UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
The Toledo Edison Company	)	
The Cleveland Electric Illuminating Company	)	Docket Nos. 50-346A 50-500A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	)	50-501A
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A 50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN RESPONSE TO APPLICANTS' INDIVIDUAL MOTIONS TO DISMISS

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The individual Applicants in this proceeding have filed five separate motions seeking the dismissal of certain portions of the direct case presented by the Department of Justice ("Department") and the other parties opposing the Applicants. Prior to taking up the specific subject matter of Applicants' individual motions, the Department will set forth the general legal standards which should govern the determination of such motions.

I. MOTIONS FOR DISMISSAL OF FACTUAL ALLEGATIONS

Since all of Applicants' motions relating to factual allegations appear to be argued by analogy to Rule 41(b) of the Federal Rules of Civil Procedure, the Department will

address itself to the standards associated with dismissal under that Rule. Rule 41(b) provides in pertinent part:

> For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.
>
> In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence [Emphasis supplied].

Initially, the Department would note that action by this Board under the standard set by Rule 41(b) is wholly discretionary. We would urge the Board not to exercise its discretion in the manner requested by the Applicants for the following reason. Rule 41(b) is directed to the dismissal of an "action" or "claim" concerning which the "plaintiff has shown no right to relief." In the instant proceeding, the clearly analogous target for such a motion would be one of the Issues and Matters in Controversy established by Prehearing Conference Order No. 2. As this Board has repeatedly pointed out, the factual descriptions of anticompetitive activity contained in the September 5 filings do not themselves constitute the issues in this proceeding (e.g., Tr. 2080-2081, 2085). Even if the Applicants were successful in all of their individual motions, their motions relate to only a portion of the facts in this record and would not eliminate a single Issue or Matter in

Controversy, nor would they resolve the question of whether a situation inconsistent with the antitrust laws exists. 1/ In actuality, Applicants are again seeking specific evidentiary rulings from the Board, since their individual motions are not directed to the dismissal of a claim upon which relief could be granted in the context of this proceeding. 2/ Applicants' attempt to secure anticipatory findings and conclusions should be rejected and their individual motions should be denied.

The remainder of this memorandum discusses the subject matter of Applicants' individual motions and demonstrates that Applicants' arguments are without merit.

A. The Duquesne Light Company

On April 20, 1976, the "Motion of Applicant Duquesne Light Company For an Order Dismissing Specific Allegations Made Against It By The NRC Staff, The Department of Justice And The City of Cleveland" was filed. For the reasons hereinafter set forth, the Department submits that it has

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1/ The sole exception would be Duquesne Light Company which has challenged every factual situation which might be relevant to the Matters in Controversy or constitute conduct which is part of a situation inconsistent with the antitrust laws.

2/ In order to defeat a motion under Rule 41(b), the Department must have established the facts upon which it relies by a preponderance of the evidence, which the trier of fact should weigh after resolving any evidentiary conflicts. 9 Wright & Miller, Federal Practice & Procedure §2371.

met the burden of proof under Rule 41(b) 3/ and that the Duquesne Light Company (DL) Motion should be denied. DL's arguments will be answered in the order in which they appear in the Motion.

1. The Borough Of Ellwood City

a. The Evidence

The record establishes that Ellwood City's Solicitor made a request to three DL representatives that DL sell power at wholesale to Ellwood City (Tr. 6403-6406, 6418). This request was made, probably in June of 1966 (Tr. 6060), in a hotel room maintained by DL (Tr. 6413-14) at a convention of all of the boroughs of the State of Pennsylvania (Tr. 6405) in Pittsburgh (Tr. 6413-14). Furthermore, it was made in the presence of Ellwood City's borough manager and one or two councilmen (Tr. 6414). DL's representatives gave an unequivocal refusal in response to the request (Tr. 6403-06, 6418).

DL has argued that this request was made in a social setting and was not made to officers of the company. In fact,

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3/ With respect to DL's acquisitions of the municipal system of Etna and Sharpsburg which took place prior to September 1, 1965, the Department will assert that the Licensing Board has committed reversible error by excluding evidence of anticompetitive activities occurring prior to 1965, since the record demonstrates that such activities have contributed to a presently existing situation inconsistent with the antitrust laws, and evidence thereof is clearly relevant and probative in this proceeding.

the request was made to middle management personnel (Tr. 6405) -- the representatives DL selected to deal with borough officials at the convention. DL's own documents clearly show that the company considered such conventions to be a time for conducting negotiations and generally dealing with municipal systems (DJ 251). The record further shows that such conventions "are informative, they are educational, there is some for sales, and certainly there is the social aspect" (Tr. 6415).

DL's argument that an unequivocal refusal was not followed up is without substance (Tr. 6416). Similarly, DL's argument that Mr. Luxenburg was not "authorized" by Ellwood City to make the request is meaningless without evidence that such an authorization was needed. The presence of the borough manager and councilmen (Tr. 6414) eliminates any inference of caprice.

Thus, the record demonstrates that Ellwood City made a clear request that DL sell it wholesale power, and DL unequivocally refused.

b. Anticompetitive Effect

DL has argued a business justification exists for its refusal because it allegedly did not have transmission lines in the vicinity of Ellwood City. Whatever the truth of this unsubstantiated assertion, the record is clear that a transmission line which connects the Pennsylvania Power Company system and the DL system is located in close proximity to Ellwood City (Tr. 6403).

In addition, the request made of DL went solely to the sale of power; the question of a need for wheeling by any third party was not raised.

The subject request and refusal are relevant to market definition. Dr. Wein defined the geographic market for wholesale firm power sales as coincident with the area served by each of the companies at retail (DJ 587, pp. 130-31, 136). The fact that Ellwood City was unable to secure bulk power from a supplier located outside the area served by Pennsylvania Power Company supports this market definition.

DL's argument that its refusal is irrelevant because state law defines exclusive service areas for electric utilities is equally without substance. As support for its proposition, DL cited pages 33-34 of the Prehearing Brief of the Department of Justice. This wholly misrepresents the Department's position -- Pennsylvania utilities have defined retail service areas. Sales of electric power at wholesale are subject to federal, not state, regulatory jurisdiction. FPC v. Southern California Edison Company, 376 U.S. 705 (1964). Indeed, the Pre-Hearing Fact Brief of Duquesne Light Company, filed on December 1, 1976, at page 49, clearly admits that the FPC, not a state agency, regulates wholesale sales. 4/

4/ State jurisdiction over wholesale sales is also refuted by the fact that Pennsylvania Power Company was making such sales pursuant to FPC filed rates at approximately the time of DL's refusal (NRC 106-110).

