

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of)

THE TOLEDO EDISON COMPANY and)
THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY)
(Davis-Besse Nuclear Power Station,)
Unit 1))

NRC Dkt. No. 50-346A

THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY, ET AL.)
(Perry Nuclear Power Plant, Units)
1 & 2))

NRC Dkt. Nos. 50-440A
50-441A

COMMENTS OF THE DEPARTMENT OF JUSTICE

The United States Department of Justice ("Department") files these comments in response to the August 6, 1979 request by the Office of Nuclear Reactor Regulation of the Nuclear Regulatory Commission ("NRC") that any interested party file comments concerning whether an appeal to the Federal Energy Regulatory Commission ("FERC") by the Cleveland Electric Illuminating Company ("CEI") of an Order of a FERC Administrative Law Judge ("ALJ") modifying a tariff filed by CEI will be rendered moot if the NRC issues an order requiring CEI to file a tariff at FERC similar to the tariff which gave rise to the pending appeal at FERC.

For the reasons set forth below, the Department believes that the issuance of an order by the NRC requiring CEI to file a tariff at FERC would not, as a matter of law, render moot CEI's present appeal at FERC, and, alternatively, even if mootness did occur as a result of the issuance of such an

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order by the NRC, the NRC cannot be precluded from discharging its statutory obligation to issue such an order if it determines that CEI has willfully violated its license conditions.

History of the Proceeding

On January 6, 1977, an Atomic Safety and Licensing Board ("Licensing Board") issued its Initial Decision in The Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), Docket Nos. 50-346A, 50-500A, 50-501A, and The Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plants, Units 1 and 2), Docket Nos. 50-440A, 50-441A, 5 N.R.C. 133 (1977) ("Perry proceeding"). The Licensing Board found that the issuance of unconditioned licenses for the five nuclear units which were the subject of that proceeding "would both create and maintain a situation inconsistent with the antitrust laws and the policies underlying those laws." Id. at 133. CEI was one of the Applicants for the licenses. Accordingly, the Licensing Board ordered that ten conditions attach to the requested licenses. Among those conditions was condition 3, which reads:

3. Applicants shall engage in wheeling for and at the request of other entities in the CCCT: 1/

1/ Within the context of the NRC proceeding the CCCT referred to the Combined CAPCO Companies Territories.

- 1) of electric energy from delivery points of Applicants to the entity(ies); and,
- 2) of power generated by or available to the other entity, as a result of its ownership or entitlements in generating facilities, to delivery points of Applicants designated by the other entity.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of Applicants, the use of which will not jeopardize Applicants' system. In the event Applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effective until reductions of at least 5% 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 in this proceeding.

Applicants shall make reasonable provisions for disclosed transmission requirements of other entities in the CCCT in planning future transmission either individually or with the CAPCO grouping. By "disclosed" is meant the giving of reasonable advance notification of future requirements by entities utilizing wheeling services to be made available by Applicants. (Footnote added.)

On January 14, 1977, Applicants moved to stay imposition of the license conditions pending appeal. The motion to stay was denied by the Licensing Board on February 3, 1977, and by the Atomic Safety and Licensing Appeal Board on March 23, 1977.

On April 22, 1977, the operating license for Davis-Besse Unit 1 was issued with the antitrust conditions attached.

On May 3, 1977, the construction permit for the Perry Nuclear Power Plants, Units 1 and 2, was issued with the antitrust conditions attached.

On January 6, 1978, CEI filed a transmission tariff with the FERC. On June 28, 1978, after a request by the City of Cleveland ("City") that was supported by the Department, the NRC issued a Notice of Violation to CEI stating that "at least as of CEI's submittal of the January 27, 1978, transmission schedule to [FERC] a continuing refusal to wheel in accordance with the license conditions began to occur." The Notice of Violation cited five conditions contained in CEI's filed tariff which individually and collectively violated license condition 3, and which amounted to a refusal to wheel. ^{2/} On April 27, 1979, a FERC Administrative Law Judge issued an Initial Decision which found that the CEI transmission tariff filed January 27, 1978, violated the Federal Power Act ("FPA") because it

