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

PREHEARING BRIEF OF THE DEPARTMENT OF JUSTICE

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INTRODUCTION

The initial objective of this antitrust hearing pursuant to Section 105c of the Atomic Energy Act is to determine "whether the activities under the license(s) would create or maintain a situation inconsistent with the antitrust laws." If the Board finds affirmatively on that question, it must then determine whether the licenses should be issued, continued, modified or conditioned as the Board deems appropriate.

This brief sets forth the direct case of the Department of Justice. The Department will present evidence which shows that there exists today in large portions of Ohio and Pennsylvania a situation inconsistent with the antitrust laws -- a situation wherein Applicants have monopolized the wholesale and retail firm power markets within their respective service areas. Furthermore, we will present evidence that the activities under the subject licenses would maintain, and indeed exacerbate, this situation. The Department maintains that the low-cost, large-unit base-load nuclear power to be supplied by the subject units will strengthen and expand Applicants' systems and will increase their ability in the future to install and obtain low-cost power from large units -- and that this would clearly further Applicants' respective monopolies. We will also propose certain license conditions which would be appropriate to eliminate this situation inconsistent with the antitrust laws.

I. BACKGROUND

A. The Applicants

The Applicants in this consolidated proceeding are The Cleveland Electric Illuminating Company, Duquesne Light Company, The Toledo Edison Company, Ohio Edison Company and its wholly owned subsidiary, Pennsylvania Power Company. Together, they propose to construct and operate nuclear power generating stations named the Davis-Besse Nuclear Power Station, Units 2 and 3, and the Perry Nuclear Power Station, Units 1 and 2. 1/ Two of the Applicants, The Toledo Edison Company and The Cleveland Electric Illuminating Company, propose to construct and operate another unit, Davis-Besse Nuclear Power Station, Unit 1.

1. The Cleveland Electric Illuminating Company

The Cleveland Electric Illuminating Company (CEI) is a fully integrated investor-owned utility which serves an area in and surrounding the City of Cleveland of approximately 1,700 square miles which has a population of approximately 2,100,000 people. CEI does not provide full or partial requirements wholesale electric service to any municipal or cooperative electric utility. In 1973, CEI had electric operating revenues in excess of $322,931,000 and a net generating capacity of about 3,940 mw.

CEI was incorporated in Ohio in 1892, as the Cleveland General Electric Company, a consolidation of the Brush Electric Light and Power Company and the Cleveland Electric Light

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1/ Applicants also propose to construct and operate Beaver Valley Power Station, Unit No. 2 (see AEC Docket No. 50-412A).

Company. 2/ Its present name was adopted in 1894. Between 1907 and 1923, the Company acquired properties of Cuyahoga Light Company and Bedford Electric Light and Power Company, two private systems and the municipal plants at Lakewood and Rocky River, Ohio. Between 1924 and 1929, it acquired twenty-two private and municipal systems, including the municipal system of Ashtabula. In 1946, CEI acquired the plant of the Cleveland Light and Power Company which served 412 electric and 14 steam customers in downtown Cleveland. Between 1950 and 1954, the Company acquired the distribution system of the Village of Willoughby, the distribution and generation system of the City of Berea and the distribution system of Euclid Doan Power Company. In 1956, CEI acquired Brooklyn Acres, system. Since then, CEI has not acquired any private or municipal systems. The only two municipal generating systems which remain in the 1700 square mile territory served by CEI are those of the City of Painesville and the City of Cleveland (MELP). Within its retail service area, CEI, as of 1973, owned 94.11% of all generating capacity and made 96.44% of the retail sales.

2. Duquesne Light Company

Duquesne Light Company (Duquesne) is an investor-owned integrated electric utility which serves an 800 square mile area in the northwestern part of Pennsylvania, including Pittsburgh and surrounding urban areas in Allegheny and Beaver Counties,

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2/ The source of this and subsequent statements concerning the Applicants is the Direct Testimony of Dr. Harold H. Wein, hereinafter referred to as "Wein."

which consist of 147 communities which have a population of approximately 1,600,000 individuals. Its service area is in one of the most highly industrialized regions of the country. In 1973, Duquesne's total electric operating revenues were in excess of $241,753,000, comprised of the combined proceeds of retail sales of 12.5 billion kwh and wholesale sales of 9.2 million kwh; the company had a net generating capacity of about 2,530 mw.

Duquesne was incorporated in Pennsylvania in 1912. Between that time and 1960, other properties were acquired and numerous subsidiaries were merged. Since 1960, it has acquired the municipal generating systems of Etna, Sharpsburg and Aspinwall with a combined capacity of 4535 kw. The only municipal system remaining in the Duquesne service area, and the only municipality to which Duquesne sells power at wholesale, 3/ is Pitcairn which has an estimated generating capacity of 2500 kw. Its sales to Pitcairn is 1973 amounted to 9.2 million kwh. There are no cooperative systems within its service area; Duquesne is the only electric utility therein which generates, transmits and distributes power to ultimate consumers.

3. The Toledo Edison Company

The Toledo Edison Company (TE) is a fully integrated investor-owned electric utility serving an area of 2,500 square miles, including the City of Toledo and territory to the west, south and east thereof, with a population of

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3/ Pitcairn currently purchases all of its requirements from Duquesne.

approximately 719,000 people. In 1973, TE had electric operating revenues of $126,415,000. Its net generating capacity for that year of 1,030 mw constituted about 94.68% of all generating capacity in its retail service area. TE made about 93.34% of all retail sales and 100% of the wholesale sales in its retail service area. 4/ In 1973, TE supplied the full bulk power requirement of 13 municipal electric utilities and the partial bulk power requirements of two such system at wholesale.

As a result of prior acquisitions, TE's territories at one time extended further east and southeast, but it traded these with Ohio Edison Company for territories in Ottawa and Sandusky Counties, closer to the core of TE's system, in 1955. The present company is an amalgamation of at least 190 companies acquired by mergers and acquisitions. In 1901, the Toledo Traction Company (which was a merger of two electric street railways and which in 1898 had acquired the Toledo Electric Company) merged with the Toledo Consolidated Electric Company to form the Toledo Railways and Light Company, which TE considers the original company. Between 1901 and 1927, 18 other companies were acquired, many of which had themselves evolved from acquisitions and mergers. From 1927 to 1955, 24 other acquisitions were made, further expanding TE's retail service area. In 1921, TE sold all its street railway properties and adopted its

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4/ These wholesale sales figures exclude sales made by Buckeye Power, Inc., a generation cooperative, to member distribution cooperatives, because many of the latter are not located wholly within the retail service area of one of the Applicants. See Wein at pp. 75-76.

present name. In 1928, all gas properties in the City of Toledo were sold.

Since 1955, in addition to the territory exchanged with Ohio Edison, five other electric properties were acquired. These were the municipal generating systems of Stryker, Clyde and Waterville, Ohio, (between 1963 and 1968) with a combined generating capacity of 9684 kw, and the distribution system of the U.S. Army facility at Rossford, Ohio. In 1974, TE acquired the Liberty Center municipal system.

In addition to the systems acquired since 1960, TE made offers to purchase the municipal systems of Bryan, Edgerton, Napoleon, and Pioneer, and offered to make system surveys which might lead to the purchase of other municipal electric systems, including Bradner, Custar, Elmore, Genoa, Haskins, Montpelier, Oak Harbor, Pemberville, and Woodville.

By 1973, all the systems which TE had not yet acquired purchased their full bulk power requirements from the company except the generating systems of Bryan and Napoleon, which were partially supplied by TE, and the Village of Tontagany (population 395), which purchases at wholesale from Bowling Green (which, in turn, is a full-requirements customer of TE). In 1975, both Bryan and Napoleon ceased generating power, so that today all municipal systems in the TE retail service area purchase all of their bulk power requirements from TE except Tontagany.

4. Ohio Edison Company

Ohio Edison Company (OE) is a fully integrated investor-owned utility serving an area of approximately 7,400 square miles with a population of approximately 2,337,000 people in central and northeastern Ohio. OE supplies the full bulk power requirements of 20 municipal electric utilities and the partial bulk power requirements of one municipal system. In 1973, OE had electric operating revenues in excess of $383,238,000 derived from its position as the sole supplier at wholesale 5/ and the supplier of 94.17% of the power sold at retail in its service area. Its net generating capacity of about 3620 mw comprised 96.61% of the capacity in its retail service area.

OE was incorporated in 1930 as a consolidation of five private utilities which were also formed from previous mergers and acquisitions. In the same year, OE acquired the physical assets of Ohio River Edison and its subsidiaries, Mahoning County Light Company and Ohio River Transmission Company. In 1931, in order to consolidate its geographical territories, OE exchanged territories north of Springfield, Ohio, for other territories in the vicinity of Akron, including the distribution systems in Ravenna, Medina, Doylestown, and Seville. OE, in 1950, merged with the Ohio Public Service Company, a substantial private utility, and itself a product of previous acquisitions or mergers. In 1955, OE exchanged territory which it served in Ottawa and Sandusky Counties with TE, receiving

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5/ See footnote 4, supra.

in return electrical territories which TE served in Erie, Lorain, Huron, Sandusky and Seneca Counties.

In 1956, OE acquired a privately-owned distribution system serving the Village of McDonald, Ohio, and the municipal systems of Huron, Plain City, and Leroy, Ohio. In 1965, OE acquired the municipal system of Lowellville, Ohio; in 1972, the municipal system of Norwalk, Ohio; in 1973, the municipal system of Hiram, Ohio; in addition to these acquisitions, in 1974, the municipal system of East Palestine. East Palestine, Hiram, and Norwalk, the most recent acquisitions, were small generating systems, the largest (Norwalk) having a generating capacity of 32,000 kw. OE also conducted a survey of the municipal generating and distribution system of the town of Newton Falls, but this acquisition was not consummated. As a result of acquisition of municipal generating plants by OE, and abandonment of municipal generating plants by other municipalities, there appear to be only three generating municipal systems in the service area of Ohio Edison.

