

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION



In the Matter of)
)
THE TOLEDO EDISON COMPANY and) Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY (Davis-Besse Nuclear Power)
Station, Unit 1))
)
THE CLEVELAND ELECTRIC ILLUMINATING) Docket Nos. 50-440A
COMPANY, ET AL. (Perry Nuclear) 50-441A
Power Plant, Units 1 & 2))

ANSWER OF CITY OF CLEVELAND, OHIO,
IN OPPOSITION TO
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S
REQUEST FOR STAY OF THE REQUIREMENTS OF THE
ORDER OF JUNE 25, 1979, UNTIL 25 DAYS AFTER THE
EFFECTIVE DATE OF THE "FINAL OPINION AND ORDER BY THE
FEDERAL ENERGY REGULATORY COMMISSION
IN FERC DOCKET NO. ER78-194."

The City of Cleveland, Ohio (City) files this answer in opposition to The Cleveland Electric Illuminating Company's (CEI) request for a stay of the requirements of the order of June 25, 1979 until 25 days after the effective date of the "final opinion and order by the Federal Energy Regulatory Commission in FERC Docket No. ER78-194."

As its sole ground for stay, CEI, without specification, asserts that if required to file an amended transmission service tariff with the Federal Energy Regulatory Commission "a number of contested issues being considered in the FERC appeal will be mooted by that filing" and "CEI will be unfairly deprived of a meaningful opportunity to exercise both its appeal rights at FERC and its hearing rights before the Nuclear Regulatory Commission

prior to the filing of a transmission service tariff which it legitimately believes to be objectionable in several important respects."

CEI also asserts that the grant of the stay will not prejudice any other interested parties.

CEI's sole ground for a stay even if the allegations are accepted as true, which they are not, does not constitute a basis for a stay. In order to secure a stay CEI must satisfy the four criteria or factors of Virginia Petroleum Jobbers Association v. FPC, 295 F.2d 921, 925 (D.C. Cir. 1958), as clarified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). These criteria govern NRC stay practice. The Toledo Edison Co., et al. and The Cleveland Electric Illuminating Co., et al., Docket Nos. 50-346, et al. and 50-440A, et al., 5 NRC 621, 624 (1977); National Resources Defense Council, CLI-76-2, 3 NRC 76, 78 (1976); Northern Indiana Public Service Co., (Bailly Generating Station, Nuclear-1), ALAB-192, 7 AEC 420 (1974); Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-199, 7 AEC 478 (1974); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, NRC 1-7617, 10, 13 (1976).

The four criteria are:

1. Has the applicant for a stay made a strong showing that it is likely to prevail on the merits of its appeal
2. Has the applicant for a stay shown that without a stay it will be irreparably injured;

3. Would issuance of a stay substantially harm other interested parties; and

4. Where lies the public interest?

An applicant for a stay must sustain its burden of proof with respect to each of the four criteria or factors. The sine qua non for a stay is a showing that the applicant will suffer irreparable injury if a stay were not granted. A "party is not ordinarily granted a stay of an administrative order without a showing of irreparable injury." Permian Basin Area Rate Cases, 390 U.S. 747, 778 (1968). In other words, even if the other criteria were met, failure to show irreparable injury results in denial of a stay, and even if irreparable injury be shown, no stay will issue unless the other factors are satisfied.

The total absence of any reference to, and discussion of, the four criteria for stay of Virginia Petroleum is not attributable to CEI's lack of familiarity with the criteria and their applicability to NRC practice. CEI recognized the necessity of meeting the criteria when it sought a stay of all of the license conditions, including the license conditions relating to wheeling, following issuance of the Licensing Board's decision.

The Licensing Board found that CEI had not met the criteria which are a prerequisite to issuance of a stay and denied the stay (5 NRC 452 (1977)). When CEI renewed its motion for stay to the Appeal Board, it also denied the stay, ruling that in assessing the request for stay, the adjudicatory boards must consider the four criteria of Virginia Petroleum and that CEI had failed to satisfy the required criteria (5 NRC 621 (1977)).

It would unnecessarily extend this answer even to summarize the decisions of the Licensing and Appeal Boards denying the applications for stay. They are recommended reading in connection with the present application for stay and the City is confident that these decisions will receive the careful attention they deserve in connection with the NRC's consideration of the present application.