^{2/} The conditions described by the NRC Staff in Appendix A to the Notice of Violation were: 1) agreeing to provide wheeling services only until the date of the final decision of the NRC in the Perry proceeding; 2) providing that CEI is the sole judge as to whether it has the capacity to make available wheeling services; 3) conditioning the wheeling services in a manner which allows CEI to preempt unused transmission capacity; 4) requiring that the minimum wheeling transaction occur for a period of no less than 12 months; and 5) proposing wheeling services upon the condition that CEI file separate supplemental wheeling schedules for each wheeling transaction.

was "unjust, unreasonable and unduly discriminatory" (Initial Decision at 56). Accordingly, the ALJ ordered CEI to file the revised tariff described in the Initial Decision. The ALJ specifically declined to rule on whether "CEI is in compliance with the NRC license conditions or the antitrust laws of this country," because "[t]he NRC and other duly constituted bodies will be the judges of that." (Initial Decision at 6). 3/ On June 25, 1979 the NRC issued an 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 ("Order"). The Order amends CEI's licenses and construction permits to require CEI to file with FERC the tariff ordered by the FERC ALJ as amended by the NRC.4/ By its terms the Order was to take effect immediately.

On August 2, 1979 CEI wrote to the NRC requesting that the Order be modified so as to become effective twenty-five days after the final opinion and order of the FERC in the proceeding concerning CEI's wheeling tariff. In support of its request CEI argued:

The transmission service tariff in question is currently the subject of an adminis-

3/ The tariff required by FERC does not bring CEI into compliance with the NRC license conditions because it does not require CEI to reduce transmission service to the other Applicant companies prior to reducing such service to non-Applicant entities and does not require CEI to consider disclosed transmission needs of non-Applicant entities in its future planning.

4/ The NRC amendments are intended to bring CEI into Compliance with License Condition 3.

trative appeal before FERC in Docket No. ER 78-194. If CEI is required to file prematurely with FERC an amended tariff pursuant to the Order here, a number of contested will be mooted by that filing. As a consequence, 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 ultimately believes to be objectionable in several important respects.

On August 6, 1979 the NRC issued an Order which modified its June 25, 1979 Order by suspending its "immediately effective" aspect pending receipt and review of Comments by interested persons on CEI's mootness contentions.

On September 6, 1979 the Atomic Safety and Licensing Appeal Board of the NRC issued its Decision in the Perry proceeding. That Decision affirmed license condition 3 in its entirety.

1. Filing in FERC of the NRC Ordered Tariff Will Not Moot CEI's Appeal of the FERC ALJ Decision.

CEI argues that if it files the NRC ordered tariff with FERC its appeal of the FERC ALJ's decision will be mooted. Understandably, CEI has failed to furnish the NRC with any support for this demonstrably erroneous proposition.

Pursuant to Section 205 of the FPA 16 U.S.C. § 824d, every rate and charge, and all rules and regulations pertaining to such a rate or charge, within the jurisdiction of the FERC must be filed with the FERC. If a filed rate is challenged it may be suspended for a period of not more than

five months pending a hearing to determine whether the rate is just, reasonable and nondiscriminatory. If a decision has not been reached within the five month period the rate will become effective, subject to refund in the case of rate changes.

Once a rate has gone into effect, even if a decision on that rate is pending, a filing company may file a subsequent rate to take effect on a certain date. 18 C.F.R. § 35.13. 5/ The first rate becomes "locked in" for that period of time between its effective date and the date on which the second¹ filed rate schedule is to take effect. The issue for decision in the first proceeding then becomes whether the first rate schedule is valid for the "locked in" period. The first proceeding does not become moot simply because the subject rate schedule has been superseded. If a third rate schedule is filed, the second rate becomes "locked in" to the period starting with its effective date and terminating on the effective date of the third filing. This is known as "pancaking." (See, e.g., Southern California Edison Company, Docket No. E-8570, Opinion No. 55 (August 1, 1979) at 1-3. Implicit in the notion of "pancaking" is that the filing of subsequent tariffs has no mootness effect on prior tariffs.

