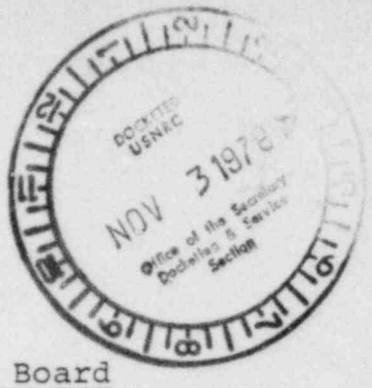

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A
THE TOLEDO EDISON COMPANY, ET AL. (Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

OHIO APPLICANTS' COMMENTS ON THE OHIO STATUTE REQUIRING CERTIFICATION OF EXCLUSIVE SERVICE TERRITORIES FOR ELECTRIC LIGHT COMPANIES

On March 28, 1978, the Ohio Legislature passed Amended House Bill No. 577, a law "to certify exclusive territory to electric light companies." On April 11, 1978, Governor James A. Rhodes approved the recently enacted legislation, and, on July 12, 1978, the new law became effective. Following a request by the Ohio Applicants that the Appeal Board in tne above-captioned proceeding take judicial notice of this statute, the Appeal Board issued its October 20, 1978 Order, directing the Ohio Applicants to submit their views on the relevance of the statute to the issues raised on this appeal.

We have divided our response into three sections. The initial section briefly highlights the more significant provisions of the new Ohio law and explains the relationship of those provisions to preexisting restrictions imposed by Ohio on municipal entities desirous of providing electric service. Second, we have undertaken to describe briefly the relevance of the recent legislation to three specific issues raised on this appeal: (1) alleged retail territorial agreements; (2) the Buckeye Project; and (3) the scope of appropriate relief. The final section of our response discusses the significance of the new law in terms of the Applicants' position that application of the antitrust laws to the electric utility industry in Ohio must necessarily recognize the very limited nature of all forms of competition among electric power entities in the geographic area under scrutiny due to natural economic and technological forces, must further recognize the existence of regulatory restraints on industry activities at both the state and federal levels, and then, in the competitive market structure so defined, must proceed on the basis of a careful reconciliation of the competing policy considerations underlying the direct regulation already in place and the indirect regulation contemplated by antitrust enforcement.

I. Nature of Statute

Amended House Bill No. 577 sets forth a procedure for the Public Utilities Commission of Ohio ("PUCO") to certify exclusive service territories for electric light companies. The operative provision of the statute, section 4933.82(B), provides as follows:

> [E]ach electric supplier shall file with the Public Utilities Commission a map or maps showing all of its existing distribution lines and the proposed boundaries of its certified territory. The Commission shall prepare * * * a map of uniform scale to show, accurately and clearly, the boundaries of the certified territory of each electric supplier as proposed by such electric supplier, or as established under division (A) of this section * * *.1/

Subject to certain limitations, the legislation goes on to provide that "each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier" (section 4933.83(A)). An essential element of the exclusive service areas established by the statute is the obligation that all "[e]lectric suppliers shall furnish adequate facilities to meet the reasonable needs of the consumers and inhabitants in the certified territories that they are authorized and required to serve * * *" (section 4933.83(B)). Any proposed assignment or transfer of the rights and authority

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1/ The referenced "division (A)" provides in relevant part (section 4933.82(A)):

> [T]he boundaries of the certified territory of each electric supplier shall be considered set as a line or lines substantially equidistant between its existing distribution lines and the nearest existing distribution lines of any other electric supplier in every direction, so that there is thereby certified to each electric supplier such land area as is located nearer to one of its existing distribution lines than to the nearest existing distribution lines of any other electric supplier.

granted by this provision must be approved by the PUCO (section 4933.85).[2/]

Amended House Bill No. 577 also specifies the procedures that are to be used for implementing Ohio's program of certified exclusive service areas (see sections 4933.82(B)-(F)). The PUCO already has drafted proposed rules for implementing these procedures (see Letter from C.E. Glasco to James D. Wilson (September 7, 1978), attached hereto as Appendix A), and a preliminary meeting between electric light companies and the PUCO staff has been held. Further meetings are planned.[3/]

Excluded from some of the procedural requirements of the new law are municipal electric systems (see section 4933.81(A)).[4/]

[2/] In addition, the statute provides a mechanism through which electric light companies can reallocate certified territories among themselves so as to better rationalize the provision of electric service to Ohio consumers (see section 4933.83(E)).

