50-440/441

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
Operating License Antitrust Review
(Perry Nuclear Power Plant, Unit 1)

Motion for Clarification and Correction of Finding
Of the Director of Nuclear Reactor Regulation
Concerning Operating License Antitrust Review

Now comes the City of Cleveland ("City") and moves for clarification and correction of certain findings of the Director of Nuclear Reactor Regulation concerning the antitrust review of the Cleveland Electric Illuminating Company ("CEI") in connection with its application for an operating license for the Perry Nuclear Power Plant, Unit 1. The City wishes by this motion to correct certain factual inaccuracies in the findings of the Director and accompanying Staff recommendations as well as to make the Director and Commission aware of recent controversies between the City and CEI which impact on certain of the factual conclusions drawn by the Director and Staff.

The City brings these matters to the attention of the Director both in the interest of presenting a complete record and to put the Commission on notice of the City's intention to pursue these matters. In the event that the City is unsuccessful in resolving these matters through negotiation with CEI, the City may be forced to bring complaint proceedings to enforce the existing license conditions governing the Davis-Besse and Perry Nuclear Power Plant. The City will address itself to both the decision of the Director regarding his finding of no significant change to

justify an operating license antitrust review as well as the Director's and Staff's recommendations concerning the imposition of a civil penalty on CEI for delaying implementation of wheeling services to the City consistent with the existing license conditions.

A. Findings of the Director of Nuclear Reactor Regulation Regarding Antitrust Review

1. On page one of his finding, the Director states that:

> "Applicants have helped enhance the reliability of these same smaller systems by offering them power and services previously denied."

Although CEI ultimately provided wheeling service to the City pursuant to the mandate of License Condition No. 3, such services were provided only after unreasonable delay and repeated attempts by CEI to impose onerous terms and conditions on the City as noted in the recommendation of the Department of Justice for imposition of a civil penalty discussed infra. Further, CEI has refused to provide other services to the City which are routinely provided by the CAPCO companies to each other. Most important, in a recent rate case filed before the Federal Energy Regulatory Commission (The Cleveland Electric Illuminating Company FERC Docket No. ER83-138, Phase I) CEI attempted to terminate short and limited term power services it had previously provided to the City under Service Schedule A of the City/CEI Interconnection Agreement.[1] After extended litigation, the FERC ordered CEI to continue to provide these

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[1] See, FERC Order Issued January 18, 1983, pg. 4, 22 FERC ¶ 61,016 at pg. 61,031, wherein the Commissioners found "By redefining the service schedule . . . CEI has effectively eliminated short-term and limited-term power services. Thus, the current filing is somewhat in the nature of a notice of termination or curtailment of service."

services to the City under new properly designated schedules. (FERC Opinion No. 172 Issued June 16, 1983, 23 FERC ¶ 61,380) However, notwithstanding the FERC Order, CEI has still not complied but has instead employed the same delaying tactics and attempt to impose burdensome conditions that led to this Commission's Notice of Violation of the license condition to provide wheeling services. CEI has refused to file short-term and limited-term schedules in compliance with the recent FERC orders and has refused to provide any short-term or limited-term power service to the City during the pendency of the compliance proceedings. Thus, not only has CEI not offered the City "power and services previously denied" but CEI has in fact denied the City power and services previously provided. Further, these are services which the CAPCO companies routinely provide to each other pursuant to Schedule B of the CAPCO Basic Operating Agreement as amended September 1, 1980.

Similarly the City has attempted to coordinate its plans to construct an expansion of its transmission system with a similar CEI planned transmission line within the City of Cleveland so as to avoid costly duplication of facilities and adverse environmental impact. Coordination in construction and operation of such facilities was explicitly found by the Atomic Safety and Licensing Board to be a benefit enjoyed by CAPCO members. 5 NRC 133 at pg. 154. As the Appeals Board noted, the principal issue which the Licensing Board order addressed was:

> ". . . whether dominant electric companies in a relevant market area which do not compete with one another may make competitive benefits, including coordination and pooling, available to each other while denying these benefits to smaller actual or potential competitive entities within the market."
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> 10 NRC 265 at pg. 277.
> (Emphasis supplied.)

The license conditions were designed to remedy this very situation which both Boards found to be inconsistent with the antitrust laws. Yet CEI has, as with the establishment of additional interconnections discussed infra, continued to profess "doubt" that CEI is required to cooperate with the City to coordinate development and operation of this project with the City.

