ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

DEC 17 1973

Howard K. Shapar, Esquire
Associate General Counsel
U. S. Atomic Energy Commission
Washington, D. C. 20545

Re: Duquesne Light Company
Ohio Edison Company
Pennsylvania Power Company
The Cleveland Illuminating Company and
The Toledo Edison Company --
Perry Nuclear Power Plant, Units 1 & 2
AEC Docket Nos. 50-440A & 50-441A

Dear Mr. Shapar:

You have requested our advice pursuant to the provisions of Section 105 of the Atomic Energy Act, as amended, in regard to the above-cited application.

I. The Applicants

Perry Nuclear Power Plant, Units 1 & 2, which will be located near Lake Erie in Lake County, Ohio, 35 miles northeast of the City of Cleveland, will consist of two units with outputs of 1205 mw and 1265 mw. The units will be jointly owned by the following investor-owned utilities in, as yet, undetermined shares: Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company (a subsidiary of Ohio Edison Company), The Cleveland Electric Illuminating Company, and The Toledo Edison Company. The total estimated cost of the units at completion will be $1,302 million. Unit 1 is scheduled to go into operation between 1978 and 1980; Unit 2, between 1979 and 1981. The units will be constructed and operated on behalf of the Applicants by The Cleveland Electric Illuminating Company.

Duquesne Light Company (Duquesne) is an investor-owned integrated electric utility which serves an 800 square mile area in the northwestern part of Pennsylvania which has a

population of approximately 1,615,000 individuals. At present, Duquesne supplies the full bulk power requirements of one municipal electric utility. In 1972 Duquesne's total electric operating revenues were in excess of $215,079,000; the company has a net generating capacity of 2,461 mw.

Ohio Edison Company (Ohio Edison) is a fully integrated investor-owned utility serving an area of approximately 7,400 square miles with a population of approximately 2,321,000 people in central and northeastern Ohio. Ohio Edison's net generating capacity is 3,494 mw. Ohio Edison supplies the full bulk power requirements of 19 municipal electric utilities and the partial bulk power requirements of two municipals. In 1972 Ohio Edison and its subsidiaries had electric operating revenues in excess of $340,435,000.

Pennsylvania Power Company (PPC), a subsidiary of Ohio Edison Company, provides electrical service throughout an area of approximately 1,500 square miles in western Pennsylvania which has a population of 324,000 people. PPC supplies the full bulk power requirements of five city systems. In 1972, PPC had operating revenues of $45,522,000 and a net generating capacity in excess of 579 mw.

The Cleveland Electric Illuminating Company (CEI) is a fully integrated investor-owned utility which serves an area in and surrounding the City of Cleveland of approximately 1,700 square miles which has a population of approximately 2,100,000 people. CEI does not provide full or partial requirements wholesale electric service to any municipal or cooperative electric utility. In 1972, CEI had electric operating revenues in excess of $287,775,000 and a net generating capacity of 3,930 mw.

The Toledo Edison Company (Toledo) is a fully integrated investor-owned electric utility serving an area of 2,500 square miles, including the City of Toledo and territories to the west, south and east thereof, with a population of approximately 719,000 people. Toledo supplies the full bulk power requirements of 14 municipal electric utilities and the partial bulk power requirements of one such system at wholesale. In 1972, Toledo had electric operating revenues of $115,767,000 and a net generating capacity of 1,046 mw.

## II. The CAPCO Pool

The Applicants are all members of a five-company power pool, known as CAPCO, which was organized in 1967. CAPCO

provides the framework within which the members coordinate their operations, interchange power and share reserves. Generation and associated transmission facilities for the CAPCO members are planned on the basis of the requirements of the pool as a single system. The Perry Nuclear Power Plant, Units 1 & 2, as well as the Davis-Besse and Beaver Valley facilities, are nuclear generating units planned and constructed by the members of CAPCO to meet these requirements. The CAPCO members serve approximately 2 million customers within a 14,000 square mile area in northern Ohio and western Pennsylvania.

III. Competitive Considerations

The Applicants herein have made two previous applications to the Commission on which the Department was requested to render antitrust advice: Davis-Besse Nuclear Power Station (Docket No. 50-356A) and Beaver Valley Power Station, Unit No. 2 (Docket No. 50-412A). Since there had been no formal request for participation in either facility, and since the Applicants appeared to be responding voluntarily and adequately to certain allegations of anticompetitive conduct, the Department did not recommend that an antitrust hearing be held upon either application. The competitive situation outlined in the Department's advice letter dated April 20, 1973, on the Beaver Valley facility appears to be unchanged with respect to all but one of the Applicants, CEI. Therefore, we will not at this time reiterate the conclusions concerning the activities of the other Applicants which we set forth in our prior correspondence.

Although CEI does not serve any municipal or cooperative wholesale customers, its facilities are located adjacent to and surrounding the municipal systems of the City of Cleveland and the City of Painesville. CEI controls all of the transmission facilities surrounding these two cities. CEI is engaged in intense competition with the City of Cleveland at the retail distribution level, and to a lesser extent, with Painesville. It is CEI's objective to "reduce and ultimately eliminate" the systems of both of these municipal competitors. 1/

In our Beaver Valley advice letter, the Department indicated that Painesville, presently an isolated system, has been seeking an interconnection with CEI for several years. Painesville alleged that this interconnection was required if the City was to remain competitive with CEI. Early in April of this year, DEI informed the Department that it expected an interconnection agreement with Painesville to be concluded

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1/ October 9, 1970 Memorandum from R. H. Bridges, CEI Public Information Department, to Lee C. Howley, CEI Vice President and General Counsel; Exhibit 24, City of Cleveland v. Cleveland Electric Illuminating Company (FTC Docket Nos. E-7631, E-7633 & E-7713).

"within a few months." Eight months later no agreement has been concluded; CEI and Painesville have now been negotiating for three years without reaching such an agreement. On April 11, 1973, Painesville wrote to CEI requesting participation in the Perry facility "on a shared capacity basis." In August of this year, CEI informed the Department that it would permit unconditioned participation in Perry by Painesville. However, this offer was apparently not effectively communicated to Painesville for, in the following month, the City wrote to the Commission requesting participation and stating "unless they [CEI] are compelled to sell us power from the Perry Nuclear Plant they will, within a very few years, effectively monopolize the distribution of electric energy in this entire area." Painesville has informed the Department that unless it can secure either access or interconnection and coordination, it will be unable to remain a viable competitor. It does not appear that CEI has at any time flatly refused either to interconnect with Painesville or to allow them access to the Perry units.

CEI and Cleveland have a long history of litigation and mutual antagonism. Both have made allegations to the Department that the other has engaged in anticompetitive conduct violative of the antitrust laws. They are presently engaged in litigation concerning Cleveland's payment for past services rendered by CEI. For many years, Cleveland was a completely isolated electric system. Recently, upon Cleveland's petition, the Federal Power Commission ordered CEI to establish both temporary and permanent interconnections with the City's system. Cleveland's system serves approximately 20 per cent of the retail distribution load existing inside the city limits; the remaining 80 per cent is served by CEI. The City's system had a peak load of 104 mw in 1971 and has a projected peak of 280 mw by 1980. It presently has a nominal summer generating capability of 193.6 mw, but the system has experienced serious reliability problems in the past.