5. Pennsylvania Power Company

Pennsylvania Power Company (PPC), a wholly-owned subsidiary of Ohio Edison Company, provides electrical service throughout an area of approximately 1,500 square miles in western Pennsylvania which has a population of 324,000 people. PPC supplies the full bulk power requirements of five municipal systems. In 1973, PPC had operating revenues of $53,701,000 derived from its position as supplier of all of the wholesale power and 96.95% of the

retail power sold in its retail service area. Its net generating capacity in excess of 600 mw comprised 100% of the capacity in its service area.

In 1962, a portion of the Carpenter Light and Power Company, a distribution system in Meadville, Pennsylvania, was acquired by PPC. PPC also attempted to purchase the electrical system of the Borough of Grove City, and in 1966, offered to lease Grove City's electric properties, including generating capacity, for a period of 30 years. (This was refused, but in 1967, Grove City became a wholesale customer of PPC.) There are no generating municipal systems remaining in PPC's retail service area.

B. Description Of The Industry

Applicants are engaged in the generation, transmission and distribution of electric power. In the early stages of the electric power industry, the area which a single plant could serve was limited by the short distance that electric power could be carried with low voltage direct current. (Direct Testimony of Roland A. Kampmeier at p. 5 (hereinafter referred to as "Kampmeier"); and see generally L. W. Weiss, Antitrust in the Electric Power Industry, in Promoting Competition in Regulated Markets, (Brookings Institution, 1975)). Plants were built to serve various localities, and there was a resulting proliferation of plants, as well as of the entities which operated them. At about the time of World War I, there were 4000 or more privately owned electric companies and 3000 or more municipally owned plants in the United States. (Kampmeier at p. 6).

About half of all generating capacity was owned by industries generating power primarily for their own use.

Changes in technology provided a push toward consolidation. Extra high voltage transmission allowed power to be carried greater distances profitably. Single plant sizes grew with developing economies of scale. (See Wein at pp. 49-51 concerning the importance and impact of economies of scale in generation and transmission.) For single generating units, the capital cost per kilowatt of capacity declines as the size of the unit increases, up to some limit which depends on the state of technology. So also various operating costs, such as maintenance and supervision, decline with increasing unit size. Heat rate in thermal plants generally improves so that fuel costs decline. As more units are added to a plant, costs directly associated with the structure (i.e., land, buildings, etc.) also decline per unit of capacity. The cost curve flattens out after a certain point, so that the percentage reduction in costs from 1000 mw to 2000 mw would be substantially less than from 500 mw to 1000 mw, and so forth (Kampmeier at pp. 22-23). According to the 1970 National Power Survey (IV-2-7), "The economies of scale are inherently more pronounced with nuclear generating units than with conventional, fossil-fired units." (See also Kampmeier at pp. 24-25).

Economies of scale are also marked in transmission, with the capability of a transmission circuit increasing approximately as

the square of its rated voltage (1970 National Power Survey (IV-2-2)).

These developments in technology provide an economic reason and incentive to service increasingly larger loads. The substantial economies of scale of generation and transmission which were obtained by the acquisition and merger of smaller vertically integrated companies could have been obtained through a variety of organizational forms. (Wein at p. 53). During the time these consolidations took place, the simplest and most economically advantageous method of creating an integrated utility which could benefit from scale economies was through the acquisition of many small companies.

Thus, by 1970, the total number of municipal systems dropped to 2,000, with only about 700 of these still generating at least some of their own power. (Kampmeier at p. 6; see Wein at p. 39). Industrial self-generation had dropped to only one percent of total generation. (Kampmeier at p. 6). Similarly, in 1970 there were only about 400 investor-owned utilites; this relatively small number of companies, however, directly served 78% of all the electric consumers in the United States, and indirectly served a portion of the remaining 22% of consumers through wholesale sales. (Kampmeier at p. 7). In sum, through mergers and acquisitions, investor-owned systems diminished in number but grew in average size; they served larger areas with bigger plants and more complex long distance transmission networks.

C. Coordination And Its Benefits

The wave of consolidation by acquisition and merger was followed by increasing arrangements for interconnecting the separately-owned systems and for inter-system coordination. 6/ Interconnection and coordination are ways in which electric utilities can obtain further economic benefits, similar to those attained by acquisition and merger, as well as provide for emergency or maintenance power during times of mechanical failure or equipment maintenance. Thus, coordination provides both economies and reliability.

Most users of electric power want "firm power", power that is available as close to 100% of the time as possible. Generating units, however, are subject to mechanical failure or "forced outage" which requires their removal from service. (Wein at p. 60). They are also out of service periodically for maintenance. In order to meet their consumers' needs, electric utilities must therefore maintain generation in excess of their loads, or "reserves," in order to provide the continuity of service, or "firm power," users expect.

6/ As used herein, the term "coordination" encompasses both coordinated operation and coordinated development as defined in Prehearing Conference Order #2, page 9:

> "Coordinated operation" includes but is not limited to such activities as reserve sharing, exchange or sale of firm power and energy, deficiency power and energy, emergency power and energy, surplus power and energy, and economy power and energy.
>
> "Coordinated development" includes but is not limited to joint planning and development of generation and transmission facilities.

For very small systems, "the single largest unit down" standard of reserves is generally applied to ensure such continuity of service. This means the system must set aside as reserves an amount of generating capacity equal to the capacity of its largest generating unit, in order to insure that it will be able to meet demand in the event that unit suffers a forced outage. (Wein at p. 60; Kampmeier at p. 20). Thus, a small distribution system with a load of 10 megawatts (mw) would need two 10 mw generating units; one to supply the load and the other to be held in reserve.

The use of large units by a small system increases the amount of reserves required and thereby increases the cost of its bulk power supply because of the fixed charges on the reserv equipment which is idle except during emergency periods. The amount of reserves which must be maintained can be reduced by using several smaller units. For example, eleven one mw units could be used in lieu of two 10 mw units to supply a 10 mw load. A system with eleven one mw units could lose its largest unit and still supply 10 mw to its "firm customers." But this system would lose the benefits of the scale economies available from larger generating units. The system planner must compromise between using larger units to obtain scale economies and using smaller units in order to reduce the capital costs associated with reserves. (Kampmeier at pp. 19-24).

System loads vary from hour to hour during the day, month and year. "Peaking units" are used to supply loads that occur a few hours a year.. "Base load" units supply loads which occur a greater

number of hours during the year. Peaking units have relatively lower capacity costs and higher energy costs than base load units. Base load units have relatively high capital or capacity costs (cost per kilowatt), but much lower energy costs (cost per kilowatt hour), both because they can use lower cost fuels and because of their greater efficiency in converting these fuels into kilowatt hours of electricity. Economies of scale are much greater for base load units than for peaking units.

Nuclear generators are used as base load units. Utilities have found them financially feasible to install only in large sizes. (Kampmeier at p. 24).

1. Reserve Sharing

High voltage transmission allows the use of larger units while keeping reserves to a reasonable level. Two or more electric systems can join in an interconnected system through high-voltage transmission. They can then share their reserves and, by making greater use of already installed capacity which formerly had to be held in reserve, serve more loads than they would have been able to serve operating isolated. (Kampmeier at p. 11).

The elements of such a "reserve sharing" arrangement are an interconnection and an agreement between two (or more) utilities as to the minimum amounts of reserves necessary to maintain adequate reliability on their combined systems and apportionment of these reserve requirements among the participants. These agreements

obligate each participant to supply "emergency power" on an if-and-when-available basis.

To demonstrate the practical effect of reserve sharing, let us suppose two systems each having two 10 mw units. Isolated, each could sell only 10 mw of firm power, for a total of 20 mw of firm power from the total 40 mw of generating capacity. Following interconnection, the two systems would need to keep a total of only 10 mw of generation in reserve. If they share the savings equally, each would need to keep only 5 mw in reserve, and each could then sell 15 mw as firm power. Alternative ways of accomplishing the same goal would include merging or consolidating the two or more systems into a single integrated system, or making them subsidiaries in a holding company system.

System size and prior coordination arrangements have a major effect upon the bargaining position of utilities seeking to negotiate reserve sharing arrangements. The value or benefit of reserve sharing is proportionally much greater to a small system than to a larger integrated one or to an already coordinated group of systems. This is because the large system or group of systems have already achieved the large part of the benefits available from coordination; the former, because it is the result of the consolidation and integration of smaller systems; the latter, by virtue of the already achieved coordination between companies. (Kampmeier at p. 43). Where the systems have equal bargaining strength,

the bargain is usually struck on the basis of equal percentage reserves.

2. Coordinated Development

"Coordinated development" of power supply resources by two or more electric utilities on a joint planning basis to meet the combined load requirements of those utilities was aptly characterized by Mr. Kampmeier (at p. 14): "Planning for the optimal regional combinations of diverse types of generation." This practice, like reserve sharing, can permit electric utilities to use larger scale, base load generating units. (Kampmeier at p. 14).

Load growth is substantial in the electric industry, on a national average of approximately 7% per year. The system planner must be concerned with the absolute amount of growth. For a system with a 4000 mw load, 7% growth would mean 280 mw of growth in a year. Under those circumstances, installation of an 800 mw unit system would leave idle 520 mw of capacity for one year; for a 2000 mw system with 140 mw of annual load growth, installing an 800 mw unit would leave 660 mw idle the first year, 510 mw the second year, and so forth. If power supply development is independent, the system planner again must compromise between the economies of scale available from large units and the cost of maintaining idle generating equipment.

