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September 17, 1979

\*NO BAR ONLY

Mr. Harold R. Denton  
Director, Office of  
Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, D.C. 20005

Re: 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

Dear Mr. Denton:

Under date of September 14, 1979, by letter addressed to you, counsel for Cleveland Electric Illuminating Company (CEI) purports to comment on the City of Cleveland's (City) opposition to CEI's request for a stay of the immediate effectiveness requirement of the order of June 25, 1979.

CEI's counsel suggests that the City's opposition is based on a misconception of the applicability of the "review standard announced in Virginia Petroleum Jobbers Association v. FPC, 295 F.2d 921, 925 (D.C. Cir. 1958), and its progeny." City did not misconceive CEI's request and Virginia Petroleum Jobbers does not deal with review standards. That case deals with the factors to be considered in deciding whether a stay should be granted or denied.

CEI may have chosen to make it appear that it was not seeking to stay the effectiveness of the order of June 25, 1979 because CEI could not satisfy the requirements for a stay, but there is no gainsaying the fact that CEI is seeking a stay of the requirements of that order. A stay by any other name is still a stay. To hold the effectiveness of the June 25 order in abeyance for some indefinite period of time until FERC completes its appellate process is to stay the order.

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CEI's counsel misrepresents City's opposition when CEI's counsel states that City does not dispute CEI's contention that immediate compliance with the June 25 order "would effectively moot CEI's appeal currently pending before the Federal Energy Regulatory Commission in FERC Docket No. ER78-194" and does not dispute "that such interference with the ongoing appellate process at FERC runs counter to the NRC's own directive in antitrust license condition 11."

No one is so blind that will not read. City flatly stated (Answer In Opposition, p. 7):

"Contrary to CEI's assertions, the immediate effectiveness of the June 25, 1979 order will not deprive CEI of any appellate rights at FERC to which it is entitled. CEI's appellate rights before FERC, indeed, its rights before FERC in hearing and on appeal, do not involve the issues of compliance with the license conditions relating to wheeling."

City pointed out (Answer in Opposition, pp. 11-12) that CEI in a pleading filed with FERC asserted that there is no mootness in the event CEI were to comply with the order of June 25, 1979 immediately. CEI advised FERC that "the NRC order issued June 25, 1979 and the transmittal letter of the same date are . . . irrelevant and immaterial" to the FERC proceeding (Answer in Opposition, p. 12).

If CEI's counsel would only read City's answer in opposition it would sink in that City does dispute CEI's contention of mootness and does dispute CEI's contention that there would be any interference with the appellate process at FERC or with antitrust license condition 11 which has been recently upheld by the NRC Appeal Board (See decision of September 6, 1979).

CEI's counsel is wrong in contending that the order of June 25, 1979 does not constitute agency action. Section 2.204 of the NRC's Rules of Practice (10 CFR §2.204) clearly designates the June 25, 1979 order as Commission action.

CEI's counsel makes the bare assertion that City and the public interest will not be injured if the immediate effectiveness of the order is stayed. The fact is that enforcement of all of the license conditions relating to wheeling--

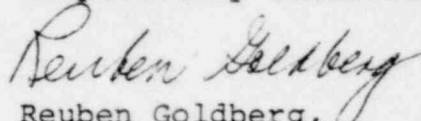
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not just some of them--are essential to cure the unlawful activities of CEI. City is about to invoke wheeling services from CEI. Compliance with the license conditions now are imperative to enable City to acquire access to other power sources on terms that are not destructive of City's municipal electric operation.

Respectfully submitted,



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Attorney for The City of Cleveland

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