It cannot be gainsaid that a grant of the stay presently sought will constitute a pro tanto reversal (to the extent of the wheeling license conditions) of the prior stay denials. Additionally, the reversal would create an anomaly. The wheeling licensing conditions would be effective immediately in part by reason of the Licensing and Appeals Boards' denials of stay and in part would not be effective because of the grant of the present stay application. The stay would impair the efficacy of the wheeling conditions because elimination of the antitrust violations relating to CEI's refusal to provide wheeling services depends upon all of the wheeling conditions being effective. The Licensing Board clearly regarded each of the conditions to be necessary to eliminate the antitrust violations arising out of the refusal to wheel.

The allegations of CEI that if it be required to file an amended transmission service tariff in compliance with the license condition "a number of contested issues being considered in the FERC appeal will be mooted by that filing" and "CEI will be unfairly deprived of a meaningful opportunity to exercise both its appeal rights at FERC and its hearing rights before the Nuclear Regulatory Commission" do not constitute a showing of

irreparable injury. As the D.C. Circuit stressed in Virginia Petroleum Jobbers "(t)he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." 259 F.2d at 925, emphasis the court's. Moreover, the allegations are untrue.

CEI's obligation to file a transmission service tariff with FERC flows solely from the wheeling license conditions imposed by the Licensing Board. In filing that tariff CEI was obligated to comply with the license conditions. The NRC has found in its order of June 25, 1979, that CEI failed in this obligation in a number of respects. The NRC found further that revisions of the tariff required by the Initial Decision of the FERC Administrative Law Judge, which the NRC has adopted as its own, cured some, but not all, of the violations. There remained three other violations and the NRC, charged with the enforcement of its license conditions, ordered CEI to comply forthwith by amending the tariff filed with FERC.

Compliance with the order does not deprive CEI of the hearing to which it is entitled under Section 2.204 of the NRC's Regulations any more than the denial of a stay by the Licensing and Appeal Boards, which made it necessary for CEI to file the transmission services tariff with FERC, deprived CEI of its appellate rights before the Appeal Board with respect to the merits of the Licensing Board's decision, including the licensing conditions, or deprived CEI of its hearing before FERC on its tariff filed under the Federal Power Act.

Granted that CEI preferred to put the license conditions to one side pendente lite and to have the benefit of a license to construct and operate the nuclear stations while it remained free to continue its violations of the antitrust laws, the Licensing and Appeal Boards correctly found that this result would not be in the public interest. Similarly, the NRC in its order of June 25, 1979 correctly found (p. 7):

"that the public interest requires this Order be made effective immediately"

The NRC found (Order of June 25, 1979, pp. 6-7):

"... 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. In view of this, and the public interest, the Director of Nuclear Reactor Regulation has determined that, pursuant to 10 CFR §2.204, License No. NPF-3 and Construction Permit Nos. CPPR-148 and 149 shall be amended effective immediately to require CEI to file the transmission tariff ordered by the FERC (Appendix D) and an attached amendment thereto identified as Appendix E 5/ with the Federal Energy Regulatory Commission within twenty-five (25) days after the Order and so file this tariff in conformity with applicable FERC filing requirements.

* * *

"5/ Appendix E is CEI's January 27, 1978 draft transmission schedule as modified by the FERC on April 27, 1979 in Docket No. ER78-194 and further modified by the NRC to implement requirements set forth in Antitrust License Condition No. 3."
(emphasis supplied)

A stay would reward CEI's intransigence.

1147 262

Contrary to CEI's assertions, the immediate effectiveness of the June 25, 1979 order will not deprive CEI of any appellate rights at FERC to which it is entitled. CEI's appellate rights before FERC, indeed, its rights before FERC in hearing and on appeal, do not involve the issues of compliance with the license conditions relating to wheeling. Although CEI has constantly sought to make it appear in the FERC proceedings that the City seeks FERC enforcement of the wheeling license conditions, this is not the fact. Thus, discussing CEI's failures to comply with one of the license conditions the City in its brief on exceptions in FERC Docket No. ER78-194 stated (p. 14):

"Notwithstanding this license condition and CEI's avowed intention to comply with the license condition, CEI has nevertheless filed a Transmission Service Tariff that restricts wheeling services to municipalities and rural electric cooperatives.

"This restriction, of course, violates the license condition, but enforcement of the license condition is for the NRC, not this Commission. City, therefore, did not seek enforcement of the license condition by the Commission."

If CEI's assertions be true that the immediate effectiveness of the June 25, 1979 order impairs its hearing and appellate rights before FERC, then CEI's rights to hearing and appellate rights before FERC were also impaired by the Licensing and Appeal Boards' denials of stay. Yet, CEI does not contend that its hearing and appellate rights at FERC were impaired by the fact that it filed the transmission service tariff with FERC as a result of the NRC wheeling license conditions and purportedly in compliance with them. The reason why CEI makes no such argument, and made no such argument to the Licensing and Appeal Boards,

is that no such impairments flow from compliance with the license conditions relating to wheeling. The proceedings before FERC are not proceedings to enforce the license conditions.

