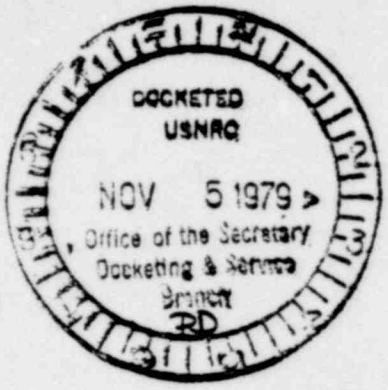

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

ANSWER OF CITY OF CLEVELAND
TO PETITION OF DUQUESNE LIGHT
COMPANY FOR REVIEW

One October 22, 1979, Duquesne Light Company filed its petition for review of the Atomic Safety and Licensing Appeal Board's decision of September 6, 1979, (ALAB-560) in the above-entitled proceeding. The City of Cleveland, a party to the proceeding below, makes this answer in opposition pursuant to Section 2.786(b) of the Commission's Rules of Practice and Procedure, 10 C.F.R. Section 2.786(b)(1979).

The grant or denial of a petition for review is within the discretion of the Commission, except that a petition for review of matters of law or policy will not ordinarily be granted unless it appears that the issue sought to be reviewed constitutes an important antitrust questions, involves an important procedural issue, or otherwise raises important questions

of public policy. 10 C.F.R. Section 2.786(b)(4)(i).

Duquesne Light, in its petition, contends that the Appeal Board erred in proceeding to a decision without the full participation of a departed member or replacement. In support of this assertion, Duquesne Light points to the lack of any quorum requirements in Section 2.787(a) of the Commission's Rules. As further support, Duquesne Light points to the reference in that section to the appointment of alternate members of an appeal board.

Duquesne fails to make any mention of Section 2.787(b) which provides for the taking of certain procedural actions by an appeal board in the absence of a quorum. The obvious importance of Section 2.787(b) is that action can be taken by less than all of the members of an appeal board. Moreover, the very provision dealing with the appointment of alternate members, relied upon by Duquesne Light states:

> an alternate may be assigned to serve as a member of an Atomic Safety and Licensing Appeal Board for a particular proceeding in the event that a member assigned to such proceeding becomes unavailable. 10 C.F.R. Section 2.787(a) (emphasis added).

The use of the permissive word "may" in Section 2.787(a) coupled with the obvious approval of action by a quorum in Section 2.787(b), leaves no room for doubt that a decision by the two remaining appeal board members is appropriate and provided for by the Commission's Rules of Practice and Procedure.

This is a phony issue not worthy of review by the Commission. It is a desperate attempt by Duquesne to avoid the day of reckoning. To accept Duquesne Lights' argument would intolerably delay a decision in this case.

Duquesne Light's reliance on cases involving three-judge courts is misplaced. Three-judge courts are statutarily created to hear matters of unusual importance or of an extraordinarily delicate nature within our Federal system. They are in no way analogous to Appeal Boards created by Commission rule.

One further point should be made. The portion of the opinion written by Mr. Sharfman has no affect except to the extent that it has b een adopted by the two remaining appeal board members. It is neither a concurring nor dissenting opinion for at the time of its issuance, Mr. Sharfman had no authority to decide the issues or render an opinion on them.

The major thrust of Dequesne Lights' petition appears to be a complaint that the Appeal Board followed the Commission's South Texas decision.1/ Accordingly, Duquesne Light complains that "The Appeal Board...clearly erred in concluding that it is merely an antitrust enforcement agency to whom the public interest is irrelevant" and in particular "gave no consideration the the extent to which Pennsylvania, in the furtherance of the public interest, had eliminated competition among public

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1/ Houston Lighting and Power Co., CLI-77-13, 5NRC 1303 (1977).

utility entities "and did not consider..pervasive regulation or the economic and technological factors that characterized this industry" and "failed to consider the special circumstances of Duquesne, where Pennsylvania law so prevents competition that Duquesne's...conduct simply had no significant anti-competitive conduct" (Petition pages 4-5).

The scope of this Commission's antitrust jurisdiction is not a novel question. The Commission had occasion to address the matter at some length in its South Texas decision wherein it said:

> But in the field of antitrust, our expertise is not unique. We merely apply principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry. Through the licensing process, we can effectuate the special concern of Congress that anticompetitive influences be identified and corrected in their incipiency. 5NRC at 1316.

Any argument that the antitrust laws ought not be applied to the electric utility industry or should be applied only in limited extent is properly addressed to Congress, not this Commission. As the Commission properly stated its duty is to "effectuate the special concern of Congress that anti-competitive influences be identified and corrected in their incipiency" (emphasis added). Congress' special concern with anticompetitive influences ought not be diluted should this Commission decide that a full application of the antitrust laws

is not in the public interest.