5/ 18 C.F.R. § 35.0 et seq. contain the FERC rules which are applicable to the filing of rate schedules.

By filing the NRC ordered tariff, CEI would be engaging in "pancaking." The "locked in" period for the original tariff would be the period from its effective date to the effective date of the new tariff. Commission review of the FERC ALJ Decision on the initial tariff would then be concerned only with the "locked in" period of the initial tariff.

Indeed, CEI itself appears to have acknowledged that "pancaking" obviates mootness problems. On July 9, 1979 the City petitioned FERC to reopen the record in the FERC proceeding concerning CEI's wheeling tariff for the purpose of receiving into evidence the NRC's June 25, 1979 Order modifying license condition 3. In opposing the City's petition CEI stated:

Finally, CEI submits that City's Petition is superfluous. The order issued by the NRC Staff Director proposed that CEI file a revised Tariff (set forth in Appendix E to the order) with the Commission. In the event that CEI files a revised Tariff, such filing would initiate a new proceeding wherein the issues of law and fact could be fully developed and considered. Thus, there is no reason to delay Commission action in the instant proceeding by reopening the record. (Emphasis added).

Answer of the Cleveland Electric Illuminating Company to Motion to Reopen the Record, FERC Docket No. ER 78-194, at 3 (a copy of which is attached hereto). Thus, CEI seems to recognize that the filing of a second tariff does not moot the proceeding

concerning the initial tariff, it simply triggers a "new proceeding" which would not interfere with an ongoing proceeding regarding the initial tariff.

Because of the "pancaking" principle, the only legal effect that filing the NRC ordered tariff would have at FERC is to "lock in" the initial tariff. Filing the NRC ordered tariff would have the same effect at FERC as would the filing of any new tariff at FERC by CEI. CEI's argument seems to suggest that even if it wanted to, CEI could not file a new tariff without thereby vitiating its initial tariff. The "pancaking" principle renders this argument absurd. A contrary result would mean that CEI could not file a new tariff at FERC until all pending proceedings with respect to the initial tariff had terminated. The acceptance by FERC of "pancaking" eliminates this issue. 6/

2. Additional Reasons for Denying CEI's Request

Acceptance by the NRC of CEI's mootness argument would jeopardize the integrity of the NRC antitrust enforcement program. The imposition of antitrust license conditions by the NRC impliedly requires an applicant to file with FERC

6/ It bears noting that no traffic has occurred under the initial tariff filed by CEI and therefore no right or liabilities have arisen under that tariff for or against CEI which will be mooted if the NRC requires CEI to file a new tariff at FERC. It goes without saying that, as to future conduct, CEI has no right to have in place a tariff which violates the NRC license conditions. Accordingly, even if the FERC decides not to hear the pending appeal of the initial tariff this will not prejudice any existing legal interest of CEI.

a tariff which faithfully reflects the NRC's conditions. 7/ The filing of a tariff at FERC by an NRC licensee does not divest the NRC of its responsibility to determine whether that tariff complies with the NRC's license conditions, yet that is the major, albeit unstated, premise of CEI's argument.

The nature of the concomitant jurisdiction which the NRC and FERC share in this area requires that each agency ensure that its statutory responsibilities are properly discharged. The filing of such a tariff simply triggers FERC's statutory duty to determine whether the tariff passes muster under the FPA, it does not diminish the NRC's responsibility to enforce its antitrust license conditions. Indeed, even if FERC approved a tariff which, while satisfying the FPA, did not comply with the NRC antitrust license conditions, it would remain incumbent upon the NRC to require the applicant to file a new tariff at FERC which satisfied the NRC's conditions. FERC approval of the initial tariff would not abort the licensee's obligations to the NRC or override the NRC's jurisdiction over the applicant or its jurisdiction to enforce its antitrust license conditions.

