

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Marshall E. Miller, Chairman
Robert M. Lazo
B. Paul Cotter, Jr.



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In the Matter of:

DUKE POWER CO., NORTH CAROLINA ELECTRIC
MEMBERSHIP CORP., SALUDA RIVER ELECTRIC
COOPERATIVE

(Catawba Nuclear Station,
Units 1 and 2 - Antitrust)

Docket Nos. 50-413A
50-414A

January 13, 1981

MEMORANDUM AND ORDER
(Denying Request for Antitrust Hearing)

Pursuant to the provisions of §105c of the Atomic Energy Act of 1954, as amended, on July 11, 1980, the Commission sought additional antitrust advice from the Attorney General of the United States in connection with the purchase of ownership interests in Catawba Nuclear Station, Unit 1.^{1/} This nuclear plant is owned by Duke Power Company ("Duke"), whose participation was the subject of an antitrust review conducted by the Department of Justice ("Department") in 1973. The Department originally recommended that an antitrust hearing be initiated, but the necessity for such a hearing was then obviated when Duke agreed to have certain conditions attached to its license.

^{1/}42 U.S.C. §2135(c).

The Department reviewed the instant situation resulting from the proposed sale by Duke of a 75% ownership in Catawba Unit 1 to the North Carolina Electric Membership Corporation (NCEMC, 56.25%) and to the Saluda River Electric Cooperative (Saluda River, 18.75%). It found that this sale was the result of discussions between Duke and the cooperative systems in its service area that occurred after the cessation of the original antitrust proceeding. The Department reviewed information submitted by seventy neighboring electric systems, and by letter dated October 29, 1980, the Attorney General advised NRC that no antitrust hearing was necessary with respect to the proposed transfer of ownership interests.^{2/}

Pursuant to §105c of the Atomic Energy Act of 1954, as amended [42 U.S.C. §2135(c)(5)], and to its own policy, the Commission upon receiving the Department's advice duly published a notice in the Federal Register, giving an opportunity for intervention to any person whose interest may be affected by this proceeding.^{3/} Any person with the requisite interest could file by December 15, 1980, a petition for leave to intervene and request a hearing on the antitrust aspects of the application (10 CFR §2.714).

A handwritten letter from Harvard G. Ayers, dated December 15, 1980, was received by the Commission on December 19. Mr. Ayers, whose address is Rt. 3, Box 662, Boone, North Carolina, stated:

"I am a member of the Blue Ridge Electric Membership Corporation of northwestern North Carolina, and as such I am seriously concerned with the pending purchase by the North Carolina EMC's (which include

^{2/} Staff's Answer to Request for an Antitrust Hearing by Harvard G. Ayers, dated January 9, 1981, p. 3.

^{3/} 45 Federal Register 75393-94 (November 14, 1980).

BREMCO) of 56.25% of Duke Power's Catawba 1 reactor. I feel the safety of this Westinghouse unit is clearly in question, vis-a-vis the McGuire containment adequacy question being pursued by the ASLB at this time. Further I question the financial advisability of the NCEMC purchase - we are in essence giving Duke Power a blank check for construction costs plus a guaranteed profit. Because of these and other reasons, I request that the NRC hold hearings on this matter preferably in Boone."

The Staff filed an answer to the request for an antitrust hearing on January 9, 1981. This answer opposed the Ayers request because (1) the letter failed to establish standing to request an antitrust hearing; (2) the letter does not satisfy any of the general criteria set forth in 10 CFR §2.714 or the other antitrust criteria governing such requests; and (3) discretionary intervention is not warranted. The Staff further requested the Board to treat this matter in an expedited manner in light of unusual circumstances, involving the formal issuance of the license amendment on December 23, 1980 because the appropriate divisions of NRC Staff were unaware of the Ayers' letter and request.^{4/}

Although Mr. Ayer's letter is somewhat informal as a pleading, we will consider it on the merits as a petition for leave to intervene and request for a hearing on the antitrust aspects of the application, timely filed pursuant to 10 CFR §2.714. This case is very similar on the facts to Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), LBP-78-13, 7 NRC 583 (1978), aff'd. ALAB-475, 7 NRC (1978). Under the principles

^{4/} Staff's Answer, pp. 3-5.

there discussed, the instant intervention petition will be denied.