With coordinated development of generation, two or more utilities can pool their load growth and use larger scale base-load units efficiently. Thus, two or more systems with a combined annual load growth of 800 mw can install an 800 mw generating

unit; neither system will have to pay for idle capacity. Through coordinated development, the "lumpiness" that results from installation of blocks of generating capacity can be conformed more closely to the smoothly rising curve of load growth. (Kampmeier at pp. 14-16).

Varying arrangements or methods may be used to carry out programs of coordinated development, including joint construction or joint ventures, with equity participation by each of the participants, and sales of "unit power" by contract for the life of the unit. The purchaser under a "unit power" contract is entitled to power from a specific generating unit (or plant) when that unit (or plant) is in operation. Another method is "staggered construction," where one utility builds a unit larger than it needs and markets its temporary surplus and then another takes its turn in adding a large unit.

But coordinated development, at its most sophisticated level, is more than cleverly timed additions of generation, however helpful that may be to strengthening existing systems and making more economical their additions to capacity. Mr. Kampmeier (at p. 14) points out that coordinated development does more than merely tie together several separately planned transmission networks, or merely take advantage of such complementarity as there might happen to be among the power plants of the several systems.

Coordinated development means a one-system approach, creating the best regional and interregional pattern of

transmission facilities, at standardized voltages, without duplications, and with adequate capacity for power delieveries that can cope with various emergencies and can take full advantage of diversities among diversified loads and power supply characteristics. It means planning for the optimal regional combinations of diverse types of generation: nuclear, fossil, pumped-storage hydro, and all other potentially beneficial types and subtypes. Facilities are added in the most economical sequence, using first the plant sites and line locations that minimize capital and operating costs and transmission costs and losses, while providing maximum reliability of service. Timing of installations can be staggered to minimize temporary excess capacity and to enable facilities to be fully loaded quickly.

Further savings can be achieved by the best use of skilled and creative system planners and greater use of special financing techniques such as joint ownership, high-debt-ratio generating companies, and municipal bond financing. (Kampmeier at pp. 14-15).

For small "pools" there is some conflict between the objective of achieving economies of scale in generation and transmission and that of minimizing excess capacity. Such conflict can be reduced by expanding the size of the "pool."

As in the case of reserve sharing, the small system seeking coordinated development with a larger system or pool of systems is placed in an unfavorable bargaining position, particularly when it lacks other alternatives for coordination. This is because the

proportional benefit or value of the coordinated development arrangement to the smaller system is greater than its incremental proportional value to the large system or the members of the large pool, who already enjoy substantial benefits of coordinated development. As a result, the large system or pool frequently will attempt to extract a larger-than-fair share of the benefits brought to the coordinated development by the small system.

3. Joint Transmission Arrangements (Wheeling)

A third general category of coordination may be achieved by coordinating the operation and development of transmission facilities used for power exchanges and sales. If small systems are far apart, the cost of constructing the intervening transmission may outweigh the savings involved in the coordination of operations and development. As two potential coordinating systems grow in size, the economic feasibility of constructing transmission over greater distances increases.

The addition of more systems to the arrangement can also help to justify interconnection for a program of coordinated development. Assume two hypothetical systems, A and B, located just so far away that the cost of constructing and operating transmission outweighs the savings from reserve sharing and coordinated development. Assume also two other independently owned, isolated systems, C and D, located between A and B. While an A-B coordinated system would be economically unfeasible, coordination among A, B, C and D would be feasible since there is more generation and load to share the expense of transmission.

There are generally large economic advantages in utilizing spare capacity in an existing transmission network rather than constructing duplicating transmission. Assume A and B are separated not by C and D but by Y and Z which are the 25th and 26th properties of a single integrated system that dominates power supply in the entire region around A, B, Y and Z. Use of Y and Z's transmission system on payment of fair costs would be valuable to A and B; it could make coordination economically feasible for them. Y and Z, however, would already have achieved the advantages of coordinated operation and development through integration into the dominant system, and that dominant system would probably not find much value in the coordinated development of transmission facilities with A and B, even though it might obtain some benefit from the sale of surplus transmission capacity as a type of coordinated operation. The economic feasibility of possible coordination arrangements among small systems will often depend on their ability to obtain wheeling over spare capacity in the transmission system of the dominant integrated utility in an area.

Other forms of coordination touched on previously are also important to electric utilities. These include coordination of maintenance schedules, maintenance service, economy energy exchange, seasonal and diversity exchange, integration of different types of generating resources, and short-term surplus capacity exchange. (See generally, Kampmeier at pp. 10-13).

D. The CAPCO Pool

The benefits of coordination, discussed above, are well known to the Applicants, who together formed the CAPCO Pool to obtain the benefits of coordinated development through the joint development of generation and transmission facilities. CAPCO, formed in September 1967, is clearly a "Team Pool" 7/, as close to a "Corporate Pool" as one can get without being under common ownership. The members themselves state:

> Generation and associated transmission facilities for the CAPCO members are planned on the basis of the requirements of the pool as a single system, and accordingly, the members do not establish their installed reserves independently. (Answer number 7 to the Attorney General's request--each CAPCO member).

Planning for generating capacity includes selecting the size, type of base load units (nuclear or coal), peaking capacity, pumped storage, the time scheduling, proportion of joint ownership for each member, financing commitment, long-range load forecasting, provision of nuclear fuel and coal, and so forth. Joint transmission facilities, called "CAPCO transmission," are similarly planned

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7/ "Team Pools", consist of legally separate companies not affiliated with each other through a common ownership, which provide the normal interconnection functions as well as major joint planning and construction programs or economic dispatch. These may be contrasted with a "Corporate Pool" which is comprised of coordinated operation and development between two or more utilities which are owned by a common parent. (See "Power Pools and Rates--A Comparison of the Terms and Provisions for Power Exchanges Among Fifteen Major Power Pools" prepared by D. M. Blank, H. J. Lester and E. H. Maugans of CEI and presented to the Rate Research Committee of the Edison Electric Institute, published January 24, 1972).

and constructed, including interconnection points with non-CAPCO systems both within and outside the States of Ohio and Pennsylvania. These interconnections enable every member of the CAPCO Pool to engage in any advantageous transaction with non-CAPCO systems, even though the CAPCO member may not be directly interconnected with the non-CAPCO system. Thus, Duquesne can buy economy energy directly from Consumers Power Company by utilizing TE's interconnection with Consumers, together with the CAPCO transmission operated by TE and OE. The transmission planning comtemplated lines with voltage of 500 kv and 765 kv, enabling future transmission of huge loads at great economy over long distances. As the CAPCO members freely admit and, indeed, advertise (see advertisement of Duquesne in Moody's Public Utilities, 1974), such single system-wide development enables each member to avail itself of the largest economies of scale in both generation and transmission, economies which they could not obtain by themselves.

CAPCO engages in a number of complex power transactions, which provide the Applicants with the full range of benefits available from coordinated operation: 8/

(a) Limited Term Power: capacity and energy reserved for periods normally covering a month or more. This has two variations--that which is delivered from the suppliers' entire system and

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8/ Source: Wein at pp. 106-107.

that which is a power entitlement from a specific unit (unit power).

(b) Short Term Power: capacity and energy reserved for periods of a week or more.

(c) Spinning Reserve Service: unloaded generating capability available upon demand. (This is provided under the Interchange Capacity Energy Schedule.)

(d) Emergency Service: capacity and energy supplied in the event of breakdown or other emergency in the receiving party's system.

(e) Scheduled Maintenance Power: energy supply in connection with scheduled maintenance, repair or overhauling of generating equipment.

(f) Economic Service: energy supplied by mutual agreement whenever a savings in operating costs may be realized by displacement of the receiver's source of energy by the supplier's source. The CAPCO Pool has made provision for the exchange of economy capacity as well as economy energy.

(g) Interchange Capacity and Energy: capacity and/or energy available at the supplying party's discretion, when other service schedules do not apply.

(h) Transmission Service: use of an intervening party's transmission facilities. In CAPCO, joint investment responsibility for bulk transmission facilities precludes the need for additional kilowatt or kilowatt hour charges for transmission service.

(i) Payment-in-Kind: an acceptable means of payment for certain transactions between members.

(See Form S-7 filed by Ohio Edison, June 13, 1974, detailing the complete CAPCO program.)

II. COMPETITION IN THE ELECTRIC POWER INDUSTRY

A. Generally

It is well recognized that competition plays as important a role in regulated industries as it does in those which are entirely subject to the forces of the market place. Speaking of another highly regulated area, the Supreme Court has stated a principle which is easily applied to electric utilities: "The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so." United States v. Philadelphia National Bank, 374 U.S. 321, 372 (1963). Competition is clearly economically possible in regulated industries and can be of great value in helping to achieve the very goals for which regulatory agencies were established by Congress and the States. (Wein at p. 20).

There are many reasons given by economists for favoring competition. For those industries in which many buyers and many sellers are directly subject to the forces of the market place, competition provides: a maximum of consumer choice; a maximum of competitive pressure on each of the sellers to keep its prices, and therefore its costs, down so that it may remain viable; and responsiveness to consumer demand both in terms of quantity and quality. Thus, a competitive market structure yields, in theory, an optimal allocation of resources. Such competitive industries require no regulation; their economic structure and the self-interest of both sellers and buyers compel behavior which is in the public interest. The antitrust laws exist to ensure that the benefits to the public of a competitive market structure are not nullified by conspiracy or predatory practice.