2. The Borough of Aspinwall

a. The Evidence

DL's argument that it did not refuse to sell Aspinwall power for resale is directly contrary to the record. From the time Aspinwall first informally requested that DL sell it power at wholesale (DJ 168), the company took the position that it would not do so (DJ 169, 171, 172, 173, 174).

b. Anticompetitive Effect

DL has argued that a refusal to sell to Aspinwall has no antitrust significance because of the state law context in which it was made. As noted in Section I.B.1.b, supra, state law could not prohibit such sales because it was the FPC, not the state, which had regulatory jurisdiction over such sales.

DL also contends that Rule 18 of its tariff prohibited the sale of bulk power at wholesale for resale. Assuming arguendo that this tariff could prevent wholesale sales, there is no reason why DL could not have filed anotner tariff with the Pennsylvania Public Utility Commission which would have permitted such sales.

It is clear from Exhibits DJ 321, 175, 195 and 201 that DL's refusals resulted, not from state law prohibitions, but from the company's desire to acquire the Aspinwall system.

c. Relevance

DL argues that whatever it did to Aspinwall is not relevant

to the present proceeding, because DL's present policy is to sell power at wholesale. 5/

First, there is nothing to prevent DL from refusing to sell power at wholesale to any system in its service area. Its dominance of transmission (NRC 133, p. 28), which gives it unlimited power to foreclose any attempt by a system in its service area to obtain wholesale power, coupled with its history of never willingly selling power at wholesale, provide no basis for a belief that DL will refrain from anticompetitive behavior in the future. There is no evidence of DL's alleged present policy.

Further, DL's proven past policy of refusing to sell at wholesale was part of a course of conduct constituting monopolization -- DL effectively put its competitor Aspinwall out of business (DJ 321). Thus, the effect of this conduct is still being felt. To argue that acts in furtherance of monopolization become irrelevant once that monopolization has been completed (these acts having been stopped because there is no longer a need for them) is preposterous. DL's quotations from Consumers Power opinion concerning mootness are plainly inapposite in this context.

5/ DL contends that "the Record discloses absolutely no request since 1966 for wholesale power which has not eventually been satisfied" (Motion, p. 10). The attempts of the Borough of Pitcairn, the only remaining municipal system in DL's service area after DL's acquisition of Aspinwall, to obtain power at wholesale are discussed in Section I.C., infra.

3. The Borough of Pitcairn

a. Wholesale Power

DL argues that the allegation that it refused to provide wholesale power when asked by Pitcairn was unsupported by the record. Their argument deals exclusively with the request by Pitcairn for the sale of emergency power contained in Exhibit DJ 1 -- this argument completely ignores Pitcairn's numerous requests for the sale of other types of power at wholesale.

In 1966, Pitcairn asked DL to sell it power at wholesale and suggested three different alternate plans for such a sale (Tr. 1619; see also NRC 13). DL's own notes (NRC 13), as well as Mr. McCabe's testimony (Tr. 1616, 1654), establish that DL refused each of these requests. 6/

It is obvious from Mr. McCabe's testimony that Pitcairn requested emergency service because it was not able to obtain any other type of wholesale power from DL (Tr. 1641-42, 1824-25). Thus, DL's argued willingness to supply emergency power under its Rate M cannot legitimate the company's repeated refusals to sell power to Pitcairn at wholesale.

6/ Such refusals by DL were repeated during the period from 1966 through 1968 (Tr. 1616, 1619, 1625, 1654; NRC 14, 15, 16 and 19).

b. Interconnection

DL appears to argue that its refusal to offer emergency service on terms and conditions other than those of Rate M refutes the Department's allegation that DL refused to enter an interconnection agreement with Pitcairn.

DL's overall argument that it was legally prohibited from selling power at wholesale has been discussed previously (see Sections I.A.1.b and I.A.2.b., supra).

DL's additional argument that if Pitcairn did not think the Rate M tariff was fair, modification should have been sought before the Pennsylvania P.U.C. is somewhat less than candid. Aside from the fact that the Pennsylvania Commission had no jurisdiction over wholesale rates, Pitcairn would have been required to expend large sums of money in such a challenge. As was true with Aspinwall, DL knew that a small municipality did not have the fiscal ability to mount a challenge to these rates. 7/

DL's refusal to sell emergency power on terms and conditions other than those of Rate M, when viewed in the context of DL's market position and other anticompetitive conduct,

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7/ DL has also argued that changes in the Rate M tariff might result in charges of discrimination by other classes of customers. In this regard, it need only be noted that Pitcairn was the only municipal wholesale customer in DL's service area, so there is no possibility that a change in the Rate M tariff could discriminate against any other wholesale customer.

is another element in a situation inconsistent with the anti-trust laws.

c. Anticompetitive Effect

DL's refusals must be examined in light of the knowledge that the company wanted to acquire the Pitcairn system and that the plan for acquisition which DL's chief executive approved (DJ 246) specified denying wholesale power to the target utility (DJ 321). Other company documents clearly show that DL wanted to "clean up" the last remaining municipal system in its service area and believed that it could do so with "careful handling" (DJ 245). See also Exhibits NRC 13, 57, DJ 238, 242-43, 248, 251, 254-55. It is clear that the refusal of DL, the dominant owner of transmission in its service area, to sell emergency power to Pitcairn at anything but an outrageous rate (Tr. 1826), with the intent of driving the Borough out of business is properly included as part of a situation inconsistent with the antitrust laws. 8/

DL's argument that its refusal to sell wholesale power is not relevant to this proceeding because there can be no competition between a private system and a municipal system confuses competition at wholesale and competition at retail. In fact, at page 49 of its Pre-Hearing Brief, DL specifically

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8/ DL's arguments that its conduct was required by state law has already been discussed and will not be addressed further here.

admits that today state law is not applicable to wholesale competition. There is no legal prohibition of competition between different utilities in the sale of power at wholesale in Pennsylvania.

