

LAW OFFICES

GOLDBERG, FIELDMAN & LETHAM, P. C.

1100 FIFTEENTH STREET, N. W.

WASHINGTON, D. C. 20005

(202) 463-8300

REUBEN GOLDBERG
ARNOLD FIELDMAN
GLENN W. LETHAM
PAUL H. HARRINGTON
CHANNING D. STROTHER, JR.

DOCKETED
USNRC

'84 FEB 23 A10:31

DAVID C. HJELMFELT

February 22, 1984

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Mr. Nunzio J. Palladino,
Chairman
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Re: The Cleveland Electric Illuminating Co.,
et al. (Davis-Besse Nuclear Power Station,
Unit 1), NRC Docket No. 50-346A; Perry
Nuclear Power Plant, Units 1 and 2),
NRC Docket Nos. 50-440A and 50-441A

Dear Chairman Palladino:

Reference is made to your letter dated January 31, 1984, on behalf of the Nuclear Regulatory Commission (NRC) to Assistant Attorney General J. Paul McGrath, Antitrust Division of the Department of Justice (Department). In that letter the Department was advised that the NRC, by a 3 to 2 vote, denied the Department's request, which was supported and joined in by the City of Cleveland, Ohio (City), for the imposition of a civil penalty on the Cleveland Electric Illuminating Company (CEI) for violation of License Condition No. 3 which requires CEI to provide transmission services to City and other entities.

On February 6, 1984, City filed a motion for clarification and correction of certain findings of the Director of Nuclear Reactor Regulation in connection with CEI's application for an operating license for the Perry Nuclear Power Plant, Unit 1. The Director adopted the findings of the Staff of the NRC that no significant change since the antitrust review in connection with CEI's application for a construction license required an antitrust review in connection with the operating license.

8402240052 840222
PDR ADDCK 05000410
M PDR

DS03

GOLDBERG, FIELDMAN & LETHAM, P. C.

Mr. Nunzio J. Palladino
February 22, 1984
Page Two

With regard to the Staff's recommendation that no civil penalty be imposed on CEI for violation of the license condition referred to above, the Director did not specifically adopt Staff's recommendation noting only that if the Commission disagreed with the Staff's recommendation and pursues the civil penalty issue, it should be adjudicated independently of "the OL antitrust review" (Finding of the Director, at p. 2). City agrees with the Director on the procedural recommendation.

In City's motion for clarification and correction of the Director's findings, City specifically addressed the Staff's recommendation against assessment of a civil penalty and showed that the Staff's recommendation is based on errors of fact and fallacious reasoning. (See City Motion, pp. 9-13, inclusive).

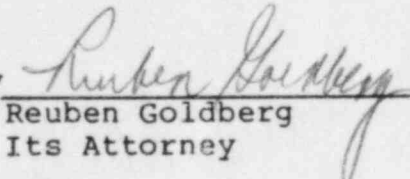
The NRC's 3 to 2 decision, obviously, did not consider City's analysis in support of imposition of a civil penalty included in City's motion since the NRC's letter advising of the decision is dated January 31, 1984 whereas City's motion was filed on February 6, 1984.

City submits that the NRC should reconsider its decision regarding the matter of a civil penalty requested by the Department, taking into account in such reconsideration the showing made by City in its motion, and upon such reconsideration should grant the request for the imposition of a civil penalty for CEI's willful and knowing violation of License Condition No. 3. A copy of the relevant portion of the City's motion is enclosed for the convenience of the Commissioners.

Respectfully submitted,

CITY OF CLEVELAND, OHIO

By


Reuben Goldberg
Its Attorney

GOLDBERG, FIELDMAN & LETHAM, P. C.

Mr. Nunzio J. Palladino
February 22, 1984
Page Three

John D. Maddox
Director of Law
June W. Wiener
Chief Assistant Director of Law
Craig A. Glazer
Assistant Director of Law
Department of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114
Telephone (216) 664-2737

Reuben Goldberg
Goldberg, Fieldman & Letham, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone (202) 463-8300

Attorneys for City of Cleveland, Ohio

Enclosure

cc: J. Paul McGrath, Assistant Attorney
General, Antitrust Division
Department of Justice (w/encl.)
Commissioner Victor Gilinsky (w/encl.)
Commissioner James Asselstine (w/encl.)
Commissioner Frederic Bernthal (w/encl.)
Commissioner Thomas Roberts (w/encl.)
Commissioner William Dircks (w/encl.)

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."

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."

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 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."

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.

. . .

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:

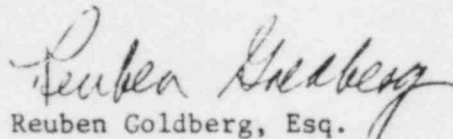
"A penalty of this magnitude is justified by CEI's continuing, willful violation of the license conditions and its direct restraint on competition that has resulted by virtue of that violation."

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,



Reuben Goldberg, Esq.
Goldberg, Fieldman & Letham, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone (202) 463-8300

Attorney for City of Cleveland, Ohio

Of Counsel:

John D. Maddox
Director of Law
June W. Wiener
Chief Assistant Director of Law
Craig A. Glazer
Assistant Director of Law
Department of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114
Telephone (216) 664-2737

February 6, 1984