UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

THE PETITION OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY FOR REVIEW OF ALAB-560

Pursuant to Section 2.786(b)(1) of the Commission's Rules of Practice, 10 C.F.R. § 2.786(b)(1) (1979), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TECO"), two of the five Applicants involved in the above-captioned consolidated antitrust proceeding,[1/] hereby petition the Commission for review of ALAB-560, issued on September 6, 1979. Commission review is required because the Appeal Board's decision concerns important questions of fact, law and policy relating to the proper interpretation of Section 105(c) of the Atomic Energy Act, and to the manner in which

1/ The other three Applicants are: Ohio Edison Company, Pennsylvania Power Company, and Duquesne Light Company.

M

the antitrust laws should be applied thereunder to the electric utility industry, which have not yet been addressed by the Commission and have been wrongly decided below. In accordance with the requirements of Section 2.786(b)(2), CEI and TECO state the following in support of this review petition:

A. Concise Summary of ALAB-560

On January 6, 1977, the Atomic Safety and Licensing Board ("Licensing Board"), convened to undertake Section 105(c) antitrust review (42 U.S.C. § 2135(c) (1976)) of the activities under the Davis-Besse and Perry licenses, announced its initial decision. See LBP-77-1, 5 N.R.C. 133 (1977). The Licensing Board found one or more situations inconsistent with the antitrust laws to exist within the geographic area identified as the combined CAPCO Company Territories ("CCCT"),[2/] and it therefore ordered that ten conditions be attached to the requested licenses.[3/]

The Applicants separately filed extensive exceptions to the initial decision with the Atomic Safety and Licensing Appeal Board ("Appeal Board"). The central thrust of those

---

2/ CAPCO is an acronym for the Central Area Power Coordination Group, a pooling association to which the five Applicant utilities belong. For convenience, the Licensing Board adopted the abbreviation CCCT to describe the outer boundary drawn around the five service areas of the Applicant utilities. The service areas extended generally across northern Ohio and into western Pennsylvania.

3/ The five Applicants moved for a stay of the license conditions pending appeal. The motion was denied by both the Licensing Board (see LBP-77-7, 5 N.R.C. 452 (1977)) and the Appeal Board (see ALAB-385, 5 N.R.C. 621 (1977)).

exceptions was that the legal approach of the Licensing Board to its antitrust review responsibilities was fundamentally in error. It was pointed out that the manner in which the Licensing Board framed its antitrust inquiry necessarily condemned pooling arrangements among electric utilities without regard to industry structure, the purpose and intent for such a formation, and the benefits achieved thereby. Having so framed the inquiry, the Licensing Board had no difficulty determining that the questioned conduct was inconsistent with the Sherman Act. It saw no need to consider, let alone grapple with and resolve, the truly central issues raised by the inherent structural and economic characteristics of the industry, the extant regulatory policies at both the federal and state levels, and the public interest consequences associated with the questioned conduct.

On review, the Appeal Board adopted a similarly defective framework for its legal analysis. In so doing, it again largely ignored the arguments advanced by CEI, TECO and the other Applicants with regard to the manner in which antitrust principles should be applied in an industry which has long been subject to extensive federal and state regulation -- electing in certain instances to reformulate positions advanced so as to be better able to dismiss them. On this basis the Appeal Board: (1) rejected a claim (never advanced by the Applicants) "that the electric power industry is impliedly exempted from the full rigors of the antitrust laws" (ALAB-560, slip op. at 30-32);

(2) dismissed out-of-hand -- due to a misreading the Commission's decision in Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 N.R.C. 1303 (1977) ("South Texas") -- the notion that Section 105(c) antitrust review must be sensitive to and fully cognizant of legitimate "public interest" considerations (ALAB-560, slip op. at 32-35); and (3) brushed aside, as "an artful variation of the theme * * * just rejected", the request of the Applicants to "harmonize" antitrust enforcement with the competing policies of other regulatory agencies and statutory proscriptions (ALAB-560, slip op. at 35-40).

