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

On October 22, 1979, The Cleveland Electric Illuminating Company (CEI) and The Toledo Edison Company (TECO) filed their joint petition for Commission review of ALAB-560, issued on September 6, 1979. CEI and TECO listed five errors which they request the Commission to consider. The City of Cleveland, a party to the proceeding below, makes this answer in opposition to the joint petition.

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PER SE RULES

In their first statement of error, CEI and TECO claim that is was error for the Appeal Board to hold that certain conduct engaged in by Applicants was per se inconsistent with Section 1 of the Sherman Act. Since no particular applications of a per se rule are complained of, apparently CEI and TECO are asserting

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that no per se application can be made to electric utilities. In support of their contention, CEI and TECO rely upon some ephemeral "growing disenchantment with that kind of unthinking response in the antitrust arena" citing Broadcast Music, Inc. v Columbia Broadcasting System, Inc., 99 S Ct. 1551 (1979).

Unfortunately for CEI and TECO, BMI does not ennunciate any new position regarding the use of per se rules. Rather it applies long standing rules to a fact situation, i.e. the use of blanket licenses to use copyrighted musical works, which the court called sui generis. The focus of the court was on the effect of the act on competition.1/

The use of per se rules was discussed at length by the same court in National Society of Professional Engineers v U.S., 98 S ct 1355 (1978). The court in discussing the rule of reason said at 1363:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead it focuses directly on the challenged restraint's impact on competitive conditions. (emphasis added.)

The court also noted that foreclosed by the Rule is:

1/ Important to the court's rejection of a per se rule was the fact that blanket licenses are provided for in the new Copyright Act and the Department of Justice supported the use of blanket licenses. Neither factor is present in this case.

> The argument that because of special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. Id at 1364.

Finally, the court described the interplay of the rule of reason and the use of per se rules as follows at 1365:

> There are thus, two complementary categories of antitrust analysis. In the first category are arrangements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are 'illegal per se'; in the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest or in the interest of members of an industry. Subject to exceptions defined by statute, that policy decision has been made by Congress. (emphasis added.)

Indeed the courts have already approved the application of per se rules to electric utilities, Otter Tail Power Co. v U.S., 410 U.S. 366 (1973); Pennsylvania Water & Power Co. v Consolidated G.E.L. & P. Co., 184 F. 2d 552 (CA 4, 1950).

What National Society of Professional Engineers makes clear is that no industry may claim an exemption from per se rules in the context of antitrust. The most that can ever be argued is that within the context of a particular fact situation, the activity complained of is one designed to increase economic efficiency and render markets more rather than less competitive. BMI does not alter the law in this regard.

CEI and TECO have not argued that any particular application of a per se rule was erroneous. Rather their claim is that any application of a per se rule is erroneous. Their claim is clearly foreclosed by National Society of Professional Engineers and their petition should be denied on that assignment of error.

ALLEGED FAILURE TO CONSIDER THE INHERENT STRUCTURAL AND ECONOMIC CHARACTERISTICS OF THE INDUSTRY AND EXTANT REGULATORY POLICIES.

CEI and TECO argue that the Appeal Board failed to consider the inherent structural and economic characteristics of the industry and extant regulatory policies. They say that they are not claiming an antitrust exemption but that somehow the Appeal Board was to limit the application of the laws in the "public interest" and that antitrust laws must be harmonized with the competing policies of other regulatory agencies and statutes. Again we are told very little regarding wherein the error occurred. Clearly the Appeal Board did, in fact, consider CEI and TECO's arguments regarding state constitution and the statute provisions including statutes enacted after the close of the record (Slip Op. 71-89). Moreover, the Appeal Board considered the effect of

the decisions of the Federal Power Commission on the relationship between City and CEI (Slip Op. 208-18). The Appeal Board also considered, albeit not to CEI and TECO's liking, the recent decision of the FERC in Gulf States Utilities Co., Docket No. ER 76-816 (October 20, 1978) setting forth that Commission's view that there is no public policy basis under the Federal Power Act to support the foreclosure of competition at wholesale. Indeed the FERC stated that certain restrictions on competition "are so devoid of redeeming value in light of the availability of other well-established means of accomplishing the legitimate purposes of regulated utilities that they should be declared per se unlawful in this and in all other cases in which the issue may be presented" (Slip Op. at PP 6-7). In light of the consideration, the Appeal Board actually gave to CEI and TECO's arguments, it is difficult to consider what more it is that should have been done. This issue should not be accepted for review.

ALLEGATION THAT AN IMPROPER STANDARD WAS UTILIZED TO MEASURE MONOPOLY POWER AND THAT NO CONSIDERATION WAS GIVEN TO WHETHER CEI AND TECO DEMONSTRATED A "DELIBERATE OR WILLFUL PURPOSE TO EXERCISE MONOPOLY POWER"

The argument that the Appeal Board erred in its Section 2 findings because it applied an imporper standard in determining whether monopoly power existed fails to advise the Commission what act of the Appeal Board is to be reviewed. Nowhere is it stated what the Appeal Board should have done that it did not do. Presumably the reliance on market shares forms the basis of the complaint. Market statistics, however, did not form the sole basis

for the Appeal Boards findings. The Appeal Board also considered the applicant's stipulated dominance of generation and transmission facilities. The Licensing Board found that transmission is an essential bottleneck resource, 5 NRC 156, and the Appeal Board agreed with that finding. These measures of market power were utilized by the court in the Otter Tail case, Supra, and by the Licensing Board in the Farley case, 5 NRC 807. To the extent that the argument is based upon the contention that monopoly power was assumed on the basis of size alone, petition page 7, it must clearly fall for it is contrary to fact. The Appeal Board did not rely upon size alone but considered as well the strategic dominance of essential resources.