Cleveland alleges that without coordination, including wheeling, reserve sharing, and joint planning of and participation in large-scale generating units, it cannot continue to compete with CEI. Cleveland further alleges that CEI's membership in the CAPCO Pool has provided CEI with the benefits of coordination, reserve sharing, and wheeling, as well as the ability to take advantage of the economies of scale associated with large-scale generating units. Cleveland also alleges that the CAPCO Pool members have been able to monopolize the presently available sites for the location of large-scale nuclear generating facilities.

On April 4, 1973, Cleveland wrote to CEI and requested participation in the CAPCO Pool. On April 13, 1973, Cleveland again wrote to CEI and specifically requested access to the Perry units, either through unit power purchase or ownership participation by the City or, on the City's behalf, by American Municipal Power-Ohio, Inc. (AMP-O). 2/ On April 17, CEI responded to the City's request, noting that both CAPCO contractual arrangements and Perry ownership raised the same questions; CEI suggested that the City arrange a meeting with CEI's General Counsel to discuss these questions. While a continuing interchange apparently took place between the City and CEI in the following months concerning litigation and other matters, the Department is unaware of any further communication concerning CAPCO membership or participation in Perry until August of this year.

On August 3, 1973, Cleveland wrote to CEI conveying a detailed proposal for membership in CAPCO and for participation in all proposed CAPCO nuclear units. This proposal provides that the City would receive 55 mw from Davis-Besse (projected to come on line in 1975), 26.6 mw from Beaver Valley (on line in 1978), 30.1 mw from Perry Unit No. 1 (on line in 1979), and 30.1 mw from Perry Unit No. 2 (on line in 1980). 3/ These gradual increments of power comprise a total participation in CAPCO units of 141.8 mw and are scheduled to correspond to the City's projected load growth. We are informed by the City that this power would be used exclusively to provide for load growth and not to replace existing generating facilities.

The August 3 letter requested a meeting on August 20. On August 13, CEI replied in a noncommital fashion and indicated that, no later than September 1, it would be prepared to schedule a meeting in the future. On September 10, Cleveland again wrote to CEI reiterating ~~it's~~ desire for CAPCO membership. On September 26, CEI replied that it was prepared to meet with the City's representatives. On October 25 this meeting was finally held but did not result in even a commitment in principle

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2/ AMP-O is a nonprofit Ohio corporation which was established in 1971 to coordinate the generation, transmission and distribution of electric energy within Ohio by municipally-owned electric utilities. It now represents 44 such utilities, including the City of Cleveland.

3/ As previously noted, at the time of the Department's advice on the applications for both Davis-Besse and Beaver Valley, no formal requests for participation had been made. Subsequently, Cleveland made such requests and filed petitions to intervene in the proceedings before this Commission concerning both of these applications.

by CEI with respect to any element of the City's proposal.

On December 12, CEI finally made a counterproposal to the City. CEI has said that it will agree to negotiate with Cleveland concerning the City's participation in CEI's share of the Davis-Besse, Beaver Valley No. 2 and Perry nuclear generating units, as well as concerning the attendant wheeling and reserves. This offer to negotiate is subject to several conditions, one of the more significant of which is that, prior to the commencement of negotiations, Cleveland must withdraw all requests for antitrust hearing on the applications relating to all of the above units. Also on December 12, CEI informed Cleveland that membership in the CAPCO Pool was out of the question. 4/ In addition, CEI allegedly informed the City that the company would not wheel any power for the City except from the three nuclear installations.

AMP-O has supplied to the Department information suggesting further anticompetitive conduct by CEI. On November 27, 1972, AMP-O wrote to CEI inquiring whether the company would allow AMP-O to participate in large scale bulk power generation, and whether the company would provide wheeling for power from various sources to AMP-O's member systems. CEI replied that it would be willing to meet with AMP-O's representatives to discuss these matters. Early in 1973, AMP-O made application to Power Authority of the State of New York (PASNY) to secure an allocation of 30 mw of hydroelectric power which was to be made available to a public agency. AMP-O allegedly satisfied all of PASNY's requirements concerning the financial feasibility of the transaction and its authority to enter into the contract. The one remaining requirement which AMP-O would have to meet before being in a position to secure the PASNY power was proof of its ability to deliver the power from PASNY to the point of ultimate consumption. AMP-O made preliminary arrangements to sell the PASNY power to the City of Cleveland and made the following proposal for wheeling of the 30 mw: PASNY's wheeling agent, Niagra Mohawk, would wheel the power to the New York-Pennsylvania state line, from which point it would be wheeled by Pennsylvania Electric Company (Penelec) to the Pennsylvania-Ohio state line;

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4/ Duquesne wrote to the City on December 10, 1973, informing them that Duquesne would not agree to participation by the City in either CAPCO or the three nuclear installations.

at this point, it would be delivered to CEI, which could wheel the power to the City of Cleveland. On May 1, 1973, counsel for AMP-O wrote to both Penelec and CEI outlining its intent to secure the PASNY allocation and asking whether they would be prepared to wheel this power. Penelec's general counsel allegedly made an immediate commitment in principle to wheel the PASNY power. No such commitment was forthcoming from CEI, the only remaining company whose cooperation was necessary in order to transmit the power from PASNY to its proposed recipient. Counsel for AMP-O and CEI engaged in extended negotiations which culminated in CEI's letter of August 30, 1973, refusing to wheel the power. The letter gave the following explanation of CEI's refusal:

> As you may know, The Illuminating Company competes with the Cleveland Municipal Electric Light Plant on a customer-to-customer and street-to-street basis in a sizeable portion of the City. This competitive situation is clearly unique. Economic studies indicate that an arrangement to transmit the PASNY power would provide the Municipal system electric energy at a cost which would be injurious to The Illuminating Company's competitive position.

The issues raised by Painesville's and Cleveland's requests for coordination (through both interconnected operation and membership in the CAPCO Pool) and for participation in large-scale nuclear generation planned by CAPCO do, as observed by CEI, raise the same issue. These requests must be considered under the antitrust principle requiring those who control an essential resource to grant access to it, on equal and non-discriminatory terms, to all others engaged in the given business. See, e.g., United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1945); Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir. 1952), cert. denied 344 U.S. 817 (1952). As we have indicated in past advice letters, this principle applies to bulk power supply arrangements. United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), aff'd 410 U.S. 366 (1973). While it does not appear that CEI has completely rejected any of the requests made by Painesville or Cleveland (with the exception of Cleveland's request for participation in the CAPCO Pool) the Department is not convinced that CEI is fully prepared to commit itself to grant access to either coordination or large-scale nuclear generation in a manner which would be free of anticompetitive effect. At least with respect to the

City of Cleveland's request, CEI has been unwilling to make a commitment in principle which we feel would be sufficient to permit Cleveland to participate in such a way as to maintain its present competitive posture.

CEI's refusal to wheel power for AMP-O raises a somewhat different problem which should be considered in the perspective of CEI's monopoly control of those transmission facilities surrounding the City of Cleveland. Antitrust principles have evolved which place distinct limits upon a supplier's exercise of monopoly power at one level of distribution to adversely affect competition at another level. The District Court in United States v. Otter Tail Power Co., supra, clearly held that a utility could not use the power derived from a lawful monopoly at the bulk power supply level (in that case a monopoly of subtransmission facilities) to impair competition at the retail level.

