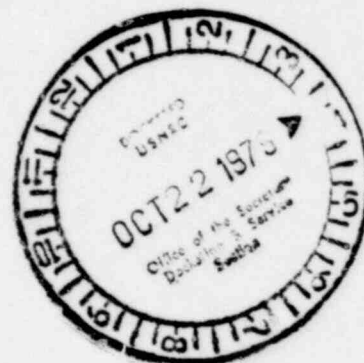


NRC PUBLIC DOCUMENT ROOM

October 22, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission



In the Matter of)	
)	
THE TOLEDO EDISON COMPANY and)	
THE CLEVELAND ELECTRIC ILLUMINATING)	Docket No. 50-346A
COMPANY)	
(Davis-Besse Nuclear Power Station,)	
Unit 1))	
)	
THE CLEVELAND ELECTRIC ILLUMINATING)	
COMPANY, ET AL.)	Docket Nos. 50-440A
(Perry Nuclear Power Plant,)	50-441A
Units 1 and 2))	
)	
THE TOLEDO EDISON COMPANY, ET AL.)	Docket Nos. 50-500A
(Davis-Besse Nuclear Power Station,)	50-501A
Units 2 and 3))	

OHIO EDISON COMPANY', AND
PENNSYLVANIA POWER COMPANY'S
PETITION FOR REVIEW OF ALAB-560

Pursuant to 10 CFR § 2.786(b), Petitioners, Ohio Edison Company and Pennsylvania Power Company ("OE/PP"), seek review of a decision by the Atomic Safety and Licensing Appeal Board ("ALAB") in the captioned matter which was entered on September 6, 1979 ("ALAB-560"). By order dated October 5, 1979, the Commission provided until October 22 to file this Petition.

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The Proceedings Below

On January 6, 1977, the Atomic Safety and Licensing Board ("ASLB") rendered its initial decision under § 105c* that "a situation inconsistent with the antitrust laws and the policies underlying those laws would be both created and maintained by the unconditioned license of the Davis-Besse and Perry nuclear stations." 5 NRC at 254-55.** The ASLB found that Petitioners had engaged in conduct which had the purpose and effect of restricting the competitive efforts of smaller competing systems in Petitioners' service territories. This conduct was deemed violative of various antitrust statutes, including sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as § 105c. The Licensing Board imposed

* Atomic Energy Act, Section 105c, 42 U.S.C. § 2135(c) (1976)

** In March 1973 and August 1974, Petitioners requested construction permits for the Perry Nuclear Units 1 and 2 and Davis-Besse Units 2 and 3. These applications were made jointly with the other members of the Central Area Power Coordination Group ("CAPCO"), the Cleveland Electric Illuminating Company ("CEI"), The Toledo Edison Company ("Toledo"), and Duquesne Light Company ("Duquesne"). The hearing commenced following the receipt of adverse advice letters from the Attorney General and consolidation of these applications with an earlier application by CEI and Toledo involving Davis-Besse Nuclear Unit 1. The City of Cleveland was permitted to intervene in these proceedings and the Department of Justice and the Staff of the Nuclear Regulatory Commission participated as complaining parties.

ten remedial conditions requiring Petitioners, inter alia, to provide a variety of coordination and wheeling services to smaller systems in the combined CAPCO service territory, and permit such systems to obtain ownership shares in all nuclear units, including the Davis-Besse and Perry Units, for which Petitioners seek a construction permit or operating license over the next twenty-five years.

All Applicants and the City of Cleveland appealed the initial decision. On September 6, 1979, in an unusual two opinion pronouncement,* the Appeal Board affirmed the ASLB with certain modifications. The ALAB was divided on the appropriate scope of remedial license conditions.**

* Two members of the Appeal Board decided to publish a draft opinion of a third, departed, member. They ruled that where they agreed with that opinion it became the Board's decision and that where they disagreed it became a dissent. This procedure may, itself, constitute reversible error since there is no provision in the Commission's Rules of Practice for two members of the Appeal Board to render a decision after the departure of the third member. 10 C.F.R. § 2.787(a); Cf. 10 C.F.R. § 2.721(d). Alternatively, adoption of this unusual procedure and the absence of full judicial interplay among the three members of the Appeal Board represent additional reasons for the Commission to scrutinize the Appeal Board's actions by granting the instant Petition.