Even the absence of actual competition at wholesale or retail at the present time does not mean that there are no competitive pressures at work. There is always the presence of potential competition. If alternative sources of bulk power supply are available in DL's service area, either by direct sale or wheeling, the effect of competition will be felt even if no actual competitors materialize. This is not idle speculation. DL has recognized that the possibility of competition continues to exist (DJ 251, 255). Furthermore, with regard to retail sales, DL's presence at the edge of Pitcairn makes the company a potential competitor of Pitcairn. This point was established by Dr. Wein (Tr. 6998). 9/

DL's argument that Pitcairn is an unregulated monopoly is untrue since the Borough's customers (i.e., the citizens) have the power to raise or lower their own rates. Since the customers directly control the utility which is serving them, there is no monopoly power. DL's customers, on the other hand, do not have any comparable power over the utility which serves them.

9/ The presence of two utilities in the same geogrpahic area provides for yardstick competition as discussed by Dr. Wein (DJ 587, p. 134; Tr. 6986-6987).

d. Access to Beaver Valley

The pertinent part of the Department's allegation which has been challenged by DL reads as follows:

> In 1968, Duquesne refused the request of Pitcairn for participation in a nuclear unit.

The record demonstrates that the request in question was made at a February 21, 1968, meeting between Mr. McCabe, representing Pitcairn, and Messrs. Munsch and Dempler, the individuals designated by DL to represent the company. (NRC 17, Tr. 1636-1638, 1839-1840). DL's notes of the meeting clearly indicate that the company's representatives understood Mr. McCabe to be making a request (NRC 17, pp. 5-6) and Mr. McCabe testified that he made such a request (Tr. 1636-7). There is no evidence to the contrary. 10/

DL further argues that there is no evidence of an earlier or later inquiry. DL's unequivocal negative manifestly did not invite renewed requests for nuclear access. In addition, Exhibit DJ 247, p. 2, clearly states that Pitcairn's Mr. McCabe had previously "indicated a desire to explore the possibility of Pitcairn participating in the recently announced joint generation program

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10/ DL's arguments that the request was oral and not directed to a company officer are, in context, the merest quibbles.

of the company." Clearly, Pitcairn's position with respect to access to generation was known to DL. 11/

DL also argues that Pitcairn made the request for access knowing that DL was short of capacity and needed to construct all capacity possible to satisfy its own needs. DL then argues that if it had sold Pitcairn generating capacity, it would have violated the duty imposed by state law to provide electricity at the lowest possible cost. This dialectic is laughable at best. If DL could not spare capacity to sell to Pitcairn for resale at retail, then how could DL intend to purchase the Pitcairn system and to serve the same customers at retail. (The evidence of DL's desire to acquire the Pitcairn system is overwhelming, NRC 13, 57, DJ 238, 242, 243, 245, 246;

11/ DL's argument that Mr. McCabe was referring to a fossil, rather than a nuclear unit is without substance. At page 4 of Exhibit NRC 17, Mr. Dempler is reported as referring to "the Beaver Valley unit" and again on page 5, Mr. McCabe is reported to specifically request access to "the new Beaver Valley unit." (Emphasis supplied.) Since Mr. Munsch, DL's attorney, and Mr. Dempler, DL's System Planning Engineer, were thoroughly familiar with the nomenclature of both the company and CAPCO (e.g., the "Beaver Valley" units and the "Mansfield" units), there can be little doubt that they understood Mr. McCabe's reference to be to a Beaver Valley nuclear unit and to no other. Furthermore, Mr. McCabe specifically mentioned the Beaver Valley generating facility and that it was being built in the DL service area (Tr. 1839). Finally, Mr. McCabe clearly referred to "their initial units at Beaver Valley" (Tr. 1638). In any event, this denial of access clearly demonstrates DL's utilization of dominance in generation and transmission to prevent Pitcairn from receiving the benefits of coordinated development.

Tr. 1684-86.) 12/ Clearly, DL is talking out of both sides of its mouth.

There is no indication that DL has changed its policy with regard to access. Mr. McCabe testified that Pitcairn is currently interested in nuclear units (Tr. 1716), but that he has not requested access to any specific plants since his request for access to Beaver Valley, because Pitcairn is unwilling to commit itself to the extensive litigation that would be necessary to obtain access (Tr. 1717-18). If DL has changed its access policy, it is a well-kept secret.

e. Mootness

After repeating the argument that DL's purported present policies render its past activities irrelevant, the company argues that Pitcairn's settlement of a private damage action against the company resolved all questions concerning DL's conduct and that it is unfair for another party to now raise any issue which involves Pitcairn.

12/ If DL was in dire need of capacity as it suggests, then why did it not look more favorably on Pitcairn's requests to interconnect with the company and to join CAPCO, since Pitcairn had informed DL at the February 21, 1968, meeting that the Borough had excess capacity (NRC 17, p. 3). If Pitcairn's capacity was too small to be helpful, its purchase of capacity would be too small to be harmful to DL.

If DL is arguing that something analogous to collateral estopped exists, it is submitted that none of the required elements of that doctrine can be shown here. 13/

Further, there is a world of difference between a private damage suit intended to compensate a single plaintiff for past wrongs and the present proceeding which is addressed to numerous relationships between DL and large and small utilities in two states and which has the objective of protecting the public interest on a scale impossible and unnecessary for a single private litigant.

f. CAPCO and Interchange

DL appears to argue that its acknowledged refusals to grant Pitcairn access to the benefits of coordinated operation and development through an interchange agreement or CAPCO membership cannot constitute an element in a situation inconsistent with the antitrust laws solely because those refusals were justified by "legitimate business reasons." Its legal analysis and conclusion are completely unfounded.

It is a well recognized principle in antitrust law that "[t]he promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct."

13/ For a discussion of the doctrine of collateral estoppel, see Section II, infra.

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967). 14/ This antitrust principle has been specifically applied to the electric utility industry. Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973).

In addition, the record clearly demonstrates that DL's refusals were motivated by its desire to acquire the Pitcairn system, thereby eliminating the last remaining competitor in its service area (DJ 245-46, 321). 15/

B. Ohio Edison Company - Pennsylvania Power Company

On April 20, 1976, "Ohio Edison Company's and Pennsylvania Power Company's Motion For Dismissal of Certain Allegations" was filed. As previously indicated, the Department does not believe it is necessary or appropriate for the Board to rule on specific evidence in the piecemeal fashion requested by Ohio Edison Company (OE) and Pennsylvania Power Company (PPC).

14/ We note that DL presents no other argument for the proposition that its exclusionary conduct was legal. For a full discussion of the law concerning such refusals, see Prehearing Brief of the Department of Justice, pp. 38-54.