[3/] Particular concern has been raised over the precise manner the Ohio Applicants can lawfully participate in the development of the certified territories in view of the antitrust license conditions drafted by the Licensing Board below. The PUCO staff has suggested that the electric light companies meet privately for the purpose of drawing boundary lines. While the Ohio Applicants are not reluctant to provide maps depicting their distribution facilities, different antitrust concerns may come into play with respect to placement of the boundary lines. The lawyer representing the Ohio cooperatives has taken the position before the PUCO that under the doctrine of Parker v. Brown, 317 U.S. 341 (1943), there is no obstacle to active participation by the Ohio Applicants in any boundary line drawing exercise (see Letter from Robert P. Mone to C.E. Glasco (October 3, 1978), attached hereto as Appendix B). While the Ohio Applicants might agree with that legal analysis, in view of the backhanded treatment afforded the Parker doctrine by the Licensing Board below, there is an obvious reluctance on the part of the Ohio Applicants to proceed without some guidance from this Appeal Board.

[4/] The exclusion is not, however, absolute since municipal systems are afforded an opportunity under the statute to contest maps filed with the PUCO by electric light companies (section 4933.82(C)).

Nevertheless, maps depicting the certified exclusive territories of electric light companies are to:

> show the service areas of municipally owned electric systems * * *. The service area of each municipally owned electric system shall include all of the incorporated area of said system and that territory within a line substantially equidistant between its existing distribution lines and the nearest existing distribution line of any electric supplier in every direction. [Section 4933.82(B)]

Moreover, "[t]he existence of a municipally owned electric system service area shall not in any respect restrict or limit the boundaries of the certified territory established for electric suppliers" (id.).

The effect of excluding municipally owned electric systems from the operation of Amended House Bill No. 577 is merely to maintain those limitations on municipal electric plants already specified in the Ohio Constitution and the Ohio Revised Code. As we previously have noted (see App. Opening Br. at 51-52, 197-98, 240; App. Reply Br. at 34-35), chief among these limitations are the restrictions of article XVIII, sections 4 and 6 of the Ohio Constitution. Those provisions authorize operation of a municipal utility where the "products or service of which is or is to be supplied to the municipality or its inhabitants * * * (section 4). Where such a municipal utility exists, it "may also sell and deliver to others * * * the surplus product of any [nontransportation] utility in an amount not exceeding * * * fifty percent of the total service or product supplied by such utility within the municipality * * *" (section 6).

Taken together these limitations evidence an Ohio policy recognizing the existence of municipal electric systems, where the purpose of such systems is to serve municipal inhabitants, while at the same time severely restricting the ability of such systems to serve customers outside the corporate limits of the municipality.[5/] The new Ohio statute neither alters this policy nor expands or restricts the previously adopted limitations on municipal utilities. Indeed, Amended House Bill No. 577 complements the Ohio constitutional restrictions on municipal utilities by adopting a rational system for similarly precluding the deleterious impacts of competition in this industry that arise when the service areas of contiguous utilities are not clearly delineated.

In this regard, Amended House Bill No. 577 repeals section 4905.261 of the Ohio Revised Code, which was the preexisting statutory provision relating to competition between electric light companies. As we previously have explained (App. Opening Br. at 55, 192-93, 206-07, 237; App. Reply Br. at 32-33 n.31), section 4905.261, the so-called "90-day disconnect provision", established de facto exclusive service areas in Ohio by precluding customers from switching electric service except after a 90-day disconnect period. The new statute formalizes the policy long recognized as the motivating force behind section 4905.261 by establishing de jure territories to be served exclusively by a single electric light company.

