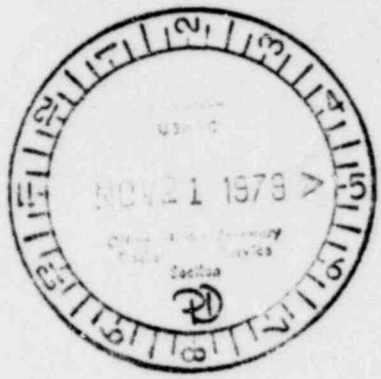

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CONSOLIDATED ANSWER OF THE NRC STAFF IN OPPOSITION TO THREE PETITIONS FOR COMMISSION REVIEW OF ALAB-560

On September 6, 1979, the Atomic Safety and Licensing Appeal Board issued an opinion[1/] which affirmed as modified the Initial Antitrust Decision of the Atomic Safety and Licensing Board[2/] which concluded, subsequent to an evidentiary hearing, that the construction and operation of the five nuclear units by the Applicants[3/] would create and maintain a situation inconsistent with each of the antitrust laws specified in section 105a of the Atomic Energy Act of 1954, as amended. Three separate petitions for Commission review were filed. For purposes of convenience and to avoid duplication, the Staff has consoli-

1/ ALAB-560, 9 NRC ___ (September 6, 1979) hereinafter referred to as ALAB-560.

2/ LPB-77-1, 5 NRC 133 (1977).

3/ The Applicants are The Cleveland Electric Illuminating Company, ("CEI") The Toledo Edison Company, ("TE") Ohio Edison Company ("OE") Pennsylvania Power Company, ("PP") and Duquesne Light Company.

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dated its responses to the three petitions in a single pleading.[4/] Section I is a response to the CEI-TE petition; section II is a response to the OE-PP petition; section III is a response to the Duquesne petition.

Under the provisions of 10 CFR § 2.786 a party to a proceeding may file a petition for review of an Atomic Safety and Licensing Appeal Board decision with the Commission on the ground that the decision is erroneous with respect to an important question of fact, law or policy. The regulation further provides that a petition for review will not normally be granted unless it appears that the case, among other things, constitutes an important antitrust question or involves an important procedural issue or otherwise raises important questions of public policy. This regulation also provides that a petition for review of factual determinations will not be granted unless it appears that an Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Licensing Board. It is the view of the NRC Staff that none of these elements are raised by the petitions for review of ALAB-560. Accordingly, for the reasons discussed below, the petitions for review should be denied.

I. The Petition of CEI and Toledo Edison

The Staff has reviewed the petition filed by CEI and Toledo Edison and believes that petition fails to raise any issues meeting the designated standards for Commission review under 10 CFR § 2.786. Moreover, the Appeal Board's well-reasoned decision clearly has dealt with the matters raised in the petition in

4/ Whereas answers to a single petition for Commission review are limited to ten pages, the Staff will respond to the three petitions in a single thirty-page pleading.

a manner fully supported by the Commission's regulations, and relevant NRC and judicial decisions.

With respect to this petition, one introductory matter requires clarification. The CEI petition states that the Licensing Board found one or more situations inconsistent with the antitrust laws to exist within the geographic area (market) of the Combined CAPCO Company Territories ("CCCT"). (CEI-TE petition, p.2) It should be noted that the Licensing Board found, and the Appeal Board affirmed almost two dozen anticompetitive activities engaged in by CEI. In addition, the Licensing Board found that TE had engaged in over a dozen anticompetitive activities (see 5 NRC pp. 211-223), all but one of which findings were affirmed by the Appeal Board.[5/] Moreover, the Licensing Board found that CEI and TE engaged in numerous concerted refusals to deal which are generally regarded as more onerous under the antitrust laws.

A. Legal and Regulatory Framework

In their petition, CEI and TE contend, as a basis for Commission review, that the legal and regulatory "framework" for antitrust review adopted by both the Licensing Board and Appeal Board was "defective" (CEI-TE petition, p.3). The alleged defects were that the Boards below failed to consider "inherent structural and economic characteristics of the industry", "extant regulatory policies at both the federal and state levels" and "the public interest". In fact, all of these arguments were considered below but necessarily rejected as defenses to the findings of anticompetitive conduct and policy.

5/ One finding was not affirmed by the Appeal board, see Slip Op., p. 231.

The CEI-TE petition claims that the Appeal Board "ignore the arguments advanced by CEI-TE and the other Applicants with regard to the manner in which antitrust principles should be applied in an industry which has long been subject to extensive federal and state regulation." (CEI-TE petition, p.3). Contrary to this assertion, the CEI-TE arguments are analyzed and rejected on pp. 30-38 of ALAB-560, as well as by the Licensing Board below at 5 NRC 244-250. Both the Licensing Board and the Appeal Board correctly applied basic antitrust principles in light of the legislative history of section 105c of the Act to these arguments. This mandated the rejection of the CEI-TE proposition that these companies are entitled to special treatment or antitrust immunity because of existing federal or state regulation, or because of the nature of section 105c of the Act. This is so, in part, because it is basic antitrust law that regulation by the Federal Power Commission (now Federal Energy Regulatory Commission) does not exempt an electric utility from application of the antitrust laws, Otter Tail Power Co. v. U.S., 410 U.S. 366, Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 758-59 (6913). Moreover, in Cantor v. Detroit Edison, 428 U.S. 579, 96 S. Ct. 3110, 3118, the Supreme Court re-affirmed its prior holding that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. And it has long been true that exemptions from the operations of the antitrust laws cannot be inferred.[6/] Finally as the Appeal Board noted, the Supreme Court in U.S. v. Radio Corporation of America, 358 U.S. 334, 350-52 (1959) has concluded that whether an activity "would serve the public interest" does not present the same question as whether licensing activities are consistent with the antitrust laws. (Slip. Op. at 33).