15/ See also Exhibits NRC 13, 57; DJ 238, 242-43, 248, 251, 254-55; Tr. 1684.

The Department will, however, answer Applicants' arguments concerning specific factual allegations. 16/

The Department acknowledges that it has presented only limited evidence going to prove that OE has refused or delayed providing new delivery points to rural electric cooperatives; we do not believe that the evidence presently of record meets our burden under Rule 41(b). While the evidence of record does not demonstrate OE's 1966 offer to or the existence of its territorial agreement with Firelands Rural Electric Cooperative as described in our September 5 filing, the record does demonstrate the existence of such an agreement between OE and Holmes-Wayne Rural Electric Cooperative (DJ 522). This latter agreement was only brought to light through examination of documents which were produced by OE after the close of discovery; the Department has been informed that the agreement itself, as well as any other documentary evidence relating thereto, are no longer in OE's possession.

16/ With respect to those anticompetitive activities which took place prior to September 1, 1965 (i.e., OE and PPC's refusals to sell power at wholesale and OE's offer of subsidy in furtherance of the acquisition of a municipal system), the Department will assert that the Licensing Board has committed reversible error by excluding testimony and documentary evidence of anticompetitive activities occurring prior to 1965, since the record demonstrates that such activities have contributed to a presently existing situation inconsistent with the antitrust laws, and evidence thereof is clearly relevant and probative in this proceeding.

Similarly, the Department does not believe it has met the burden of proving a 1971 refusal by OE to wheel power from Buckeye Power, Inc. to Norwalk. We do believe, however, that the evidence relating to this allegation (DJ 425, 426 and 427) clearly indicates interest by municipal electric systems located within OE's retail service area in becoming customers of Buckeye Power, Inc. Access to this alternative bulk power supply from municipal systems was anticompetitively impeded by the Buckeye agreements to which OE is a party (NRC 190).

On the other hand, the Department believes that it has met the burden of proof under Rule 41(b) with respect to the remaining factual situations challenged by OE and PPC.

As noted by Applicants' Motion, OE's 1970 bid on the Norwalk system is documented by Exhibit DJ 422; it is further supported by Exhibits DJ 429, 433 and 434 which show OE's later refusals to bid on any of Norwalk's generating equipment. 17/ Contrary to OE's characterization of this situation as a potential tying arrangement, the Department alleged that OE's offer was a device to eliminate a municipal system's ability to compete. While the Department does not believe OE's offer standing alone constitutes a situation inconsistent with the antitrust

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17/ The Board's ruling with respect to the Department's offer of proof goes simply to the weight which will be accorded Exhibit DJ 422 standing alone (Tr. 6191-92).

laws, we do believe the offer to be relevant in the context of OE's overall campaign to eliminate competition from and to acquire the system of Norwalk.

With respect to the term of OE's wholesale contracts, the company has acknowledged as "undisputed" its numerous contracts with municipalities for ten year terms (Motion, p. 10). OE attempts to argue that such a term is reasonable on the basis of Mr. Mayben's testimony that for "certain" contracts, ten years might be an "appropriate" term. It has ignored Mr. Mayben's testimony that, even though ten years might protect OE's investment, such a term would be "appropriate" only where the municipal system had an opportunity to shift from full to partial requirements on one to two years' notice; Mr. Mayben also noted that a five-year term would be reasonable with respect to a municipal system which might wish to purchase from an alternative bulk power supplier (Tr. 7807-09). Mr. Kampmeier testified that a five-year contract term might be reasonable for a good size load (Tr. 5827-28), but that the term need not be long if the load is small (Tr. 5972-73). Mr. Kampmeier also testified that, in Ohio, Applicants have agreed upon contract terms of as little as one to two years with industrial retail customers which have greater loads than Applicants' municipal wholesale customers (Tr. 5972).

PPC apparently attacks the Department's allegation concerning PPC's 1965 refusal to supply maintenance power to Grove City by noting that the only evidence of record concerned a request by Grove City for "partial requirements" power. The record shows that Grove City's generation in 1965 was in poor condition and needed to be repaired (Tr. 4767). The record also demonstrates that Grove City sought partial requirements power from PPC in order to conduct maintenance of the city's generating units in 1965 or 1966 (Tr. 4768). Grove City received a negative response (Tr. 4774) and was told such a purchase would not be to its advantage (Tr. 4775). The City felt that it had no alternative but to purchase all of its power from PPC (Tr. 4786). PPC's attempt to characterize Grove City's request for partial requirements power to perform repairs as something other than maintenance power poses a distinction without difference.

The Department's allegation of a territorial agreement between OE and CEI with respect to new customers was demonstrated on the record in this proceeding. Initially, it should be noted that it was not the intention of the Department to charge only one party to a bilateral agreement with

anticompetitive conduct; the Department believes that the restraint upon competition flowing from this agreement is attributable to both OE and CEI. While the Department believes Exhibit DJ 488, standing alone, is probative of this allegation, there is other evidentiary support in the record. While denying the existence of an agreement, Mr. Rudolph of CEI testified upon deposition:

> My understanding is that the company that is closest and can serve at the least cost, they get the business.
>
> Now, there may be a little bit of conflict between those two, and I can't speak to that conflict, but I think that is the situation. (DJ 558, p. 53).

OE's 1965 territorial agreement with Ohio Power Company with respect to rural electric cooperatives is also documented on the record. The inference the Department has drawn from Exhibit DJ 490 is substantiated by other evidence of record proving that an overall territorial agreement was in existence between OE and Ohio Power at that time (DJ 200, p. 18000030; DJ 518-31). The inference which OE attempts to draw from Exhibit DJ 490 is wholly unwarranted, even if one completely accepts Mr. Frederickson's self-serving statements upon deposition (DJ 573, pp. 225-26).

The Applicants' challenge of the Department's allegations that OE has eliminated competing municipal systems by acquiring them assumes that the existence of such acquisitions, standing along, constitute a Matter in Controversy in this proceeding. As the Department has pointed out at length on numerous occasions, such acquisitions are not alleged to constitute a situation inconsistent with the antitrust laws, but merely to be elements of such a situation when viewed in the overall context of Applicants' market power and anticompetitive activities. We must note in passing that the standards employed by the Securities and Exchange Commission under the Public Utilities Holding Company Act of 1935, 15 U.S.C. §797 et seq., hardly amount to the "rigorous antitrust analysis" which OE asserts (Motion, pp. 15-16). None of the standards set forth by OE in its Motion remotely approximate those which the Nuclear Regulatory Commission must employ under Section 105c.

