UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A
	)	
	)	
THE TOLEDO EDISON COMPANY, et al. (Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A
	)	

PETITION OF DUQUESNE LIGHT COMPANY FOR REVIEW

Duquesne Light Company ("Duquesne"), pursuant to §2.786(b) of the Rules of Practice of the Nuclear Regulatory Commission, 10 C.F.R. §2.786(b)(1979), hereby petitions the Commission for review of a decision of the Atomic Safety and Licensing Appeal Board ("Appeal Board") dated September 6, 1979 (ALAB-560).

SUMMARY OF THE DECISION AND PERTINENT MATTERS RAISED BEFORE APPEAL BOARD

The proceeding below was a consolidated antitrust review held pursuant to §105(c)1/ of the Atomic Energy Act in connection with applications filed jointly by five utility companies, including Duquesne,

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1/ Under §105(c)(5), 42 U.S.C. §2135(c)(5), the Commission is to determine whether the activities under a license to construct or operate a nuclear plant will "create or maintain a situation inconsistent with the antitrust laws." Under §105(c)(6), 42 U.S.C. §2135(c)(6), the Commission may impose conditions on such licenses if "inconsistent situations" are found.

to construct four nuclear generating stations in northern Ohio.[2] These five utility companies have separate retail electric service areas in western Pennsylvania[3] and northern Ohio. They participate in a five-company power pool known as CAPCO.

The Appeal Board's decision and order affirms, with certain modifications, an Atomic Safety and Licensing Board decision finding that activities under license applications being reviewed by it "would create or maintain a situation inconsistent with the antitrust laws" and imposing conditions on each licensee intended to redress the situations so found. The Appeal Board's decision was decided by only two board members, who, however, relied heavily on a draft opinion written by the third departed member with which they conceded they disagreed in certain unspecified respects.[4]

In defining the applicable legal standards to be applied, the Appeal Board rejected the contentions that it must apply a "public interest" standard as well as consider the specialized economic and pervasive regulatory context of the public utility industry in assessing purported inconsistencies with the antitrust laws. Slip Opinion,

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2/ The proceedings with respect to these four units were consolidated with the application by two of the five companies (but not Duquesne) for a license to operate Davis-Besse Nuclear Power Station, Unit No. 1.

3/ Duquesne is based in Pittsburgh, Pa., and provides electric service solely within Pennsylvania.

4/ No opportunity was given Duquesne and the other applicants to object to the decisional process used by the Appeal Board. The places where other issues asserted here were raised before the Board are indicated by appropriate references to applicants' briefs and the Appeal Board's decision.

passim. In doing so, it failed to take into account this special context in finding applicants possessed monopoly power and were guilty of unlawful monopolization. See, e.g., Slip Opinion at 166. Similarly, despite finding that power pools were in the public interest and that consensus requirements for pool decision-making were necessary, it inferred from meetings conducted in this mode a "group boycott" based on the failure to include other utilities in CAPCO and on subsequent decisions purportedly to deny non-members access to CAPCO and to nuclear power to be generated by CAPCO. It rejected business justifications for such decisions, ruling in part that "good motives" were irrelevant. Slip Opinion at 302-03, 164-65, 167-73, 181-96, 197-203. Finally, it found that Duquesne's actitivies under the licenses would "create or maintain" an inconsistent situation based on conduct which predated both the Supreme Court decision in Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973), and the enactment of Section 105(c). Slip Opinion at 165-66.

ERROR COMMITTED AND REASONS WHY COMMISSION SHOULD REVIEW5/

I. The Appeal Board Applied Erroneous Legal Standards and Ignored Important Factors.

1. The "public interest" factor required to be considered in fashioning relief by §105(c)(6), as is true in other regulatory contexts, requires a weighing of the potential benefits of competition against other regulatory objectives. Even though the Commission itself

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5/ Since review by the Commission is discretionary, Duquesne sets forth below only those issues which it believes peculiarly merit the Commission's attention. By doing so, it does not intend to waive its right to obtain judicial review of any other errors which the Appeal Board committed.