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6/ See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-452, 6 NRC 892, 916 (1977) (hereinafter "Midland"), and citations therein.

One final statutory barrier to accepting the CEI-TE request to apply antitrust principles in an atypical manner in this case is the use by Congress of the phrase "situation inconsistent with the anti trust laws" in section 105 of the Act. The use of the word "inconsistent" by Congress in section 105, rather then the word "violation," constitutes a direction by Congress not to dilute the application of the antitrust laws in section 105 of the Act, for Congress was adopting a lesser standard of proof under section 105c of the Act.[7/] It is clear for all of the above reasons, that both the Licensing Board and Appeal Board have treated this argument in a manner totally consistent with the Act, and relevant court decisions, and that Commission review is not warranted.

B. Per Se Rules

CEI-TE claim that the Appeal Board erred in holding certain conduct to be per se inconsistent with Section 1 of the Sherman Act.

At the outset, it is important to note that the Appeal Board utilized per se rules in limited and very traditional circumstances: (1) horizontal territorial limitation and customer allocation agreements (Slip. Op. pp. 96-100, 238-239) and (2) group boycotts (Slip. Op. p. 154 et seg.). Secondly, it should be noted that the per se approach was used not as a basis for exclusion of evidence (which can be a proper use of per se rules) but as a rule of law to find antitrust inconsistencies.

7/ See S. Rep. No. 9-1247, 91st Cong., 2nd Sess., at 14 (1970).

Per se rules were established by the Supreme Court when it concluded that certain types of agreements and conspiracies

> ... because of their pernicious effort on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Northern Pacific Ry. Co. v. U.S., 35 U.S. 1, 5 (1958).

Similarly, a per se violation cannot be excused or justified because the conspiracy was motivated by good intentions, business necessity, or a desire to benefit the public. Ethyl Gasoline Corp. v. U.S., 309 U.S. 436, 461 (1940); U.S. v. Trenton Potteries Co., 273 U.S. 392 (1927). Moreover, per se rules apply to regulated industries. Silver v. New York Stock Exchange, 373 U.S. 341, 347 (1963); Otter Tail Power Co. v. U.S., supra. at 378-79.

The Appeal Board applied the per se approach to group boycotts. As is indicated by the Appeal Board, (Slip. Op. pp. 150 et seg.) such an application of a per se rule reflects the application of basic antitrust law.[8/]

The Appeal Board also applied the per se approach to horizontal territorial limitation and customer allocation agreements which have repeatedly been condemned by the Supreme Court as per se violations. Indeed, as pointed out by the Appeal Board the Supreme Court (Slip. Op. 98-101), in Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 46 specifically re-affirmed the per se approach in the case of horizontal restrictions, such as were present in this

8/ See generally, Klors Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207, 212 (1959); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (per curiam); U.S. v. General Motors Corp. 384 U.S. 127.

proceeding. CEI-TE's citation to Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. 99 S.Ct. 1551, 60 L. Ed. 2d, (1979) is not persuasive. In that case the Supreme Court concluded that blanket licensing to copyrighted music compositions did not amount to price fixing per se. This was the Supreme Court's first examination of these price-fixing features under the per se rule; however, in that case the Supreme Court re-affirmed the per se rule generally as ". . . valid and useful tool of antitrust policy and enforcement." 60 L. Ed. 2d at 9 (footnote omitted).

Finally, it should be noted that in the limited instances where the Appeal Board applied a per se approach, it also generally examined the challenged activities in light of the surrounding circumstances. Accordingly, the Staff believes that Commission review of this issue should not be granted.

C. Meaningful Assessment of Section 1 Sherman Act Activities

On p. 9 of their petition, CEI-TE claim that the Appeal Board "erred in holding certain conduct inconsistent with Section 1 of the Sherman Act as unreasonable restraints of trade without any "meaningful assessment" of such conduct in the context of the inherent structural and economic characteristics of the industry and the existing federal and state regulatory policies.

The Staff has previously discussed how the "assessment" conducted by the Appeal Board was consistent with basic antitrust law and section 105 of the Act. Petitioners now claim that the examination of Section 1 Sherman Act activities by the Appeal Board was not in the context of the industry "assessment" they urge. Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of or commerce among the several States, or with foreign nations, is declared to be illegal.

CEI-TE have not in their petition identified how the Section 1 Sherman Act analysis was improper, or more significantly, why the Section 1 analysis conducted by the Appeal Board raises a significant antitrust question worthy of Commission review. Moreover, petitioners repeatedly have failed to refer to any portions of their previously filed briefs to support this contention.

As previously discussed, the Appeal Board approved the use of the per se approach to Section 1 activities in two limited instances involving overt conspiratorial conduct by the Applicants. Moreover, in the instance of the concerted denial by the Applicants of CAPCO membership to small electric systems, the Appeal Board fully analyzed Applicant's proffered factual and economic arguments. (See Slip. Op. pp. 150-164).