IV. Conclusion

Based upon our review, the Department of Justice can only conclude that a failure by CEI to grant the requests by Painesville and Cleveland would create a situation inconsistent with the antitrust laws. CEI's refusal to wheel power for AMP-O appears to be another indication of this inconsistency. Construction and operation of the Perry units appear likely to enable CEI to maintain this anticompetitive situation. Accordingly, the Department of Justice concludes that the Commission should hold an antitrust hearing on this application.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

# APPENDIX D

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before the Atomic Safety and Licensing Board

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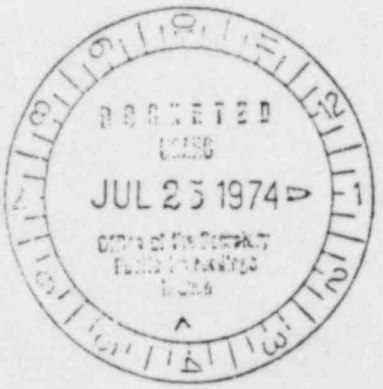
| In the Matter of | ) | |
| | ) | |
| THE TOLEDO EDISON COMPANY | ) | |
| THE CLEVELAND ELECTRIC ILLUMINATING COMPANY | ) | Docket Nos. 50-346A |
| | ) | 50-440A |
| (Davis-Besse Nuclear Power Station) | ) | 50-441A |
| | ) | |
| THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. | ) | |
| (Perry Nuclear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




PREHEARING CONFERENCE ORDER #2

A. Background

Pursuant to Notice and Order for same, the Second Prehearing Conference in this consolidated proceeding was held on June 25, 1974. Counsel for all parties were present and participated except counsel for State of Ohio, who had earlier requested,[1/] and the Board had granted, leave to be absent.

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1/ By letter dated June 20, 1974 from Deborah M. Powell, Esq., Assistant Attorney General, incorporated herein by reference. By attachment to said letter, the State, with agreement of the parties, set forth the nature and scope of its participation under Section 2.715(c). The Board approved same.

the contentions to relate primarily to structure, and only incidentally to conduct. Accordingly, any discovery directed to conduct should be limited and clearly designed to develop whatever evidence of conduct is needed beyond structure to demonstrate the "situation" referred to herein.

D. The Issues and Matters in Controversy

The following Issues and Matters in Controversy, as finally formulated by the Board, and based on the joint stipulation and record to date, are admitted as issues in the proceeding for purposes of discovery:

BROAD ISSUE A

Whether the structure of the relevant market or markets and Applicants[9/] position or positions therein gives them the ability, acting individually, together, or together with others, to hinder or prevent:

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9/ Applicants are the five participants in the Davis-Besse and Perry nuclear units: Cleveland Electric Illuminating (CEI), Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company and Toledo Edison Company. The Applicants are also the five members of CAPCO, referred to below.

(1) Other electric entities[10] from achieving access to the benefits of coordinated operation[11] either among themselves, or with Applicants:

(2) Other electric entities from achieving access to the benefits of economy of size of large electric generating units by coordinated development,[12] either among themselves, or with Applicants:

BROAD ISSUE B.

If the answer to Broad Issue A is yes, has Applicants' ability been used, is it being used, or might it be used to create and maintain a situation or situations inconsistent with the antitrust laws or the policies underlying these laws.

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10/ "Other electric entities" refers to commercial firms, (other than the five Applicants), cooperatives, governmental units or similar organizations that generate, transmit or distribute electric power within the relevant market(s).

11/ "Coordinated operation" includes but is not limited to such activities as reserve sharing, exchange or sale of firm power and energy, deficiency power and energy, emergency power and energy, surplus power and energy, and economy power and energy.

12/ "Coordinated development" includes but is not limited to joint planning and development of generation and transmission facilities.

MATTERS IN CONTROVERSY UNDER BROAD ISSUES A AND B

(1) Whether the Combined CAPCO-Company Territories (CCCT)[13/] is an appropriate geographic market for analyzing the possible creation or maintenance of a situation inconsistent with the antitrust laws or the policies underlying those laws.

(2) Whether there are any relevant geographic submarkets, and, if so, what are the boundaries.

(3) Whether any or all of the following are relevant product markets for analyzing the possible creation or maintenance of a situation inconsistent with the antitrust laws or the policies underlying those laws:

(a) Regional power exchange transactions within power pooling arrangements involving exchanges and/or sales of electric power for resale.

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13/ The Combined CAPCO Company (Central Area Power Coordination Group) Territories (CCCT) refers to the region bounded by the outer perimeters of the geographic territories of the five CAPCO members, as shown on the map submitted by CEI as Exhibit F to Information Requested by the Attorney General for Antitrust Review in connection with the Perry Nuclear Power Plant Units 1 & 2. (The map is entitled "Principal Facilities of CAPCO as of October 31, 1969" and was prepared by Duquesne Light Co.)

(b) Bulk power transactions involving individual contracts for sale-for-resale of firm electric power or for emergency, deficiency or other types of wholesale power.

(c) Retail power transactions involving sales of electricity to ultimate consumers.

(4) Whether Applicants' stipulated[14/] dominance[15/] of bulk power transmission facilities in the CCCT gives them the ability to hinder or preclude competition in the transmission of bulk power.

(5) Assuming the answer to (4) is yes, whether Applicants have, do or could use their ability to preclude any other electric entities within the CCCT from obtaining sources of bulk power from other electric entities outside the CCCT.

(6) Assuming that the answer to (4) is yes, whether Applicants have exercised, are exercising, or intend to exercise, their ability to prevent other electric entities in the CCCT from achieving:

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14/ Transcript pp. 448-451; 473; 483-484

15/ Dominance here and below refers to percentage shares of 75% or more in relevant service market areas

(a) the benefits of coordinated operations either among themselves or with Applicants.

(b) access to the benefits of economy of size from large nuclear generating facilities.

(c) any other benefits from coordinated development either among themselves or with Applicants.

(7) Assuming the answer to (6) is yes, has this ability to hinder or preclude competition been exercised for the purpose or effect of eliminating one or more of the other electric entities in the CCCT.

(8) Whether Applicants' stipulated[16/] dominance of bulk power generation in the CCCT gives them the ability to hinder or preclude competition in one or more relevant markets.

(9) Assuming the answer to (8) is yes, whether Applicants have exercised control over bulk power facilities to deny to other electric entities in the CCCT:

(a) access to the benefits of coordinated operation, either among themselves, or with Applicants.

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16/ Transcript pp. 440-441.

(b) access to the benefits of economy of size of large electric generating units.

(c) assess to any other benefits from coordinated development, either among themselves or with Applicants.

(10) Whether Applicants' policy or policies with respect to providing access to their nuclear facilities to other electric entities in the CCCT, that are or could be connected to Applicants, deprives these other electric entities from realizing the benefits of nuclear power.

(11) Whether there are logical connections between the activities under the proposed licenses for the nuclear facilities and each of the matters in contention (1) through (10) that meet the nexus test established by the Atomic Energy Commission. 17/

The Board will not address issues and matters in controversy with respect to remedy until a situation

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17/ In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-382A, Memorandum and Order of February 23, 1973, RAI-73-2-48 and In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-382A, Memorandum and Order of September 28, 1973, RAI-73-9-619.

inconsistent with the antitrust laws or underlying policies thereof has been established. Consequently, at this time, no discovery specifically directed to potential remedies is appropriate.