5/ The "surplus product" limitation specified in article XVIII, section 6 clearly precludes full or partial requirements wholesale customers (as are all of the Ohio municipal systems located in the CCCT) from ever lawfully serving any customers outside the corporate limits (see App. Opening Br. at 197-98).

II. Relevance of Statute to Specific Factual Issues Raised on this Appeal

(a) Alleged territorial agreements. One of the findings made by the Licensing Board below in its Initial Decision is that certain of the Applicant companies entered into territorial agreements dividing among themselves various retail markets.[6/] In their exceptions, Applicants have heretofore noted the paucity of evidence supporting this erroneous finding (App. Opening Br. at 182-83, 190-92, 234-36 & n.263; App. Reply Br. at 65). In addition, Applicants have argued that, in a market where economic and statutory restrictions severely limit the opportunities for, or desirability of, competition, it must be determined whether retail territorial agreements of the kind alleged here (even on the assumption that such agreements existed) substantially lessen any cognizable form of competiton (e.g., App. Opening Br. at 41 n.43). The evidence of record cited by the Applicants demonstrates that such retail territorial agreements in the electric utility industry, even if they could be shown to exist, would have no adverse competitive effect, and, therefore, could not in any event be faulted as inconsistent with the antitrust laws.

Enactment by the Ohio Legislature of Amended House Bill No. 577 forcefully confirms this assessment of the alleged territorial agreements. The new law unambiguously makes clear the view of

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6/ Regardless of whether one views the evidence offered in this proceeding as sufficient to prove the existence of territorial agreements, there can be little doubt that this evidence relates at most solely to retail marketing activities. Each and every map introduced into evidence shows only the distribution facilities of various companies. In no instance are bulk power facilities that might be used to provide wholesale service depicted. Nor do any of the memoranda relating to the maps evidence any discussion with respect to wholesale service.

the Ohio Legislature that retail competition among electric light companies is neither necessary nor desirable in the provision of electric service to Ohio consumers. It certainly would be anomalous for a federal agency (like the NRC) to hold that the existence of alleged retail territorial agreements ten or more years ago is reason for now faulting these Applicants under the antitrust laws, while the state PUCO is currently enlisting the aid of these very same Applicants for the purpose of drawing maps that would establish certified exclusive service areas in all of Ohio.

Amended House Bill No. 577 should once and for all dispose of the misguided attempts by DOJ, the NRC Staff, and the City of Cleveland to resurrect allegations of territorial division as a basis for imposing nuclear-related license conditions.

(b) The Buckeye Project. A further claim made throughout this proceeding is the charge that participation by Ohio Edison and Toledo Edison in the Buckeye Project is inconsistent with the antitrust laws. The basis for this charge is a definition in the Buckeye Project agreements (S-188, ¶1.1, p. 3; S-190, ¶1, p. 2), incorporating by reference the 90-day disconnect requirement of section 4905.261. This charge always has been especially perplexing to the Applicants since the 90-day disconnect requirement was only inserted into the agreements after they had been submitted, carefully reviewed and awarded written advance clearance from Mr. Donald Turner, then Assistant Attorney General, Antitrust Division, under DOJ's business review procedures (A-248).

Nevertheless, repeal of section 4905.261, and replacement by Amended House Bill No. 577, should resolve any remaining antitrust

concerns in this area. By its terms the Buckeye Project agreements incorporated by reference section 4905.261. Since that statute has been repealed, the reference to the section is now meaningless, and the restriction set forth in the section no longer governs the conduct of Ohio Edison and Toledo Edison under the Buckeye Project agreements. Thus, there no longer exists any basis (misguided or otherwise) for attacking the lawfulness of the Buckeye Project under the antitrust laws.

(c) Appropriate Relief. A final specific area where Amended House Bill No. 577 bears directly on this Board's consideration of the instant appeal is the area of appropriate relief. Our position on the scope and nature of relief already has been fully set forth (App. Opening Br. at 283-97; App. Reply Br. at 15-24; App. Supp. Br. at 45). Clearly any relief ordered by the Appeal Board should not have the effect of requiring any of the Applicants to take action (or to refrain from taking action) in a manner inconsistent with the directives of another regulatory agency. The relief fashioned by the Licensing Board below already has caused some ambiguity in this area.