Second, it is clear that while applying a per se rule, the Appeal Board did consider the degree of competition in the marketplace in concluding that there was no basis in law from deviating from the basic holdings of the Supreme Court in the area of Section 1 Sherman Act violations (See, Slip. Op. p. 158). Third, as the Appeal Board perceptively indicates, the judicial authority cited by Applicants' on this issue refers only to dictum in lower court cases which "applicants mistate" (Slip. Op. pp. 158-159). Last, as the Appeal Board moted, Applicants proffered evidence does not support their proposition that these Section 1 activities were economically justifiable (Slip Op. pp. 160-164). Review of this question is not warranted.

D. Section 2 Sherman Act Approach by the Appeal Board

CEI-TECO assert that the Appeal Board erred in its Section 2 holdings in that it employed an improper standard for measuring monopoly power and further failed to consider whether any of the Applicants demonstrated a "deliberate or willful purpose to exercise monopoly power" (CEI-TECO petition, p. 10).

Section 2 of the Sherman Act, 15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states... shall be deemed guilty of a felony.

Proof of monopolization consists of (1) a demonstration of the existence of monopoly power in the relevant market - the power to fix prices or to exclude competition - plus (2) evidence of conduct or policies designed to acquire or preserve that monopoly or market power.9/

It should be noted that CEI-TE have not sought Commission review on the question of whether monopoly power exists in the CCCT (the relevant market) but only as to the "method" utilized below for determining whether that power exists. In the Staff's view the "methodology" used below for determining the existence of "monopoly" or "market power" was well within the accepted procedures of basic antitrust analysis. The methodology used below was both a structural and functional approach to identifying market power. As to structure, the Appeal Board noted that Applicants "concededly control a 95% or greater share of the bulk power generation and transmission facilities in their respective service

9/ See U.S. v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); U.S. v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curcium 347 U.S. 531 (1954).

areas" (Slip. Op. p. 9). Applicants did not contest this structual condition, in fact, they stipulated to the dominance by the companies over these facilities (Slip. Op. p. 9, n. 14; see also 5 NRC p. 154). Thus, in terms of the structure of the relevant markets, Applicants' dominated and controlled, jointly and separately, at least 95% of all generation, transmission retail sales, and wholesale sales.10/

CEI and TE contend, citing Berkey Photo, Inc. v. Eastern Kodak Co., _____ F.2d _____, 1979-1 Trade Cases (CCH) para. 62, 718 (2d Cir. 1979) that the Boards below "erroneously assumed the existence of monopoly power on the basis of size alone," (CEI-TE petition, p. 7). Such is not the case, for the Boards below not only examined structural dominance but also examined the overwhelmingly large shares of retail and wholesale power sales in the relevant markets (Slip. Op. p. 22; see also 5 NRC at 152). In addition, the Boards below examined Applicants control over strategic transmission networks as well as their control over the only vehicle for coordination in the CCCT - the CAPCO power pool. (Id.). Finally, the Boards below found further evidence of Applicants monopoly power by their effective use of their dominant position by actions which (1) reduced the reliability and economic viability of their competitors; (2) avoided competition with their competitors; (3) engaged in agreements not to compete with each other; (4) imposed anticompetitive agreements on other electric systems in their service area in luding territorial and customer allocation agreements and (5) constituted refusals to deal. (Slip. Op., p. 23). Thus, the Appeal Board, in conformance with basic antitrust law, concluded that

10/ The precise extent of this structural dominance is set forth at 5 NRC 153-154.

monopolization had occurred when a dominant entity used its market power to control prices or to exclude competitors (Slip. Op. p. 241). The Appeal Board cited and relied on Supreme Court cases to the effect that

> if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possiblity of eventual deconcentration is correspondingly great. (Slip. Op. p. 241, citing U.S. v. Aluminum Co. of America, 377 U.S. 271, 279 (1964); U.S. v. Philadelphia National Bank, 374 U.S. 321, 365 n. 42 (1963).

The Appeal Board's market power analysis is consistent with approval by the Supreme Court in Otter Tail Power Co. v. U.S., supra., of the market power analysis and methodology of the District Court. In Otter Tail the Supreme Court affirmed a finding of monopoly power where an electric utility had

> ... a stragegic dominance in the transmission of power in most of its service areas and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply. 331 F.Supp. 54, 60.

Accordingly, the CEI-TE challenge to the methodology used by the Appeal Board to find the existence of monopoly power must fail and Commission review is clearly unwarranted.

Secondly, CEI-TE contend, without citation to authority or to the decision, that the Appeal Board erred by not considering whether any of the Applicants' demonstrated a "deliberate or willfull purpose to exercise monopoly power." The key phrase with respect to this matter is petitioner's use of the word "demonstrated," for it is generally true that proof of anticompetitive intent is a question of fact.[11/] Moreover, matters of anticompetitive intent were

11/ See, U.S. v. Aluminum Co. of America, 148 F.2d 416, 433-34 (2d. Cir. 1945); Gary Theatre Company v. Columbia Pictures Corp., 120 F.2d 891, 894 (7th Cir. 1941).

consistently decided by the Licensing Board and the Appeal board. Accordingly, review of such factual determinations is beyond the scope of Commission Review. (See 10 CFR § 2.786(b)(ii)).

Moreover, this alleged error by CEI-TE is predicted upon an incorrect interpretation of applicable antitrust law.

Contrary to petitioner's assertion, proof of a specific intent to restrain competition is not required to prove the offense of actual monopolization.[12/] U.S. v. Griffith, 334 U.S. 100, 105 (1948); U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 173 (1978).