Intervention as a matter of right is governed under our practice by judicial standing doctrines, which require the petitioner to allege both (1) some injury that has occurred or will probably result from the action involved ("injury in fact" test), and (2) an interest arguably within the "zone of interests" protected or regulated by the statute sought to be invoked (and which the tribunal is empowered to administer).^{5/}

The petition asserts that Mr. Ayers is a member of the Blue Ridge Electric Membership Corporation of northwestern North Carolina ("Blue Ridge"), which is a member of one of the applicants (NCEMC) which seeks to become a co-owner and co-licensee of Catawba Unit 1. Petitioner is therefore not a ratepayer of the present licensee (Duke), nor of the potential additional licensees (NCEMC or Saluda River). His electric rates will not be affected by any action of applicant utilities, but only by possible actions of Blue Ridge after rate-setting proceedings by the appropriate State regulatory body. Under a similar factual situation in Ferri, supra, the Appeal Board stated:

"Petitioner seeks to invoke the Commission's antitrust jurisdiction. That jurisdiction is not plenary, however; the Commission's writ to enforce the antitrust laws does not run to the electric utility industry generally. Neither does it reach all actions by utilities that generate electricity with nuclear-powered facilities. Rather, Congress authorized this Commission to condition nuclear power plant

^{5/} Portland General Electric Company (Pebble Springs, Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); Virginia Electric & Power Company (North Anna Power Station, Units 1 & 2), ALAB-363, 4 NRC 631, 632 (1976). See also Data Processing Service v. Camp, 397 U.S. 150, 153 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972).

licenses on antitrust grounds only where necessary to insure that the activities so licensed would neither create nor maintain situations inconsistent with the antitrust laws. The reason for the grant, as the Commission has explained, was 'a basic Congressional concern over access to power produced by nuclear facilities,' because the industry was nurtured by public funds and the legislature was anxious that nuclear power 'not be permitted to develop into a private monopoly via the [NRC] licensing process.' Put another way, the preservation and encouragement of competition in the electric power industry through 'fair access to nuclear power' is the principal motivating consideration underlying Section 105c of the Atomic Energy Act." (Footnotes omitted) (7 NRC at 756-57)

The petitioner's apprehensions were not addressed to a large utility seeking to keep nuclear power away from cooperatives, which was the subject of some Congressional concerns. Indeed, her concerns were quite the opposite. The Appeal Board continued:

"Boiled down, Mrs. Drake's arguments amount to dissatisfaction with the cooperatives' management decision to satisfy an expected need for more baseload power by acquiring part of the Fermi nuclear plant. She would prefer some other course; she fears this one will raise her electrical rates inordinately.

But the Nuclear Regulatory Commission and its adjudicatory boards do not sit to supervise the general business decisions of the public utility industry nor to second-guess the judgment of those who do; that task is entrusted to others. Injuries from those causes are beyond the zone of interests that Section 105c of the Atomic Energy Act was designed to protect or regulate." (7 NRC at 757-58)

In this proceeding, Mr. Ayers purports to "question the financial advisability of the NCEMC purchase." Such a concern or contention by a ratepayer is clearly beyond the scope of the "zone of interests" that §105c of the Atomic Energy Act was designed to protect or regulate.

The Ayer's letter further states: "I feel the safety of this Westinghouse unit is clearly in question, vis-a-vis the McGuire containment adequacy question being pursued by the ASLB at this time." Intervention petitions and requests for hearing cannot properly raise antitrust issues and health and safety issues in the same proceeding.^{6/} In addition, the notice of opportunity for hearing to which Mr. Ayers apparently responded referred only to requests for "a hearing on the antitrust aspects of the application."^{7/} The safety concerns described in the letter obviously are not within the ambit of antitrust issues.

In determining whether a hearing request is sufficient to invoke the Commission's antitrust jurisdiction, the request must also meet the following requirements:

- (1) describe the situation allegedly inconsistent with the antitrust laws which is the basis for intervention;
- (2) describe how that situation conflicts with the policies underlying the Sherman Act, Clayton Act, or Federal Trade Commission Acts;
- (3) describe how the situation allegedly inconsistent with the antitrust laws would be created or maintained by activities under the license;

^{6/} Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 & 2), ALAB-381, 5 NRC 582, 589 (1977); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167 (1976).

^{7/} 45 Federal Register at 75394.

- (4) identify the specific relief sought; and
- (5) explain why the relief sought fails to be satisfied by the license conditions, if any, which have been proposed by the Department of Justice.^{8/}

The Ayers letter does not describe a situation inconsistent with the antitrust laws in the slightest degree, let alone the specificity necessary to trigger a hearing.