The only significant difference in this Commission's antitrust responsibility from that of the courts is that the licensing process allows the Commission to act in a unique way to fashion remedies.2/ After the licensing process is completed, the Commission's ability to act is not appreciably different from that of traditional antitrust forums.3/ The Commission arrived at the above stated conclusion after an analysis of the statutory language and legislative history to define the scope of its responsibility in enforcing the antitrust laws and the policies underlying them in relation to the enforcement responsibilities of other agencies.4/

Moreover, the Atomic Energy Act provides that nothing in the Act shall relieve any party from the operation of the Sherman Act, Clayton Act or Federal Trade Commission Act.5/ Accordingly, this Commission's antitrust responsibilities differ greatly from those of other Federal agencies such as the Federal Energy Regulatory Commission which consider antitrust matters only as a part of their general obligation to protect the public interest within the framework of a particularized regulatory scheme. For this Commission, the extent of regulation and the economic and technological factors of the industry, are

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2/ South Texas, 5 NRC at 1316.
3/ Id.
4/ Id at 1309.
5/ Atomic Energy Act Section 105(a), 42 USC 2135(a).

no more than facts of life in the marketplace. That is precisely the treatment accorded these matters by the Licensing Board and affirmed by the Appeal Board. Significantly, Duquesne Light does not allege that when considered as facts of life in the marketplace, the Appeal Board erred, rather its complaint is that they were not treated as negating the applicability of the antitrust laws.

The statute itself does not provide for the application of a public interest standard in determining whether a situation inconsistent with the antitrust laws exists.6/ Rather the public interest is not brought into play until the Commission has made a finding of inconsistency.7/

The Commission has indicated its intention that its rules governing petitions for review be strict rules in order to retain the concept of limited review. It is not the purpose of the petition procedure to create a full third level of hearing within the Commission. Thus when the Commission has once spoken on an issue, review by petition is not appropriate absent some compelling showing of changed circumstances. No such showing has been demonstrated.

Duquesne Light also argues that the only individual findings applicable to Duquesne Light related to dealings which occurred prior to any reasonable notice to Dequesne Light that such behavior could be regarding as inconsistent with the antitrust laws and that the activity was terminated before this proceeding and never repeated. Such activity, it is argued, cannot

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6/ Section 105c(5), 42 USC 2135 (c) (5).
7/ Section 105c(6), 42 USC 2135 (c) (6).

justify a finding that activities under the license "would create or maintain a situation inconsistent with the antitrust laws." First, the facts simply do not support Duquesne Light's argument. It has been clear at least since the 1950 decision in Pennsylvania Water & Power Co. v. Consolidated G.E.L. & P. Co.,8/ that the antitrust laws apply to electric utilities. Moreover, as early as 1968, Duquesne Light was involved in antitrust litigation in U.S. District Court 9/ which it believed it had a 50% chance of losing.10/ In 1967 at a meeting of the CAPCO executives, Mr. Mansfield, the President of Ohio Edison, questioned "whether refusal by the private companies to take the public agencies into the group would be an anti-trust violation".11/

Second, the acts found to be anticompetitive demonstrate the existence of a situation in which Duquesne Light had monopoly power which it utilized to destroy competition in its service territory. This demonstrated a situation inconsistent with the antitrust laws which would be maintained by issuance of a license without conditions. The fact that the situation had existed for many years is more, not less, cause to impose license conditions. Moreover, the fact that Duquesne Light had successfully eliminated all but one municipal competitor and thus reduced the opportunities for use of its

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8/ 184 F2d 552 (CA 4,1950).
9/ DJ 254.
10/ DJ 260.
11/ C-52.

monopoly power also militates in favor of imposing license conditions. Further, while certain anticompetitive acts, such as the refusal to sell wholesale power, had not been engaged in for some time, that act was itself part of a continuous chain of anticompetitive acts. While the individual acts may have changed from time to time to adjust to changed circumstance, the anticompetitive objective remained. Much of the anticompetitive activity merely changed from the arena of individual acts to the arena of joint action through CAPCO. Finally, a review of the history of the parties anticompetitive behavior provides a guide to the types of relief required.

Duquesne Lights' remaining statement of error is that the Appeal Board failed to distinguish among the companies in the license conditions it imposed. Duquesne Light does not indicate which license conditions should not be applied to it. Rather it merely alleges that "such indiscriminate imposition of conditions is arbitrary and an abuse of the Commission's authority under Section 105(c)(6) (Petition page 7). As the Appeal Board pointed out, the manner in which applicants themselves designed CAPCO, makes it impossible to separate the license conditions. Even individual actions frequently require the consent of the other members. (Slip Opinion P. 281). Under the circumstances of this case with the massive factual showing of joint action, it is not arbitrary to impose one set of license conditions applicable to all of the applicants. Particularly when there is no allegation that Dequesne Light

can not comply with the conditions.

Wherefore, for the foregoing reasons, the petition of Dequesne Light for review by the Commission should be denied.

Respectfully submitted,

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UNITED STATES OF AMERICA

BEFORE THE NUCLEAR REGULATORY 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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Answer of the City of Cleveland to Petition of Duquesne Light Company For Review" 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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