Finally, the Department has clearly proven the factual allegations relating to OE's refusals to file rates for 138 kv service and PPC's similar refusals to file rates for 69 kv service. This anticompetitive technique -- like rate squeeze, etc. -- appears to be part of an overall pattern of conduct which prevents competition for industrial customers at retail and which is employed by both companies. The Applicants' attempt to shield their refusals behind the absence of an

affirmative duty under Federal Power Commission regulations to file a rate does not succeed in making such refusals one whit less anticompetitive. It is the antitrust laws, not the Federal Power Act, which provide the standard against which Applicants' conduct should be measured. The record demonstrates that Applicants' municipal customers were unable to determine the amount of any high voltage discount rate which OE or PPC might ultimately file (DJ 419, 421; Tr. 5002-03, 6410). The record is equally clear that a municipal customer could not build facilities or contract to take high voltage service without advance knowledge of the rate level (Tr. 4979-80, 5000-01). This refusal to state the amount of any high voltage discount rate deterred municipal systems from requesting and securing high voltage service which would allow them to compete more effectively with the Applicants for industrial customers.

C. The Toledo Edison Company

On April 20, 1976, the "Motion of Applicant Toledo Edison Company For an Order Dismissing Allegations Made Against It" was filed. As heretofore noted, the Department does not believe it is necessary or appropriate for the Board to make evidentiary rulings in the piecemeal fashion requested by The Toledo Edison Company (TE). The Department will answer Applicant's arguments concerning specific factual allegations.

1. Waterville

TE argues that the Department's allegation that the company refused to sell power to Waterville in order to acquire the system is unsupported by the record. 18/ TE is mistaken.

Waterville's request for wholesale power is clear upon the record. TE challenges the written request of Waterville's acknowledged consultant (DJ 505) as an "informal and unofficial inquiry." TE does not enlighten us as to what an "official" inquiry must consist of. We would merely note that TE's refusal (DJ 506) is not based on the consultant's lack of authority to request the transaction or on the form of the request.

The basis for TE's refusal is clear on the record. Exhibit DJ 504 gives a full, concise and clear picture of TE's conduct relating to Waterville. This TE memorandum (DJ 138) from Mr. Cloer (District Manager) 19/ to Mr. Schwalbert (then Assistant to the Senior Vice President and General Manager) states that it was TE's intent to refrain from selling

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18/ TE's objection that the Department's evidence consisted solely of documents and depositions is unique, but without substance.

19/ Mr. Cloer was TE's spokesman in the company's dealings with Waterville (DJ 582, p. 7). Similarly, Mr. Schwalbert was deputy to TE's second in command (DJ 138).

wholesale power to Waterville in an attempt to force the sale of the system and that, as a political tactic, TE would publicly announce other reasons for its conduct.

We note in passing that Mr. Cloer's statements are wholly consistent with TE's policy of trying to acquire municipal systems (DJ 577, p. 7). Indeed, TE had made an offer to acquire the Waterville system in the past (NRC 158, p. TE-34; DJ 577, pp. 22-24) and did acquire the system in 1968 (NRC 158, p. TE-37).

Finally, TE argues that the Waterville system was sold after a public election. The existence of such an election, if established in the record, would be irrelevant since TE's refusal to sell wholesale power to Waterville denied the municipal system a bulk power supply alternative which would have allowed it to remain in business as a competitor. In the circumstances, the Waterville system was doomed. The election simply permitted the city's voters to set the date for the funeral.

2. Price Squeeze

TE has also argued that there is insufficient evidence to establish the existence of a price squeeze. The record, however, clearly establishes that it was and is TE's policy to attempt to equalize the rates of its wholesale municipal and retail industrial customers (NRC 47, 127, 150; DJ 583,

p. 52). This evidence clearly confirms Dr. Wein's (DJ 587, p. 96) and Mr. Kampmeier's (DJ 450, p. 35) conclusions with respect to a price squeeze. 20/

TE's attempt to focus attention on the fact that the company is outcompeted at retail by some of its municipal wholesale customers is simple misdirection. The proper focus is on the differences, if any, between the wholesale rate TE charges its municipal customers and the retail rate the company charges its industrial customers. 21/ The fact that TE is underpriced and outcompeted by its municipal customers can result solely from the fact that the municipals are more efficient distributors of electric power than TE and can, therefore, offer a lower industrial rate despite the discriminatory wholesale prices they pay TE (Tr. 6135-36). TE's argument that in 1971 Napoleon managed to capture a TE industrial customer by offering lower rates than TE ignores the fact that Napoleon was

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20/ TE's argument that Mr. Kampmeier did not make a detailed study to determine the precise relationships between TE's rate to Bowling Green and its rate to industrial customers of a similar size overlooks the fact that such a study was not necessary or relevant to Mr. Kampmeier's analysis (Tr. 6056).

21/ See Dr. Wein's definition of price squeeze (DJ 587, pp. 29-30).

generating 75 per cent of its power requirements at the time (Tr. 5250). 22/

TE also points to the fact that its rates are regulated by both the FPC and the PUCO, but as pointed out by Dr. Wein (Tr. 6661-63), separate regulation by two separate agencies does not necessarily prevent a price squeeze. As pointed out by Mr. Kampmeier, cost of service studies are not an exact science and almost always give different results so the fact that both retail and wholesale rates are regulated does not prevent a price squeeze (Tr. 6126-30; DJ 455). Indeed, it is this dual system of regulation which allows the development of a price squeeze.

3. Bryan

TE has also urged that the Department's allegation concerning Bryan is not supported by the record. While the Department's original allegation has not been proven on the record, the Department submits that the evidence presented clearly establishes that Bryan had an interest in obtaining bulk power from Buckeye Power, Inc. (Tr. 5455-56; DJ 316-20). 23/

22/ TE has misstated Mr. Dorsey's testimony in that he testified to a 20% rate differential at retail between TE and Napoleon with respect to residential, not industrial, customers (Tr. 5254).

23/ TE admits the fact in its Motion at p. 12.