** Relying upon the ALAB's earlier decision in Consumers Power Company (Midland Plant, Units 1 and 2), 6 NRC 392 (1977), one member would have limited the availability of the remedial conditions to electric systems acquiring access to nuclear power, whether by ownership share, unit participation, or contractual pre-purchase of power. ALAB-560 at 290. The remaining members of the ALAB would not accede to this limitation.

The Petition for Review

Petitioners submit that the ALAB has erroneously perpetuated or created unsubstantiated findings of fact, conclusions of law, and statements of policy which were challenged before it by Petitioners. The Appeal Board erroneously concluded:*

1. That Petitioners' participation in CAPCO created an identity of interests with the other Applicants which permitted antitrust review under 105c of all as a group and justified findings of OE/PP's vicarious responsibility for the acts of other Applicants.

2. That license conditions imposed on Petitioners need not bear a reasonable relationship to any situation allegedly inconsistent with the antitrust laws which would be created or maintained by Petitioners' activities under the license.

* This is by no means an exhaustive list. Space requirements dictate its limitation to general statements of the most significant errors of the ALAB. The substantial errors of the ASLB in each of these areas were raised before the Appeal Board in exceptions of Ohio Edison Company and Pennsylvania Power Company's Initial Decision dated February 7, 1979 and Applicants' Appeal Brief in Support of Their Individual and Common Exceptions To the Initial Decision, see especially pp. 212-259.

3. That conduct scrutinized and evaluated by this Commission on antitrust grounds need not bear a reasonable relationship to activities under the licenses sought.

4. That the CCCT* area was the relevant geographic market for purposes of antitrust analysis of OE/PP.

5. That Petitioners refused to make available to other electric entities certain benefits which they themselves obtained through their membership in CAPCO, that the "P/N" formula was rigidly applied as a condition of CAPCO membership, and that the relatively small size and poor operational records of two potential applicants was not itself a justification for their exclusion from CAPCO.

6. That Petitioners possess monopoly power and that they have abused that power by engaging in territorial allocations, improper acquisitions, attempts to fix prices, contractual restrictions, refusals to deal, restraints on alienation, and group boycotts.

7. That a per se analysis of antitrust allegations was appropriate in a § 105c proceeding.

* The Combined CAPCO (Central Area Power Coordination Group) Company Territories.

8. That the S.E.C.'s review, under the Public Utility Holding Company Act, of Ohio Edison's purchase of municipal electric systems was irrelevant for purposes of § 105c.

9. That under Ohio or Pennsylvania law municipalities are entitled to compete freely for retail loads located outside their boundaries.

10. That Petitioners acted unreasonably and in a manner inconsistent with the antitrust laws during the WCOE* negotiations and thereby denied WCOE reasonable and practical access to nuclear generation.

11. That Petitioners inflicted a "price squeeze" on municipalities purchasing power at wholesale by charging them significantly higher rates than Petitioners charge retail industrial customers for comparable sales and that the difference between these rates is not cost justified.

12. That Petitioners' due process rights were adequately protected.

The Commission Should Grant Review
of the Decision Below

ALAB-560 was only the second "full fledged"

* Wholesale customers of Ohio Edison.

Licensing Board antitrust decision on the merits to come before the ALAB. ALAB-560 at 5. The first, Midland,* did not come before the Commission for review. To date all Commission decisions construing section 105(c) have been decided in the context of various procedural matters ** Thus, the ALAB'S interpretation of the Commission's duties under section 105, its fundamental errors in construction and application of antitrust law, and the majority's expansive view of appropriate remedies have not been reviewed by the Commission in this or any analogous proceeding.