E. Clarification of AMP-O's Contentions

In its Memorandum and Order of April 15, 1974, the Board required AMP-O to explain more fully the mechanisms and relationships that it believed would result in operations under the licenses for the Davis-Besse and Perry plants injuring AMP-O. This requirement was held in abeyance pending the development of the Joint Statement. The Joint Statement did not provide the information the Board seeks, and consequently, such requirement is hereby reinstated. AMP-O's statement shall be filed within 10 days of this Order. In any event, since AMP-O's contentions were limited to wheeling, its discovery shall also be so limited.

The Board notes that AMP-O has not filed the proposed schedule requested and did not file timely a response to the Board's Order requesting clarification. Henceforth, the Board will not accept an untimely filed pleading unless it is

APPENDIX E

APPENDIX

License Conditions Approved by the Appeal Board.

1. Applicants shall not condition the sale or exchange of wholesale power or coordination services upon the condition that any other entity:

a. enter into any agreement or understanding restricting the use of or alienation of such energy or services to any customers or territories;

b. enter into any agreement or understanding requiring the receiving entity to give up any other power supply alternatives or to deny itself any market opportunities;

c. withdraw any petition to intervene or forego participation in any proceeding before the Nuclear Regulatory Commission or refrain from instigating or prosecuting any antitrust action in any other forum.

2. Applicants, and each of them, shall offer interconnections upon reasonable terms and conditions at the request of any other electric entity(ies) in the CCCT, such interconnection to be available (with due regard for any necessary and applicable safety procedures) for operation in a closed-switch synchronous operating mode if requested by the interconnecting entity(ies). Ownership of transmission lines and switching stations associated with such interconnection shall remain in the hands of the party funding the interconnection subject, however, to any necessary safety procedures relating to disconnection facilities at the point of power delivery. Such limitations on ownership shall be the least necessary to achieve reasonable safety practices and shall not serve to deprive purchasing entities of a means to effect additional power supply options.

3. Applicants shall engage in wheeling for and at the request of other entities in the CCCT:

(1) of electric energy from delivery points of Applicants to the entity(ies); and,

(2) of power generated by or available to the other entity, as a result of its ownership or entitlements[81/] in generating facilities, to delivery points of applicants designated by the other entity.

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81/ "Entitlement" includes but is not limited to power made available to an entity pursuant to an exchange agreement.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of Applicants, the use of which will not jeopardize Applicants' system. In the event Applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effected until reductions of at least 5% have been made in transmission capacity allocations to other Applicants in these proceedings and thereafter shall be made in proportion to reductions 82/ imposed upon other Applicants to this proceeding.

Applicants shall make reasonable provisions for disclosed transmission requirements of other entities in the CCCT in planning future transmission either individually or within the CAPCO grouping. By disclosed" is meant the giving of reasonable advance notification of future requirements by entities utilizing wheeling services to be made available by Applicants.

(a) Applicants shall make available membership in CAPCO to any entity in the CCCT with a system capability of 10 Mw or greater;

(b) A group of entities with an aggregate system capability of 10 Mw or greater may obtain a single membership in CAPCO on a collective basis. 83/

(c) Entities applying for membership in CAPCO pursuant to License Condition 4 shall become members subject to the terms and conditions of the CAPCO Memorandum of Understanding of September 14, 1967, and its implementing agreements; except that new members may elect to participate on an equal percentage of reserve basis rather than a P/N allocation formula for a period of twelve years

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82/ The objective of this requirement is to prevent the preemption of unused capacity on the lines of one Applicant by other Applicants or by entities the transmitting Applicant deems noncompetitive. Competitive entities are to be allowed opportunity to develop bulk power services options even if this results in reallocation of CAPCO transmission channels. This relief is required in order to avoid prolongation of the effects of Applicants' illegally sustained dominance.

83/ E.g., Wholesale Customer of Ohio Edison (WCOE).

from date of entrance. 84/ Following the twelfth year of entrance, new members shall be expected to adhere to such allocation methods as are then employed by CAPCO (subject to equal opportunity for waiver or special consideration granted to original CAPCO members which then are in effect).

(d) New members joining CAPCO pursuant to this provision of relief shall not be entitled to exercise voting rights until such time as the system capability of the joining member equals or exceeds the system capability of the smallest member of CAPCO which enjoys voting rights. 85/

5. Applicants shall sell maintenance power to requesting entities in the CCCT upon terms and conditions no less favorable than those Applicants make available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract; or (2) to non-Applicant entities outside the CCCT.

6. Applicants shall sell emergency power to requesting entities in the CCCT upon terms and conditions no less favorable than those Applicants make available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract; or (2) to non-Applicant entities outside the CCCT.

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84/ The selection of the 12-year period reflects our determination that an adjustment period is necessary since the P/N formula has a recognized effect of discriminating against small systems and forcing them to forego economies of scale in generation in order to avoid carrying excessive levels of reserves. We also found that P/N is not entirely irrational as a method of reserve allocation. We have observed that Applicants themselves provided adjustment periods and waivers to integrate certain Applicants into the CAPCO reserve requirement program. The 12-year period should permit new entrants to avoid initial discrimination but to accommodate and adjust to the CAPCO system over some reasonable period of time. Presumably new entrants will be acquiring ownership shares and entitlements during the 12-year period so that adverse consequences of applying the P/N formula will be mitigated.

85/ Our objective is to prevent impediments to the operation and development of an areawide power pool through the inability of lesser entities to respond timely or to make necessary planning commitments. While we grant new member entities the opportunity to participate in CAPCO it is not our intent to relieve joining entities of responsibilities and obligations necessary to the successful operation of the pool. For those smaller entities which do not wish to assume the broad range of obligations associated with CAPCO membership we have provided for access to bulk power service options which will further their ability to survive and offer competition in the CCCT.

7. Applicants shall sell economy energy to requesting entities in the CCCT, when available, on terms and conditions no less favorable than those available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract; or (2) to non-Applicant entities outside the CCCT.

8. Applicants shall share reserves with any interconnected generation entity in the CCCT upon request. The requesting entity shall have the option of sharing reserves on an equal percentage basis or by use of the CAPCO P/N allocation formula or on any other mutually agreeable basis.

9. (a) Applicants shall make available to entities in the CCCT access to the Davis-Besse 1, 2, and 3 and the Perry 1 and 2 nuclear units and any other nuclear units for which Applicants or any of them, shall apply for a construction permit or operating license during the next 25 years. Such access, at the option of the requesting entity, shall be on an ownership share, or unit participation or contractual pre-purchase of power basis.86/ Each requesting entity (or collective group of entities) may obtain up to 10% of the capacity of the Davis-Besse and Perry Units and 20% of future units (subject to the 25-year limitation) except that once any entity or entities have contracted for allocations totaling 10% or 20%, respectively, no further participation in any given units need be offered.

(b) Commitments for the Davis-Besse and Perry Units must be made by requesting entities within two years after this decision becomes final. Commitments for future units must be made within two years after a construction permit application is filed with respect to such a unit (subject to the 25-year limitation) or within two years after the receipt by a requesting entity of detailed written notice of Applicants' plans to construct the unit, whichever is earlier; provided, however, that the time for making the commitment shall not expire until at least three months after the filing of the application for a construction permit. Where an Applicant seeks to operate a nuclear plant with respect to which it did not have an interest at the time of the filing of the application for the construction permit, the time periods for commitments shall be the same except that reference should be to the operating license, not the construction permit.