Furthermore, the evidence proves that TE is a party to the Buckeye Power Delivery Agreement (NRC 188). That agreement specifically prohibits municipal systems from becoming members of Buckeye. Further, the Buckeye agreements provide that a municipality which purchases power from an investor-owned party to the agreements cannot purchase power from a Buckeye member cooperative, nor have that power wheeled to the municipal system, without first disconnecting its system from that of its present supplier for a 90-day period (NRC 188, p. 3, definition of Buckeye Power section requirement, and 4-1). Thus, before Bryan could purchase Buckeye power and have TE deliver it, Bryan would have to disconnect and run as an isolated system for 90 days. 24/

Mr. Schwalbert, a TE officer, stated that the reason for including the 90-day provision in the Buckeye agreements was to prevent Buckeye from competing with TE and other investor-owned utilities at wholesale for municipal customers (DJ 577, pp. 44-46). In this context, TE's argument that it did not insist on the enforcement of an outstanding restrictive contract provision in disingenuous. The mere existence of such an anticompetitive restraint is itself sufficient to stop municipal

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24/ Mr. Schwalbert acknowledged that such a 90-day disconnect requirement was "impractical" (DJ 577, p. 46).

systems from turning to Buckeye as an alternative source of bulk power supply.

4. Coordinated Development

TE has argued that the Department's allegation that TE refused to consider joint ownership of large-scale generating facilities with the City of Napoleon in 1971 and 1972 is not supported by the evidence. On the contrary, this allegation is completely established by the uncontradicted evidence contained in the Lewis affidavit (NRC 127).

TE apparently argues that evidence of its policies in 1974 (specifically, DJ 151), during a period after this proceeding had commenced in response to adverse antitrust advice from the Attorney General, somehow legitimates its earlier refusals to engage in coordinated development.

Such refusals are directly within the scope of the Issues and Matters in Controversy framed by this Board. Further, they are elements in a situation inconsistent with the antitrust laws which will be maintained by Applicants' activities under the licenses sought herein. 25/ Thus, TE's contention that no "nexus" exists because the joint ownership arrangements

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25/ See Prehearing Brief of the Department of Justice, at pp. 114-19, for a full statement of the basis for "nexus" in this context.

envisioned by Mr. Lewis did not specifically involve nuclear units is fatally defective. 26/

5. Wholesale Contracts

TE argues that the Department's allegations with respect to restrictive provisions in the company's wholesale contracts should be dismissed because these contracts are expiring. There appears to be no dispute that, at one time, there were thirteen such restrictive wholesale contracts, and that some are still in effect today. Notwithstanding TE's protestations that the company "voluntarily" deleted restrictive provisions from more recent contracts, the evidence indicates such restrictions were omitted only at the insistence of TE's wholesale customers (NRC 46, 47; DJ 147, 3131; Tr. 5278-80).

The Department is mystified by TE's assertion that "a complete and adequate remedy has already been prescribed by the FPC" (Motion, p. 16). Certainly, the filing of such contracts with the FPC, including those presently in effect, has not prevented TE from including such restrictive privisions. 27/

26/ In fact, Mr. Lewis did not exclude nuclear generation when he spoke of large-scale generation; the only qualification he placed on the use of that term was that it applied to units of a size larger than 300 to 400 mw (Tr. 5628).

27/ TE's assertion that all other allegations should be dismissed is not accompanied by any statement of grounds or basis therefor. The Department does not believe it would advance this proceeding t further address this type of argument.

II. MOTIONS BASED ON COLLATERAL ESTOPPEL

On April 20, 1976, two motions were filed urging this Board to hold that evidence of certain of Applicants' anti-competitive activities should be excluded from this proceeding by virtue of the doctrine of collateral estoppel: 28/ "Dismissal Motion of The Cleveland Electric Illuminating Company With Respect to the Allegations Fully Litigated Before and Finally Decided by the FPC"; and "Motion of Applicant Toledo Edison Company for an Order Dismissing an Issue Which Has Been Fully and Fairly Litigated Before the Nuclear Regulatory Commission In a Prior Proceeding." As will be shown below, neither The Cleveland Electric Illuminating Company (CEI) nor Toledo Edison Company has met the burden of proving that the elements of collateral estoppel exist with regard to their respective claims.

A. The Doctrine of Collateral Estoppel

Although comparable in many respects, the doctrines of res judicata and collateral estoppel differ in their precise application and effect. Briefly, res judicata prevents the relitigation of an entire claim or cause of action, while

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28/ To the extent that Applicants urge that, in addition to such evidence being striken from the record, certain "allegations" should be "dismissed," their arguments have been discussed previously. Clearly, even if all such allegations were eliminated, Applicants would not meet the test established by Rule 41(b).

collateral estoppel prevents the relitigation of a single issue, even though that issue may have been originally litigated as part of a cause of action different from that of the subsequent proceeding. The classic statement of the doctrines of res judicata and collateral estoppel and the way in which those doctrines differ is contained in Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1876):

> There is a difference between the effect of a judgment as a bar or estoppel against prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. [Emphasis supplied.]

Thus, to apply the doctrine of collateral estoppel to a controverted fact, the party pleading collateral estoppel must show that there exists an identity of parties and issues

between the prior and subsequent actions, and that the prior action resulted in a final judgment to which determination of the controverted fact was essential. These elements will be discussed in detail as they apply to Applicants' claims of collateral estoppel here.

While it is clear that the doctrines of res judicata and collateral estoppel may be applied in administrative hearings, the courts have held that their application should be less strict than would be the case in the federal district courts. Thus, in United States v. Smith, 482 F.2d 1120, 1123 (8th Cir. 1973), the Court held:

> Although application of the doctrine of res judicata to administrative decisions does, indeed, serve a useful purpose in preventing the relitigation of issues properly determined administratively it is not, where applicable, applied with the same rigidity as its judicial counterpart. "[P]ractical reasons may exist for refusing to apply it," held the court in Grose v. Cohen, 406 F.2d 823 (4th Cir. 1969), and, continuing, "[I]n any event, where traditional concepts of res judicata do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, Administrative Law, §18.03 (1958)."

See also: Title v. Immigration and Naturalization Service, 322 F.2d 21 (9th Cir. 1963); Grose v. Cohen, 406 F.2d 823 (4th Cir. 1969); Tipler v. E. I. du Pont de Nemours and Co., 443 F.2d 125 (6th Cir. 1971); Gordon Co. Broadcasting Co. v. FCC, 446 F.2d 1335 (D.C. Cir. 1971); Retail Clerks Union, Local 1401 v. NLRB, 463 F.2d 316 (D.C. Cir. 1972); United

States v. Smith, 428 F.2d 1120 (8th Cir. 1973); and United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974).