The view that a competitive market structure is most consistent with the ideals of political democracy is traditional in our country. It underlies the Sherman Act; it is a premise of the Celler-Kefauver amendment of the Clayton Act; and it has been recognized by numerous Supreme Court decisions. In United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963), the Supreme Court, in construing amended Section 7 of the Clayton Act, found that Congress had adopted a national policy designed to counter industrial concentration.

The Court went on to observe that Congress realized that such a policy might have adverse effects upon some companies under certain circumstances, 374 U.S. at 371:

> . . . Congress determined to preserve our traditional competitive economy. It therefore proscribed anticompetitive mergers, the benign and malignant alike fully aware, we must assume, that some price must have to be paid.

In the regulated industries, competitive forces can be equally as important as in those industries where competition alone determines who survives and who prospers. Competition can provide a stimulus to efficiency and innovation that no regulator can mandate. (Wein at p. 44). As Dr. Wein points out, a regulatory agency is most often in the position of arbiter for those conflicting interests which are brought before it. (Wein at p. 168). Indeed, no regulatory staff can supervise or regulate every aspect of the regulated business. Regulatory agencies are overburdened and their attention must necessarily wander. Neither is indirect consumer pressure adequate; consumers generally cannot afford the protracted litigation which regulatory hearings entail. Moreover, regulatory relief may be limited in nature and scope.

The pressure of the market place, where it can be brought to bear, can be the most flexible, efficient and quickest way to achieve reduction of costs, increased service or the other

benefits which we commonly associate with competitive industries. (See generally Wein at pp. 165-72).

This section will outline the manner in which competition is possible and desirable in the electric utility industry and how the benefits to the public from competition act to supplement those of regulation.

B. Sale Of Firm Power At Wholesale

An electric distribution system must have a source of firm power from which it can satisfy the demands of its customers. The distribution system may therefore obtain a source of firm power by purchasing the power at wholesale from a producer of bulk power or by entering into the business of producing its own power supply. One element of competition in the electric power industry is in the sale of bulk power at wholesale to distribution systems.

Wholesale power is firm power delivered in bulk, i.e., at high voltages (compared to the voltages most retail customers can use), and to large loads (kw). 9/ The larger the load, the more economical it is to deliever power at higher voltage.

The market for firm power at wholesale in the Applicants' respective service areas may be divided into two categories: the distribution systems operated by municipalities and cooperatives

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9/ For example, the smallest municipal utility buying wholesale power for resale at retail on the OE system had a load of 572 kw and the largest, a load of 32520 kw.

("independent" wholesale sales) and the distribution systems operated by the Applicants themselves ("captive" wholesale sales). With a "captive" wholesale sale, the wholesale function is performed by a single integrated utility, which produces, transmits and distributes power to the ultimate retail user; with an "independent" wholesale sale, bulk power is sold by the generating and transmitting company to an independent utility which, in turn, performs the function of breaking bulk and selling at retail to ultimate users. (Wein at p. 98).

Any utility may be a seller of bulk power at wholesale if it has a low-cost bulk power supply and has a transmission capability which allows it to deliver that power to a wholesale purchaser; such a capability may exist either by virtue of the direct ownership of transmission facilities by the selling utility, or by access to the transmission facilities of others. Thus, effective competition in the sale of power at wholesale can exist where there are at least two such systems having integrated generation and transmission capabilities.

Competition is not possible for "captive" loads. No captive wholesale sale of firm power by a CAPCO company is open to capture by another CAPCO company. Hence, at least 95% of the total wholesale sales in the combined service areas of the Applicants are not subject to competition of CAPCO companies with each other. For the same reasons, no CAPCO captive wholesale sales are subject to capture by any other private utility.

Where competition is possible is in the sale of firm power at wholesale for the noncaptive component, i.e., sales to cooperative and municipal systems. In the combined service areas of the Applicants, this competitive segment comprises about 5% of the total sales of power at wholesale.

The value of maintaining even a small amount of competition in a highly concentrated market has long been recognized by antitrust courts. In such concentrated markets, the Supreme Court has condemned even very small increases in concentration. In United States v. Aluminum Company of America, 377 U.S. 271 (1964), for example, the Supreme Court condemned a merger where the acquiree had only 1.3% of the relevant market. Even a relatively small amount of competition, as we have indicated in our discussion of competition, supra, can be an important stimulus, pushing the giant away from obsolete equipment, swollen bureaucracy and outworn production methods and toward innovation, efficiency, and responsiveness to consumer desires.

In each of the Applicants' service areas, however, competition for sales of power to these "independent" wholesale loads has been systematically eliminated. Those who might provide such competition, including other CAPCO companies, non-CAPCO companies, cooperative systems and generating municipal systems, are precluded from active competition for noncaptive wholesale loads by a number of substantial barriers to competition which have been erected by Applicants.

Under present circumstances, there is no competition by any private utility located outside any of the Applicant's respective service areas for noncaptive wholesale sales within those service areas. Though these non-CAPCO companies may be in a position to provide potential competition, 10/ such competition is of no significance at this time, since it is not of sufficient intensity to influence any of the Applicants to revise their respective captive wholesale rates. (Wein at p. 135).

In the case of cooperative systems, while there is no practical bar to competition between the Applicants and cooperative systems to supply the wholesale bulk power requirements of municipal 11/ systems, no such competition exists. Such competition has been specifically eliminated by provisions in contracts

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10/ Potential competition is the competitive influence currently exerted on a firm in a particular market by the set of potential competitors in the given market. It operates to reduce price and/or increase quality of service. (Wein at p. 148).

The significance of potential competition on the economic actions of the existing firm or firms in the given market depends upon several factors. If the market does not have such a competitive structure, (that is, if it is one in which monopoly power exists), then potential competition can have great influence if the monopolist believes that the potential entrants (a) have a substanial probability of actually entering the market in the foreseeable future; and (b) will enter it with sufficient economic capacity to compete. Potential competition can cause the monopolist to set its prices low enough to prevent the potential competitor from actually entering the market.

11/ The cooperative distribution systems located wholly or partially within the retail service areas of OE and TE are members of Buckeye Power, Inc., a generation cooperative, which supplies their full wholesale requirements.

between some of the Applicants 12/ and the only generating cooperative serving in the Applicants' combined service areas. These provisions require a wholesale customer served by Applicants to operate in isolation for a period of 90 days before it may take service from the cooperative. This is clearly impossible for a non-generating municipal system and extremely difficult for the small generating municipal utilities.

Finally, the generating municipal systems which could offer competition at wholesale to Applicants are not in a position to do so absent access to the benefits of coordinated operation and development enjoyed by Applicants. 13/

C. Sale Of Power At Retail

Retail competition is competition for the loads of the ultimate consumers of electric power. Sales of power at retail consist, with one exception, 14/ of sales of firm power 15/ to

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12/ OE and TE are parties to such contracts. See Sections III.D.3.b. and III.D.4.b., *infra*.

13/ The nature and impact of these benefits is discussed in detail in Section I.C., *supra*.

14/ This exception is interruptible power, which may be curtailed at the option of the supplier; it is generally purchased by a few large industrial customers. Since it is more difficult to produce firm than interruptible power, the former is generally more expensive than the latter. In the service areas of the Applicants, no rates for interruptible power are available.

15/ Firm power is, as a practical matter, always available (the probability is very close to 1.00) for use at the option of the ultimate user.

residential, commercial and industrial users. Retail customers are served by distribution systems, which require sufficient firm power to satisfy their customers' demands. As noted above, Applicants, the cooperative distribution systems, and the municipal utilities all operate distribution systems in the combined service areas of the Applicants. Competition for retail customers exists between these distribution systems wherever one system is in a position to serve the retail customer(s) of another or wherever two or more of these systems are in a position to serve a new retail customer. This competition takes two principal forms--competition for the franchise or opportunity of serving "blocks" of retail customers on a de facto exclusive basis, 16/ and competition for individual retail customers, either residential or industrial, at the boundary or in overlapping portions of the service areas of two or more distribution systems. The extent of this competition may be influenced by economic factors, as well as by statute, regulation, and contractual provision.

State statutes in both Ohio and Pennsylvania prevent actual competition between investor-owned utilities, including Applicants,

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16/ "Blocks" of retail customers are those identifiable as a community, either politically (i.e., a municipality incorporated under state law) or geographically (i.e., an unincorporated community). Competition for these "blocks" of customers may take two general forms. Two utilities may compete for the franchise or privilege of providing electric service to a municipality, or the municipality itself may wish to compete by providing its own electric service in place of a previously franchised utility.

for both blocks of customers and individual retail customers, except under very limited circumstances.

Ohio law prohibits the switching of existing retail customers of one private utility to another for a period of 90 days after disconnecting from the former supplier. Ohio Revised Code, Section 4905-261. To avoid the prohibitions of the law, exceptional circumstances would have to be shown, or the two utilities would have to agree to the switch. 17/ This law clearly eliminates any realistic possibility of effective competition between private utilities for existing retail loads. Although competition between private utilities in Ohio for new retail customers (e.g., a newly built house or industrial facility) is legally permitted at the fringes of their service areas, 18/ the amount of such competition is de minimis.

In Pennsylvania, the State has promulgated a plan certificating specifically defined service areas to private utilities, thereby eliminating any possibility of competition for either

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17/ In some instances, private utilities have agreed to exchange retail customers without subjecting those customers to a suspension of service. For example, in (e.g., the exchanges between Ohio Edison and Toledo Edison, and between Ohio Edison and Columbus and Southern Ohio Electric noted earlier). Such exchanges, however, cannot be characterized as procompetitive in nature or effect.