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86/ Requesting entities' election as to the type of access may be affected by provisions of state law relating to dual ownership of generation facilities by municipalities and investor-owned utilities. Such laws may change during the period of applicability of these conditions. Accordingly, we allow requesting entities to be guided by relevant legal and financial considerations (including Commission regulations on nuclear power plant ownership) in fashioning their requests.

10. Applicants shall sell wholesale power to any requesting entity in the CCCT, in amounts needed to meet all or part of such entity's requirements. The choice as to whether the agreement should cover all or part of the entity's requirements should be made by the entity, not the Applicant or Applicants.

11. These conditions are intended as minimum conditions and do not preclude Applicants from offering additional wholesale power or coordination services to entities within or without the CCCT. However, Applicants shall not deny wholesale power or coordination services required by these conditions to non-Applicant entities in the CCCT based upon prior commitments arrived at in the CAPCO Memorandum of Understanding or implementing agreements. Such denial shall be regarded as inconsistent with the purpose and intent of these conditions.

The above conditions are to be implemented in a manner consistent with the provisions of the Federal Power Act and all rates, charges or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them.

APPENDIX F

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
P.O. BOX 5000 ■ CLEVELAND, OHIO 44101 ■ TELEPHONE (216) 622-9800 ■ ILLUMINATING BLDG. ■ 55 PUBLIC SQUARE
*Serving The Best Location in the Nation*

September 18, 1980

Federal Energy Regulatory Commission
825 Capital Street, N.E.
Washington, D.C. 20426

Attention Kenneth F. Plumb, Secretary

Gentlemen:

On behalf of each of the following listed Companies, we hereby transmit for filing under Section 205 of the Federal Power Act twelve (12) copies of the CAPCO Basic Operating Agreement as amended September 1, 1980 (the "revised Agreement") to replace without interruption the CAPCO Basic Operating Agreement dated as of January 1, 1975, as amended (the "Agreement"), which is on file with the Commission and which is identified by the rate schedule numbers shown for each listed Company.

| Company | FERC Rate Schedule Number |
|---|---|
| The Cleveland Electric Illuminating Company | 13 |
| Duquesne Light Company | 14 |
| Ohio Edison Company | 120 |
| Pennsylvania Power Company | 29 |
| The Toledo Edison Company | 26 |

Please return one (1) time-stamped copy of the filing documents to each of the undersigned.

The documents accompanying this letter include:

1. The CAPCO Basic Operating Agreement as amended September 1, 1980.

2. Cost support data for each of the Companies for the rates specified in the revised Agreement.

3. Three (3) copies of a form of Notice suitable for publication in the Federal Register, in accordance with Section 35.8 of the Commission's Regulations.

4. A check covering the required filing fee.

The signed copies of the revised Agreement evidence the agreement of the Parties, and all of the Parties to the CAPCO Basic Operating Agreement have approved this filing.

Facilities over which services will be provided under the revised Agreement have been provided for pursuant to the provisions of the CAPCO Transmission Facilities Agreement among the Parties, dated as of September 14, 1967, which is on file with the Commission and is identified by the rate schedule numbers shown for each listed Company.

| Company | FERC Rate Schedule Number |
|---|---|
| The Cleveland Electric Illuminating Company | 8B |
| Duquesne Light Company | 12B |
| Ohio Edison Company | 96B |
| Pennsylvania Power Company | 22B |
| The Toledo Edison Company | 21B |

The Parties to the CAPCO Basic Operating Agreement respectfully request that the Commission waive any requirements not already complied with under the Commission's Regulations and permit the revised Agreement to become effective as of September 1, 1980.

A check in the amount of $500 is enclosed to cover the filing fee of $100 for each of the Parties pursuant to Section 36 of the Commission's Regulations.

The revised Agreement amends the CAPCO Basic Operating Agreement dated as of January 1, 1975 by addition, substitution and deletion in the following respects without in any way changing or modifying the Appendices to Schedule E of the Agreement.

Article 1, entitled Purpose of Agreement, is amended chiefly by deletion of reference to the CAPCO Basic Generating Capacity Agreement which was to be formulated among the Parties and which the Parties have decided not to formulate, and by deletion of reference to the CAPCO Basic Transmission Facilities Agreement.

Article 2, entitled Definitions, is amended by deletion of the definitions for CAPCO Capacity, CAPCO Operating Reserve, CAPCO Operating Reserve Requirement, Committed Capacity, Common Facilities, Daily Operating Capacity, Daily Operating Capacity Requirement, Daily Operating Reserve Requirement, Monthly Actual Reserve, Planned Outage, Replacement Capacity and Replacement Energy, and by the addition of the definitions for Operating Capacity and Power.

Article 3, entitled Operating Committee, is amended by revising Subsections 3.05 (d), (e) and (f) to direct the CAPCO Operating Committee to establish rules and procedures for determining minimum Operating Reserve for each Party and for scheduling CAPCO Back-Up Power in lieu of determining Daily Operating Reserve requirements for each Party and the scheduling of Replacement Capacity and Replacement Energy.

Article 4, entitled CAPCO Coordinating Office, is amended by deleting reference in Subsection 4.02 (a) to specific types of operating information which the CAPCO Coordinating Office shall have the duty and responsibility to collect, record and disseminate.

Article 5, entitled Operating Conditions, is amended in consequence of a similar provision described in Article 3 by deleting the Section 5.07 requirements of each Party to provide Operating Reserve determined consistent with the rules and procedures established by the Operating Committee; and by deleting the Section 5.09 obligation of the Parties to supply capacity and energy to each other on the mandatory basis presently provided in Article 6.

Article 6, entitled Coordinated Operation and Services, presently consisting of 11 pages, is extensively revised into a new Article 6, entitled Coordinated Maintenance and CAPCO Back-Up Power, consisting of four pages. The amended Article continues Coordinated Maintenance responsibilities among the Parties, but discontinues unqualified Replacement Capacity and Replacement Energy entitlements and obligations between the Parties in favor of a limited and qualified mutual back-up system designated as CAPCO Back-Up Power. CAPCO Back-Up Power shall consist of CAPCO Unit Back-Up Power calling for back-up entitlements and obligations upon the loss of a CAPCO Unit designated in the revised Agreement, and shall consist of CAPCO System Back-Up Power to provide back-up entitlements and obligations upon the outage or outages of other units of the Parties. These entitlements to CAPCO Unit Back-Up Power and CAPCO System Back-Up Power shall be netted, scheduled and billed as CAPCO Back-Up Power, and such power will be made available from the least cost available power.

Article 7, entitled Communications, is substantially unchanged, but has been amended to include voice communication and automatic generation control as a means of communication.

Article 8, entitled Service Schedule, is amended by changing the title to Services, by changing the Schedule A title from Replacement Capacity and Replacement Energy to CAPCO Back-Up Power, by changing the Schedule B title from Short Term Power and Energy to Short Term Power, by changing the Schedule C title from Interchange Capacity and Energy to Non-Displacement Power, by changing the Schedule D title from Economy Interchange of Operating Capacity and/or Energy to Economy Power, by changing the Schedule E title from Specific Unit Capacity and Energy to Unit Power, by changing the Schedule G title from Pre-Commercial Equivalent Energy to Emergency Power and by deleting Schedule H, entitled System Capacity and Energy, which otherwise would expire December 31, 1980 under the Agreement.

Article 8 is further amended by the additions of Sections 8.02 and 8.03 relating to transmission loss, accounting and procedures; and relating to modified transactions resulting in material interference with facilities or operation of the system of any Party, respectively.

