a single issue. Nowhere do Applicants set forth law or facts which would even hint that there is a possibility, let along a likelihood, that Applicants would prevail on appeal. The closest Applicants' approach even attempting to making such a showing is on page 9, fn. 3, where it is erroneously asserted that the Licensing Board failed to consi-

der the evidence offered by Applicants and instead relied habitually on the opposing parties' direct evidence. This attempt fails to demonstrate a likelihood of success on appeal because (1) there is no support offered for the allegation; (2) evidence is not unreliable merely because it is offered by opposing parties in their direct case; and (3) much, if not most, of the evidence offered by the opposing parties and relied upon by the Licensing Board was documents prepared by and obtained from Applicants and deposition testimony of Applicants' officers and employees.

Since Applicants have failed to point to any particular findings which it is claimed are not supported by the record, it is not possible for City to demonstrate record support without in effect incorporating by reference the proposed findings of City, NRC Staff and the Department of Justice. It ought to suffice to point to Applicants' total failure to make the required showing.

B. Applicants Have Failed To Demonstrate Irreparable Injury

Applicants' allegation of irreparable injury, like its allegation of substantial likelihood of prevailing on the merits, is defective. The Court in Virginia Petroleum Jobbers said, with respect to this test, at page 925:

> The key word in this consideration is irreparable. Mere injuries, however substanial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.

Applicants argue at pages 10-14 that a stay should be granted because (1) Applicants cannot do what the licensing conditions would require

them to do; (2) the licensing conditions will have an unsettling impact on relationships between Applicants and non-Applicants; (3) Applicants may sustain financial injuries; (4) the license conditions under certain speculative conditions might result in higher costs to Applicants' customers; (5) power from the Davis-Besse and Perry units might be sold to entities outside of the CAPCO service area; and (6) Applicants and their customers may incur increased transmission costs if non-Applicant entities require a certain unspecified and purely speculative level of transmission service. In a footnote on page 12, Applicants also argue that license condition 9a is ambiguous. Even if it were ambiguous, that would not be grounds for a stay. Applicants are free to file a motion with the Licensing Board seeking clarification or if the need arises litigate the matter in enforcement proceedings before the Commission. At this point, any harm to Applicants from the alleged ambiguity in condition 9a is purely speculative.

It is clear that the injury to Applicants from the immediate effectiveness of the license conditions is primarily possible increased costs. In several instances any increase in costs is speculative. Under Virginia Petroleum Jobbers mere increased costs are not such injuries as justify staying the effectiveness of a decision.

Applicants' first argument that the license conditions are impossible to perform is completely without any specificity as to which license conditions are impossible of performance. Nor do Applicants offer any explanation as to why it is impossible to comply with the conditions. Applicants

cannot meet their burden of showing irreparable injury with mere generalized assertions devoid of specification and support in fact or law.

Applicants' second argument regarding the unsettling effect of the licensing conditions on relationships between Applicants and non-Applicants fails even to assert injury to the Applicants. Instead, Applicants stated that it is the consumers of electricity not the Applicants that will bear the costs of re-aligning these relationships. Moreover, if Applicants were to prevail on this point, it is difficult to conceive of license conditions in an antitrust proceeding which would not be stayed. The very purpose of the license conditions is to alter the long standing anticompetitive nature of the relationships between Applicants and non-Applicants. Moreover, in any renegotiations of these relationships Applicants can insert contractual language providing for the eventuality that the licensing conditions are subsequently modified or stricken.

Applicants' third argument is predicated on the incorrect assumption that the licensing conditions provide non-Applicants with preferential access to the nuclear units. 1/ It is further premised on the speculative assumption that non-Applicant entities in fact elect to purchase shares of these units in amounts Applicants claim to be preferrential. Until such election is made, there is no basis in fact for finding injury to Applicants.

1/ While it is true that the opposing parties did not examine Dr. Pace with respect to this portion of his testimony, Dr. Pace was examined by the Licensing Board (Tr. 11,720 et seq.). Nor does the decision of the opposing parties not to cross-examine mean that Dr. Pace's testimony was uncontroverted.

To the extent that the costs of such "preferential" elections are passed through to Applicants' customers, Applicants have failed to demonstrate any injury. The key to this argument by Applicants is found on page 13 of their motion where it is stated:

> The waste caused by such planning in response to an anticipated flood of 'premature' requests will, of course, be passed through to Applicants' customers in the form of higher costs.