In addition, CEI has refused to provide for coordination of distribution facilities with the City despite the fact that such services are routinely provided amongst the CAPCO companies. As a result, the City has been forced to engage in the costly duplication of facilities such as erecting poles on a public street for the purpose of installing street-lighting fixtures, despite usable space already available on existing CEI poles running along the same street. CEI recently filed a tariff before the Public Utilities Commission of Ohio pursuant to a recently enacted statute which mandates that CEI extend pole attachment rights to "any person or entity" within the CEI service territory. Yet CEI's tariff is written to specifically exclude the City's municipal electric system. The City is attempting to resolve this matter through an appeal pending before the Supreme Court of Ohio but wishes to apprise the Commission of this example of CEI's continued refusal to provide services to the City which are routinely available to its CAPCO members.

The City wishes the Director to confirm that the existing license conditions are intended to require the licensees to offer power and services previously denied, including coordinated development and operation of facilities, so as to help enhance the reliability of the smaller competitive entities within the CCCT.

2. The Director notes at page one of his finding that:

> "Applicants have begun to work with and provide smaller systems in the area the means to search out alternative sources of power and energy."

As noted in the September 8, 1982 letter from Joseph Pandy, Jr., Commissioner of City's Division of Light and Power ("Cleveland Public Power") to Mr. Argil Toalston of the NRC Staff, CEI, rather than aiding the City in providing the means to search out alternative sources of power and energy has instead made it increasingly difficult for the City to engage in economical purchase power transactions with third parties. This has been accomplished through a variety of means, including the elimination of the City's ability to control its firm power purchases from CEI coupled with imposition of a twelve-month demand ratchet on the City imposed on those costly firm power purchases. In addition, CEI has recently attempted to terminate short-term and limited-term power services previously available. These services are essential to the City's ability to schedule resources economically and to avoid the inappropriate imposition of the ratchet.

Further, throughout 1981 and 1982 the City repeatedly requested CEI to enter into a coordination agreement to provide for the seasonal banking of power to make up for the unavailability of Buckeye Power to the City in the winter months. CEI did not even respond to the City's repeated requests to enter into such an agreement.

The City wishes the Director to confirm that the existing license conditions are intended to require the licensees to provide municipal utilities within the CCCT the means to effectively search out

and receive alternative sources of power and energy and are prohibited from hindering such efforts.[2]

3. On page two of his finding the Director notes that:

> "the smaller power systems in the area, notably the cities of Cleveland and Painesville and the wholesale customers of Ohio Edison have taken advantage of 1.) newly constructed interconnections. . ."

While it is true that the license conditions imposed by the Commission were crucial in the ultimate establishment of a second 138kv synchronous interconnection between the City and CEI, the Director should be aware that CEI resisted and delayed that project and continues to resist the establishment of additional interconnections. As the Staff notes in its recommendation to the Director (Staff Recommendation at pg. 17) the City's electric system recently won the right to serve Cleveland Hopkins International Airport, a large City-owned facility with a load of approximately 8 MW. The City has recently announced a ten year capital improvement plan to improve and expand the services of the Cleveland municipal electric system to pick up additional City-owned facilities and has begun work on a proposed $25-30 million dollar bond issue to fund these improvements. The establishment of additional interconnections with CEI is critical to this capital improvement plan which includes service to Cleveland Hopkins International Airport. CEI has consistently refused,

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[2]The Staff at page 18 of its recommendation states that "the City still maintains the capability to start up its 85 MW diesel unit in emergencies". The recommendation should be corrected by noting that the City presently has the capability to utilize its three 16 MW gas turbine units for both emergencies and peaking power. The reliability of these units was recently upgraded as a result of a $1.9 million rehabilitation of these units. The City is presently studying the feasibility of rehabilitating its 85 MW steam turbine generator.

despite four written requests by the City, to state in writing any intention to cooperate with the City to establish additional interconnections at points mutually agreeable to the parties. Rather, CEI officials have declared that they cannot provide any such written assurance because CEI "does not know" if the existing NRC license conditions require the establishment of these additional interconnections with the City.[3]

In light of the Staff's finding that the City's right to expand its facilities through interconnection to serve the City-owned Hopkins International Airport "is a natural application of the license conditions, but wasn't addressed specifically during the CP review" (Staff Recommendation at pg. 18) there would appear to be no question that CEI's refusal to cooperate with the City in the establishment of these additional interconnections is a direct violation of the existing license condition. As the Staff found:

> "Moreover, the City of Cleveland could not have competed for the right to serve the municipal airport in Cleveland if the City had not attained these same competitive instruments embodied in the NRC license conditions."
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> Staff Recommendation at pg. 27.