18/ The cost of constructing the distribution and transmission facilities necessary to serve a new customer located within another utility's service area, when compared with the revenues to be recouped from such service, effectively restricts competition between private utilities to the fringes of service areas.

new or existing retail customers. Act No. 57, Session of 1975 (July 30, 1975).

Thus, no private utility may compete for customers of another private utility within the latter's service area.

There is, however, no legal barrier to competition between private and municipal 19/ utilities for new or existing retail customers in either Ohio or Pennsylvania. 20/ The degree to which these municipal systems may engage in effective competition, however, has been severely limited by Applicants' various refusals to allow the smaller systems the benefits of coordinated operation and development enjoyed by Applicants (see Wein at p. 44), as well as by various contractual restraints upon competition employed by Applicants. 21/

19/ This category would include both existing generating and nongenerating municipal systems as well as other cities, towns and municipalities which, though not now engaged in the sale of electric power at retail, may in the future elect to condemn and purchase the distribution facilities of a private utility. Existing municipal systems are actual competitors while municipalities presently served at retail, with or without a franchise, are potential competitors.

20/ The distribution cooperative utilities located within the Applicants' combined service areas are not prohibited by law from competing with Applicants for either new or existing retail customers. Their ability to compete for existing customers has been eliminated by restrictive provisions in contracts to which OE and TE are party.

21/ Such restraints include restriction on resale by municipal system of power purchased at wholesale from Applicants, as well as various instances of "rate squeeze" or discriminatory pricing of wholesale power. See Section III.D, infra.

Clearly, the elimination of these barriers to competition with municipal systems which have been raised by Applicants is both necessary and proper.

III. THE SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

A. The Standard Of Section 105c

The Nuclear Regulatory Commission and, by delegation, this Licensing Board is required to determine "whether the activities under the license[s] would create or maintain a situation inconsistent with the antitrust laws." Section 105c, Atomic Energy Act of 1954, 42 U.S.C. §2135c.

1. The Situation

The language of the statute is clear; it is a situation which is the focus of the inquiry. A situation is, by definition, a state or condition at a given point in time -- as opposed to specific anticompetitive conduct. To be inconsistent with the antitrust laws, a situation must be the result, in substantial part, of conduct engaged in by a nuclear license applicant which itself is anticompetitive or exclusionary -- i.e., inconsistent with the antitrust laws or the "policies clearly underlying these laws." 22/ Moreover, it is a situation which must be maintained by the activities under the nuclear license if the requisite nexus is to be established. 23/

22/ See S. Rep. No. 91-1247, 91st Cong. 2d Sess. (1970); H.R. Rep. No. 91-1470, 91st Cong. 2d Sess., 14 (1970).

23/ Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1), Dkt. No. 50-482-A, Decision of Atomic Safety and Licensing Appeal Board, at 19-20 (June 30, 1975).

2. The Standard of "Inconsistency"

Section 105(c) prohibits the licensing of nuclear power facilities where the activities under such licenses would create or maintain a situation inconsistent with the antitrust laws. The test is inconsistency with the antitrust laws, not violation of those laws. The Report of the Joint Committee on Atomic Energy on the 1970 amendments to the Atomic Energy Act elaborates upon the standard to be applied under this test of inconsistency:

> The concept of certainty of contravention of the antitrust laws or the policies clearly underlying those laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. S. Rep. no. 91-1247, 91st Cong., 2d Sess. (1970); H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., 14 (1970).

Two points stand out: (1) certainty of contravention of the antitrust laws is not required; and (2) a finding of inconsistency may be based on the contravention of policies underlying the antitrust laws. The necesssary conclusion is that the level of proof required to show inconsistency with the antitrust laws is less than what would be required to establish violations of those laws in the courts.

The Supreme Court, in Northern Pacific Railroad v. United States, 356 U.S. 1 (1958), set forth the underlying principles of the Sherman Act, and it is against this national commitment to the maintenance of unfettered competition that the consistency or

inconsistency of the situation in Applicant's area must be measured:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfetterd competition as the rule of trade. It rests on the premise that the unrestraind interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States.' 356 U.S. at 4 and 5. (Emphasis added).

Even conduct by Applicants which fails to rise to the level of a violation of the antitrust laws may nevertheless support a finding that there is a situation existing which is inconsistent with the antitrust laws. Indeed, when exclusionary conduct of any nature is found together with a high degree of market concentration -- the prevention of which is a goal of the antitrust laws 24/ -- such an inconsistency becomes manifest.

Section 105, unlike the Sherman Act, contains no criminal penalties and attaches no legal censure to the conduct under scrutiny. Rather, Section 105 directs the Atomic Energy Commission to insure that the publicly financed investment in nuclear

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24/ United States v. Philadelphia National Bank, 374 U.S. 321, 363, 371 (1963).

generation will be utilized in a manner consistent with the antitrust laws and the competitive policies underlying those laws.

B. The Antitrust Laws and the Policies Underlying Those Laws

Clearly, conduct which constitutes a per se violation of the antitrust laws gives rise to a "situation inconsistent with the antitrust laws." In addition, cases concerning monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2, provide invaluable guidance in establishing the bounds of Section 105. Such cases delineate a variety of practices, many of which were are not per se illegal, but which have been condemned as exclusionary when practiced by persons possessing or attempting to acquire monopoly power. This section of the brief will outline the current state of the law concerning monopolization as it is relevant to this proceeding.

1. The Law of Monopolization

Section 2 of the Sherman Act, 15 U.S.C. §2, reads as follows:

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

The offense of monopolization consists of monopoly power in the relevant market -- in economic terms, the power to fix prices or to exclude competition -- coupled with policies designed to acquire or preserve that market power. Thus, the Supreme Court held that

> the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so. American Tobacco v. United States, 328 U.S. 781, 811 (1946).

More recently the Court stated, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966);

> The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen or historic accident.

The first element of the offense, possession of monopoly power in a relevant market, can be inferred "from [a] predominant share of the market," see Grinnell, 384 U.S. at 571, or from control over a "bottleneck" facility which affords the controlling company the power to exclude competition or set prices. See United States v. Otter Tail Power Company, 331 F. Supp. 54, 59 (D. Minn. 1971), aff'd in part, 410 U.S. 366, 371 (1973).

Once it is established that a company possesses monopoly power, that company's conduct in the market place is judged by a different, stricter standard: it cannot willfully act to maintain or expand that power without violating the antitrust laws. The willful maintenance of monopoly power can be established merely by showing that "transactions neutral on their face" have an exclusionary effect on the market, without a specific showing of anticompetitive motivation. See United States v. Aluminum Company of America, 148 F.2d 416, 432 (2d Cir. 1946); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954). That a monopoly results from a defendant's conduct is sufficient for a finding of monopolistic intent. United States v. Griffith, 334 U.S. 100, 105-06 (1948).

The electric power industry poses a slightly different question than do the other industries which are subject to antitrust examination. Electric utilities may be, to some extent, legally recognized monopolies because society has determined that in special instances it is desirable to avoid the duplication of facilities which might occur in a fully competitive environment. What is important from an antitrust perspective is that, although a monopoly may be to some degree recognized, it may not be exploited; it may not be carried beyond the minimum necessary to achieve the public interest in efficient allocation of resources; it may not be used to choke out competition where that competition can otherwise flourish. Indeed, it has been recognized that competition has an important role in making effective the regulation of regulated industries. United States v. Philadelphia National Bank, supra; United States v. Otter Tail Power Company, supra.

That a monopoly results from a defendant's conduct is sufficient for a finding of monopolistic intent. United States v. Griffith, 334 U.S. 100, 105-106 (1948). Furthermore, none of the transactions engaged in by a defendant need be illegal in and of themselves if they are part of a course of conduct to maintain its monopoly. See American Tobacco v. United States, supra. It follows, therefore, that individual elements of an anticompetitive situation may not be singled out for evaluation on a piece-by-piece basis; for a group of activities, each perhaps lawful standing alone, may comprise a monopolization in violation of the antitrust laws. See the recent opinion by Judge Edelstein in United States

v. International Business Machines, 1975 CCH Trade Cas. ¶60,495 (S.D.N.Y. 1975).

That the offense of monopolization may be proved by merely showing the exclusionary effect of the policies and practices engaged in by a company possessing monopoly power (with no showing of specific intent) is confirmed by the following quotation from Judge Hand's opinion in ALCOA, supra, a case which was very much in the minds of the framers of the 1954 Atomic Energy Act: 25/

> This increase and this continued and undisturbed control did not fall undesigned into Alcoa's lap; obviously it could not have done so. It could only have resulted, as it did result, from a persistent determination to maintain the control, with which it found itself vested in 1912. There were at least one or two abortive attempts to enter the industry, but Alcoa effectively anticipated and forestalled all competition, and succeeded in holding the field alone. . . . We need charge it with no moral dereliction after 1912; we may assume that all it claims for itself is true. The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingots and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitiors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the élite of personnel. Only in case we interpret "exclusion" as limited to maneuvers not honestly industrial, but actuated

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25/ Joint Committee on Atomic Energy, Hearings on S. 3323 and H.R. 8862 to Amend the Atomic Energy Act of 1946, 83rd Cong., 2d Sess., Part 2, at 441-443, 495-498, 629, 641-642 (1954).

> solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act: would permit just such consolidations as it was designed to prevent. 148 F.2d at 430-31 (Emphasis added).