Applicants' current anticipation of a flood of requests for nuclear power is directly contrary to the arguments in their post hearing brief. At page 542 it is asserted that no electric entity in areas served by Ohio Edison and Penn Power has ever asked for access to nuclear plants. Duquesne Light argues that the only municipal utility in its service area has never requested access to nuclear power (Brief pp. 349-50) and is unlikely to do so (Brief p. 671). Similarly, Toledo Edison argues that the City of Napoleon has never requested access to nuclear plants (Brief p. 477). Moreover, Applicants have argued throughout these proceedings that their wholesale customers obtain all benefits that will flow from nuclear generation. If this were true, there would be no reason to anticipate a "flood" of requests for access to nuclear power. In addition, it has been argued that municipals in Ohio are precluded by law from purchasing shares in nuclear units.

Applicants' argument that non-Applicant entities may purchase an excess amount of capacity for the purpose of transmitting that "extra" power out of the area for other than purposes of coordination is purely

speculative. No such threat has been pointed to as existing anywhere but in the mind of counsel.

Similarly, the argument that the license conditions may result in increasing costs for transmission is speculative. In fact, there is not even any allegation that the existing or planned transmission facilities of Applicants are not adequate to handle all foreseeable requests for service by non-Applicant entities. No specifics are provided. In claiming increased expense Applicants here, as elsewhere, make no reference to the fact that any non-Applicant entity taking advantage of the licensing conditions will pay a just and reasonable rate for any capacity, energy or service obtained from Applicants. Even if Applicants' speculative scenario should come to pass, there is no showing that Applicants' own requirements would not grow to utilize any added capacity. Moreover, since the non-Applicant entities either buy at retail from Applicants or, with the exception of Painsville and Orrville, are all requirements or partial requirements customers of Applicants, the issue is likely to be one of which party owns the power and energy and serves the customers rather than one of adding capacity.

Applicants have failed to demonstrate that immediate effectiveness of the license conditions will cause them irreparable injury.

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

Whereas no irreparable harm would be done Applicants if the license conditions are not stayed, the City would suffer substantial harm if the li-

cense conditions are not immediately effective. 2/ After a long and exhaustive inquiry into the relationships between City and CEI and the other Applicants covering a period from the early 1960's to 1976, the Licensing Board found Applicants guilty of a myriad anticompetitive acts. Many of those acts persist to this very day. The Licensing Board has found that City and CEI compete for customers in a sizeable portion of the City of Cleveland (Ff. 30). Rates and quality of service are the principal elements of this competition (Ff. 31). CEI has a competitive advantage in reliability and economy resulting from its interconnections with others and its participation in CAPCO (Ff. 33). The current interconnection between City and CEI places an "unusual and unjustifiable" reserve burden on City and effectively denies City the full benefits of coordinated operation and development (Ff. 56). City has requested access to nuclear generating units being constructed by CAPCO. Applicants offered access to those units upon conditions which the Licensing Board found to be an "outrageous affront to the policies underlying the antitrust laws" (Ff. 62). The Licensing Board found that "in order to remain or become a viable competitor Cleveland must have both access to nuclear power and third party wheeling" (Ff. 63).

The Licensing Board found "that at least from August 20, 1967 forward Applicants were a party to a joint plan or combination, one facet of which was to exclude participation by municipals" (Slip Op. p. 193 fn.).

2/ The City has now decided not to sell its electric system to CEI.

The Licensing Board held (Slip Op. p. 194):

> We further hold that the CAPCO agreement was an agreement in restraint of trade in that it extended services and benefits to parties to agreements not to compete which it denied to their would-be competitors. We hold that these denials were not accidental or unintended but were the result of consideration of the consequences of these actions. Given the stipulated dominance of Applicants' of generation and transmission within their service areas and their collective dominance within the CCCT, the denial of membership opportunities was an act of monopolization and also constituted a group boycott. Thus we hold that there were violations of both Section 1 and Section 2 of the Sherman Act resulting from the form of CAPCO agreement which Applicants adopted knowingly. (footnote omitted)

At this point in the proceedings the issue is whether a stay of the license conditions would substantially harm other parties to the proceedings. There is no need to show that the harm to City would flow from activities under the license. The decision of the Licensing Board clearly depicts the egregrious anticompetitive situation in the CCCT which has in the past and continues today to cause substantial harm to City and to other entities in the CCCT. No justification for continuing that harm has been put forth by Applicants. For each day that the present anticompetitive situation is allowed to continue, City is denied low cost PASNY power. CEI has itself recognized that receipt of PASNY power would improve the City's competitive position. City would incur substantial damage in being forced to continue to deal only with CEI for purchased power. 3/

3/ Although City here focuses only on harm to City, the Licensing Board is well aware that other entities in the CCCT would also suffer substantial harm from a stay of the License conditions.