Thus, License Condition 1a, which prohibits conditioning the sale or exchange of electric energy or the grant or sale of bulk power services upon the condition that any other entity enter into any agreement or understanding restricting the use or alienation of such energy or services to any customer or territories, could be read as precluding the types of activities the State of Ohio (and its PUCO) are now proposing to require from the Ohio Applicants. Obviously, a direct conflict between Ohio's regula-

tory requirements and those imposed by the NRC must be avoided. No less important, however, is the avoidance of the potential for conflict and the uncertainties introduced when the Ohio Applicants cannot determine for themselves whether certain conduct is inconsistent with the antitrust license conditions that might be imposed by the NRC.

The Appeal Board certainly should not be insensitive to such concerns in reviewing the loosely worded antitrust conditions formulated by the Licensing Board. The recent enactment of Amended House Bill No. 577 underscores the infirmity of the decision below to devise sweeping relief which is inattentive to the established nexus requirements announced by the Commission. Antitrust enforcement, even if found in some respect to be necessary (but see App. Opening Br. at 129-33; App. Reply Br. at 17-24; App. Supp. Br. at 37-38) is not a talisman permitting the imposition of license conditions such as License Condition 1a which go well beyond the scope of this agency's nuclear expertise and intrude impermissibly into areas reserved for other federal and state regulatory agencies.

III. Relevance of Statute to Legal Issues Raised on this Appeal

A final point with respect to the relevance of Amended House Bill No. 577 is its relation to what we believe to be a primary task of this Appeal Board in the instant proceeding: that is, the adaptation of antitrust principles adopted on the basis of market analyses in settings significantly different from the

market settings presented by the electric utility industry in Ohio and Pennsylvania to the market realities that exist in the instant proceeding. Our earlier briefs have discussed in a variety of ways the need for a tailoring of broad antitrust principles to accommodate the competitive framework in this industry that has already been molded by natural forces and existing regulatory restraints. In addition, we have explained at length the manner in which such an analytical approach should be undertaken on the facts of this case and the results that must be reached.

Without limiting the scope of those prior arguments, we believe, at a minimum, that this Appeal Board must recognize and respond to the policy issues raised by the very limited nature of competition among electric utilities in Ohio and Pennsylvania and by the very real dangers associated with unfettered competition in such a market setting. In addition, we believe that this Appeal Board must reconcile the divergent approaches to regulation mandated by state and federal legislation on the one hand, and by the antitrust laws on the other hand. Where the policies underlying these different modes of regulation conflict -- as we previously have noted that they do -- this Appeal Board must make an explicit and reasoned assessment of how such a reconciliation is to be made.

Amended House Bill No. 577 obviously must be a part of this harmonization process. In a very narrow and parochial sense, the statute is simply another piece of the "situation" -- in this case additional legislation at the state level -- which must be

assessed before determining whether there exists a "situation" inconsistent with the antitrust laws. If viewed only in this manner, however, the true importance of Amended House Bill No. 577 most likely will be lost. This is because Amended House Bill No. 577, in concrete and unambiguous terms, makes very clear Ohio's legislative policy against competition among the electric utilities in the state.

Although implemented in various ways throughout the years, this policy against competition has been a constant signal to all Ohio utilities. Not surprisingly, it has played an important role in shaping industry practices that have emerged in this market setting defined by natural forces and regulatory supervision. The Licensing Board below chose to ignore such realities, electing instead to fault the Ohio Applicants on abstract antitrust principles having little meaning in the context presented by the evidence of record. We have urged in our briefs here that this Appeal Board correct the errors committed below by giving full recognition in its antitrust analysis to the essential nature of the electric utility industry in Ohio and Pennsylvania and the established economic realities which compel states like Ohio to adopt policies such as reflected in Amended House Bill No. 577. This harmonization process is essential to a proper resolution of issues presented in this proceeding.