Similarly, Judge Wyzanski, referring to otherwise legal practices in United States v. United Shoe Machinery Corp., stated:

> So far, nothing in this opinion has been said of defendant's intent in regard to its power and practices in the shoe machinery market. This point can be readily disposed of by reference once more to Aluminum, 148 F.2d at pages 431-432. Defendant intended to engage in the leasing practices and pricing policies which maintained its market power. That is all the intent which the law requires when both the complaint and the judgment rest on a charge of "monopolizing," not merely "attempting to monopolize." Defendant having willed the means, has willed the end. 110 F. Supp. at 346 (Emphasis added).

In addition to the offense of monopolization, Section 2 also prohibits attempts to monopolize. The principal differences between the offense of monopolization and the offense of attempt to monopolize, are these: when an attempt is alleged, a firm's market power need not amount to monopoly; in addition to a showing of exclusionary conduct, "specific intent" to monopolize and a "dangerous probability of success" must be demonstrated. Note, however, that it is unnecessary to show a "dangerous probability of success" in monopolization cases because in these cases actual success must be shown, -- i.e., having monopoly power in the relevant market. Similarly, "specific intent" need not be proved since intent is inferred from the achievement of the monopoly. While there are these differences between "monopolizing" and

"attempting to monopolize", exclusionary practices must be found whichever offense is alleged. Consequently, both monopolization and attempt to monopolize cases are important sources of relevant legal precedents in determining whether a company possessing monopoly power has acted to exclude competitors from the market by creating artificial barriers to entry.

2. Refusals to Deal

The Department contends that the principal means by which Applicants maintain their respective monopoly power in the relevant markets -- i.e., monopolize -- is through selective refusals to deal. The CAPCO member companies deal with each other in all aspects of coordinated operation and development, while at the same time refusing to deal with smaller competing systems. Applicants have engaged in refusals to interconnect, refusals to sell different types of bulk power, refusals to provide transmission services, and refusals to grant access to nuclear and fossil generation -- in short, refusals to allow access to virtually every aspect of coordinated operation and development.

It is well established that selective refusals to deal by a single firm can be exclusionary and, therefore, violate Section 2 of the Sherman Act, if that firm possesses monopoly power or has a reasonable probability of achieving a monpoly. In Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), Kodak originally sold at wholesale to a number of independent companies, but then decided to act as its own wholesaler and succeeded in buying out all the wholesalers in the area except the plaintiff. Kodak refused to sell to

Southern at the traditional wholesaler's discount, forcing it to pay the retail price. This made it impossible for Southern to compete with the Kodak-owned distribution network. Kodak had a monopoly (75% to 80%) of the national photographic supply market, and it was expanding its monopoly into a second market -- retail distribution. Although no direct evidence as to Kodak's specific intent was presented at trial, Kodak's refusal to sell to its retail competitors at a price which would allow competition in the retail market was held to constitute illegal monopolization.

Packaged Programs, Inc. v. Westinghouse Broadcasting, 225 F.2d 708 (3d Cir. 1958), also provides guidance concerning unlawful extensions of monopoly power. The key facts in this case are as follows: Westinghouse owned the only TV station in Pittsburgh, giving the company a legal monopoly in television broadcasting in parts of Pennsylvania, West Virginia and Ohio; the company also operated a related business involving the production of commercials for TV advertisers, the same business in which the plaintiff was engaged; Westinghouse refused to sell television time to advertisers whose commercials were produced by the plaintiff. Plaintiff argued that Westinghouse was refusing to deal in a market where it held a monopoly -- television broadcasting in Pittsburgh -- in order to monopolize the market for production of TV commercials. The Court sustained plaintiff's argument and held that a company possessing monopoly power in one market cannot

selectively refuse to deal in order to expand its monopoly power to another level of business operations.

Another case dealing with a monopolist which used its power in one market to foreclose competition in a related market is Six Twenty-Nine Productions v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966). Plaintiff was an advertising agency which prepared commercials for television broadcasting. Defendant, the only television station in the area, had its commercials prepared both by the station personnel and by the three advertising agencies in the area, one of whom was the plaintiff. The problem arose when a client, whose advertising had previously been handled by the station, hired plaintiff to prepare a commercial. The station advised plaintiff agency that it would pay no commission to the agency and that it would refuse to deal with this agency henceforth. The court concluded that:

> . . . the complaint is sufficient if the refusal of defendant to accept advertising from plaintiff by setting upon reasonable standards or by adopting an arbitrary course of action is for the purpose of destroying plaintiff as an agency and thereby furthering a course toward monopolization. 365 F.2d at 483.

The classic case concerning a monopolist's refusal to deal is Lorain Journal Co. v. United States, 342 U.S. 143 (1951). There the defendant had enjoyed a local monopoly in the mass dissemination of news and advertising until the FCC licensed a radio station to serve in Lorain and adjoining areas. To

combat this threat of competition, the newspaper refused to sell advertising space to anyone who advertised on the radio. The Supreme Court recognized that the defendant's monopoly position in news and advertising had been eroded, that defendant was attempting to ruin its radio competitor through selective refusals to deal, and that if defendant continued to refuse to deal, it was likely that a monopoly of the dissemination of news and advertising would be reestablished. The Court condemned the paper's conduct of selectively refusing to deal as exclusionary, and since Lorain Journal's monopoly had been eroded, it found this conduct violated the attempt to monopolize clause of Section 2.

The case most clearly in point in this proceeding on refusals to deal by a monopolist is Otter Tail Power Co. v. United States, supra. Otter Tail involved the application of both the monopolization and attempt to monopolize provisions of Section 2 to an integrated electric power company which generated, transmitted and distributed electric power in adjacent parts of Minnesota, North Dakota and South Dakota. Otter Tail had the only subtransmission system in this area. It distributed electricity in some 465 towns in its service area and sold power at wholesale to 17 other municipalities, which engaged in distribution. The District Court found that Otter Tail possessed monopoly power in the relevant market and maintained this market power by refusing to deal. When municipalities Otter Tail served at

retail (pursuant to a limited duration franchise) desired to set up its own distribution systems, the company refused to sell power to these systems at wholesale and further refused to sell transmission services so that power could be moved across its system from other suppliers (wheeling). 26/ Since, in most instances, there was no other way for such a town to purchase power, it was left with two choices: (1) either abandon its plan and renew Otter Tail's franchise or (2) establish a high-cost, isolated generation system. The District Court found that Otter Tail's refusals to deal constituted illegal monopolization and attempted monopolization under Section 2 of the Sherman Act. 27/ It enjoined Otter Tail from refusing to sell or to wheel power for municipal systems in its own area. The

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26/ Otter Tail also was a party to a territorial allocation agreement with the U. S. Bureau of Reclamation. The substance of this agreement was that Otter Tail would not wheel power for USBR to cities where it held a franchise to serve at retail. The agreement was another manifestation of Otter Tail's policy of refusing to deal in transmission services.

27/ The Supreme Court did not have to reach the issue of whether a refusal to wheel in and of itself, or a refusal to sell power in and of itself, was a violation of the antitrust laws, since Otter Tail was engaging in a combination of anticompetitive acts which together constituted monopolization. Nevertheless, a fair reading of Otter Tail is that at a minimum, the Court believed that each element of the monopolization, (namely, refusals to wheel and refusals to sell power), raised artificial barriers to entering the market and was thus anticompetitive--i.e., was a policy or practice inconsistent with the antitrust laws.

Supreme Court affirmed this portion of the District Court decision. 27/

3. "Bottleneck" Monopolization

Unilateral refusals to deal have also been found to violate Section 2 of the Sherman Act in cases where there was no demonstration of a firm's monopoly of sales in a relevant market. The central feature of these Section 2 cases is the control by a company(ies) over a facility or service which cannot practicably be duplicated and to which access is a significant factor in a firm's competitive ability -- i.e., a "bottleneck" facility. The control itself over such a facility or service is deemed sufficient to establish monopoly power. In denying its competitors access to a bottleneck facility, the controlling company violates Section 2 of the Sherman Act because monopoly power is imputed to it by virtue of its control over the facility; under Section 2 principles, the use of this monopoly power to destroy actual or potential competition is illegal. While most of these cases involved jointly-owned facilities, they all involve violations of Section 2 of the Sherman Act, a statutory provision which is concerned solely with the evil of monopoly power. This

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28/ Otter Tail also engaged in harassing litigation as an exclusionary practice. However, as to that issue, the case was remanded for further fact finding. The District Court finding of monopolization and attempt to monopolize was affirmed even though as to the litigation issue, the case was remanded. Eventually the District Court found Otter Tail had engaged in vexatious litigation. 360 F. Supp. 451 (D. Minn. 1973), aff'd 417 U.S. 901 (1974).

statutory section makes no distinction between monopoly power possessed by a single firm and market power held jointly by several companies pursuant to a conspiracy.

These cases involve refusals to deal in a particular factor of production in order to create or maintain a monopoly in a final product market -- specifically, refusal to grant access to news services in order to maintain a monopoly in newspapers, Associated Press v. United States, 326 U.S. 1 (1945); refusal to grant access to a railroad bridge in order to maintain a monopoly in transcontinental railroad service, United States v. Terminal Railroad Ass'n., 224 U.S. 383 (1912); refusal to grant access to a fruit market in order to monopolize the wholesale fruit business, Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484 (1st Cir. 1952), cert. denied, 344 U.S. 817 (1952); and refusal to grant access to subtransmission in order to maintain a monopoly of retail electric sales, Otter Tail, supra. In each of these cases, the power to grant or deny access to an important factor of production -- i.e., bottleneck facility or service -- was used to seriously handicap the competitors of the company(ies) controlling the "bottleneck" facility or service.