Article 9, entitled Executive Committee, is substantially unchanged.

Article 10, entitled Ohio Edison System, is substantially unchanged.

Article 11, entitled Interconnection Points and Metering Points, is insubstantially amended to change the title to Interconnection Metering, to delete Section 11.01 which defines the term "Interconnection Point," and to renumber the remaining sections of the Article.

Article 12, entitled Records, is unchanged.

Article 13, entitled Statements, Billings, Settlements and Payments, is unchanged except that Section 13.02 requires the payment of billing statements on the 25th day of the month in which presented or on the 15th day following receipt, whichever date is later, in lieu of requiring payment 15 days after the date of such statements.

Article 14, entitled Governmental Approvals, is amended by the addition of Section 14.02 which subjects the revised Agreement to the jurisdiction of governmental authorities and which expresses the right of any Party to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

Article 15, entitled Notices, is amended to require written confirmation of certain oral notices to be given within three working days rather than within three days.

Article 16, entitled Non-Waiver, is not amended.

Article 17, entitled Arbitration, is not amended.

Article 18, entitled Assignment, is not amended.

Article 19, entitled Governing Law, is not amended.

Article 20, entitled Other Agreements, is amended by the substitution of the date of August 31, 1980 for the date February 2, 1968, so that the revised Agreement is not to be interpreted as conflicting or interfering with the performance of any agreement between any Party and any system effective prior to August 31, 1980. Article 20 also terminates the following agreements identified by FERC rate schedule numbers shown for each listed Company:

| Company | FERC Rate Schedule Number(s) |
|---|---|
| The Cleveland Electric Illuminating Company | 2 and 2.1 |
| Duquesne Light Company | 10 |
| Ohio Edison Company | 42, 42.1, 68, 68.2, 71, 71.1, 71.2 and 71.3 |
| Pennsylvania Power Company | 21, 21.1, 21.2 and 21.3 |
| The Toledo Edison Company | 3 and 3.2 |

Article 21, entitled Term of Agreement, is amended by deleting the Section 21.01 expiration date of September 1, 1980 and by substituting language to continue the revised Agreement in effect until such time as all CAPCO Units are retired; and by adding Section 21.02 to permit any Party to withdraw from the revised Agreement by giving one year's advance notice in writing, provided that such withdrawal shall not discontinue Coordinated Maintenance of CAPCO Units, CAPCO Unit Back-Up Power, and CAPCO Coordinating Office obligations until such time as all CAPCO Units are retired.

Article 22, entitled Separate Indentities, is not amended.

Article 23, entitled Force Majeure, is not amended.

Article 24, entitled Liability, is amended by deleting the Section 24.02 reference to Section 6.12 and by substituting therefor a reference to Section 8.03.

Schedule A, entitled Replacement Capacity and Replacement Energy, which provided for mandatory replacement capacity and replacement energy transactions, compensation for such transactions and the banking of entitlements and obligations resulting from such transactions, is deleted and substituted for by a new Schedule A now entitled CAPCO Back-Up Power. Settlement of all imbalances in the replacement capacity and replacement energy accounts under the old Schedule A shall be made within 60 days in accordance with Section 5, entitled, "Effect of Termination," of old Schedule A. The new Schedule is applicable to CAPCO Back-Up Power transactions among the Parties pursuant to the provisions of Article 6 of the Agreement, shall terminate as to provisions relating to CAPCO System Back-Up Power on August 31, 1982 unless extended, and sets forth compensation charges for CAPCO Back-Up Power.

Schedule B, entitled Short Term Power and Energy, is amended by shortening the title to Short Term Power; by providing for the reservation of short term power for periods of one or more days in addition to the weeks previously provided; and by revising the compensation sections.

Schedule C, entitled Interchange Capacity and Energy, is amended by changing the title to Non-Displacement Power and by revising the compensation sections.

Schedule D, entitled Economy Interchange of Operating Capacity and/or Energy, is amended by shortening the title to Economy Power and by providing for multiple party transactions.

Schedule E, entitled Specific Unit Capacity and Energy, is amended by shortening the title to Unit Power and by deleting references to the previous mandatory CAPCO Group allocation procedures.

Schedule F, entitled Out-of-Pocket Costs, is amended by deleting specific references to various costs and by substituting a generic listing of operating capacity costs, energy costs, and purchased power costs.

Schedule G, previously entitled Pre-Commercial Equivalent Energy, terminated under its own terms on December 31, 1975 and is replaced by a new Schedule G entitled Emergency Power. This Schedule requires the Parties to provide emergency power in the event of breakdown or other emergencies in or on the systems of other Parties except where a supplying Party cannot deliver emergency power without interposing a hazard upon its operations or without impairing or jeopardizing its load.

Correspondence with respect to this filing should be addressed to each of the undersigned.

Very truly yours,

James R. Edgerly, Esq.
Vice President and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, Pennsylvania 16103

Russell J. Spetrino, Esq.
Vice President and General Counsel
Ohio Edison Company
76 South Main Street
Akron, Ohio 44308

William J. Kerner, Esq.
Senior Corporate Counsel
The Cleveland Electric
Illuminating Company
P.O. Box 5000
Cleveland, Ohio 44101

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

Paul M. Smart, Esq.
Fuller, Henry, Hodge & Snyder
1200 Edison Plaza
P.O. Box 2088
Toledo, Ohio 43605

APPENDIX G

NOV 4 1982

Mr. R. A. Miller
Executive Vice President
Cleveland Electric Illuminating Company
Cleveland, Ohio 44101

In the Matter of
Toledo Edison Company and
The Cleveland Electric Illuminating Company
(Davis Besse Nuclear Power Station, Unit 1)
NRC Docket No. 50-346A

The Cleveland Electric Illuminating Co. et al.,
(Perry Nuclear Power Plant, Units 1 and 2)
NRC Docket Nos. 50-440A, 50-441A

Dear Mr. Miller:

This letter is in reference to the petition filed by the City of Cleveland on January 4, 1978, requesting an enforcement proceeding, pursuant to 10 C.F.R. Section 2.206 of the Commission's Rules, against the Cleveland Electric Illuminating Company (CEI), for alleged violation of the antitrust conditions attached to the licenses and permits of the captioned nuclear units.

In view of the Federal Energy Regulation Commission's (FERC) acceptance for filing of the revised transmission service tariffs submitted to the FERC by your filings of May 29, June 22 and December 15, 1981 and the termination of FERC Dockets ER78-194 and ER78-194-001, we are now satisfied that compliance with the conditions has been obtained. Accordingly, this matter is closed.

Sincerely,

Original Signed by
H. R. Denton

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

cc: 1. Reuben Goldberg, Esq.
2. B. L. Mikessell, Dir. Util.
Cleveland Division of Light
and Power

8211170455

APPENDIX H

United States Department of Justice
WASHINGTON, D.C. 20530

...TANT ATTORNEY GENERAL
ANTITRUST DIVISION

FEB 28 1978

Mr. Edson G. Case
Acting Director
Office of Nuclear Reactor Regulation
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Re: Docket Nos. 50-346A, 440A, 441A, 500A and 501A, Request by City of Cleveland for Order to Show Cause

Dear Mr. Case:

By letters dated January 4 and February 3, 1978, the City of Cleveland requested that the Nuclear Regulatory Commission commence proceedings pursuant to 10 C.F.R. § 2.202 to require the Cleveland Electric Illuminating Company to comply with the license conditions attached to the operating license for Davis-Besse Nuclear Power Station Unit 1 and the construction permits issued for Davis-Besse Nuclear Power Station Units 2 and 3 and Perry Plant Units 1 and 2. The Department of Justice hereby advises that it supports the City of Cleveland's request.