In addition to committing fundamental error in connection with its antitrust analysis of the liability question, the Appeal Board, by a divided vote, also resolved the issues raised as to the scope of relief incorrectly.[4/] Contrary to the thrust of the Commission's decisions in Louisiana Power & Light Co. (Waterford Station, Unit 3), CLI-73-7, 6 A.E.C 48 (1973) ("Waterford I"), and CLI-73-25, 6 A.E.C. 619 (1973) ("Waterford II"), the Appeal Board majority ordered that Applicants make available a range of coordination services without regard to whether a requesting entity is participating in a nuclear power plant or whether such coordination services are necessary to ensure meaningful access to nuclear-generated power (ALAB-560, slip op. at 48-58).

4/ In a divided opinion (compare ALAB-560, slip op. at 48-57 with id. at 285-91), two members of the Appeal Board favored an expansive view of this Commission's authority to order antitrust relief, one which divorces remedy from Applicants' activities under the nuclear licenses. The third Appeal Board member viewed the relief question more narrowly, observing (and we believe quite correctly) that the unbounded reading given to Section 105(c) by the majority in this area is without support in the statutory language or in the legislative history.

B. Concise Statement Supporting Exercise of Commission Review

This case brings before the Commission for review the first fully adjudicated antitrust proceeding. As such, it provides the Commission with its first opportunity to address many of the substantive antitrust matters that have received divergent treatment from various licensing boards.[5/] In light of the misguided approach taken below, Commission consideration of, and informed decision on, the important questions of law and policy in this area are sorely needed. There are at the present time three ongoing major antitrust reviews pending before licensing boards.[6/] The manner in which Section 105(c) should be interpreted and applied in those proceedings is, in the final analysis, for the Commission to say. It has not yet spoken to these issues in any comprehensive fashion.[7/] The instant case furnishes an

5/ Licensing boards have issued initial decisions in three antitrust proceedings following a full adjudication of the issues: Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-75-39, 2 N.R.C. 29 (1975), rev'd, ALAB-452, 6 N.R.C. 892 (1977); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1-3) and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-77-1, 5 N.R.C. 133 (1977), aff'd as modified, ALAB-560, 10 N.R.C. (1979); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), LBP-77-24, 5 N.R.C. 807 (1977) (liability), LBP-77-41, 5 N.R.C. 1482 (1977) (relief), appeal pending.

6/ See Florida Power & Light Co. (St. Lucie Plant, Unit 2), Docket No. 50-389A; Houston Lighting & Power Co. (South Texas Project, Units 1 & 2) and Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), Docket Nos. 50-498A, 50-499A, 50-445A and 50-446A; Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), Docket No. P-564A.

7/ In four cases, the Commission has provided substantive guidance to its licensing and appeal boards on issues preliminary to the actual antitrust hearing. E.g., Florida Power & Light Co. (Continued next page)

appropriate vehicle for the Commission now to do so, both to correct the errors below and to provide useful and necessary guidance for the future.

The Commission's regulations governing review petitions expressly provide for review of cases that "constitut[e] an important antitrust question" (10 C.F.R. § 2.786(b)(4)(i)). We cannot conceive of a more compelling example of what was contemplated by this reference than the first fully adjudicated review proceeding under Section 105(c). This is especially so when the analytical framework of the Appeal Board is examined in light of emerging antitrust doctrine. The determined, albeit misdirected, effort in ALAB-560 to condemn Applicants on the basis of an overly expansive reading of the Sherman Act is not only faulty on its own terms, but also is out of step with recent antitrust adjudications by both the courts and sister agencies.

Thus, the Appeal Board's all too frequent use of the per se doctrine to find antitrust inconsistencies requires Commission review in light of the growing disenchantment with that kind of unthinking response in the antitrust arena, as indicated most recently by the United States Supreme Court last Term in Broadcast Music, Inc. v Columbia Broadcasting System, Inc.,

---

7/ (Cont'd)
(St. Lucie Plant, Unit 2), CLI-78-12, 7 N.R.C. 939 (1978); Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 N.R.C. 1303 (1977); Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 A.E.C. 619 (1973) Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7, 7 A.E.C. 48 (1973). None of these cases addressed the fundamental questions raised here as to the manner in which Sections 1 and 2 of the Sherman Act should be applied to the electric utility industry under Section 105(c).