While it is not required that City show that it would be substantially harmed by activities under the license, it clearly would be. Applicants argue at pages 15-16, that for a period of at least five months, Davis-Besse Unit 1 will not be put into commercial operation. Thus Davis-Besse Unit 1 may be expected to be in commercial operation by June 1, 1977. 4/ The Appeal Board has granted an enlargement of time for filing briefs which extends the briefing date to June 13, 1976. After briefing, it may be anticipated that at least 2 months will pass before oral argument before the Appeal Board. In the Consumers Power antitrust review appeal oral argument was held in April 1976 and no decision has been issued. There is good reason to believe that Davis-Besse will operate commercially for at least one year before an Appeal Board decision is rendered.

The Licensing Board said (Slip Op. p. 13):

> . . . Applicants are of the opinion that these units will produce economies of scale and will provide for long term generation costs well under average system costs which could be obtained either compared to the cost of operating their present generating equipment or in comparison to new generation relying upon fossil-fueled units. Thus, the operation of the Davis-Besse and Perry stations will have a substantial effect upon both the supply and the cost of electricity within the CCCT area.

Applicants argue, at pages 15 and 16, that their "policy commitments" will eliminate any harm to City. Suffice it to say that the Licensing Board has found the "policy commitments" themselves to be anticompetitive.

4/ Fuel loading is expected to commence in February, 1977.

IT IS NOT IN THE PUBLIC INTEREST TO STAY THE LICENSE CONDITIONS

In Virginia Petroleum Jobbers, supra at 925, the Court described the test to be applied in measuring the public interest in ruling on a request for a stay as follows:

> In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes. The public interest, may, of course, have many faces -- favoring at once both the rapid expansion of utilities and the prevention of wasteful and repetitive proceedings at the taxpayers' or consumers' expense; both fostering competition and preserving the economic viability of existing public services; both expediting administrative or judicial action and preserving orderly procedure.

The license conditions ordered by the Licensing Board do not in any way hinder the rapid expansion of utilities. Indeed, no real allegation has been made that the license conditions would delay expansion of utilities. By providing small entities access to facilities which provide economies of scale, the conditions promote the public interest in preventing wasteful expenditures on less economic means of production and transmission of electricity. Moreover, the license conditions were specifically designed to promote the public interest by both fostering competition and preserving the economic viability of existing public services such as the electric service provided by City. Neither a grant nor a denial of Applicants' motion would expedite administrative action while on the other hand, a denial of a stay would preserve orderly procedure.

In their motion at pages 17-19, Applicants fail to address in any meaningful fashion, the criteria set out in Virginia Petroleum Jobbers for measuring the public interest. Applicants' initial argument is simply a general restatement that Applicants are likely to succeed on the merits of their appeal and that in an absence of a stay Applicants and their customers will suffer irreparable harm. Since the matters of irreparable harm and likelihood of success on appeal are set forth as separate and distinct factors to be considered, this argument fails to address the public interest. Apparently, Applicants believe that what is good for Applicants is good for the world.

Applicants' second argument is predicated on broad unsubstantiated charges that the Department, Staff and Intervenors have engaged in "nuclear blackmail". It is argued that failure to stay the license conditions will have some "chilling effect" on parties seeking licenses and will promote negotiated settlements of antitrust issues. The same may be said of a final decision affirming the opinion in this case. License conditions will not be imposed unless Licensing Board first finds that the activities under the license will create or maintain a situation inconsistent with the antitrust laws. An innocent Applicant has nothing to fear. Finally, assuming, arguendo, that "nuclear blackmail" exists and was applied in this case, it has been singularly ineffective. The most that could be argued is that maybe sometime in the future some Applicant would be deterred from contesting antitrust contentions because it believed it likely that the result would be a finding that it had engaged in anticompetitive conduct and, accordingly, license

conditions would be imposed which would not be stayed pending appeal because on the facts of this case no stay were granted.

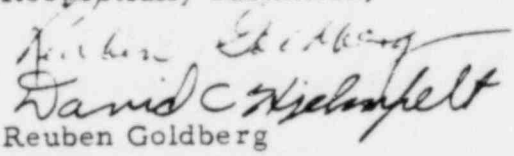
Applicants' third argument is that the public interest is not served by imposing license conditions on Applicants. Once again, Applicants fail to distinguish between their own interests and the public interest. Nowhere in their motion do Applicants undertake to show how the imposition of the license conditions fails to comport with the public interest rather than the private interest of Applicants.