Lack of unanimity within the Commission on these critical issues is demonstrated by the Licensing Board

* There an ALAB composed of two of the three members of the ALAB in the instant case reversed a decision of the Licensing Board which found that the granting of a license for the Midland nuclear plant would not create or maintain a situation inconsistent with the antitrust laws. In reversing that decision, the ALAB in Midland took a diametrically different approach to the law and facts than had the lower Board. The two members of the Midland Appeal Board who were members of the Appeal Board herein were those filing the majority opinion. No petition for review was filed in Midland.

** See, e.g., Florida Power & Light Co. (St. Lucie Plant, Unit 2), 7 NRC 939 (1978); Houston Power & Light Co. (South Texas Project, Units 1 and 2), 5 NRC 1303 (1977); Louisiana Power & Light Co. (Waterford Station, Unit 3), 6 AEC 48 and 6 AEC 619 (1973). See also Ft. Pierce Utilities Authority v. NRC, Dkt. 77-1925, Dkt. 77-2101, (D.C. Cir. March 23, 1979), cert. denied, U.S. (1979).

decision in Midland, the dissenting opinion below, and the "somewhat different" approach to these vital legal issues taken by the Licensing Board in Alabama Power Company (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), 5 NRC 804, 5 NRC 1482 (1977) (appeal pending). See Midland, 6 NRC at 997 n.407.

The Appeal Board's view of the Commission's antitrust role is particularly suspect.* That view cannot be squared with the Commission's admonition in Waterford II, supra:

"[T]he specific standard which Congress required for antitrust review--'whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a'--has inherent boundaries. It does not authorize an unlimited inquiry into all alleged anticompetitive practices in the utility industry. The statute involves license activities, and not the electric utility industry as a whole. If Congress had intended to enact a broad remedy against all anticompetitive practices throughout the electric utility industry, it would have been anomalous to assign review responsibility

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- * The Appeal Board rejected or severely limited any responsibility to consider or harmonize public interest considerations in performing its antitrust review under section 105c(5) or imposing remedial conditions under section 105c(6). (ALAB-560 at 30-40, 263-65) Rather, the Board appeared to equate its antitrust authority with that of a federal district court. (ALAB-560 at 48-57) See also ALAB-560 at 300 ("[W]e are the only administrative agency with authority to protect, under the antitrust laws, the right of the municipal and cooperative electric systems to buy wholesale power....").

to the Atomic Energy Commission, whose regulatory jurisdiction is limited to nuclear facilities. It is the status and role of these facilities which lie at the heart of antitrust proceedings under the Atomic Energy Act." 6 AEC at 620 (emphasis in original)

The detrimental impact of ALAB-560 will be felt not only by Petitioners but in pending and future proceedings under section 105c. Additionally it may affect litigation in other fora. Refusing to review the decision* will let stand a message ALAB has now twice sent to America's utilities, to wit, that application for NRC licensing approval will subject the applicant to the most extensive and unlimited antitrust review, with procedural and evidentiary standards substantially less stringent than those available in federal district courts, with substantial per se treatment of alleged offenses, and with the likely imposition of harsh and far reaching remedies having little or no relationship to the proposed nuclear plant.

It is submitted that the decision below takes the Commission far beyond the statutory responsibility which Congress envisioned in enacting 105c. Even assuming that

* Exercise of that discretion will seldom be more clearly mandated than in a case which contains the first "full fledged" record below.

the Commission shares the view of the Appeal Board, it is imperative that the Commission, itself, speak to the significant legal and antitrust policy questions decided by the Appeal Board, many of which constitute issues of first impression.

Respectfully submitted,

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Dated: October 22, 1979

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Units 2 and 3))	50-501A

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing
"OHIO EDISON COMPANY'S AND PENNSYLVANIA POWER COMPANY'S
PETITION FOR REVIEW OF ALAB-560" have been served on the
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the Washington, D. C. area, and by mailing copies, postage
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