Enactment of Amended House Bill No. 577 underscores the validity of the approach to this case that Applicants have urged on this Commission from the outset. In the face of current state legislation establishing certified exclusive service areas it

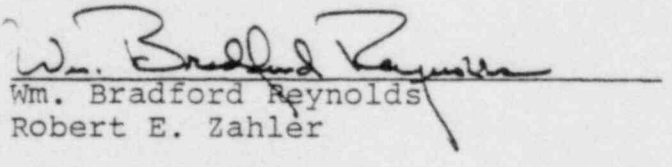
makes little practical sense, and serves no economic purpose, to fault conduct or fashion license conditions for the sole aim of promoting competition in a market setting where competition has long been recognized by governmental authorities as contrary to the public interest. This is not to say that the Applicants are free to act as they please in this industry -- far from it. But, it does mean that if the Applicants' conduct, as evidenced by their policies with respect to nuclear access (see A-44), is sufficient to satisfy the primary thrust of section 105(c) of the Atomic Energy Act in making available to all entities nuclear power on reasonable and nondiscriminatory terms, then this Commission's antitrust responsibilities are fully satisfied.

IV. Conclusion

For all these reasons, the Ohio Applicants believe that enactment of Amended House Bill No. 577 reinforces the positions previously urged upon this Appeal Board by the Applicants, and requires reversal of the Initial Decision rendered by the Licensing Board below.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE



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Dated: November 3, 1978

STATE OF OHIO
PUBLIC UTILITIES COMMISSION
180 EAST BROAD STREET
COLUMBUS, OHIO

September 7, 1978

James D. Wilson, Chief
Rates & Valuation Eng.
Ohio Edison Co.
76 S. Main Street
Akron, Ohio 44308

Dear Mr. Wilson:

Enclosed is a draft copy of proposed rules for implementing House Bill No. 577, past by the 112th General Assembly in the 1977-1978 regular session, declaring electric light companies and including electric companies organized as non-profit corporations to file boundary line maps within one year from the effective date of July 12, 1978.

This draft will serve as a basis for discussion at an informal meeting to be held at the State Office Tower Lobby Hearing Room, 30 East Broad Street, Columbus, Ohio. The meeting will start at 9.00 a.m., September 21, 1978. Please send a representative to this meeting if you care to participate in the finalizing of this procedure.

Yours truly,

C. E. Glasco

C. E. Glasco, Chief
Electric Section
Compliance Division

CEG:im 6-11
Enclosure

APPENDIX A

BOUNDARY MAP PROCEDURE FOR ELECTRIC SUPPLIERS AS DEFINED IN SECTION 4933.81(A), REVISED CODE.

Topographical maps of boundary line drawings, scale one inch equals 2,000 feet, shall be used exclusively in all filings.

Distribution line maps showing geographical location of distribution facilities as they existed on January 1, 1977, were under construction on that date, or for which contracts had been signed, must be submitted to the Commission as supporting material for boundary maps. Maps showing distribution line locations will be acceptable with any legible scale. Distribution maps of lines not pertinent to boundary determination need not be supplied.

Three copies of each boundary map submitted for approval shall be filed with three copies of the transmittal letter. One copy will be stamped approved, or not approved, and it shall include questions which have arisen. This copy will be returned to the company or corporation.

On or before July 12, 1979 each electric supplier (defined in Section 4933.81(A), Revised Code) shall file with the Public Utilities Commission a map or maps showing ~~all of~~ its existing distribution lines (defined in Section 4933.81 (C)) and a map or maps showing the proposed boundaries of its certified territory (defined in Section 4933.81(G)).

Natural boundaries such as expressways, railroad tracks, roads, rivers, creeks, wooded areas, political subdivisions, etc. should be used for area boundaries where possible and practical.

When a boundary map involves more than one adjoining area, alphabetical letter designations with arrows shall clearly indicate the exact point of meet with each adjacent service territory.

Signed concurrences shall be indicated on the appropriate area(s) on the maps involved and shall be in substantially the following form; This service area boundary is concurred in by the undersigned electric light company - corporation:

_____

_____

by_____

Title_____ Date_____

The following regulations are applicable with respect to each of said areas:

Municipal Corporations which retail electric service, but which purchase electricity at wholesale from an electric light company or non-municipal non-profit corporation, shall be indicated as such on the map.