CEI's mootness argument suggests that the NRC postpone its statutory responsibilities until the FERC has

7/ The final paragraph of the License Conditions provide that they be implemented in a manner consistent with the Federal Power Act.

discharged its statutory duties. This constitutes an erroneous and unnecessary suggestion by CEI because it wrongly implies that there may be an unavoidable conflict between the FERC and the NRC with respect to CEI's tariff, and invites the NRC to delay needlessly its effort to bring CEI into compliance with the antitrust license conditions.

The inevitable effect of inaction by the NRC would be to put off even further CEI's compliance with the NRC's license conditions and to reward CEI for its long-standing and deliberate refusal to abide by those conditions.

It is clear that CEI has made no real effort to comply with the NRC license conditions. In the 28 months since the issuance of the Initial Decision in Perry, CEI has failed to bring itself into compliance with the antitrust license conditions imposed by the Licensing Board. It was a full twelve months after the issuance of the NRC's Initial Decision before CEI filed its initial tariff, which, although purporting to comply with license condition 3, contained numerous provisions which were in obvious conflict with both the letter and spirit of the license. Even after the NRC issued a Notice of Violation based on this tariff, CEI did not voluntarily come into compliance with license condition 3. To bring CEI into compliance, it has become necessary for the NRC to issue an Order modifying CEI's license. Against this background CEI loudly complains that if it is forced to file the NRC ordered tariff at FERC it will be deprived of an oppor-

tunity to exercise its appeal rights before FERC. Even if filing the NRC ordered tariff would moot CEI's FERC appeal, and we believe it would not, CEI's complaint must be rejected because it was CEI's refusal to comply with license condition 3 which forced the NRC to modify CEI's license. If CEI had voluntarily complied with license condition 3 it would not now be necessary for the NRC to modify CEI's license. Thus, in the final analysis, CEI has, by its own actions, invited the very problems which it now asks the NRC to cure. Accordingly, CEI should not be permitted to parlay its habitual recalcitrance into an excuse to gain an additional respite from its duty to comply with the NRC license conditions

CONCLUSION

For the reasons stated above, the Department believes that a filing in FERC of the NRC ordered tariff will not moot CEI's appeal of an Initial Decision concerning a previously filed tariff. Further, we do not believe that CEI should be permitted to benefit from its continuously recalcitrant behavior by being permitted to delay even further its compliance with license condition 3. For these reasons, we urge

the NRC to deny CEI's request for a delay of the effective date of the NRC's June 25, 1979 Order.

Respectfully submitted,

Janet R. Urban
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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

The Cleveland Electric)
Illuminating Company)

Docket No. ER78-194

ANSWER OF THE
CLEVELAND ELECTRIC ILLUMINATING
COMPANY TO MOTION TO REOPEN THE RECORD

The Cleveland Electric Illuminating Company (CEI or Company), pursuant to Section 1.33(a)(2) of the Commission's Rules of Practice and Procedure, files this Answer in opposition to the Motion to Reopen the Record for the Limited Purpose of Making an Order of the Nuclear Regulatory Commission issued June 25, 1979, and its Letter of Transmittal a Part of the Record (Petition) filed by the City of Cleveland, Ohio (City) on July 9, 1979 in the above-referenced proceeding. In support of its opposition, CEI alleges and states:

1. On July 9, 1979, City filed its Petition to reopen the record in the instant proceeding for the purpose of receiving into evidence an order dated June 25, 1979 and issued by the Director, Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission (NRC) in The Toledo Edison Co., NRC Docket Nos. 50-346A, et al. and the letter of even date transmitting the order.

2. In support of its Petition, City states that the record in the instant proceeding contains a Notice of Violation from the NRC Staff and that the NRC transmittal letter and order of June 25, 1979 are material and relevant to this proceeding.

3. CEI submits that the NRC order of June 25, 1979 and transmittal letter of even date are immaterial and irrelevant to this proceeding. Moreover, they add nothing to the record which is not already present in the Notice of Violation, Exhibit 5.