On January 6, 1977, an Atomic Safety and Licensing Board ("Licensing Board") issued its initial decision in the above-cited dockets. The Licensing Board found that issuance of unconditioned licenses for the Davis-Besse and Perry nuclear power plants would create and maintain a situation inconsistent with the antitrust laws. Accordingly, that Board ordered that ten conditions be attached to the Davis-Besse and Perry licenses to alleviate that situation. Since the date of the initial decision, those conditions have attached to the operating license for Davis-Besse Unit 1 and the construction permit for Perry Nuclear Power Plant Units 1 and 2.

On January 27, 1978, the Cleveland Electric Illuminating Company ("CEI") filed a transmission service tariff with the Federal Energy Regulatory Commission which

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PDR

purports to implement Condition 3 ordered by the Licensing Board. The City of Cleveland has objected to various terms of that tariff, claiming that they are inconsistent with the NRC license conditions. After review of the subject tariff, the Department believes the objections of the City to be correct. For example, the provision which cancels the tariff upon a final decision of the Commission, even if that decision does not overturn Condition 3, would relieve CEI of its obligation to wheel despite the existence of such a requirement in the subject licenses. Furthermore, the tariff provision which obliges CEI to wheel only if it does not interfere with its other CAPCO transmission obligations directly conflicts with Condition 3 which requires CEI to reduce its CAPCO transmissions by five percent prior to reducing transmission for non-CAPCO entities.

Accordingly, the Department of Justice supports the City of Cleveland's request that this Commission commence proceedings pursuant to 10 C.F.R. § 2.202 to require CEI to comply with the outstanding license conditions.

Sincerely yours,

John H. Shenefield
Assistant Attorney General
Antitrust Division

cc: Counsel of Record
Jack M. Schulman

APPENDIX I

United States Department of Justice
WASHINGTON, D.C. 20530

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

10 AUG 1979

Mr. Harold Denton
Director
Office of Nuclear Reactor
Regulation
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Mr. Denton:

The Department of Justice requests the Nuclear Regulatory Commission ("NRC") to institute proceedings pursuant to section 234 of the Atomic Energy Act (42 U.S.C. § 2282) and section 2.205 of the Nuclear Regulatory Commission Rules of Practice (10 C.F.R. § 2.205) to impose a civil penalty on The Cleveland Electric Illuminating Company ("CEI") for violating the license conditions attached to the operating license for Davis-Besse Nuclear Power Station Unit 1 and the construction permits issued for Perry Plants Units 1 and 2. The specific basis for our request is that CEI is, and has been, in violation of license condition 3, which requires that Applicants engage in wheeling for non-Applicant entities within Applicants' combined service areas. 1/

On January 6, 1977, an Atomic Safety and Licensing Board ("Licensing Board") issued its Initial Decision in 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. 50-440A, 50-441A, 5 N.R.C. 133 (1977) ("Perry proceeding"). The Licensing Board found that the issuance of unconditioned licenses for the five nuclear units which were the subject of that proceeding "would both create and maintain a situation inconsistent with the antitrust laws and the policies underlying those laws." Id. at 133. Accordingly, the Licensing Board ordered that ten conditions attach to the requested licenses. Among those conditions was condition 3, which reads:

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1/ CEI was one of the applicants for the Davis-Besse operating license.

3. Applicants shall engage in wheeling for and at the request of other entities in the CCCT: 2/

1) of electric energy from delivery points of Applicants to the entity(ies); and,

2) of power generated by or available to the other entity, as a result of its ownership or entitlements in generating facilities, to delivery points of Applicants designated by the other entity.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of Applicants, the use of which will not jeopardize Applicants' system. In the event Applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effective until reductions of at least 5% have been made in transmission capacity allocations to other Applicants in these proceedings and thereafter shall be made in proportion to reductions imposed upon other Applicants in this proceeding.

Applicants shall make reasonable provisions for disclosed transmission requirements of other entities in the CCCT in planning future transmission either individually or with the CAPCO grouping. By "disclosed" is meant the giving of reasonable advance notification of future requirements by entities utilizing wheeling services to be made available by Applicants. (Footnote added)

On January 14, 1977, Applicants moved to stay imposition of the license conditions pending appeal. The motion to stay was denied by the Licensing Board on February 3, 1977, and by the Atomic Safety and Licensing Appeal Board on March 23, 1977.

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2/ Within the context of the NRC proceeding the CCCT referred to the Combined CAPCO Companies Territories.

On April 22, 1977, the operating license for Davis-Besse Unit 1 was issued with the antitrust conditions attached. On May 3, 1977, the construction permit for the Perry Nuclear Power Plants, Units 1 and 2, was issued with the antitrust conditions attached.

On January 6, 1978, CEI filed a transmission tariff with the Federal Energy Regulatory Commission. On June 28, 1978, after a request by the City of Cleveland that was supported by the Department, the NRC issued a Notice of Violation to CEI stating that "at least as of CEI's submittal of the January 27, 1978, transmission schedule to the Federal Energy Regulatory Commission ("FERC"), a continuing refusal to wheel in accordance with the license conditions began to occur." The Notice of Violation cited five conditions contained in CEI's filed tariff which individually and collectively violated license condition 3, and which amounted to a refusal to wheel. 3/ On April 27, 1979, a FERC Administrative Law Judge ("ALJ") issued an Initial Decision which found that the CEI transmission tariff filed January 27, 1978, was "unjust, unreasonable and unduly discriminatory" (Initial Decision at 56), and ordered CEI to file the revised tariff described in the Initial Decision. The ALJ specifically declined to rule on whether "CEI is in compliance with the NRC license conditions or the antitrust laws of this country," because "[t]he NRC and other duly constitued bodies will be the judges of that." (Initial Decision at 6). 4/ On June 25, 1979 the NRC

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3/ The conditions described by the NRC Staff in Appendix A to the Notice of Violation were: 1) agreeing to provide wheeling services only until the date of the final decision of the NRC in the Perry proceeding; 2) providing that CEI is the sole judge as to whether it has the capacity to make available wheeling services; 3) conditioning the wheeling services in a manner which allows CEI to preempt unused transmission capacity; 4) requiring that the minimum wheeling transaction last for a period of no less than 12 months; and 5) proposing wheeling services upon the condition that CEI file separate supplemental wheeling schedules for each wheeling transaction.