In the instant proceeding, the Department contends that each of the Applicants controls an individual bottleneck facility -- a strategically dominant transmission network -- which each is utilizing to maintain its respective monopoly position by denying access to this facility to its competitors.

Collectively, Applicants also control a "bottleneck facility" for overall coordinated operation and development in their combined service areas -- the CAPCO power pool. Applicants' refusals to provide transmission services and access to CAPCO to their competitors constitute anticompetitive misuse of their monopoly power.

The "bottleneck" theory of monopolization had its genesis in United States v. Terminal Railroad Association, 224 U.S. 383 (1912). A group of railroads established a jointly-owned company which controlled the principal terminal facilities in St. Louis, Missouri, and East St. Louis, Illinois. This was a key east-west traffic location because eastern railroads terminated on the eastern side of the Mississippi River and western railroads had their terminus on the western side. The terminal company owned the lines connecting the two terminal areas on each side of the river and the only two bridges and ferry available for crossing. The agreement underlying the joint terminal company provided that nonmember railroads could be admitted to ownership upon unanimous approval of the members. Thus, the sponsors of the terminal company could discriminate against outsiders in charges as well as veto entirely the use of facilities by outsiders.

The Supreme Court found that outsiders as a practical matter could not build their own facilities due to topological and geographic limitations. The Court concluded that:

> When the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violate both the first and second sections of the act. 224 U.S. at 409 (Emphasis added).

The bottleneck theory was reaffirmed in Associated Press v. United States, 326 U.S. 1 (1945). The Court made clear in Associated Press that the competitive advantage afforded by the service need not be indispensably necessary to competitive survival, but it is sufficient that without it the excluded competitor is at a "competitive disadvantage." 326 U.S. at 17-18. This was stressed by Judge Learned Hand for the three-judge District Court in Associated Press, in a passage quoted with approval by the Supreme Court:

> Most monopolies, like most patents, give control over only some of the means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose . . . . And yet that advantage alone may make a monopoly unlawful. 326 U.S. at 17, n. 17.

Gamco, Inc. v. Providence Fruit & Produce Building, Inc., supra, involved a "bottleneck" facility which could have been duplicated by competitors. In that case, local fruit and vegetable wholesalers who desired to lease space in the Produce Buidling were required to purchase stock in the corporation which owned the building. Because the building had the area's best shipping facilities and attracted most of the retail buyers, practically all wholesalers had leased there for the twenty

preceding years, and no similar facilities had been developed. When plaintiff was denied a renewal of its lease because of its affiliation with an out-of-state firm, it brought suit under Sections 1 and 2 of the Sherman Act.

The District Court interpreted the Sherman Act as condoning the defendants' action since it found that "competition ruled the ultimate selling market subsequent to Gamco's ouster." 194 F.2d at 486. However, the Court of Appeals found that

> . . . evidence that competitive activity has not actually declined is inconclusive both as to Section 3 of the Clayton Act . . . and for our present purposes under Sections 1 and 2 of the Sherman Antitrust Act. 194 F.2d at 487.

Moreover, the Court found that defendants possessed monopoly power even though other alternative selling sites were available. The Court stated:

> The short answer to this is that a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization. . . . To impose upon plaintiff the additional expenses of developing another site, attracting buyers and transshipping his fruit and produce by truck is clearly to extract a monopolist's advantage. 194 F.2d at 486.

The most recent case to apply the "bottleneck" theory of monopolization is Otter Tail, supra. In that case, Otter Tail was found to have "a strategic dominance in the transmission of power in most of its service area" -- i.e., it controlled a subtransmission network which was a bottleneck to entering the relevant market. Otter Tail's refusal to grant access to this "bottleneck facility" was deemed a violation of Section 2 of the

Sherman Act. It is important to note that Otter Tail's "bottleneck" was limited to transmission of certain voltage, namely, 41.6 kv lines; the United States Bureau of Reclamation owned most of the larger transmission lines in the area. Otter Tail underscores the fact that a single firm "bottleneck" is fully subject to scrutiny and sanction under Section 2 of the Sherman Act. The subtransmission network to which the municipalities were denied access was owned solely by Otter Tail Power Company.

4. Other Exclusionary Practices

Applicants have also maintained and extended their monopoly power in the relevant markets through a variety of restraints of trade, including territorial market allocations with private, cooperative and municipal utilities, restrictive contracts with their wholesale customers, a restrictive power pooling agreement, and the pricing of power at wholesale to eliminate competition for retail sales, i.e., "price squeeze." These agreements are per se violations of Section 1 of the Sherman Act and thus are anticompetitive; the remaining practice is clearly exclusionary in effect. A company possessing monopoly power which is a party to restraints of trade which are condemned by Section 1 is engaging in exclusionary practices in violation of Section 2.

a. Territorial Market Allocations

The legal status of territorial allocations is clear; such restrictions among competitors are per se violations of the

Sherman Act. Otter Tail, 410 U.S. at 378; United States v. Topco Associates, 405 U.S. 5 , 608 (1972).

b. Restraints on Alienation

The Supreme Court stated in United States v. Arnold, Schwinn and Co., 388 U.S. 365, 379 (1967):

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with which an article may be traded after the manufacturer has parted with dominion over it.

In the context of this proceeding, Applicants contractually restricted and defined areas where purchasers of electric power could dispose of that power, thereby violating Section 1 of the Sherman Act.

c. Group Boycotts

In Klors Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 212 (1959), the Supreme Court stated "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."

The Licensing Board in Consumers Power Co. (Midland Units 1 & 2) NRC Docket Nos. 50-329A and 50-330A, correctly applied the holding of the Klors case to the electrical industry when it stated:

> If two utilities enter into a coordination arrangement thereby reaping the benefits of such arrangement and further conspire to prevent other utilities from entering the coordination arrangement with the intent to injure such other utilities, such conspiracy falls squarely within the prohibition of Section 1 of the Sherman Act. (Initial Decision of the Hearing Board, at p. 88 (July 18, 1975)).

d. Price Squeeze

Only a few months ago, the District of Columbia Circuit was presented with questions raised by a proposed increase in wholesale prices by a private utility to municipal and cooperative electric systems which were in competition with the private utility for large retail customers, Conway Corp. v. Federal Power Commission, 510 F.2d 1264 (D.C. Cir. 1975), cert. granted, 44 U.S. L.W. 3270 (1975). In dealing with these allegations of anticompetitive behavior through price squeeze, the Court reviewed and analyzed the consequences of such alleged behavior, noting that if allowed to continue in these activities, the private utility, "through its position as supplier . . . will be able . . . to affect the quality and price of petitioners' retail service in such a way as to tilt the scales of competition in its favor." 510 F.2d at 1269 (Emphasis added).

"At its most basic level," the Court pointed out,

> this competition represents a struggle on the part of the municipal and cooperative systems to preserve their independence from their supplier insofar as they compete at retail. 510 F.2d at 1268.

The Court further went on to quote with approval (510 F.2d at 1268) from Professor Meeks, "Concentration in the Electric Power Industry, the Impact of Antitrust Policy," 72 Col. L. Rev. 64, 78 (1972):

> Unless the municipality has access to alternative sources of economical power . . . the neighboring system can virtually control the performance of the municipal system through its control over the wholesale price of power. . . . Such control by selling

> systems is . . . very effective, primarily because of the almost universal control over transmission by the dominant selling system in an area.

Similar conduct by Applicants should be condemned with equal force in this proceeding.

5. The Relevant Markets

The existence and extent of monopoly power cannot be determined in a vacuum; it must be established in the context of a particular market or markets. See e.g., United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

The determination of relevant markets involves considerations of both product and geographic markets. Grinnell, supra. The relevant market is, therefore, the answer to the question: A monopoly of what and where? A determination of relevant markets in which Applicants' monopoly power may be measured is thus prerequisite to any showing of inconsistency with the antitrust laws based upon the Applicants' monopolization.

The basic rule with regard to the definition of relevant product markets is that "commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." United States v. Dupont, 351 U.S 377, 395 (1956). For products to be deemed interchangeable, two factual questions must be answered: (1) Whether the physical characteristics of products are such that they can be used for the same purpose (functional interchangeability), and, if this is answered affirmatively, (2) whether

a purchaser is willing to substitute one product for the other (reactive interchangeability):

> To determine whether acids are in competition in a particular industry it is first necessary to decide whether they can be used for the same purpose -- whether they are functionally interchangeable . . . . Having found one or more productions functionally interchangeable with citric acid in a particular use, the next question to be resolved is one of purchaser reaction -- the willingness or readiness to substitute one for the other. United States v. Chas. Pfizer & Co., Inc., 246 F. Supp. 464, 468 (E.D.N.Y. 1965).

> While a finding of functional interchangeability must precede that of reasonable (reactive) interchangeability, it is not determinative. For products to be classified in the same market they must be both functionally and reasonably interchangeable. 246 F. Supp. at 468, n. 3.

The basic rule with regard to the definition of the geographic extent of relevant product markets is that the market must "correspond to commercial realities of the industry and be economically significant." Brown Shoe Co. v. United States, 370 U.S. 294, 336-337 (1962). Stated differently, "The area of effective competition in the effective line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." United States v. Philadelphia National Bank, 374 U.S. 321, 359 (1963).

In this proceeding, the facts indicate three appropriate product markets: the retail distribution firm power market, in which electric distribution systems supply firm power to ultimate consumers of that power; the wholesale-for-resale firm power

market, in which producers (or wholesalers) of firm electric power in bulk supply that power to the distribution systems; and the regional power exchange market, in which producers of firm electric power transact with one another for necessary inputs or factors of producing firm power in bulk. (Wein at pp. 97-101).