The second leg of this contention is that the Appeal Board did not consider whether CEI or TECO demonstrated a "deliberate or willful purpose to exercise monopoly power". CEI and TECO cite nothing in the law of antitrust which would give validity to the contention that monopolization requires a finding of a "deliberate or willful purpose to exercise monopoly power". If what is meant is a showing that an act was taken with the deliberate purpose to have an exclusionary effect on the market, certainly the facts would support such a finding. But such a finding is not required.

The law is that the willful maintenance of monopoly power can be established merely by showing that transactions neutral on their face have an exclusionary effect on the market, without a showing of anticompetitive motivation. United States v Alumunum Company of America, 148 F. 2d 416 (CA 2, 1945). A company possessing

monopoly power cannot willfully act to maintain or expand that power without violating the antitrust laws. A monopoly which results from a party's conduct is sufficient for a finding of monopolistic intent. United States v Griffith, 334 US 100 (1948).

There is nothing to be gained from arguing once more well settled rules of antitrust law. CEI and TECO have failed to demonstrate that this issue constitutes an important antitrust question that has not long been answered. This issue ought not to be accepted for review.

ALLEGATION THAT THE APPEAL BOARD FAILED TO DETERMINE WHETHER THE ANTICOMPETITIVE ACTS OF CEI AND TECO WOULD CREATE OR MAINTAIN A SITUATION INCONSISTENT WITH THE ANTITRUST LAWS.

CEI and TECO assign as error the failure of the Appeal Board to consider whether their anticompetitive acts would create or maintain a situation inconsistent with the antitrust laws. Although it is not clear from their petition, apparently the complaint is that the Appeal Board followed the statute in determining whether there would be a situation inconsistent with the antitrust laws rather than considering each act individually and in isolation.

This assignment of error is so devoid of merit as to require no extended discussion. The argument of CEI and TECO flies squarely in the face of the language of Section 105(c)(5) of the Atomic Energy Act. It is the situation and not the individual activities that must be inconsistent with the antitrust laws. The situation of course is composed of the individual acts. This assignment of error should not be accepted for review.

ALLEGATION THAT THE APPEAL BOARD ERRED IN IMPOSING LICENSE CONDITIONS DESIGNED TO ELIMINATE THE ANTICOMPETITIVE CONCERN.

As its final assignment of error, CEI and TECO contend that the Appeal Board overstepped its authority in imposing license conditions. According to CEI and TECO, the license conditions should be limited to those necessary to ensure meaningful access to nuclear-generated power. Without agreeing with the underlying premise that the license conditions do in fact go beyond ensuring meaningful access to nuclear-generated power,2/ the City disagrees with the limits that CEI and TECO would place on the Commission's remedial powers.

The Joint Committee on Atomic Energy indicated that it believed:

> Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative findings under paragraph (5).3/

The remedies imposed by the Licensing and Appeal Boards in this case are within the confines of the remedial powers that would be exercised by a District Court. But the power of this Commission to fashion a full and complete remedy is greater, not

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2/ The City believes that the license conditions do not go far enough in ensuring access to nuclear power.

3/ Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954, as amended, to Eliminate the Requirement for a Finding of Practical Value, to Provide for Prelicensing Anti-trust Review, etc., H.R. Rep. No. 91-1470 and S. Rep. No. 91-1247, 91st Cong., 2nd Sess. (1970) at 31.

less, than that of the district courts. As this Commission pointed out in Houston Lighting & Power Company, 499A (South Texas) 5 NRC 1303, 1316 (1977), its power during the licensing process to eliminate antitrust concerns is unique, while after licenses are issued, its power to eliminate antitrust concerns is not appreciably different from that of traditional antitrust forums. This issue, having been resolved by the Commission in South Texas, should not be accepted for review.

WHAT MATTERS SHOULD BE REVIEWED

CEI and TECO argue that review should be granted because this is the first full-fledged antitrust review proceeding to come before it and because there are three other major antitrust reviews pending before licensing boards. This alone should not be considered adequate reason for review. Review by the Commission should be limited to important issues which pose a novel question. Certainly review ought not to be granted for issues previously in the South Texas decision. Nor should review be granted of antitrust questions long ago settled by the courts. Any review granted by this Commission will interpose an additional period of delay and expense before final resolution by the courts.

Moreover, it is not necessary for the Commission itself to decide an issue for there to be adequate guidance for the Licensing Board. The Appeal Board has issued two lengthy opinions in which the issues raised here have been treated at length. These Appeal Board decisions provided adequate guidance to the licensing boards.

Finally, review should not be granted where the issues are framed in broad generalized terms which taken together are susceptible of bringing forth a discussion of every legal issue in the case. That is particularly true of the issues framed by CEI and TECO.

Wherefore, for the foregoing reasons, the City of Cleveland prays that the joint petition of CEI and TECO for review of ALAB-560 be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Answer of the City of Cleveland to the Petition of the Cleveland Electric Illuminating Company and the Tolego Edison Company 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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