Last. the findings below clearly reveal the willfullness of many of the anti-competitive activities engaged in by petitioners (See 5 NRC at 166, 170, 172-77, 211-213, 217, 221-22). Accordingly, Commission review of this issue is not warranted.

D. Relationship Between the Situation Inconsistent with the Antitrust Laws and the Activities Under the License

The CEI-TE petition states that the "Appeal Board erred as to the scope of Commission antitrust review by failing to determine whether the posited antitrust inconsistencies would be created or maintained by activities under the license." (CEI-TE petition, p. 10).

12/ Under § 105 of the Act, proof of actual monopolization is not required. Rather the standard test is a reasonable probability of an inconsistency with Section 2 of the Sherman Act (Slip. Op. p. 8). Also seei, 5 NRC 133, 149 for a correct analysis of applicable precedent.

Section 105c(5) of the Act requires a finding as to whether the "activities under the license" would create or maintain a "situation" inconsistent with the specified antitrust laws. Thus, a relationship or nexus between two things must be shown: (1) "a situation inconsistent with the antitrust laws", and (2) "activities under the license." The requisite nexus is simply that the "activities" must create or maintain the "situation". Waterford I[13/] teaches us that structure may be very important in analyzing "nexus".

> In this connection, the relationship of the specific nuclear facility to the applicant's total system or power pool, e.g., size, type of ownership, physical interconnection, may need to be evaluated.

Petitioners state that the Appeal Board "failed" to make the nexus determination. The Staff does not agree; the "nexus" determination appears at pages 261-262 of ALAB-560. The Appeal Board's nexus determination not only was made, but was made in a manner totally consistent with prior decisions including Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-229, 1 NRC 892 (1977).

E. Relief

The CEI-TE petition states that the Appeal Board erred "in failing to limit the prescribed relief to only that which is necessary to ensure meaningful access to nuclear-generated power." (CEI-TE petition, p. 10).

The purpose of relief in the form of antitrust license conditions is to remedy the situation found to be inconsistent with the antitrust laws under § 105(5)

13/ Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3) CLI-77-7, 6 AEC 48, 49 (1973).

of the Act. Since a principal purpose of § 105 of the Act is to assure a consistency between the Commission's licensing policies and the antitrust laws, if the Commission were aware of an antitrust situation, but did not remedy that situation, the desired consistency between licensed activities and the antitrust laws might not be assured.[14/] In the Staff's view, the Appeal Board correctly and appropriately modified the licenses by imposing antitrust license conditions.

What is the pragmatic effect of these license conditions? These license conditions essentially do no more than oblige Applicants to offer similar bulk power services and access to nuclear units to other electric utilities as they make available, by action or agreement, to each other, and which they have denied others.

It is important to note that the conditions only require Applicants to "offer" these certain power supply options as it is clearly contemplated by the ordered license conditions that Applicants will be compensated for any such options selected by other electric entities in the CCCT in accordance with applicable rate schedules that Applicants may file with the appropriate regulatory agencies (See, Slip Op. p. 64).

Moreover, as stated by the Appeal Board majority, the ordered license conditions are also "appropriate" under § 105c(6) of the Act for a number of reasons. First, the antitrust abuses perpetrated by these Applicants mandated these

14/ Cf. Slip. Op. p. 55.

license conditions (See Slip Op. pp. 52-53 as to the legal standards of appropriate relief). Second, the ordered license conditions are consistent with judicial precedent under similar circumstances (See Slip Op. p. 56, n.76). Thus, there is no indication that Congress intended to limit the Commission's authority to order appropriate antitrust license conditions in appropriate cases, such as this proceeding (See Slip. Op. pp. 51-52). .

Finally, in Applicants' motion for a stay of similar conditions pending this appeal, they have stated that the impact of these (or similar) license conditions simply involves dealing with additional electric systems in their service areas with which they have previously refused to deal, and additional costs and efforts associated with additional planning necessitated thereby (See generally, 5 NRC pp. 626-628). The Staff believes that the relief ordered by the Appeal Board was appropriate in this proceeding and that Commission review of this issue is likewise not required.

For all of the reasons stated above, the Staff believes that the CEI-TE petition fails to raise any important matters which warrant Commission review.

II. The Petition of Ohio Edison and Its Subsidiary Pennsylvania Power Company

A. Joint Application For Nuclear Units

As its first reason for requesting Commission review of ALAB-560, OE and PP assert that the Appeal Board erroneously concluded that petitioners' participation in the CAPCO power pool "created an identity of interest with other

Applicants which permitted antitrust review under section 105c of the Act of all as a group and justified finding of OE/PP's vicarious responsibility for the acts of other Applicants."

The Applicants for the Perry Nuclear Power Plant Units 1 and 2 are OE, PP, along with CEI. TE, and Duquesne Light Company. These same five companies are also the joint Applicants for the Davis-Besse Nuclear Power Station Units 2 & 3. As section 105 of the Act requires, the antitrust review of these applicants was conducted at the same time without objection by OE and PP. Moreover, the issues in controversy in the Perry and Davis-Besse proceeding focused upon the activities of Applicants individually and as a group. On July 30, 1975, when these antitrust reviews were in their incipiency, Applicants' counsel agreed to the utilization of the joint issues in controversy (focusing on Applicants' jointly and severally) as the basis for the antitrust review of both the Davis-Besse 2 and 3 applications as well as the Perry 1 & 2 applications.[15/] Moreover, there are no findings in ALAB-560 of "vicarious responsibility" for the acts of one Applicant by another Applicant company. There are findings of concerted refusals to deal in which each of the Applicant companies participated. Such findings do not constitute "vicarious responsibility" but rather separate liability because of OE's and PP's participation in group boycotts and conspiracies. Moreover, as is clear from ALAB-560, OE and PP were also held to be responsible for anticompetitive acts and practices which they individually committed against their neighboring electric systems. Accordingly, for the above reasons, the Staff believes that Commission review of this issue should be denied.