Finally, the party pleading collateral estoppel has the burden of proving that all the requirements of that doctrine are present. 1B Moore, Federal Practice and Procedure ¶4.08[1] at 954 (2d Ed. 1974) (hereinafter cited as "Moore").

B. The Cleveland Electric Illuminating Company

1. Identity of Issues

As noted above, an essential element of the doctrine of collateral estoppel is the existence of an identity of issues between the prior and subsequent proceedings.

> Collateral estoppel is confined, however, to "situations where the matter raised in the second proceeding is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." Commissioner of Internal Revenue v. Sunnen, 33 U.S. 591, 599-600, 68 S. Ct. 715, 720, 92 L. Ed. 898 (1948). Even if the issue is identical and the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially "the same bundle of legal principals that contributed to the rendering of the first judgment" Id. at 602, 68 S. Ct. at 721.
>
> Neaderland v. Commissioner, 424 F.2d 639, 642 (2d Cir.), cert. denied, 400 U.S. 827 (1970).

Thus, issues may differ between proceedings, even where the proceedings concern substantially identical facts, because of the application of different statutory standards to those

facts. Where, as here, the prior and present proceedings arose under different statutes, the Board should be especially careful in applying collateral estoppel. As stated by the Court in Tepler v. E.I. duPont de Numous and Co., 443 F.2d 125, 128-29 (6th Cir. 1971):

> Absent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statue. [Citations omitted.] This is because the purposes, requirements, perspective and configuration of different statutes ordinarily vary.

See also: United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922); Title v. Immigration and Naturalization Service, 322 F.2d 21 (9th Cir. 1963); and Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968); cert. denied, 393 U.S. 1093 (1969).

Because of the differing treatment of antitrust considerations under Section 202(b) of the Federal Power Act and Section 105c. of the Atomic Energy Act, an identity of issues cannot exist between the prior Federal Power Commission (FPC) proceeding and the instant proceeding. The FPC proceeding was litigated under Section 202(b) of the Federal Power Act, 16 U.S.C. §824(b) (App. 20). That section gives the FPC authority to order an interconnection between utilities when, after opportunity for a hearing, it "finds such action necessary or appropriate in the public interest." This general public interest standard differs substantially from the specific

antitrust standard of Section 105c. While Section 105c. deals entirely with antitrust questions, antitrust considerations have little overall impact under Section 202(b). The extent to which antitrust considerations impact on decisions under Section 202(b) was discussed by the Supreme Court in Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973):

> Otter Tail maintains here that its refusals to deal should be immune from antitrust prosecution because the Federal Power Commission has the authority to compel involuntary interconnections of power pursuant to §202(b) of the Federal Power Act. The essential thrust of §202, however, is to encourage voluntary interconnections of power. [legislative citations omitted] Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection. The standard which governs its decision is whether such action is "necessary or appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative. [Emphasis supplied.]

An examination of Exhibits App. 18-24 shows that antitrust considerations in fact played a very minor part in the prior FPC proceeding. The City's allegations of anticompetitive activities were not discussed in the FPC's "Order Directing Immediate Temporary Emergency Interconnection and Standby Service, Consolidating Hearing, Setting Expedited Hearing, and Denying Motion for Oral Argument" (App.19). Nor did that order include those allegations in its statement of issues to be considered in the subsequent hearing (App. 19, p. 8), although those allegations were in issue prior to the order (see App. 20, p. 13).

The City's allegations were considered and discussed as one of seven issues in the "Presiding Examiner's Initial Decision In Consolidated Proceeding" (App. 20). However, an examination of that Decision shows that, while findings concerning the City's allegations of anticompetitive conduct were made, they had little or no bearing on the decision of the presiding examiner. 29/ After stating that the City's claims of antitrust activities by CEI were unsupported by the record, the presiding examiner nevertheless went on to grant the relief requested by the City:

> The relief provided in this proceeding should eliminate any continuing threat to MELP's ability to provide dependable service, if the City moves effectively to restore its 206 megawatts of installed capacity to full production on a dependable operating basis. (App. 20, pp. 16-17).

This was the only statement concerning the effect of the antitrust findings on the ordered relief, although the presiding examiner discussed at length the relationship between the relief and the other issues litigated. 30/

29/ A clear example of how the different statutory standards of Section 202(b) and Section 105c. destroy the claimed identity of issues between the prior FPC proceeding and this proceeding is found in the statement by the presiding examiner in the FPC proceeding that wheeling, the factual basis for several important issues in this case, is "outside the scope of this proceeding" (App. 20, p. 15).

30/ In its appeal to the Commission, the City took exception to the examiner's findings concerning the allegations of anticompetitive conduct. Those findings were not discussed in the Commission's Opinion (App. 21), presumably because they were dicta.

It is clear that because of the statutory standard of 202(b), the City's allegations of anticompeetitive activities were examined by the FPC from a perspective entirely different than that employed under Section 105c. This difference in perspective, arising because similar factual questions were litigated under different statutes, eliminates the identity of issues necessary for the application of collateral estoppel.

2. Facts Not Necessary to the Prior Decision

Collateral estoppel may only be applied where there has been a final judgment in the prior suit and where the issue in question was actually litigated and essential to the judgment rendered. As the Court in Fibreboard Paper Prod. Corp. v. East Bay Union of Machinists, Local 1304, 344 F.2d 300, 306 (9th Cir.), cert. denied, 382 U.S. 826 (1965), stated:

> It is also the rule that where estoppel by judgment is asserted, the earlier determination must have been of a question of fact essential to the earlier judgment. As noted in the Restatement of the Law of Judgments, §68, the problem of collateral estoppel by judgment only arises "[w]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment" (emphasis added). See comment "o" under that section. "The rules stated in this section are applicable only where the facts determined are essential to the judgment. Where the jury or court makes findings of fact but the judgment is not dependent upon these findings, they are not conclusive between the parties in a subsequent action based upon a different cause of action."

The fact that, as discussed above, antitrust considerations are not determinative in a proceeding under Section 202(b), and in

fact were not essential to the determination in the FPC proceeding in question, shows that CEI has failed to prove this element of collateral estoppel.