99 S. Ct. 1551, 1557, 1564 (1979). Similarly, Commission review is demanded by cases like Berkey Photo, Inc. v Eastman Kodak Co. F.2d , 1979-1 Trade Cases (CCH) ¶ 62,718 (2d Cir. 1979), recently decided by the Second Circuit Court of Appeals. The Court there flatly rejected the Sherman 2 monopolization analysis employed by the Appeal Board below -- which erroneously assumed the existence of monopoly power on the basis of size alone. As the Second Circuit correctly pointed out: "Although [monopoly] power may be derived from size, the two are not identical". Id. at p. 78,003; and see id. at pp. 78,004-05.

Of equal importance to the Commission's consideration of the instant review petition is the decision a year ago last summer of the Securities and Exchange Commission approving the acquisition of Columbus and Southern Ohio Electric Company by Ohio Power Company. See American Electric Power Co., Admin. Proc. File No. 3-1476 (S.E.C. July 21, 1978). There, the SEC spoke forcefully about the limited role that competition can be expected to play in the electric utility industry, with particular reference to essentially the same geographic area that was considered in ALAB-560. The Appeal Board below, while recognizing that the considered opinion of this sister agency is at odds with a number of its conclusions, perfunctorily dismisses the contrary authority -- without offering a single reason -- by noting simply that the "SEC opinion is not binding upon us * * *" (ALAB-560, slip op. at 122).

This points up yet another fundamental flaw in the Appeal Board's antitrust approach. The electric utility industry

has been subject to close regulatory supervision by a number of federal and state agencies, including the Nuclear Regulatory Commission. Heretofore, industry structure and mode of operation have been shaped in large part by regulatory regimes that have as their predominant responsibility the protection of the public interest. In carrying out this mandate, the decision was made long ago, and has not been compromised since, that the public interest can best be served by an electric utility industry marketplace structured by comprehensive regulation and not by freewheeling competition.

The Appeal Board's antitrust approach is plainly in conflict with this general regulatory attitude of sister agencies. Notwithstanding a similar admonition to this Commission to perform its assigned responsibilities in a manner which is fully sensitive to overriding "public interest" considerations, the Appeal Board explicitly elected to disregard the public interest in its application of the antitrust laws. As a result, the Appeal Board has misused its authority under Section 105(c) to blindly restructure the electric utility industry in terms of a hypothetical competitive marketplace, notwithstanding the historic resistance to any such approach by sister agencies as being contrary to the public interest.

It has never been Applicants' contention that regulation supplants antitrust enforcement in the electric utility industry. However, the antitrust laws cannot properly be applied in the present context in total disregard of "public interest" considerations

which have heretofore largely dictated the structural framework of this industry. If Section 105(c) is to be used as a vehicle to interject competition into a marketplace which heretofore has been shaped by regulation -- precisely because it has been determined that the public interest is ill-served in a competitive framework -- such pronouncement must come from the Commission itself, not from one of its intermediary review boards. Accordingly, Commission review of ALAB-560 is essential.

C. Concise Statement of Errors in ALAB-560 and Where Such Matters were Previously Raised

The position of CEI and TECO during Appeal Board review of the initial decision is set forth in their respective exceptions filed on February 7, 1977, and in the briefs lodged with the Appeal Board in support of those exceptions. Each of the five errors listed below was identified as an exception and fully briefed to the Appeal Board:

> 1. The Appeal Board erred in holding certain conduct of CEI, TECO and the other Applicant utilities per se inconsistent with Section 1 of the Sherman Act.
>
> 2. The Appeal Board erred in holding certain conduct of CEI, TECO and the other Applicant utilities inconsistent with Section 1 of the Sherman Act as unreasonable restraints of trade without any meaningful assessment of such conduct in the context of the inherent structural and economic characteristics of the industry and the extant regulatory policies at both the federal and state levels.
>
> 3. The Appeal Board erred in holding certain conduct of CEI, TECO and the other

Applicant utilities inconsistent with Section 2 of the Sherman Act in that it employed an improper standard for measuring monopoly power and further failed to consider whether any of the Applicants demonstrated a "deliberate or willful purpose to exercise monopoly power".