does not have broad economic regulatory authority over the public utility industry, Congress clearly did not contemplate that the Commission would ignore the broad "public interest" objectives of pervasive federal and state regulation of this industry in the licensing of nuclear facilities. The Appeal Board, therefore, clearly erred in concluding that it is merely an antitrust enforcement agency to whom the public interest is irrelevant. Compare Slip Opinion at 30-40, 115-24, 297-300 with Applicants' Appeal Brief at 29-40, 254-92. In particular, the Board gave no consideration to the extent to which Pennsylvania, in the furtherance of the public interest, had eliminated competition among electric utility entities, including municipalities. Instead, it imposed conditions designed to create competition that neither federal nor state agencies had intended would exist.

2. There is an important need to define the appropriate standards to be applied in assessing whether antitrust principles have been or will be breached in cases such as this. For example, can traditional Sherman Act §2 standards on monopolization be applied to the electric public utility industry without taking into account regulation specifically intended to limit the ability to exploit monopoly power?/

6/ A case in point is the Appeal Board's finding that Duquesne refused to sell Pitcairn emergency power except under its "unreasonably" expensive Rate M. Slip Opinion at 165-66. Pitcairn could have had the reasonableness of this rate determined by a neutral and objective agency but did not do so. The Appeal Board, however, styled Duquesne's conduct an exercise of monopoly power and effectively gave the municipality the power to dictate terms and conditions in this kind of situation.

The Appeal Board did not consider this factor of pervasive regulation or the economic and technological factors that characterize this industry. Its monopolization findings are simplistically premised on its findings of "dominance" in generation and transmission, without explanation and without regard for the economic and regulatory realities of the industry. Similarly, it failed to consider the special circumstances of Duquesne, where Pennsylvania law so prevents competition that Duquesne's allegedly "monopolistic" conduct simply had no significant anticompetitive consequenses. Compare Slip Opinion 164-66, 180, 195 with Applicants' Appeal Brief at 40-71, 83-102, 263-68; Applicants' Reply Brief at 22-56, 94-96; Applicants' Supplemental Brief at 20-33. Given the special economics and techonologies of this industry, it is unlikely that an applicant will not possess such "dominance" and, thus, under the Appeal Board's view, on this fact alone possess monopoly power. It follows that any refusal to deal with a municipal or rural electric system would be exclusionary and unlawful monopolization. Even in an unregulated industry, this is erroneous. See, e.g., Berkey Photo Inc., v. Eastman Kodak Co., ___F.2d___, 1979-1 Trade Cas. ¶62,718 (2d Cir. 1979).

Similarly, the Appeal Board's findings that membership in CAPCO and access to nuclear power were denied as a result of a per se unlawful group boycott also ignored the special context of this industry. Indeed, even though the Board found that the formation of power pools is in the public interest and that the CAPCO voting procedures were necessary, it failed to recognize this legitimate purpose

for collective action in assessing the reasonableness and independence of membership and access decisions made by CAPCO members. See Associated Press v. United States, 326 U.S. 1 (1945); Gamco, Inc. v. Providence Fruit & Produce Building, 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952). In doing so, the Appeal Board apparently drew improper inferences of conspiratorial behavior from the fact of concededly necessary and proper meetings. Further, although Duquesne's decision on these issues was made by it unilaterally for good business reasons, the Board ruled that "good motives" were irrelevant. Compare Slip Opinion at 164-65, 167-71, 196-202, 300-04 with Applicants' Appeal Brief at 102-24, 275-82.

Traditional antitrust analysis has always recognized the need to consider the specialized context of restrictive practices (Broadcast Music, Inc. v. CBS, ___U.S.___ , 47 U.S.L.W. 4359 (April 17, 1979)), and regulation has been clearly recognized as a factor that affects antitrust analysis, U.S. v. Marine Bancorporation, 418 U.S. 602 (1974). The Appeal Board refused to consider either.