C. Toledo Edison Company

1. Facts Not Necessary to the Prior Decision

The necessity that the factual finding, for which collateral estoppel is claimed, be essential to the final decision in the prior proceeding has been discussed above. The findings of fact concerning the alleged territorial agreement between TE and Consumers Power Company were not essential to the decision in the Consumers Power proceeding before this agency. While making findings concerning that allegation, the Licensing Board, at page 149 of its decision, characterized those findings as follows:

> During the hearing, evidence was presented concerning situations which were not within the relevant matters in controversy and not within the relevant market. While rulings on such situations are deemed neither essential or necessary to the disposition of the case, for the sake of completeness, several of them will be dis ussed. [Emphasis supplied.]

This was admitted by TE in its Motion at page 9: 31/

> It is true, as stated by the Board in this proceeding, that the portion of the Consumer's

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31/ TE's argument that materiality grows from an appeal by the Department is absurd. The standard is not whether one or both of the parties to the action felt the factual question to be material but whether the finding was necessary to the judgment actually rendered.

> opinion which sets forth the Board's ruling on the alleged understanding or agreement between Toledo Edison and the Consumers Power Company was characterized as unnecessary to the final disposition of the case because the Board viewed that issue as technically being neither within the relevant matters in controversy or within the relevant market area.

Thus, TE has failed to prove this element necessary for the application of collateral estoppel.

2. Identity of Issues

The fact that the facts and issue in question were not within the matters in controversy in the prior proceeding is also important in that it demonstrates that an identity of issues could not exist between this proceeding and the Consumers Power proceeding. Other facts which destroy any claim of identity of issues are that the Board in Consumers Power limited the relevant matters in controversy to whether Consumers Power Company had the power to grant or deny access to coordination (Opinion, p. 9), and that the relevant market differed from the market in this proceeding. 32/

3. Final Decision

The final decision aspect of collateral estoppel is strictly applied in the federal courts:

> The Federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judiciata or collateral estoppel, unless the appeal removes

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32/ We would note that the question here concerns the sale of power in Ohio for use in Michigan, as well as sales by Consumers in Ohio. These facts are relevant to market definition, as well as generation and transmission dominance and their exercise.

> the entire case to the appellate court and constitutes a proceeding de novo. Moore, ¶0.416[3] at 2252.

Outside the courts, however, this rule should be relaxed. Professor Davis urges that an initial decision in an administrative proceeding should not be given estoppel effect:

> Even though under §557 of the APA an initial decision of an examiner may become final in absence of either an appeal to the agency or review upon the Agency's own motion, giving res judiciata effect to such an initial deicsion that may be later reversed by the agency seems clearly undesirable, for it would compel a lack of uniformity, might produce gross injustice, and would cause dismaying confusion. Davis, Administrative Law Text at 365 (3d. Ed. 1972). 33/

An even stronger case is presented here, where the prior initial decision is actually on appeal. It is clearly appropriate for the Board in this proceeding to exercise its discretion and to apply the doctrine of collateral estoppel less strictly then would be the case in a federal court.

33/ See also Maxwell Co. v. NLRB, 414 F.2d 477 (6th Cir. 1969), where the Court held that a prior unappealed decision by an NLRB Regional Director did not prevent a later opposite decision by the Board in a proceeding involving the same facts and the same parties. In that case, the Court said:

> The right to make such changes is essential. Without it agency law could never be improved as a result of experience but would be forever burdened with its encrusted errors. 414 F.2d at 479.

4. Identity of Parties

Finally, TE urges that, although it was not a party to the Consumers Power proceeding, it should nevertheless be permitted to collaterally estop the Department from litigating the question of a territorial agreement. TE argues that, because of an erosion of the requirement of mutuality of estoppel, it should be permitted to defensively plead collateral estoppel. While the Department concedes that the requirement of mutuality has been modified in recent years, we do not believe that this Board is required to appply the doctrine of collateral estoppel in this proceeding.

After stating the reasons why mutuality of estoppel no longer need be strictly adhered to, the Court in Blonder - Tongue v. University Foundation, 402 U.S. 313, 349 (1971), added: 34/

> It is clear that judicial decisions have tended to depart from the rigid requirements of mutuality. In accordance with this trend, there has been a corresponding development of the lower courts' ability and facility in dealing with questions of when it is appropriate and fair to

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34/ It should also be noted that Blonder - Tongue dealt with the limited issue of the application of estoppel in patent litigation. After a lengthy discussion of mutuality, the Court stated:

> Obviously, these mutations in estoppel doctrine are not before us for wholesale approval or rejection. But at the very least, they counsel us to re-examine whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid. 402 U.S. at 327.

> impose an estoppel against a party who has already litigated an issue once and lost.

It is thus clear that although mutuality of estoppel is no longer required, it may be applied where the Board, in its discretion, believes it equitable to do so.

The requirement of mutuality should be applied in this proceeding. First, the Board in Consumers Power characterized the evidence concerning the alleged territorial agreement as "hearsay" (Opinion, p. 159), presumably because the evidence was based on statements made by a person not a party to that proceeding. Since TE is a party to this proceeding, it is clear that the evidence in this proceeding, testimony and government reports detailing conversations between the authors and a managing agent of TE, do not constitute hearsay with respect to TE, but rather an admission of a party.

Second, as discussed in Blonder - Tongue, supra at 328-329, the purpose behind modification of the requirement of mutuality is to prevent the misallocation of resources which occurs where litigation of the same issue is permitted "as long as the supply of unrelated defendants holds out." Such is not the case in this proceeding. The allegation of a territorial agreement between TE and Consumers Power is only one of a number of activities by TE which contribute to a situation inconsistent with the antitrust laws. Elimination of that allegation will not substantially lessen TE's defensive burden nor allow it to withdraw from the

proceeding. Thus, we do not have a situation where refusal to apply collateral estoppel will result in unnecessary and burdensome litigation. Here, the necessity of insuring that the record contains all evidence which reflects on a "situation inconsistent" clearly outweighs those considerations which led to modification of the doctrine of mutuality.

III. CONCLUSION

For the reasons set out above, the Department urges the Atomic Safety and Licensing Board to deny each of Applicants' individual motions to dismiss.

Respectfully submitted,

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May 17, 1976

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
The Toledo Edison Company and	)	
The Cleveland Electric Illuminating Company	)	Docket Nos. 50-346A 50-500A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	)	50-501A
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A 50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN RESPONSE TO APPLICANTS' INDIVIDUAL MOTIONS TO DISMISS have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand this 17th day of May 1976.

Steven M. Charno

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