Yet CEI still professes "confusion" as to whether the NRC license conditions require such interconnections.

In order to ensure the cooperation of CEI in the establishment of additional interconnections without undue delay, it is essential that the Director specifically confirm that the establishment of additional

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[3] In addition, CEI officials have begun a public relations campaign and lobbying effort against the City's ten year capital improvement plan and the City's bond issue to finance the plan.

interconnections between CEI and the City is expressly contemplated by the existing NRC license conditions applicable to the Davis-Besse and Perry Nuclear Power Plants.

The City is continuously attempting to resolve these matters with CEI in order to avoid the necessity of NRC enforcement proceedings at this time. Accordingly, although the City does not except to the Director's decision not to conduct a second antitrust review as part of the operating license proceedings for the Perry Nuclear Power Plant, Unit 1, the City does request that the Director specifically confirm and acknowledge the following:

a) That the existing license conditions ordered by the Atomic Safety and License Appeal Board September 6, 1979 (10 NRC 265) are continuing and applicable to the operating license for the Perry Nuclear Power Plant, Unit 1.

b) That License Condition No. 3 requires the establishment of additional interconnections between the applicants and the municipal electric systems in the CCCT for the purpose of permitting expansion and growth of the municipal systems.

c) That the findings of the Director that the applicants have provided municipal systems in the CCCT 1) the means to search out alternative sources of power and energy and 2) power and services previously denied are obligations of the applicants mandated by the existing license conditions, which include the coordinated development and operation of facilities.

d) That nothing in the Director's decision not to initiate a second antitrust review prevents the City of Cleveland or

any other entity from seeking relief from this Commission to enforce the obligations of the applicants arising under the existing license conditions by filing a complaint for violation of the existing license conditions.

B. Findings of the Director of Nuclear Reactor Regulation Regarding Imposition of a Civil Penalty on CEI

The City wishes to take exception to that portion of the Staff report recommending against the assessment of a civil penalty against CEI for delaying the filing of an effective wheeling tariff with the FERC. (Staff Recommendation at pg. 31) The Director did not specifically adopt this Staff recommendation but noted:

> "It is the Staff's opinion that such a civil penalty is not warranted. Should the Commission disagree with the staff's recommendation and pursue the civil penalty issue further, the procedural steps associated with the civil penalty issue would be divorced from and conducted independently of the OL antitrust review."
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> Finding of the Director of Nuclear Reactor Regulation at pg. 2.

The City does not take exception to the Director's finding that this issue be adjudicated independently of the OL antitrust review. However, the City joins with the Department of Justice in urging the Commission to institute proceedings to adjudicate this issue.

As the Staff correctly notes, the Commission in 1980 split 2-2 on the issue of whether or not to issue a civil penalty or study the matter further. Staff findings at pg. 31. As Staff notes:

> "At that time the Department (of Justice) 'was advised that the matter would be reconsidered upon the appointment and confirmation of a new NRC Chairman.'"
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> Staff findings at pg. 31.

The Staff evidently opposes the issuance of a penalty on two grounds: 1) that the issue was ultimately resolved at the FERC; and 2) that "during this period no economic harm was suffered by the City as a result of the disputed tariff because the power to be wheeled under the license condition was not available." Staff recommendation at pg. 31.

The City excepts to both of these bases of the Staff's recommendation. First, the Department of Justice's recommendation for imposition of a civil penalty was based on "CEI's long-standing and willful refusal to abide by the conditions to which its licenses to construct and operate nuclear power plants are subject." Letter of August 10, 1979 from John H. Shenefield, Assistant Attorney General to Director of Nuclear Reactor Regulation. As the Commission itself found in its order of June 25, 1979 modifying License Condition No. 3:

> ". . . the Staff has determined that CEI has been in noncompliance with Antitrust License Condition No. 3 of its operating license and construction permits at least since January 27, 1978, in that CEI has maintained and engaged in a policy and practice of noncompliance with Antitrust Condition No. 3 of its license and permits. CEI has approached its responsibility to file a wheeling schedule for the City as if it had not been required as a condition of its operating license and two construction permits to comply with Antitrust License Condition No. 3."
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> Order Modifying Antitrust License Condition No. 3 of Davis-Besse Unit 1, License No. NPF-3 and Perry Units 1 and 2, CPPR-148, CPPR-149, NRC Docket Nos. 50-346-A, 50-440-A, 50-441-A at pg. 6.