The order of June 25, 1979 deals with three items which the NRC ruled were in violation of the antitrust license conditions relating to wheeling, i.e., preemption of available transmission capacity by CEI, the requirement of a separate supplemental schedule for each wheeling request, and wheeling services for all entities in the service territories. These items were not completely covered by the FERC Initial Decision because FERC does not have jurisdiction to enforce NRC license conditions. Order of June 25, 1979, p. 4. Examination of these items discloses the total lack of merit of CEI's request for a stay.

The first item relates to the preemption of available transmission capacity by CEI. (Order of June 25, 1979, p. 4). The condition of the license is as follows:

"In the event Applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effected until reductions of at least 5 percent have been made in transmission capacity allocations to other Applicants in these proceedings and thereafter shall be made in proportion to reductions imposed upon other Applicants to this proceeding."

In a footnote to this condition, the NRC Licensing Board explained:

"The objective of this requirement is to prevent the preemption of unused capacity on the lines of one Applicant by other Applicants or by entities the transmitting Applicant deems noncompetitive. Competitive entities are to be allowed opportunity to develop bulk power services

options even if this results in re-allocation of CAPCO (Central Area Power Coordination Group) transmission channels. This relief is required in order to avoid prolongation of the effects of Applicants' illegally sustained dominance."

The transmission service tariff filed by CEI with FERC in purported compliance with the license conditions did not include the quoted provision of the license condition. As a matter of enforcement of the license conditions--a matter everyone agrees is for the NRC and not the FERC--the June 25 order directed CEI to file an amendment to the tariff as modified by the FERC ALJ Initial Decision to include the five percent reduction requirement set forth in the Antitrust License Condition in light of CEI's expressed willingness to comply with the condition.

Since the June 25 order deals with a matter of enforcement clearly within the NRC's jurisdiction, since there is no dispute that CEI's transmission services tariff did not comply with this license condition and since CEI advised the NRC of its willingness to comply with the license condition and testified to the same effect before FERC, there exists no basis whatever for a delay in immediate implementation of the requirement of the June 25 order on the ground that CEI thereby will be deprived of rights before FERC.

The second item related to provisions of CEI's transmission services tariff requiring the filing of a separate supplemental schedule for each wheeling request. The NRC accepted as satisfactory the ALJ's modification and simplification of the tariff language relating to these requirements and no longer

objects to the modified requirement of filing supplemental schedules for wheeling transactions. No exception has been taken either by the the City or CEI to the ALJ's modification before FERC on this matter. Consequently, there are no hearing or appeal rights of CEI in jeopardy at FERC or at the NRC because of the immediate effectiveness of the provisions of the order relating to this item. In fact, it would be the height of absurdity to issue a stay on a matter which is not the subject of controversy, of hearing, and appeal.

A third item related to the license condition that requires CEI and its partners to make available transmission services to all entities in their service territories that have a statutory right or privilege to engage in electric generation and/or distribution of electric energy.

Notwithstanding the license condition and CEI's avowed intention to comply with the license condition, CEI filed a transmission service tariff that restricted wheeling services to municipalities and rural electric cooperatives.

In view of the unambiguous requirement of the license condition, the NRC order of June 25, 1979 determined that CEI should file an amendment to the CEI transmission tariff, as modified by the FERC Initial Decision, to expand the transmission services to include deliveries for all entities within the Combined CAPCO Company Territories (CCCT).

Since enforcement of the license condition is admittedly the province of the NRC and not of FERC and since the tariff plainly did not comply with this license condition, the

City properly requested the NRC to enforce its license condition and the NRC properly directed the amendment to the tariff.

The June 25, 1979 order of the NRC is not reviewable by FERC and nothing that transpires before FERC on its consideration on exceptions of the ALJ's decision on this or the other points involved in the NRC order of June 25, 1979 can be lawfully affected by the FERC. In its brief opposing exceptions filed with FERC in Docket No. ER78-194, dated June 29, 1979, CEI stated (p. 3):

"CEI submits that this Commission has no authority to evaluate compliance with or otherwise enforce or implement standards of the Atomic Energy Act and licensing conditions established by the NRC. The responsibility of the FERC in this proceeding is to determine whether the proposed Tariff is just and reasonable under the standards of Sections 205 and 206 of the Federal Power Act. Whether or not the Tariff complies with the NRC license conditions is immaterial to the determination which this Commission must make. The NRC and the FERC have different statutory responsibilities. A most important difference is that the Commission neither adjudicates nor enforces the anti-trust laws. California v. FPC, U.S. 482, 486 (1962)." (footnote omitted; emphasis supplied)

Thus, it would make no sense at all to issue a stay of the June 25 order on the ground that CEI's appeal rights will be adversely affected before FERC when, in fact, FERC has no authority to enforce the license condition and the question of enforcement of the license conditions is not before FERC.