15/ See the Licensing Board's "Memorandum and Order of Consolidation," p. 4 (July 30, 1975).

B. License Conditions

OE and PP contend that the Appeal Board erred in ordering antitrust license conditions which allegedly did not bear a reasonable relationship to situation inconsistent with the antitrust laws which would be created or maintained by OE-PP's activities under the licenses.

The Staff does not agree with this assertion by OE and PP. Indeed, the Appeal Board made it clear that:

> The idea that the remedies in the antitrust arsenal are sufficient to overcome the violations is neither original nor recent (citation omitted). Rather, this selected tenet is one of the principles developed by the Antitrust Division, the Federal Trade Commission, and the Federal Courts which we apply in proceedings under section 105c. (Slip Op. p. 52).

The Staff believes that the ordered license conditions do bear a reasonable relationship to the situation inconsistent with the antitrust laws. As pointed out in Section I(E) of this pleading, the license conditions ordered are reasonable and consistent with judicial precedent. Basically, the ordered conditions require OE and PP to offer nuclear access and bulk power services which they have heretofore denied their neighboring electric systems.

C. Relationship Between Antitrust Situation and the Activities Under The License

OE and PP contend that the Appeal Board erred in that the conduct scrutinized did not bear a reasonable relationship to the activities under the license. This is but a restatement of the "nexus" objection posed by CEI-TE which is addressed in section I(E) supra. Commission review on this issue is also unwarranted.

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D. Relevant Geographic Market

OE and FP claim that the Appeal Board erred in finding that the Combined CAPCO Company Territories (CCCT) was the relevant geographic market for antitrust analysis of OE/PP.

Questions of the determination of relevant markets are essentially questions of fact of a kind which constitute neither important questions of law or policy nor factual issues upon which the Appeal Board and Licensing Board have made inconsistent findings. As such, a review of a market determination is outside the scope of 10 CFR § 2.786(b)(4). This interpretation of the above regulation is fully consistent with basic antitrust law which has established the rule that definition of relevant markets for antitrust analysis is essentially a question of fact for the trial court, whose findings will be set aside only if "clearly erroneous." International Boxing Club, Inc. v. U.S. 358 U.S. 242, 245; U.S. v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956). Accordingly, Commission review of this matter should not be granted.16/

E. CAPCO Membership, the P/N Formula, and Exclusion of Small Systems From CAPCO Membership

OE/PP contend that the Appeal Board erred in concluding that petitioners refused to make available to other electric systems benefits which they obtained through CAPCO membership, that the "P/N" reserve calculation formula (developed mostly by OE) was rigidly applied as a condition to CAPCO membership, and that the relatively small size and "poor operational records" of two CAPCO Applicants did not justify their exclusion.

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16/ It should be noted that the Licensing Board found, in addition to the CCCT, the "individual service territories of each Applicant" as a relevant geographic market, 5 NRC at 165. The Appeal Board has not set aside that finding. See Slip Op. p. 67 n.4.

The first two matters, i.e., (1) refusal to make available to other electric entities benefits which OE/PP obtained through CAPCO membership and (2) the P/N formula, are factual matters resolved in the same manner by both the Licensing Board and Appeal Board, and hence are beyond the scope of 10 CFR § 2.786. The third assignment of error concerns the findings of group boycott with respect to concerted denials of CAPCO membership in two instances. As the Appeal Board pointed out in detail (Slip Op. pp. 150-264) the Licensing Board applied the correct legal standard in concluding that these actions constituted a group boycott, which is a per se violation with the antitrust laws. Moreover, notwithstanding the Appeal Board's application of the per se rule, it went on to examine Applicants' asserted factual and economic defenses to this boycott and correctly concluded that "the evidence which they cite in support of their economic infeasibility thesis simply does not support it" (Slip Op. p. 160). Accordingly, Commission review of this issue is not warranted.

F. Monopoly Power and Exercise of That Power

OE and PP contend that the Appeal Board erred in concluding that petitioners possess "monopoly power" and that "they have abused that power by engaging in territorial allocations, improper acquisitions, attempts to fix prices, contractual restrictions, refusals to deal, restraints on lienation, and group boycotts."

The Staff has previously discussed in section I(D) the correctness of the Appeal Board's finding that Applicants, including OE and PP, possess monopoly power. The remaining items listed are factual matters correctly decided in

the same manner by both the Licensing Board and Appeal Board, and hence beyond the scope of 10 CFR § 2.786b.

G. Per se Analysis

OE/PP contend that a per se antitrust analysis was not appropriate in a section 105c proceeding. The Staff has previously discussed in section I(B) of this answer the appropriateness and correctness of the per se analysis which was used below in a conservative manner. Moreover, the decision of both the Licensing Board and Appeal Board went beyond a pure per se approach to analyze and appropriately reject the defenses proferred by petitioners.

OE/PP now contend that per se rules should not be used in section 105 proceedings. Yet, they have pointed to no reasons why the Commission should not follow established judicial precedent where applicable. As stated by the Appeal Board in Midland, supra., 6 NRC at 916, there is absolutely no indication that Congress intended section 105 antitrust reviews to be conducted under standards any less stringent than those of the antitrust laws. The antitrust laws include the use of per se rules as utilized by the Appeal Board. Accordingly, Commission review of this issue should not be granted.