In addition to standing as a matter of right, a petition for intervention may be granted as a matter of discretion to certain petitioners who may make some contribution to the proceeding. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC at 610, 616-17 (1976). Although the Ayers letter is cast as a request for a hearing and does not explicitly request intervention, we will consider it as such for purposes of discussing discretionary intervention. In determining whether to grant intervention as a matter of discretion, we must consider all the facts and circumstances of a particular case, including some of the factors set forth in 10 CFR §2.714(a) and (d). See Virginia Electric Power Co. (North Anna Power Station, Units 1 & 2), ALAB-363, 4 NRC 631 (1976). Factors to be considered include:

^{8/}Kansas City Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559 (1975) (Wolf Creek I). See also Louisiana Power & Light Co. (Waterford Steam Generating Station, Unit 3), CLI-73-7, 6 AEC 48 (1973) (Waterford I); Louisiana Power & Light Co. (Waterford Steam Generating Station, Unit 3), CLI-73-25, 6 AEC 619 (1973) (Waterford II); Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-77-26, 5 NRC 1017 (1977).

- (1) a petitioner's showing of significant ability to contribute on substantial issues of law or fact which will not be otherwise properly raised or presented;
- (2) the specificity of such ability to contribute on those substantial issues of law or fact;
- (3) justification of time spent on considering the substantial issues of law or fact;
- (4) provision of additional testimony, particular expertise, or expert assistance;
- (5) specialized education or pertinent experience.^{9/}

The one-page letter of Mr. Ayers fails to make even a rudimentary showing of any of the factors set forth in §2.714(a) and (d) or of those other factors listed above. Since it fails to set forth any anticompetitive concerns, there cannot be demonstrated any "significant ability to contribute on substantial issues of law or fact." Also, the letter fails to make any allegations that would lead to a reasonable expectation that Mr. Ayers would provide expertise, expert assistance, or additional testimony that would be helpful to any proceeding. This seems especially

^{9/}Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), supra; Public Service Co. of Oklahoma (Black Fox Units 1 & 2), ALAB-397, 5 NRC 1143 (1977) affirming in part LBP-77-17, 5 NRC 657 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418 (1977).

true since there is no Catawba antitrust proceeding now under way, the Attorney General has advised that no antitrust hearing is necessary, and the Ayers letter is the lone request for a hearing. In such circumstances, a petitioner's showing on the criteria for discretionary intervention must be particularly strong.^{10/}

There does not appear to be any basis for determining that Mr. Ayers could or would make a "valuable contribution...to our decision-making process" in an antitrust context. This case falls within the principles set forth in Fermi, supra, where it was stated:

"There remains whether Mrs. Drake should be permitted to intervene as a matter of discretion. The test is whether her participation would be likely to contribute significantly to the proceedings. Pebble Springs, supra, CLI-76-27, 4 NRC at 612, 617; Nuclear Engineering Company (Sherfield Waste Disposal Site), ALAB-473, 7 NRC 737 (May 3, 1978). Without a successful petition to intervene as of right, there is no automatic antitrust hearing under Section 105c when the Attorney General does not recommend one and the Commission has not ordered one on its own. What we said in Watts Bar applies here: 'Certainly, before a hearing is triggered at the instance of one who has not alleged any cognizable personal interest in the operation of the facility, there should be cause to believe that some discernible public interest will be served by the hearing. If the petitioner is unequipped to offer anything of importance bearing upon [the subject matter], it is hard to see what public interest conceivably might be furthered by nonetheless commencing a hearing at his or her behest.' Tennessee Valley Authority (Watts Bar, Units 1 & 2), ALAB-413, 5 NRC 1418, 1422 (1977). We agree with the Licensing Board that petitioner lacks the background and training to prosecute a complex antitrust proceeding." (7 NRC 752, 758, fn. 19).

^{10/} Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418 (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 758 n. 19 (1978).

ORDER

For all the foregoing reasons and based upon a consideration of this entire record in this matter, it is, this 13th day of January, 1981

ORDERED

1. That the request for an antitrust hearing filed by Harvard G. Ayers is denied.

2. Leave is granted to Mr. Ayers to file an amended petition for leave to intervene and request for an antitrust hearing which complies with the requirements described above, provided that an amended petition is lodged in the hands of the Licensing Board on or before January 30, 1981. Such an amended petition, if filed and served by Mr. Ayers, will be given expedited consideration by the Licensing Board.

THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller
ADMINISTRATIVE JUDGE

B. Paul Cotton
ADMINISTRATIVE JUDGE

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ADMINISTRATIVE JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
14th day of Jan 1971.

Peggy H. Downing
Office of the Secretary of the Commission

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(Catawba Nuclear Station,
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