4. The Appeal Board erred as to the scope of Commission antitrust review responsibility by failing to determine whether the posited antitrust inconsistencies would be created or maintained by activities under the license.

5. The Appeal Board majority erred in failing to limit the prescribed relief to only that which is necessary to ensure meaningful access to nuclear-generated power.

WHEREFORE, CEI and TECO respectfully request that the instant petition for Commission review of ALAB-560 be granted.

Dated: October 22, 1979.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: W. Bradford Reynolds

Wm. Bradford Reynolds
Robert E. Zahler
1800 M Street, N.W.
Washington, D. C. 20036

Counsel for The Cleveland Electric Illuminating Company and The Toledo Edison Company

Of Counsel:
John Lansdale
Alan P. Buchman
Squire, Sanders & Dempsey
Donald H. Hauser
The Cleveland Electric Illuminating Company
Michael M. Briley
Paul M. Smart
Fuller, Henry, Hodge & Snyder
The Toledo Edison Company

1243 300

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket No. 50-346A
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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "The Petition Of The Cleveland Electric Illuminating Company And The Toledo Edison Company For Review Of ALAB-560" were served upon each of the persons listed on the attached Service List, by hand delivering copies to those persons in the Washington, D.C. area, and by mailing copies, postage prepaid, to all others, all on this 22nd day of October, 1979.

Wm. Bradford Reynolds

1243 301

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

SERVICE LIST

Alan S. Rosenthal, Esquire
Chairman, Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jerome E. Sharfman, Esquire
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman, Esquire
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ivan W. Smith, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John M. Frysiak, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20006

Joseph Rutberg, Esquire
Benjamin H. Vogler, Esquire
Roy P. Lessy, Jr., Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

1243 302

Donald L. Flexner, Esquire
Melvin G. Berger, Esquire
Janet R. Urban, Esquire
Antitrust Division
U.S. Department of Justice
P.O. Box 481
Washington, D.C. 20044

Reuben Goldberg, Esquire
Goldberg, Fieldman & Letham, P.C.
Suite 650
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Jack M. Schulman, Esquire
Director of Law
Robert D. Hart, Esquire
First Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

Frank R. Clokey, Esquire
Special Assistant Attorney General
Room 219
Towne House Apartments
Harrisburg, Pennsylvania 17105

Donald H. Hauser, Esquire
Victor F. Greenslade, Jr., Esquire
William J. Kerner, Esquire
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Michael M. Briley, Esquire
Paul M. Smart, Esquire
Fuller, Henry, Hodge & Snyder
Post Office Box 2088
Toledo, Ohio 43603

Russell J. Spetrino, Esquire
Thomas A. Kayuha, Esquire
Ohio Edison Company
76 South Main Street
Akron, Ohio 44308

Terence H. Benbow, Esquire
Steven A. Berger, Esquire
Steven B. Peri, Esquire
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Walter T. Wardzinski, Esquire
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

David McNeil Olds, Esquire
Reed Smith Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, Pennsylvania 15230

Joseph A. Rieser, Jr., Esquire
Reed Smith Shaw & McClay
Suite 900
1150 Connecticut Avenue
Washington, D.C. 20036

James R. Edgerly, Esquire
Secretary and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, Pennsylvania 16103

John Lansdale, Esquire
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Alan P. Buchmann, Esquire
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

Edward A. Matto, Esquire
Richard M. Firestone, Esquire
Karen H. Adkins, Esquire
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Christopher R. Schraff, Esquire
Assistant Attorney General
Environmental Law Section
361 East Broad Street, 8th Floor
Columbus, Ohio 43215