4/ The tariff required by FERC does not bring CEI into compliance with the NRC license conditions. CEI was not required to reduce transmission service to the other Applicant companies prior to reducing such service to non-Applicant entities and was not required to consider disclosed transmission needs of non-Applicant entities in its future planning.

issued an Order Modifying Antitrust License Condition No. 3 of Davis-Besse Unit 1, License No. NPF-3 and Perry Units 1 and 2, CPPR-148, CPPR-149 ("Order"). The Order amends CEI's licenses and construction permits to require CEI to file with the FERC within 25 days of the Order the transmission tariff ordered by the FERC ALJ. In addition, CEI is required to file with the FERC other specified amendments to its transmission schedule which will bring CEI into compliance with license condition 3. 5/

On September 15, 1978, subsequent to the issuance by the NRC of the Notice of Violation and while the January 27, 1978 tariff was pending at the FERC, CEI submitted to the NRC staff a second proposed transmission schedule ("September 15, 1978 schedule"), but this proposal did little to undo the anticompetitive restraints that the Licensing Board had ordered CEI to remove. While the September 15, 1978 schedule which CEI submitted to the NRC staff for approval cured some of the defects found in the January 27, 1978 tariff, it contained new provisions which violated license condition 3: (1) it limited wheeling services to the estimated native peak demand of the City's system unless otherwise agreed, thereby allowing CEI to control the City's load growth since the estimate of the City's native peak demand must be agreed upon by the City and CEI; (2) it provided that wheeling service shall be at 138 kv or above; (3) it provided that the wheeling schedule terminates if a final decision in the Perry proceeding alters license condition 3, whether or not that alteration is significant; and (4) it provided that nothing in the schedule should be construed as requiring CEI to enlarge its facilities to wheel, despite the fact that license condition 3 specifically requires CEI to make reasonable provision for disclosed requirements of other entities in planning future transmission capacity. To our knowledge this proposed tariff was not filed with FERC.

Section 234 of the Atomic Energy Act, 42 U.S.C. § 2282, expressly authorizes the NRC to impose civil penalties on any person who violates any license condition imposed by the NRC. Prior to the 1969 enactment of section 234, the NRC was authorized only to revoke or modify

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5/ Within 20 days of the Order, CEI may request a hearing with respect to all or any part of the license amendments. A request for a hearing will not stay the effectiveness of the Order. (Order at 7)

licensees in the event of a violation of license conditions. See section 186 of the Atomic Energy Act, 42 U.S.C. § 2236. The legislative history indicates that section 234 was enacted in order to permit the NRC to impose penalties less drastic than revocation or modification in the event of a violation of a license condition. Congress believed that furnishing the NRC with a broader range of powers to deal with persons who violate license conditions would enhance compliance with license conditions. See 1969 U.S. Code Cong. and Adm. News at 1616. 6/

The imposition of civil penalties on CEI is compelled by CEI's longstanding and willful refusal to abide by the conditions to which its licenses to construct and operate nuclear power plants are subject. While the Department supports the Order recently issued by the NRC which will bring CEI into compliance with license condition 3, additional action is necessary because of CEI's intentional non-compliance with that license condition. In the 21 months since the issuance of the Initial Decision in Perry, CEI has failed to bring itself into compliance with the antitrust license conditions imposed by the Licensing Board. It was a full twelve months after the issuance of the Initial Decision before CEI filed its initial tariff, which, although purporting to comply with license condition 3, contained numerous provisions which were in obvious conflict with both the letter and spirit of the license. Not only did this tariff require the NRC to issue a Notice of Violation, but it was also held by a FERC ALJ to be "unjust, unreasonable and unduly discriminatory." Twenty months after the issuance of the Initial Decision, CEI filed the September 15, 1978 schedule with the NRC in response to the Notice of Violation, but this schedule still contained numerous provisions which conflicted with the antitrust license conditions imposed by the Licensing Board.

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6/ The legislative history of section 234 discusses that section in terms of health and safety violations. This may be attributable to the fact that when section 234 was enacted only commercial facilities for which a finding of "practical value" had been made were subject to prelicensing antitrust review. Since all nuclear plants at that time had been licensed as developmental, not commercial, facilities, no antitrust reviews had taken place prior to the enactment of section 234. It is the Department's view that section 234 applies equally to antitrust violations as it does to health and safety violations.

The January 27, 1978 and September 15, 1978 tariffs are so clearly violative of license condition 3 that CEI must be considered as having intentionally engaged in activity designed to avoid complying with the license conditions. In so doing, CEI should be held to have perpetuated a situation which the Licensing Board found to be "inconsistent with the antitrust laws and the policies underlying those laws." Perry proceeding, 5 N.R.C. at 133. Because of CEI's flagrant disobedience, it is incumbent upon the Commission to impose the maximum civil penalty permitted by section 234 of the Atomic Energy Act. By imposing the maximum civil penalty, the NRC will encourage CEI to desist from flaunting the authority of the NRC to enforce license conditions and will enhance the integrity of its entire licensing program by serving notice that future antitrust violations will not be tolerated.

The Department proposes that a civil penalty of $1.2 million be imposed on CEI. This civil penalty is calculated by multiplying $25,000, the maximum penalty permitted for all violations occurring within a 30-day period by 16, which is the number of months of continuous violation since the Notice of Violation was issued, 7/ for each of the three licenses to which the antitrust license conditions attached. A penalty of this magnitude is justified by CEI's continuing, willful violation of the license conditions and its direct restraint on competition that has resulted by virtue of that violation. The civil penalty requested by the Department is of the same order of magnitude as the maximum fine which Congress has found appropriate for violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). 8/

Finally, the Department urges that the NRC recommend to FERC and other appropriate agencies that CEI not be allowed

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7/ The Commission may also determine that it is appropriate to impose a further civil penalty on CEI for failing to file a tariff consistent with the license conditions within a reasonable period after the operating license and construction permits were issued.

8/ In 1976 Congress increased the penalties for violation of the Sherman Act from a misdemeanor to a felony and increased the fine to $1,000,000 for a corporation. Antitrust Procedures and Penalties Act, Public Law 93-528, 88 Stat. 1706, 15 U.S.C. § 1 (1976).

to pass through to its rate payers the civil penalties imposed here. If CEI's consumers, who are wholly innocent, are required to absorb these civil penalties, the deterrent effect of imposing civil penalties will be greatly diminished.

In conclusion, the Department believes that in order for the NRC's antitrust licensing program to maintain its effectiveness in preventing utilities from using nuclear licenses in an anticompetitive manner, CEI, and other licensees, must be made to understand that willful violations of antitrust license conditions will not be tolerated, and that civil pehalties imposed by the NRC cannot be considered as just a minor cost of doing business.

Sincerely,

John E. Shenefield
Assistant Attorney General
Antitrust Division

cc: Service List in This Proceeding
Except for Members of the NRC
Safety and Licensing Appeal Board

APPENDIX J

SEPT 5 1980 :

Docket Nos. 50-346A
50-440A
50-441A

The Honorable Sanford M. Litvack
Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Washington, DC 20530

Re: The Cleveland Electric Illuminating Company, et al.
(Davis-Besse Nuclear Power Station, Unit 1)
NRC Docket No. 50-346A;
(Perry Nuclear Power Plant, Units 1 and 2)
NRC Docket Nos. 50-440A and 50-441A)

Dear Mr. Litvack:

At the request of the Commission I am providing this interim response to Mr. Shenefield's letter of August 10, 1979 and your subsequent letter of June 20, 1980 requesting the imposition of a civil penalty on the Cleveland Electric Illuminating Company (CEI) for its alleged failure to comply with antitrust license condition no. 3 that is contained in CEI's licenses and permits authorizing the construction and operation of the above captioned units.

After a review of your request the NRC Staff has concluded that a civil penalty should not be imposed on CEI. The Office of the General Counsel believes that further staff review is required. The Commission has split 2-2 on these options.

Accordingly, the matter will be reconsidered by the Commission upon the appointment and confirmation of a new NRC chairman.

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Sincerely,

William J. Dircks

William J. Dircks
Acting Executive Director
for Operations

EDO