4. In its Brief Opposing Exceptions (pp. 3-6), the Company discussed the relevance of the NRC proceeding to the instant proceeding before this Commission. CEI stated that Exhibit 5 is only the allegation of a violation by the NRC Staff, not the product of an adjudication, citing Section 2.201 of the NRC Regulations, 10 C.F.R. §2.201 (1978):

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Section 2.201 Notice of Violation.--(a)
Before instituting any proceeding to modify, suspend, or revoke a license or to take other action for alleged violation of any provision of the Act or this chapter or the conditions of the license the Director, Office of Inspection and Enforcement, will serve on the licensee a written notice of violation... (emphasis added).

CEI showed that the material in Exhibit 5, naked allegations of violations, has no more merit and is entitled to no more consideration than the simple allegations of City and the Commission Staff in this proceeding. Furthermore, since it addressed compliance with the NRC license conditions instead of the justness and reasonableness of the Tariff under the Federal Power Act, the NRC Staff Notice of Violation is not relevant to the instant proceeding.

5. The order of June 25, 1979 and transmittal letter of even date were issued by the NRC Staff Director of the Office of Nuclear Reactor Regulation. Both the transmittal letter and the order indicate that the Staff Director's action only initiates an adjudicatory proceeding as a follow-up to the Notice of Violation. CEI fully intends to contest the license amendment and demand a hearing pursuant to Section 2.204 of the NRC Regulations, 10 C.F.R. §2.204 (1978). Thus, the NRC order issued June 25, 1979 and the transmittal letter of the same date are as irrelevant and immaterial to the instant proceeding as the earlier Notice of Violation. Moreover, they are duplicative of the Notice of Violation, adding no new evidence which would justify reopening of the record in the instant proceeding. "The Supreme Court has held that an agency need not reopen its record each time new circumstances arise. Otherwise, the administrative process would never be consummated [sic]." Pacific Alaska LNG Company, Docket Nos. CP75-140, et al. (Order issued June 22, 1979; mimeo, p. 2), citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

6. If the Commission were to reopen the record, then CEI requests that this proceeding be remanded to an 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.

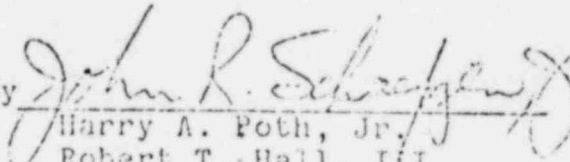
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7. Finally, CEI submits that City's Petition is superfluous. The order issued by the NRC Staff Director proposes that CEI file a revised Tariff (set forth in Appendix E to the order) with the Commission. In the event that CEI files a revised Tariff, such filing would initiate a new proceeding wherein the issues of law and fact could be fully developed and considered. Thus, there is no reason to delay Commission action in the instant proceeding by reopening the record.

WHEREFORE, for the foregoing reasons, The Cleveland Electric Illuminating Company respectfully requests that the Commission deny City's Petition.

Respectfully submitted,

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July 24, 1979

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V E R I F I C A T I O N

DISTRICT OF COLUMBIA) ss:

John R. Schaeffgen, Jr. being first duly sworn, deposes and says that he is attorney for The Cleveland Electric Illuminating Company ; that he has been duly authorized to execute, verify and file with the Federal Energy Regulatory Commission the foregoing document; that he has read the contents of same and that the statements contained therein are true and correct to his best information, knowledge and belief.

John R. Schaeffgen, Jr.
John R. Schaeffgen, Jr.

Subscribed and sworn to before
me this 24th day of
July, 1979

Judith D. Obenhein
Judith D. Obenhein
Notary Public

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My Commission Expires August 31, 1982

C E R T I F I C A T E O F S E R V I C E

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of 51.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C. this 24th day of
July, 1979.

John R. Schaeffgen, Jr.
John R. Schaeffgen, Jr.

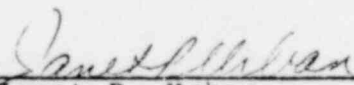
Of Counsel For:

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Comments of the Department of Justice upon the parties listed on the attachment via first class mail, postage prepaid this 13th day of September, 1979.



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