Electric suppliers which border municipal corporations which retail electric service shall indicate such boundaries on the map. If such electric suppliers do not sell wholesale to such municipal corporations this shall be so indicated on the map.

In those areas where the distribution lines are so interspersed that continuous boundaries or contiguous service territories do not result from direct application of the provisions of Section 4933.81 et. seq., Revised Code, then continuous boundaries shall be established so that they provide contiguous service territories to the extent possible and practical. Electric load centers (defined in Section 4933.81(E), Revised Code) within the certified territory of one electric supplier which are served by another electric supplier shall be treated in accordance with

Section 4933.81 et. seq., Revised Code.

Such electric load centers shall be called "overlap customers". Each electric supplier which has within its certified territory overlap customers served by another electric supplier shall show each such overlap customer on its boundary map. Each electric supplier serving overlap customers shall show each such overlap customer on its boundary map.

LAW OFFICES OF

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John W. King (1912-1977)

October 3, 1978

78-1311-EL-ORD

Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

Attention: C. E. Glasco, Chief
Electric Section
Compliance Division

Promulgation of Rule 4901:1-12 relating to "Boundry Map Procedure for Electric Suppliers as defined in Section 4933.81(A), Revised Code.

Dear Mr. Glasco:

At the informal meeting held on September 21, 1978 at the State Office Tower with respect to the draft of proposed rules relating to "Boundary Map Procedure for Electric Suppliers as defined in Section 4933.81(A), Revised Code", you indicated that interested persons were welcome to submit written comments to you regarding the proposed rules. We are submitting the following comments on behalf of Ohio Rural Electric Cooperatives, Inc. whose members consist of the twenty eight rural electric companies operating in the State of Ohio, all of which constitute electric suppliers as defined in Section 4933.81(A), Revised Code.

In the interest of brevity, we will not repeat all the comments which we made orally at the aforementioned meeting, but we reaffirm our request that you take such comments into consideration. Among our comments were the following:

1. In the second paragraph, first page, beginning in the third line, the phrase "or for which contracts had been signed" appears. We believe this should be clarified to make clear that it is only "existing distribution lines" as defined in Section 4933.81(C) and (D) which are to be considered in preparing boundary maps. The Commission's rules must be in conformity with the statutory definitions. It is a fact that where an electric supplier was under contract to serve a customer on January 1, 1977, that customer is to be included in the supplier's mapped area. Perhaps this matter could be clarified by deleting the above quoted phrase and including a separate sentence to cover situations where a contract to serve a customer existed on January 1, 1977.

APPENDIX B

2. At the end of the fifth paragraph on the first page, we suggest that the following phrase be added at the end of the sentence: "and consistent with the purposes and provisions of Section 4933.81 through 4933.90, Revised Code." We think this modification will make clear that while it is certainly the legislative intent that electric suppliers attempt to agree upon the most practical location of boundary lines, taking into account physical circumstances, no electric supplier can be compelled to accept a boundary line which is closer to its existing distribution lines, as defined, then to those of another electric supplier (except in the case of the area occuppied by customers under contract on January 1, 1977.)

3. In the first paragraph at the top of the second page, we think the phrase "electric light company-corporation" appearing in the fourth line should be "electric supplier" since this is the correct statutory term.

4. The second paragraph on the second page refers to municipal corporations "which purchase electricity at wholesale from an electric light company or non-municipal non-profit corporation." It is a statutory requirement that the service areas of all municipal corporations which provide retail electric service are to be indicated on the boundary maps regardless of the source of electricity used by such municipal corporations. The purpose of the above quoted language appears to need clarification.

5. At the hearing, the representatives of some electric suppliers indicated a concern that any discussions between electric suppliers with respect to the preparation of boundary maps might constitute a problem because of the possible application of Federal antitrust laws or the conditions contained in licenses issued by the Nuclear Regulatory Commission.