H. OE Acquisitions

OE contends that the Appeal Board erred in concluding "that the S.E.C.'s review, under the Public Utility Holding Company Act, of Ohio Edison's purchase of municipal electric systems wac irrelevant for purposes of §105c."

As found by the Licensing Board (see 5 NRC at 188), OE has engaged in numerous acquisitions of neighboring small electric systems. The Licensing Board reviewed these acquisitions and concluded that they contributed to the existence of a situation inconsistent with the antitrust laws. The Appeal Board affirmed all but one of the Licensing Board's findings in this regard (Slip Op. p. 251). Nowhere does either Board conclude or state that S.E.C. "approval" of an acquisition "was irrelevant." In fact, the Licensing Board received into evidence OE exhibits reflecting initial findings at the S.E.C., without a hearing, made under a "public interest" rather than antitrust standard. (Applicants' Exhibits 218, 220, 223). This same defense of prior S.E.C. approval was rejected in U.S. v. Otter Tail Power Co., supra. Moreover, as previously discussed, the question of whether an activity is in the public interest is not the same as whether the activity is consistent with the antitrust laws. U.S. v. Radio Corporation of America, supra. It is the Staff's view in light of the above discussion that Commission review is not warranted.

I. State Law

OE/PP complain that the Appeal Board erred in concluding that under Ohio or Pennsylvania law municipalities are entitled to compete freely for retail loads outside their boundaries. The Appeal Board's analysis of the impact of state laws is contained on pp. 71-90 of the slip opinion. The Staff believes that analysis to be a correct analysis of the law. Two points should be emphasized. First, it is clear that the volitional conduct engaged in by petitioners[17/] is not protected from the antitrust laws by state statutes. Cantor v. Detroit

17/ See Slip Op. p. 72.

Edison, 428 U.S. 579, 592-93 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975). Second, the state law provisions upon which petitioners rely are as the Appeal Board stated, ambiguous and in need of judicial interpretation. (See Slip Op. p. 80, n.38). Petitioners' have not demonstrated the relevance, let alone the significant for review of their assertion. Accordingly, this request for review should be denied.

J&K. WCOE Negotiations and Price Squeeze

Petitioners complain that the Appeal Board erred in concluding (1) that petitioners acted unreasonably and in a manner inconsistent with the antitrust laws in the WCOE negotiations thereby denying WCOE reasonable and practical access to nuclear power and (2) that petitioners inflicted a "price squeeze" on municipalities based upon a numerical comparison of certain electric rates.

Both of these matters essentially consist of factual determinations[18/] made by the Appeal Board in a correct manner (Slip Op. pp. 247-251, 255-261) consistent with the findings of the Licensing Board. (See 5 NRC 198-200, 208-211). Accordingly, review of such factual matters is beyond the scope of 10 CFR § 2.786.

L. Procedural Due Process

Petitioners' claim that the Appeal Board erred in concluding that petitioners' [procedural] due process rights were adequately protected below. With respect

18/ Findings of cost justification (for rates) clearly constitute factual determinations. See U.S. V. Yellow Cab, 338 U.S. 338, 341 (1949). The reasonableness of acts during negotiations are also clearly factual determinations.

to this issue, the Staff has previously traced on a step-by-step basis, the procedural due process opportunities afforded petitioners by the Licensing Board. (See pp. 30-40 of the "Brief of the NRC Staff in Opposition to Applicants' Exceptions..." filed before the Appeal Board on June 30, 1977). That Staff review leads to the inescapable conclusion that all procedural due process protections were afforded petitioners by the Licensing Board in full compliance with Supreme Court precedent.[19/] The Appeal Board also afforded petitioners procedural due process protections. Applicants filed an extensive 300 page brief, entire sections of which were prepared by petitioners' counsel. Moreover, petitioners' counsel participated at the oral argument before the Appeal Board. Accordingly, it is the Staff's view that the petition for review on this issue should not be granted as being wholly unmeritorious.

It is clear from the above discussion, the Staff submits, that OE/PP have failed to raise any significant issues warranting Commission review.

III. The Petition of Duquesne Light Company

The Duquesne Light Company ("Duquesne") has asserted two basic grounds for Commission review. These will be discussed seriatim below.

A. Legal Standards

Duquesne claims that the Appeal Board "applied erroneous legal standards and ignored important factors".

19/ See Slip. Op. p. 40, N. 59.

Duquesne assumes that there is "pervasive federal and state regulation of the electric industry." (Duquesne petition, p. 4). It has been clear for many years that there is no pervasive economic regulation of electric utilities and even if there were, the antitrust laws are fully applicable. Cantor v. Detroit Edison, supra., Otter Tail Power Co. v. U.S., supra., Gulf States Utilities v. F.P.C., 411 U.S. 747 (1973); F.P.C. v. Southern California Edison Co., 376 U.S. 205 (1964).

Duquesne argues that the Appeal Board erred in concluding that it "is merely an antitrust enforcement agency to whom [sic] the public interest is irrelevant" (Duquesne petition, p. 4). This is not a correct characterization. The Appeal Board concluded, as forementioned, that the question of whether an activity is in the public interest does not present the same issue as to whether the Sherman Act has been violated (Slip Op. p. 33 citing U.S. v. Radio Corporation of America). Thus, the public interest standard (utilized by other agencies) can not be used in place of the antitrust laws specified in section 105 of the act.