The fact that after years of costly litigation a party is finally able to receive relief from a blatant violation of this Commission's orders through an enforcement proceeding from a federal regulatory

agency certainly does not excuse the violation. Indeed, under the Staff's analysis, any utility could escape the civil penalty provisions of the Atomic Energy Act, no matter how blatant the violation, merely by alleging that relief to the complainant was ultimately ordered. As was stated by Assistant Attorney General John H. Shenefield in his letter to the Commission of August 10, 1979:

> ". . . Because of CEI's flagrant disobedience, it is incumbent upon the Commission to impose the maximum civil penalty permitted by section 234 of the Atomic Energy Act. By imposing the maximum civil penalty, the NRC will encourage CEI to desist from flaunting the authority of the NRC to enforce license conditions and will enhance the integrity of its entire licensing program by serving notice that future antitrust violations will not be tolerated.
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> . . .
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> In conclusion, the Department believes that in order for the NRC's antitrust licensing program to maintain its effectiveness in preventing utilities from using nuclear licenses in an anticompetitive manner, CEI, and other licensees, must be made to understand that willful violations of antitrust license conditions will not be tolerated, and that civil penalties imposed by the NRC cannot be considered as just a minor cost of doing business."

These provisions would be rendered nugatory under Staff analysis.

Staff further states that a penalty should not be issued because "no economic harm was suffered by the City as a result of the disputed tariff because the power to be wheeled under the license conditions was not available." Staff Recommendation at pg. 31. This statement is simply incorrect. As the Atomic Safety and Licensing Appeal Board noted in its September 6, 1979 decision at pg. 128, seasonal power from Buckeye Power, Inc. as well as bulk power from the Cities of Orrville, Ohio and Richmond, Indiana were available to Cleveland as early as 1975, but could not be

obtained because "CEI has not agreed to wheel this power". 10 NRC 265 at pg. 329 aff'g Board Finding No. 59, 5 NRC 133 at pg. 174.

Similarly the Staff overlooks the fact that the Atomic Safety and Licensing Board in its Initial Decision (5 NRC 133 at pg. 174 aff'd 10 NRC 265) found that Cleveland had obtained a commitment to obtain inexpensive hydroelectric power from the Power Authority of the State of New York ("PASNY") in 1973. As the Board found, this power would have been available to Cleveland but for CEI's refusal to wheel power to the City. 5 NRC 133 at pg. 174.

It is clear that the Staff's conclusion that "the power to be wheeled under the license condition was not available" is belied by the very findings of the Atomic Safety and Licensing Board as affirmed by the Atomic Safety and Licensing Appeal Board. As the Department of Justice notes in its letter to the Commission recommending imposition of a civil penalty against CEI for its "flagrant disobedience" of this Commission's orders:

> "A penalty of this magnitude is justified by CEI's continuing, willful violation of the license conditions and its direct restraint on competition that has resulted by virtue of that violation."
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> Letter of John H. Shenefield, Assistant Attorney General to Director of Nuclear Reactor Regulation (August 10, 1979) (Emphasis supplied.)

The City of Cleveland fully supports the recommendation of the Department of Justice that the Commission assess a civil penalty against CEI for its blatant disregard of this Commission's orders. CEI's conduct since then, as described in this document, mandates the imposition of a

civil penalty as recommended by the Department of Justice. CEI cannot be expected to mend its ways if it is allowed to violate the license conditions with impunity.

Respectfully submitted,

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February 6, 1984

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(Perry Nuclear Power Plant, Unit 1)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of "Motion for Clarification and Correction of Finding of the Director of Nuclear Reactor Regulation Concerning Operating License Antitrust Review" upon Donald H. Hauser, General Attorney, The Cleveland Electric Illuminating Company, Post Office Box 5000, Cleveland, Ohio 44101.

Dated at Washington, D.C., this 6th day of February, 1984.

Reuben Goldberg