We understand that because of this concern some of the Ohio electric suppliers are asserting that it would be unlawful for them to enter into any discussions with other interfacing electric suppliers in order to implement Amended House Bill 577. Any supplier standing on this position is in effect saying it is unwilling to carry out the legislative mandate to present maps to the PUCO indicating boundary lines determined in accordance with the requirements of the Am. H.B. 577. This is necessarily so because it is impossible to submit maps showing boundary lines without communicating with adjoining electric suppliers to determine the location of their respective distribution lines and customers existing as of January 1, 1977. No one supplier can determine the boundary lines of its service area without having this information from the adjoining suppliers. The statute contemplates that the PUCO not be burdened with the task of drawing the lines except in those instances where there is a disagreement between the electric suppliers as to the proper location of a boundary line. There is certainly no

possible way to carry out the statutory scheme of placing the primary burden for the determination of boundary lines in the first instance upon the electric suppliers affected unless the electric suppliers are themselves willing to cooperate. Consequently, we think it is a matter of grave importance for the successful implementation of Am. H.B. 577 in a prompt, efficient and economical manner with a minimum of burden on the Commission and its staff, that all electric suppliers be willing to fully cooperate in the preparation of the initial boundary maps.

Our research indicates that more then forty states have some type of legislation involving the allocation of service areas among electric suppliers. It is also common knowledge that many other utilities are subject to limitations on their service area under a wide variety of state and federal statutes. We are unaware of a single instance where any effort of utilities to cooperate among themselves to implement and carry out the provisions of such legislation has been found to be a violation of the antitrust laws or any Nuclear Regulatory Commission license condition.

The reason is apparent.

It is a settled principle of Federal law that no conduct of a private individual which is carried out to implement a state statute regulating competition can constitute a violation of the antitrust laws even if such conduct would be a violation of the antitrust laws if it were not being carried out for the purpose of implementing a state statute. Parker V. Brown, 317 U.S. 341. This principle was recently affirmed by the U.S. Supreme Court in Bates v. State Bar of Arizona, 97 S.CT. 2691. There are numerous decisions of the courts following the Parker V. Brown principle. See e.g., Gas Light Company of Columbus v. Georgia Power Company, 313 F. Supp. 860 (M.D. Ga.); Allstate Insurance Company v. Lanier, 361 F.2d 870 (C.A. 4th Cir.).

We have reviewed many licensing conditions contained in permits issued by the Nuclear Regulatory Commission and we have found no provisions which purports to prohibit a utility from cooperating with other utilities in implementing state territorial legislation. Moreover, since the whole purpose of such conditions is to apply the principles of the Federal antitrust laws to the licensing of nuclear generating stations, it would be illogical and inconsistent to conceive of a NRC license condition that was intended to be applied in a manner conflicting with a well established principle of the Federal antitrust laws.

Accordingly, we strongly urge the Commission to include in the proposed rules a provision substantially as follows:

> "Electric suppliers shall cooperate with one another in providing all information necessary to prepare boundary maps in conformity with the requirements of Sections 4933.81 to 4933.90, Revised Code, and to facilitate preparation of such maps in a prompt, efficient and economical manner and to minimize potential disputes concerning boundary maps submitted to the Commission by electric suppliers."

In our opinion such a provision would not result in a violation of any Federal antitrust laws or any Nuclear Regulatory Commission licensing conditions. If the Commission has any doubt with respect to this matter, we would appreciate an opportunity to meet with the Commission staff to discuss the matter further and submit additional information in support of our position.

Very truly yours,

Robert P. Mone

RPM/js

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
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THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket No. 50-346A
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THE TOLEDO EDISON COMPANY, ET AL. (Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Ohio Applicants' Comments on the Ohio Statute Requiring Certification of Exclusive Service Territories for Electric Light Companies" were served upon each of the persons listed on the attached Service List, by hand delivering copies to those persons in the Washington, D.C. area, and by mailing copies, postage prepaid, to all others, all on this 3rd day of November, 1978.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Wm. Bradford Reynolds
Wm. Bradford Reynolds
Counsel for Applicants

UNITED STATES OF AMERICA
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(Perry Nuclear Power Plant, Units 1 and 2)	)	50-441A
	)	
THE TOLEDO EDISON COMPANY, ET AL.	)	
(Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

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