In addition, Duquesne contends that the Appeal Board designed license conditions to "create competition" in the relevant areas (Duquesne petition, p. 4). The purpose of the ordered license conditions was to remedy the situation inconsistent with the antitrust laws which was found to exist by providing access to nuclear power and bulk power services which Duquesne and others had consistently denied other electric systems. If as a byproduct of that remedy more competition occurs, such competition is consistent with fundamental national economic policy. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398-400 (1978).

Duquesne contends that the Appeal Board refused to recognize existing regulation "...as a factor that affects antitrust analysis" (Duquesne Petition, p. 6). The Appeal Board did observe, as it observed in Midland, 6 NRC at 1008, that the impact of existing regulation should be assessed as another fact of market life. But such regulation, contrary to Duquesne's urgings, does not provide a shield of antitrust immunity.

Duquesne argues that its 1966-68 dealings with the electric system of Pitcairn and Aspenwall "occurred prior to any reasonable notice that such behavior could be regarded as inconsistent with the antitrust laws." (Duquesne petition, p. 6). Duquesne agreed to a discovery schedule from 1965-1975 in which period the challenged activities occurred.[20/] Moreover, in 1968 Duquesne was involved in U.S. District Court antitrust litigation with Pitcairn. An antitrust exemption for electric utilities does not exist and since at least 1950, it has been known that antitrust principles could be applied to activities of electric utilities. See Pennsylvania Water & Power Co. v. Consolidated G.E.L. & P. Co., 184 F.2d 552 (4th Cir. 1950).

Duquesne's final argument under its first point is that the ordered license conditions are arbitrary as applied to Duquesne in that the conditions uniformly apply to all applicants. (Duquesne petition, p. 7).

20/ The Licensing Board made twenty-three separate findings concerning the policies and practices of Duquesne, 5 NRC pp. 179-187. These findings have not been modified by the Appeal Board and are, therefore, part of the Appeal Board's general affirmance. See, Slip. Op. p. 67, n.4.

Even Applicants' proposed license condition commitments, Applicant's Exhibit 44, applied equally to each company.[21/] Moreover, it must be noted that under the CAPCO agreements and arrangements, unanimous consent is required for many routine transactions engaged in by any CAPCO member with a non-CAPCO entity.[22/] This presents the danger that one CAPCO member, which was not obliged to provide a bulk power service because of different license conditions, might attempt to exercise an existing contractual right and effectively veto the provision of such a service by another CAPCO member. Finally, Duquesne overlooks as a basis for imposing relief its participation in concerted refusals to deal, which, alone justify the imposition of the ordered uniform antitrust license conditions.

The above discussion demonstrates that Duquesne has failed to demonstrate that Commission review is required on the above matters.

B. Quorum Rule

Duquesne secondly contends that the Appeal Board erred in proceeding to a decision in light of Mr. Sharfman's departure. Mr. Sharfman was present and participated at the oral argument. He wrote a lengthy decision which he tendered to the Chairman of the Appeal Board and the other remaining member. That opinion was concurred in by the majority with certain limited exceptions. Duquesne's assignment of error is, in summary, that since 10 CFR section 2.787(a) "does not set forth any provision as to a quorum," it is unclear whether it was proper for the Chairman and the one remaining member to render the decision.

21/ See "Brief of the NRC Staff In Opposition To Applicants' Exceptions To The Initial Antitrust Decision," pp. 24-30 (June 30, 1977).

22/ Ibid., pp. 165-167.

The Staff believes that the Appeal Board acted properly pursuant to the quorum rule. Duquesne overlooks the remaining pertinent part of 10 CFR § 2.787(a) which provides that, "An alternate may be assigned as a member of an ... Appeal Board for a particular proceeding in the event that a member assigned ... becomes unavailable." (emphasis supplied). Thus, the Commission's regulations vest the Appeal Board with discretion to either utilize the quorum rule or replace the unavailable member. The appropriate test for exercising that discretion was stated by the Appeal Board in analyzing the quorum rule (as applied to licensing boards):

> It seems obvious to us that resort should be made to the quorum rule only when, having given due regard to all relevant considerations, the licensing board has made an affirmative determination that such resort is the only reasonable alternative (Commonwealth Edison Company (Zion Station, Units 1 and 2), Northern Indiana Public Service Company (Bailly Generating Station 1) ALAB-222, 8 AEC 229, 238 (1974) (hereinafter Zion-Bailly)

The "relevant consideration" stated by the Appeal Board majority was that "considerations of avoiding even the appearance of a conflict of interest situation have served to preclude our discussing with him (the departed Mr. Sharfman) any aspect of this proceeding." The Staff agrees that it was desirable to avoid a conflict of interest situation as stated by the Appeal Board. The Appeal Board had no reasonable alternative other than the course it followed. Certainly at that stage of the proceeding, the appointment of a substitute would have caused substantial delays while the substitute attempted to become familiar with the record without the benefit of attending and participating in the previously held oral argument. It should also be recalled that the Appeal Board majority substantially agreed with most of the determinations made by the departed member.

The Commission itself has approved the utilization of the quorum rule by Licensing Boards:

> We affirm the Appeal Board's determination that the quorum rule is valid as a matter of law, and that no prejudicial error was committed here by the absence of the Board members in the circumstances of these two proceedings. As the Appeal Board aptly found, the [quorum] rule has ample support in the case law and the Administrative Procedure Act. Ibid., CLI-74-35, 8 A.E.C. 374, 375 (1974).