APPLICANTS' MOTION SHOULD BE DENIED

Applicants, after having recognized that Virginia Petroleum Jobbers provides th test for measuring a motion seeking to stay the Licensing Board's order, fails to make even a rudimentary effort to meet the test. There being no justification in the record or Applicants' motion, the motion should be denied.

WHEREFORE, for the foregoing reasons, Applicants' motion for a stay of licensing conditions, pedente lite, should be denied.

Respectfully submitted,



Reuben Goldberg
David C. Hjelmfelt
Goldberg, Fieldman & Hjelmfelt, P.C.
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone (202) 659-2333

Vincent C. Campanella
Director of Law
Robert D. Hart
First Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114
Telephone (216) 694-2737

Attorneys for
City of Cleveland, Ohio

January 26, 1977

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing "Answer of City of Cleveland in Opposition to Motion of Applicants for Stay of License Conditions" has been made on the following parties listed on the attachment hereto, this 26th day of January, 1977, by depositing copies thereof in the United States mail, first class postage prepaid.

David C Hjelmfelt
DAVID C. HJELMFELT

Attachment

ATTACHMENT

Douglas V. Rigler, Esq. Chairman
Atomic Safety and Licensing Board
Foley, Lardner, Hollabaugh and Jacobs
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman
Jerome E. Sharfman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard K. Shapar, Esq.
Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frank W. Karas, Chief
Public Proceedings Branch
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Abraham Braitman, Esq.
Office of Antitrust and Indemnity
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Frank R. Clokey, Esq.
Special Assistant Attorney General
Towne House Apartments, Room 219
Harrisburg, Pennsylvania 17105

Edward A. Matto, Esq.
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street, 15th floor
Columbus, Ohio 43215

Christopher R. Schraff, Esq.
Assistant Attorney General
Environmental Law Section
361 East Broad Street, 8th floor
Columbus, Ohio 43215

Ivan W. Smith, Esq.
John M. Frysiak, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Andrew C. Goodhope, Esq.
3320 Estelle Terrace
Wheaton, Maryland 20906

Robert M. Lazo, Esq., Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel M. Head, Esq., Member
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph Rutberg, Esq.
Jack R. Goldberg, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Benjamin H. Vogler, Esq.
Roy P. Lessy, Jr., Esq.
Office of the General Counsel
Regulation
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

ATTACHMENT (continued)

Melvin G. Berger, Esq.
Joseph J. Saunders, Esq.
Steven M. Charno, Esq.
David A. Leckie, Esq.
Janet R. Urban, Esq.
Antitrust Division
Department of Justice
Post Office Box 7513
Washington, D.C. 20044

Karen H. Adkins, Esq.
Richard M. Firestone, Esq.
Assistant Attorneys General
Antitrust Section
30 East Broad Street, 15th floor
Columbus, Ohio 43215

Russell J. Spetrino, Esq.
Thomas A. Kayuha, Esq.
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

John Lansdale, Jr., Esq.
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Richard A. Miller, Esq.
Vice President and General Counsel
The Cleveland Electric Illuminating Co.
Post Office Box 5000
Cleveland, Ohio 44101

Gerald Charnoff, Esq.
Wm. Bradford Reynolds, Esq.
Robert E. Zahler, Esq.
Jay H. Berstein, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

David McNeill Olds, Esq.
William S. Lerach, Esq.
Reed, Smith, Shaw & McClay
Post Office Box 2009
Pittsburgh, Pennsylvania 15230

Terrence H. Benbow, Esq.
Steven B. Per[illegible], Esq.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Alan P. Buchmann, Esq.
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

Leslie Henry, Esq.
Michael M. Briley, Esq.
Roger P. Klee, Esq.
Fuller, Henry, Hodge & Snyder
Post Office Box 2088
Toledo, Ohio 43604

James R. Edgerly, Esq.
Secretary and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, Pennsylvania 16103

Donald H. Hauser, Esq.
Victor A. Greenslade, Jr., Esq.
The Cleveland Electric Illuminating Co.
Post Office Box 5000
Cleveland, Ohio 44101

Thomas J. Munsch, Jr., Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ATTACHMENT (continued)

Joseph A. Rieser, Esq.
Reed, Smith, Shaw & McClay
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

John C. Engle, President
AMP-O, Inc.
20 High Street
Hamilton, Ohio 45012

Michael R. Gallagher, Esq.
630 Bulkley Building
1501 Euclid
Cleveland, Ohio 44115