3. Even assuming arguendo that Duquesne's dealings in 1966-68 with Pitcairn and Aspinwall - the only individual acts by Duquesne at issue - were evaluated under the appropriate standards, these dealings occurred prior to any reasonable notice to Duquesne that such behavior could be regarded as inconsistent with the antitrust laws. Moreover, the conduct criticized by the Appeal Board was terminated well before this proceeding began and was never repeated. As a legal

proposition, such conduct cannot justify a finding that activities under the licenses "would create or maintain a situation inconsistent with the antitrust laws" as to Duquesne's ownership and use of the subject nuclear facilities. Compare Slip Opinion at 164-66, 293-300 with Applicants' Appeal Brief at 260-62; Applicants' Reply Brief at 94.

4. The Appeal Board improperly failed to distinguish among the companies in the license conditions it imposed, despite Duquesne's urging to the contrary. Applicants' Appeal Brief at 61-63, 283-84. Instead, it devised a blanket set of conditions which it imposed on all, regardless of the substantial differences in the situations it found as to each. See, e.g., its extensive treatment of refusals to wheel, territorial agreements, and price squeezes, Slip Opinion at 125-38, 222-39, and 255-60 - none of which pertained to Duquesne. As a result, the Board subjected Duquesne to conditions intended to prevent conduct in which Duquesne never engaged. Such indiscriminate imposition of conditions is arbitrary and an abuse of the Commission's authority under §105(c)(6).

II. The Appeal Board Erred in Proceeding to a Decision Without the Full Participation of the Departed Member or a Replacement.

5. Section 2.787(a) of the Commission's Rules of Practice requires that an Appeal Board be "composed of three members" and does not set forth any provision as to a quorum,7/ cle / inferring participa-

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7/ Cf. 10 C.F.R. §2.721(d) as to atomic safety and licensing boards.

tion by all three Board members in all Board activities. Moreover, the rules of practice provide for alternates to be appointed to an Appeal Board, 10 C.F.R. §2.787(a). The statute apparently allows Appeal Board members to be drawn from private life, 42 U.S.C. §2241(b). The Commission further has not set forth detailed procedures to be followed if a member of an Appeal board is unavailable as it has in the case of the unavailability of a Licensing Board member, 10 C.F.R. §2.704(d).

In light of these rules and the absence of any quorum provision, it is at best unclear whether it was proper for the remaining two members to decide the case before a replacement for Mr. Sharfman was appointed. See Ayrshire Collieries Corp. v. U.S., 331 U.S. 132 (1947), ruling that, in the context of three-judge courts, such conduct is reversible error. See especially, Butterworth v. Dempsey, 229 F. Supp. 754, 757 n.* (D. Conn. 1964), where a replacement was appointed to a three-judge court even though the deceased judge for whom the replacement had been appointed had drafted an opinion before his death. This is a matter in which the Commission's clarification is needed.

6. The "ultimate" factual and legal conclusions of the departed Board member, to which the remaining members of the Appeal Board limited their agreement, were necessarily premised on subsidiary findings, with which the other members of the Board admitted they disagreed in some unspecified way. Slip Opinion at 3. This kind of incorporation, without give-and-take discussion with the author of the draft opinion, is fundamentally at odds with the Administrative Procedure Act's requirement for reasoned decision making: there is no assurance that all important

factors were given adequate consideration, and there is certainly no adequate articulation of the remaining members' findings concerning such factors where it was conceded that they disagreed in unspecified ways with an opinion on which they so heavily relied. Such conduct is error. See United States Lines Inc. v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978).

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7. This case reaches the Commission at a time in its administration of Section 105(c) when the Commission's boards have had a reasonable amount of exposure to its problem, and when several other proceedings are pending which are likely to benefit from the resolution of the important questions presented here. This is the first opportunity for the Commission to review a completed antitrust proceeding for this purpose. It is incumbent on the Commission to provide its boards guidance as to how its licensing responsibilities are to be exercised in the context of the highly regulated public utility industry, and the extent to which this factor and the special economic and technological characteristics of this industry must be considered in assessing competitive questions. This petition further provides the opportunity to resolve important procedural questions governing the decision-making process of those boards.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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Dated: October 22, 1979

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing were served this 22nd day of October, 1979, by hand-delivery or by first-class mail, postage prepaid, upon those persons listed on the attached service list.

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