UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY	)	Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	50-500A
	)	50-501A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket Nos. 50-440A
	)	50-441A
(Perry Nuclear Power Plant Units 1 and 2)	)	

ANSWER OF THE CITY OF CLEVELAND TO PETITION OF OHIO EDISON COMPANY AND PENNSYLVANIA POWER COMPANY'S PETITION FOR REVIEW OF ALAB-560

On October 22, 1979, Ohio Edison Company (OE) and Pennsylvania Power Company (PP) filed their petition for review of the Atomic Safety and Licensing Appeal Board's decision of September 6, 1979. City of Cleveland, a party to the proceedings below, makes this answer in opposition.

Findings of Fact

To the extent to which the petition could be construed to request a review of findings of fact, it must be denied as clearly contrary to the Commission's Rules, 10 CFR Section 2.786(b)(4)(ii). In this regard, assignment of error number 1 must be denied, assignment of error number 4 must be denied, assignment of error number 5 must be denied, assignment of error number 10 must be denied, and assignment of error number 11 must be denied. Each

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of those assignments deals with matters that are factual in nature. Since no allegation is made, and none could be, that the facts sought to be reviewed were decided in a manner contrary to the resolution of the same issue by the Licensing Board. None of the errors questions the law applied; rather, each is addressed to the facts found to be true.

Issues Treated In Answer
To Other Petitions

Certain of the matters raised by OE and PP were also raised by Duquesne Light or The Cleveland Electric Illuminating Company (CEI) and The Toledo Edison Company (TECO). In the interest of administrative economy, the City will not repeat here what it has said in response to those petitions but will merely indicate which assignments of error have been treated elsewhere. Issue number 7, dealing with the per se application of antitrust rules in Section 105(c) proceedings has been treated in City's response to the joint petition of CEI and TECO. Issue number 9 has been treated in the City's answer to the petition of Duquesne Light and the joint petition of CEI and TECO. Issue number 2, dealing with the scope of relief has been treated in the City's answer to the joint petition of CEI and TECO.

That Conduct Scrutinized Under
Section 105(c) Must Be Limited
To Activities Under The Licenses.

OE and PP argue that the Appeal Board erred in holding that conduct scrutinized and evaluated by this Commission on antitrust grounds need not bear a reasonable relationship to activities under the licenses sought. This contention is at odds with the

entire course of antitrust litigation before the Commission. The Commission itself in Louisiana Power & Light Company, CLI-73-7, 6 AEC 48 (Waterford I), stated that in most circumstances its antitrust review "would not be limited to construction and operation of the facility to be licensed". And in Waterford II, 6 AEC 619, the Commission said that the "relationship of the specific nuclear facility to applicants total system or power pool should be evaluated in every case".

The Joint Committee Report Section by Section Analysis of Section 105 states at page 31:

> The standard applies to the activities of the license applicant. The activities of others, such as designers, fabricators, manufacturers, or suppliers of materials or services, who, under some kind of direct or indirect contractual relationship may be furnishing equipment, materials, or services for the licensed facility would not constitute 'activities under the license' unless the license applicant is culpably involved in the activities of others that fall within the ambit of the standard.

It is clear then that what Congress intended by the term "activities under the license" was to focus on activities of the license applicant rather than on the activities of those who may have some peripheral involvement but are not themselves applicants.

Moreover, the limitation on the Commission's jurisdiction advocated by OE and PP makes the reference to "maintaining a situation" nonsense. The only way to determine whether the situation

will be maintained by activities under the license is to first determine whether a situation exists. Determining whether a situation exists requires a review of an applicant's activities prior to issuance of the license.

Further, the very contention made here was dealt with in comprehensive fashion by the Appeal Board in Kansas Gas and Electric Company (Wolf Creek) ALAB-279 as long ago as June 30, 1975. The Commission did not exercise its power to review that decision and it has stood as the guiding doctrine for more than four years.

Finally, OE and PP fail to make any showing that this issue was raised before the Appeal Board.

This issue should not be accepted for review.

Alleged Error In The
Treatment of SEC's Review
Of OE Acquisition's Of
Municipal Systems

OE claims that the Appeal Board erroneously held that SEC review of OE's acquisition of certain municipal systems was irrelevant for purposes of commission review under Section 105(c). The Appeal Board's discussion of municipal acquisitions is found at pages 251-55 of the Slip Opinion. Nowhere does the Appeal Board state that SEC review was irrelevant. The Licensing Board's findings on this issue are found at pages 5 NRC 188-90. Nowhere does the Licensing Board state that SEC review was irrelevant.

While it is obvious from the fact that this issue was not decided in OE's favor, it is not apparent from the record that OE's evidence was dismissed as irrelevant. Even if certain

evidence was considered irrelevant, it would not constitute an important antitrust issue worthy of review by the Commission. Commission review was never intended to be a third level of review of all issues raised by the parties. Rather, it is intended to effectuate the Commission's rule as a policy maker and watchdog over its procedures and jurisdiction. If the Commission is to engage in the day to day function of review of Licensing Board decisions, there is no need for an Appeal Board.

Alleged Violations Of OE and PP's Due Process Rights

OE and PP allege generally that their due process rights were not adequately protected. Perhaps the best that can be said for this issue was that it was stated briefly. All of the applicants in this proceeding were accorded more than due process. They were permitted to file a brief that greatly exceeded the page limits established by the Licensing Board. As a result, the applicants obtained a substantial advantage over the other parties. OE and PP as well as the other applicants engaged in substantial discovery and had the opportunity to despose whoever they wished. During the trial of the issues applicants were accorded wide latitude to cross-examine and to offer testimony. Applicants selected a trial strategy of attempting to narrow the focus of this proceeding to the relationship between the City of Cleveland and CEI. Their strategy failed and hence their whinning collection of trivial gripes.

Apparently OE and PP are renewing their complaint that they had inadequate notice of the charges against them, particularily

their relationships with their wholesale customers.

Well before trial, OE and PP were put on notice of the issues to be tried. Nonetheless, they delayed several months--until the very eve of trial to raise their due process complaint. Significantly during the deposition of Mr. Firestone, an OE Vice-President, individual counsel for OE did not object to questions dealing with OE's relations with its wholesale customers. It is also significant that the broad document discovery afforded City and the Department of Justice and NRC staff included requests for documents relating to OE and PP relationships with the municipal and cooperative electric entities in their service areas.

Finally, OE and PP argue generally that if the Appeal Board's opinion is allowed to stand, the investor-owned utilities will be put on notice that if they apply for a license to construct a nuclear plant, they will be subject to antitrust review. Congress put the utilities on notice when the Atomic Energy Act was amended in 1970. Only those utilities which have engaged in anticompetitive activities have anything to fear from the process. In fact, most of the major utilities have already chosen to submit themselves to antitrust review and have either been willing to accept reasonable license conditions or have been found free of anticompetitive acts. Even if the threat implied by OE and PP were true, it would provide no basis for emasculating the antitrust review process. Contrary to the belief of OE and PP, investor-owned utilities are not clients of the Commission to be insulated from the will of Congress.

Wherefore, for the foregoing reasons, the City of Cleveland

prays that the petition for review filed by OE and PP be denied.

Respectfully submitted,

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UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Answer of the City of Cleveland to Petition of Ohio Edison Company and Pennsylvania Power Company's Petition for Review of ALAB-560" were served upon each of the persons listed on the attached Service List by mailing copies, postage prepaid, all on this 30th day of October, 1979.

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