CEI is playing games with the NRC. On the one hand, CEI tells the NRC that unless the stay is granted, its rights of appeal at the FERC will be mooted. On the other hand, and at the same time, CEI tells FERC that there is no mootness:

"the NRC order issued June 25, 1979 and the transmittal letter of the same date are as irrelevant and immaterial to the instant proceeding [FERC Docket No. ER78-194] as the earlier Notice of Violation.

* * *

"If the Commission were to reopen the record, then CEI requests that this proceeding be remanded to the Administrative Law Judge and that a hearing be held to consider the relevance and materiality of the NRC documents to the issues before this Commission. The Company would also seek to argue on brief the legal relevance of the NRC Staff Director's action to the Commission's responsibilities under the Federal Power Act and the weight, if any, that should be accorded the NRC document in this proceeding.

* * *

"In the event that CEI files a revised tariff (to reflect the compliance with the license conditions per the June 25, 1979 order), such filing would initiate a new proceeding where-in the issues of law and fact could be fully developed and considered."

Answer Of The Cleveland Electric Illuminating Company To Motion To Reopen The Record, filed in FERC Docket No. ER78-194, pp. 2-3, dated July 24, 1979. Material in parenthesis supplied

CONCLUSION

One of the weapons CEI has used in an effort to destroy the City's municipal electric utility system (MELP) and to eliminate it as a competitor is the refusal to wheel power for MELP, particularly and specifically low cost power, in violation of the federal antitrust laws. See Findings of the NRC

Licensing Board, 5 NRC 165-176.

The Antitrust License Condition No. 3 pertaining to wheeling are designed to cure these unlawful restraints and to give MFLP access to other sources of power, particularly low cost power.

By reason of the compulsion of the conditions of the license and the refusal of the Licensing and Appeal Boards to stay the effectiveness of the conditions pendente lite, CEI grudgingly filed a transmission service tariff with FERC. But as the June 25, 1979 order observes CEI 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 construction permits to comply with the Antitrust License Condition No. 3. The tariff was in many respects in violation of the plain and unambiguous terms of the license conditions. The ALJ's decision has cured many of the violations for they were also in violation of the standards of the Federal Power Act. Some violations remain which are within the reach only of the NRC through its enforcement powers. The order of June 25, 1979 addresses these violations and directs their immediate elimination.

If the license conditions are to be effective in curing the unlawful restraints practiced by CEI each requirement of the license condition must be the subject of CEI's compliance. CEI must not be allowed to drag its feet and delay compliance. Delay adversely affects City and the public interest. City is about to invoke wheeling services from CEI. It is imperative that the transmission services tariff be in compliance with

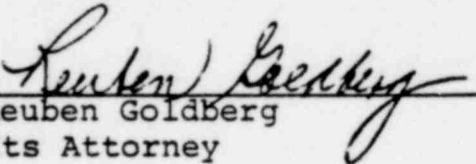
all of the Antitrust License Condition No. 3.

As shown in this answer there are no grounds for a stay.

The application for stay should be denied and CEI should be required forthwith to comply with the order of June 25, 1979.

Respectfully submitted,

CITY OF CLEVELAND, OHIO

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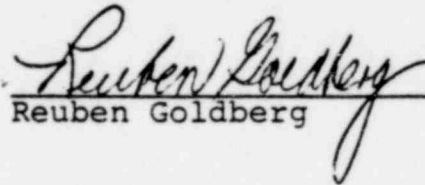
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September 6, 1979

1147 270

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing "Answer Of City Of Cleveland, Ohio, In Opposition To The Cleveland Electric Illuminating Company's Request For Stay Of The Requirements Of The Order Of June 25, 1979, Until 25 Days After The Effective Date Of The 'Final Opinion And Order By The Federal Energy Regulatory Commission In FERC Docket No. ER78-194'" upon the parties listed on the attachment via first class mail, postage prepaid this 6th day of September, 1979.


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1147 271

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1147 273

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