The Appeal Board in the above cited Zion-Bailly decision reviewed Section 191 of the Atomic Energy Act, as amended, which, while authorizing the establishment of three-member licensing boards, was silent as to the use of quorums. In such a situation, the Appeal Board properly followed the rule of administrative law set forth in FTC v. Flotill Products, 389 U.S. 179, 183-84 (1964), where the Supreme Court unanimously held:

> ...in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.[23/]

Since the Commission has approved the quorum rule as a matter of law for use by three member licensing boards, and that utilization of quorums is permissible during adjudications as a matter of law in the absence of a contrary statutory provision, it is apparent that the Appeal Board did not error in utilizing the quorum rule[24/] in appropriate circumstances, as in the case of Mr. Sharfman's departure. Duquesne has cited no relevant judicial authority to the contrary and has overlooked relevant judicial authority supporting the Commission's policy on the use of quorums.

23/ See Zion-Bailly, supra., 6 AEC at 234-35.

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24/ The Appeal Board may act in the absence of a quorum on certain procedural matters. See 10 CFR § 2.787(b).

Duquesne has cited two cases which involve interpretation of two specific statutes, and not principles of administrative law. Butterworth v. Dempsey, 229 F.Supp. 754 (D. Conn. 1964) involves a provision of a Congressional statute that applications for declaratory judgments based upon state legislative apportionment "shall be heard and determined by three judges." This language was interpreted literally to require a three judges to hear such cases, on the basis of Ayshire Collieries Corp. v. U.S., 331 U.S. 132 (1947). The same mandatory statutory language was interpreted in Ayrshire, supra. in a now repealed statute (repealed 88 Stat. 1918, formerly 28 U.S.C. § 47) that had once required that applications to enjoin the enforcement of certain ICC orders "shall be heard and determined by three judges...." As discussed by the Appeal Board, the Ayshire decision turns, in part, on the legislative history of the Urgent Deficiencies Act (See 8 AEC at 235), and the literal inperpretation of that Act in light of that history.

Duquesne has moreover, overlooked cases upholding use of a quorum of two circuit judges in a three judge Circuit Court of Appeals. 28 U.S.C. § 46(d) provides that two judges of a three judge Circuit Court of Appeals ordinarily constitutes a quorum for the hearing and determination of appeals. Courts of appeals have properly utilized the quorum rule when a justice has resigned after argument or has died after expressing his disagreement with the remaining two members.[25/]

Accordingly, the Staff believes that Commission review of this issue is not warranted.

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25/ Hatch v. Morosco Holding Co., 19 F.2d 766 (2d Cir. 1927); U.S. v. Graham, 102 F.2d 436, 444 (2d Cir. 1929) cert. den. 307 U.S. 643 (1939); reh. den. 308 U.S. 643 (1939). Gwathmey v. U.S., 215 F.2d 148, 160 (5th Cir. 1954).

CONCLUSION

For the reasons discussed above, it is the Staff's view that the three petitions for review of ALAB-560 should be denied in their entirety for failing to raise matters warranting review under 10 CFR § 2.786.

Respectfully submitted,

R P Lessy, Jr.

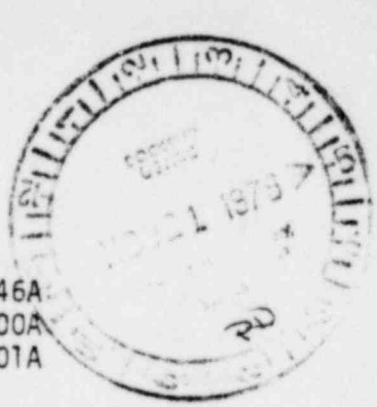
Joseph Rutberg
Director and Chief Counsel
Antitrust Division, OELD

Roy P. Lessy, Jr.
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of November, 1979.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



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

CERTIFICATE OF SERVICE

I hereby certify that copies of CONSOLIDATED ANSWER OF THE NRC STAFF IN OPPOSITION TO THREE PETITIONS FOR COMMISSION REVIEW OF ALAB-560 in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 21st day of November 1979.

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

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

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

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

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

Jerome Saltzman, Chief
Nuclear Reactor Regulation
Antitrust and Indemnity Group
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Donald A. Kaplan, Esq.
Janet R. Urban
P.O. Box 14141
Washington, D.C. 20044

Wm. Bradford Reynolds, Esq.
Robert E. Zahler, Esq.
Jay H. Bernstein, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Paul M. Smart, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
Michael D. Oldak, Esq.
Goldberg, Fieldman & Hjelmfelt
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Michael M. Briley, Esq.
Roger P. Klee, Esq.
Fuller, Henry, Hodge & Snyder
P.O. Box 2088
Toledo, Ohio 43604

Vincent C. Campanella, Esq.
Director of Law
Robert D. Hart, Esq.
1st Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

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

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

Russell J. Spetrino, Esq.
Thomas A. Kayuha, Esq.
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

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

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pa. 15219

David Olds, Esq.
Reed, Smith, Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, Pa. 15230

Roy P. Lessy, Jr.
Counsel for NRC Staff

Lee A. Rau, Esq.
Joseph A. Rieser, Jr., Esq.
Reed, Smith, Shaw & McClay
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

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

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

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

Chairman Hendrie
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Gilinsky
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Kennedy
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Bradford
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Ahearne
Office of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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