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September 27, 1979

Mr. Harold R. Denton
Director, Office of
Nuclear Reactor Regulation
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: In the Matter of
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.
50-400A, 50-441A

Dear Mr. Denton:

On September 13, 1979, the Department of Justice ("DOJ") submitted comments opposing the request of The Cleveland Electric Illuminating Company ("CEI") to modify the immediately effective aspect of your June 25, 1975 Order. Those comments, as well as an additional filing by counsel for the City of Cleveland on September 17, 1979, reflect a significant misunderstanding as to the basis for CEI's request that your June 25 Order be modified.

The fact of the matter is that the June 25 Order -- directing that the Davis-Besse operating license and the Perry construction permits be modified without first affording CEI an evidentiary hearing -- constitutes exceptional administrative action. While CEI does not doubt the authority of the Director of Nuclear Reactor Regulation to issue such a directive in appropriate circumstances -- as, for example, in the case of Three Mile Island related matters --

our position is that no cause for the exercise of that authority exists here. It is for this reason that CEI requested modification of the immediately effective aspect of your June 25 Order.

In our August 2, 1979 letter, we pointed out that an immediate modification of the conditions attached to the Davis-Besse and Perry operating license and construction permits would, among other things, prejudice CEI's appeal rights before the Federal Energy Regulatory Commission ("FERC") with respect to CEI's proposed transmission services tariff. In response, DOJ claims that an order requiring CEI to file a revised tariff now would not render its FERC appeal moot, and, even if mootness did result, the Commission is obligated "to issue such an order if it determines that CEI has willfully violated its license conditions".

Disposing of the latter claim first, the June 25 Order plainly includes no finding by the Director of a "willful violation", and certainly does not premise the "immediate effectiveness" ruling on any such determination. Instead, it specifically provides CEI with an opportunity for hearing on the matters discussed in the Order. CEI's request for modification seeks a deferral of any action on the part of the agency until CEI has been allowed to respond to the allegations of the NRC Staff concerning a disputed violation of license conditions.* Fundamental fairness and traditional concepts of due process support such a course of action in the present circumstances.

With respect to DOJ's analysis of the mootness issue, and its theory of "pancaking", the argument advanced rests on a basic misunderstanding of FERC procedures. As DOJ notes in footnote 6, page 9, no entity has yet to avail itself of CEI's wheeling tariff. Thus, the interesting discussion by DOJ about a "locked in" period under one tariff following the filing of a second tariff, is wholly irrelevant in CEI's case. That situation traditionally has

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* In testimony before the Power Authority of the State of New York ("PASNY") on August 30, 1979, the Director of Law of the City of Cleveland, testifying in support of AMP-Ohio's application for PASNY power for the City, advised that CEI's proposed transmission services tariff of January 27, 1978 "would allow for the wheeling and distribution of Niagara project power to Cleveland". He explicitly acknowledged CEI's commitment "to expedite" the required procedures so that the wheeling of PASNY power "can begin without delay".

significance where, as the Southern California Edison case cited by DOJ indicates, there exists a live dispute between adversaries regarding service actually taken under the first tariff at the time of the filing of a superceding tariff. There is in such instances reason to invoke the "locked in" concept for the period that service was taken in order to resolve the disputed issues.

In the present circumstances, by contrast, FERC has no reason to regard the CEI tariff of January 27, 1978 as being "locked in" for purposes of resolving a live dispute over service taken thereunder, since no such dispute exists. Instead, FERC can view the January 27 tariff as being fully superceded by the later tariff filed by CEI which conforms to the NRC formulation. Dismissal of CEI's present appeal at FERC would then be required on the ground of mootness, denying CEI its appeal rights as to the January 27, 1978 tariff, and effectively depriving it as well of any opportunity to be heard in any forum on its objections to the tariff proposed by the NRC prior to the date when that tariff takes effect. We cannot believe that the Director intended any such result.

DOJ makes one other point in its comments which, while not directly relevant to the matter at hand, warrants a brief reply. At footnote 3, page 5, DOJ claims that the tariff required by FERC still does not bring CEI into compliance with the license conditions because it does not require CEI to reduce transmission service to the other CAPCO companies and it does not require CEI to consider disclosed transmission needs of non-CAPCO entities. Apparently, this claim is based on DOJ's view that "[t]he imposition of antitrust license conditions by the NRC impliedly requires an applicant to file with FERC a tariff which faithfully reflects the NRC's conditions" (DOJ letter at 9-10).

That view of the relationship between NRC license conditions and a FERC tariff is just plain wrong, and, we believe, may be the underlying basis of the current dispute between the parties. The correct statement of the NRC-FERC relationship is that a tariff filed with FERC cannot be inconsistent with, or contrary to, the Commission's license conditions; the CEI-filed tariff is neither.

There never has been, however, and there never can be, a requirement that every aspect of the Commission's license conditions be reflected in a FERC tariff. Obviously, the license

condition addressing CEI's obligation to offer access to nuclear units is not appropriate for inclusion in a FERC tariff. Similarly, the license condition directing that CEI make provision for disclosed transmission needs of non-CAPCO entities -- which is a planning requirement -- would be inappropriate for inclusion in a FERC tariff. And, where FERC finds no need to include a Commission license condition in a tariff -- as in the case of the 5% transmission reduction requirement -- that also would be inappropriate for inclusion in a FERC tariff. Obviously, the absence of such provisions in a FERC tariff does not mean that CEI is free to disregard these license conditions. Rather, it only means that the conditions will be implemented in a manner that is outside of a FERC tariff. There is nothing unlawful, unreasonable or inappropriate about proceeding in this fashion.

For all these reasons, the Director's Order, as reflected in the Supplemental Order of August 6, 1979, should stand.

Respectfully submitted,

Wm. Bradford Reynolds
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