Retail distribution firm power is a distinct product, not reasonably interchangeable with other products by consumers for the same purpose. Likewise, wholesale firm power is a distinct, noninterchangeable product.

While the Department contends that a third product market -- the regional power exchange -- is germane to this proceeding, sales in this market have no bearing on the market analysis in either the retail or wholesale markets. The significance of this input or factor market centers around Applicants' refusals to engage in coordinated operation and development with small electric systems, while enjoying the benefits of such coordination among themselves, thereby enhancing and entrenching their monopoly power in the retail and wholesale markets.

The appropriate geographic markets for antitrust analysis are similarly dictated by the decisions of the Supreme Court, which in United States v. Philadelphia National Bank, 374 U.S. at 359, held the geographic market to be the "market area in which the seller operates, and to which the purchaser can practicably turn for supplies." In the electric power industry, the appropriate market must reflect the way in which the Applicants have built

their systems and conduct their business and the way in which their competitors are built and conduct their business, cf. Grinnell. The appropriate geographic markets for analysis of retail sales are the respective retail service areas of each of the CAPCO companies. (Wein at pp. 130-31). Similarly, each of Applicant's respective service areas define the geographic markets for sales of firm power at wholesale. (Wein at p. 136). For the power exchange market, the logical and appropriate geographic focus is the entire CAPCO service area. (Wein at p. 140). Indeed, these markets are dictated by the development and practices of the electric utility business, and present a logical and meaningful framework in which antitrust analysis may take place.

C. The Applicants' Monopoly Power

The method of antitrust analysis which has been established by the courts necessarily leads to a factual examination of the degree of monopoly power held by the Applicants.

Monopoly power is "the power to control prices or exclude competition." American Tobacco v. United States, 328 U.S. at 811. As indicated, the existence of monopoly power can be established either by inference from a large share of the sales of the relevant product in the relevant geographic market, or by demonstrating that a company has strategic control over a "bottleneck" facility. 29/ Monopoly power is imputed to a

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29/ See Section II.B.1, supra.

seller who has a statistically predominant share of the market. See Grinnell, supra. The Supreme Court has inferred monopoly power from a market share as low as 68 percent. See American Tobacco v. United States, 328 U.S. 781, 795 (1946) [68-80%]; United States v. United Shoe Machinery, 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954) [75-85%]; also, United States v. Otter Tail Power Company, 410 U.S. 366, 370, 377 (1973) [91%].

In this instance, Applicants' monopoly power is demonstrated by their overwhelmingly large shares of the sales in the wholesale and retail power markets, their dominance in large-scale generation, their control over strategically dominant transmission networks, and their domination of the ultimate facility required to effect coordinated operation and development in their combined service areas -- the CAPCO Pool. Clearly, the last three indicators of market power are both reinforcing and, to some extent, overlapping. Control of generation without control of the bottleneck facility of transmission, for example, would not assure an Applicant of monopoly power in generation if, through wheeling, a smaller system might obtain an alternative supply of bulk power. However, in this case, Applicants individually and collectively control and dominate every facility necessary to coordinated operation and development.

1. Applicants' Monopoly Power in the Sale of Power at Retail

Presently, each of the Applicants has over 90% of the total retail sales in its respective service area. The following tables show this dominance (Source: Wein at pp. 65A, 69, 73):

Table 1

RETAIL SALES IN CEI SERVICE AREA IN 1973

	Millions of KWH	Percent
CEI	17072.5	96.41
MELP	510.7	2.88
Painesville	125.0	.71
Total	17708.2	100.00

Table 2

RETAIL SALES IN OE--PPC SERVICE AREAS IN 1973 30/

	Millions of KWH	Percent
OE/PPC	19649.6	94.58
Orrville	115.5	.56
Oberlin	55.2	.27
Newton Falls	17.6	.08
East Palestine	26.4	.13
All Other Municipals	910.3	4.38
Total	20774.6	100.00

Table 3

RETAIL SALES IN TE'S SERVICE AREA IN 1973

	Millions of KWH	Percent
Toledo Edison	6250.6	94.53
Bryan	99.0	1.50
Napoleon	68.9	1.04
All Other Municipals	193.3	2.92
Total	6611.8	99.99

30/ OE supplies 94.17% of the power sold at retail in its service area; PPC, 96.95% of the power sold at retail in its service area.

Table 4

RETAIL SALES IN THE DUQUESNE SERVICE AREA IN 1973

	Millions of KWH	Percent
Duquesne	12576.7	99.93
Pitcairn	9.2	.07
Total	12585.9	100.00

Even if the retail sales of the distribution cooperative which are supplied by Buckeye Power, Inc. are taken into account, 31/ Applicants' overwhelming dominance remains unchecked.

2. Applicants' Monopoly Power In The Sale of Firm Power At Wholesale

Applicants individually have overwhelming monopoly power in the sale of firm power at wholesale. As indicated by the following tables, each of the Applicants supplied at least 95% of the wholesale power requirements of the utilities located within their respective service areas.

31/ The portion of Buckeye Power, Inc.'s total sales of 2.4 billion KWH which is attributable to retail sales by distribution cooperatives operating in the Applicants' combined service areas is .79 billion KWH, or approximately 1.35 per cent of all retail sales made in Applicants' combined service areas. (Wein at pp. 75-76).

Table 5

WHOLESALE SALES IN THE CEI SERVICE AREA IN 1973 32/

Purchaser	Captive Millions Of KWH	Captive Percent	Noncaptive Millions Of KWH	Noncaptive Percent	Total Millions Of KWH	Total Percent
CEI	17072.5	96.41	--	--	17072.5	96.41
MELP	510.7	2.88	--	--	510.7	2.88
Painesville	125.0	.71	--	--	125.0	.71
Total	17708.2	100.00	--	--	17708.2	100.00

Table 6

WHOLESALE SALES IN THE OE-PPC SERVICE AREAS IN 1973 33/

	Captive Millions Of KWH	Captive Percent	Noncaptive Millions Of KWH	Noncaptive Percent	Total Millions Of KWH	Total Percent
OE/PPC	19649.6	98.90	927.3	99.62	20576.9	98.84
Orrville	155.5	.78	3.5	.38	159.0	.76
Oberlin	38.2	.19	--	--	38.2	.18
Newton Falls	17.6	.09	--	--	17.6	.08
East Palestine	26.4	.13	--	--	26.4	.13
Total	19887.3	99.99	930.8	100.0	20818.1	99.99

32/ Wein at p. 65A.

33/ Wein at p. 69.

Table 7

WHOLESALE SALES IN THE TE SERVICE AREA IN 1973 34/

	Captive		Noncaptive		Total	
	Millions Of KWH	Percent	Millions Of KWH	Percent	Millions Of KWH	Percent
Toledo Edison	6250.6	98.54	274.0	100.0	6524.6	98.60
Bryan	39.3	.62	0.0	0.0	39.3	.59
Napoleon	53.1	.84	0.0	0.0	53.1	.80
Total	6343.0	100.00	274.0	100.0	6524.6	99.99

Table 8

WHOLESALE SALES IN THE DUQUESNE SERVICE AREA 35/

	Captive		Noncaptive		Total	
	Millions Of KWH	Percent	Millions Of KWH	Percent	Millions Of KWH	Percent
Duquesne	12576.7	100.00	9.2	100.0	12585.9	100.00

It should be noted that wholesale sales of Buckeye Power, Inc., the cooperative generating company owned by 28 distribution cooperatives in Ohio, have been excluded from the above tables. This was done because these cooperatives extend over several counties which often cross service areas of two CAPCO companies, as well as the service areas of a CAPCO and non-CAPCO utility

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34/ Wein at p. 73.

35/ Wein at p. 74.

system. Buckeye's generating plant is in Ohio Power territory and most of its sales are outside the CAPCO company service areas. Buckeye sold to its distribution members at wholesale approximately 2.4 billion kwh in 1973; approximately .74 billion kwh was sold to distribution cooperatives in the Applicants' combined service areas. This constituted only 1.35 per cent of the power supplied at wholesale therein. Inclusion of these figures would, therefore, change only slightly the percentages shown in Tables 5 - 8.

3. Applicants' Dominance in Generation

In addition to the stipulation by counsel for Applicants that "each of the applicants dominate the generation of bulk power in their service areas" (Tr. 440-41), the following tables make this dominance overwhelmingly clear (Source: Wein at pp. 65A, 69, 73):

Table 9

GENERATING CAPACITY IN THE CEI SERVICE AREA IN 1973

	Thousands of kw	Percent
CEI	3940.0	94.11
MELP	208.6	4.98
Painesville	38.0	.91
Total	4186.6	100.00

Table 10

GENERATING CAPACITY IN THE OE-PPC SERVICE AREAS IN 1973 36/

	Thousands of kw	Percent
OE/PPC	4220.4	97.08
Orrville	89.1	2.05
Oberlin	12.9	.30
Newton Falls	8.3	.19
East Palestine	16.5	.38
Total	4347.2	100.00

Table 11

GENERATING CAPACITY IN THE TE SERVICE AREA IN 1973

	Thousands of kw	Percent
Toledo Edison	1030.0	94.68
Bryan	24.0	2.23
Napoleon	22.5	2.09
Total	1076.5	100.00

36/ PPC controls 100% of the generating capacity in its retail service area.

Table 12

GENERATING CAPACITY IN THE DUQUESNE SERVICE AREA IN 1973

	Thousands of kw	Percent
Duquesne	2530.0	99.90
Pitcairn	2.5	.10
Total	2532.5	100.00

Even if the generating facilities of Buckeye Power, Inc. are taken into account, the Applicants' dominance of generating facilities is unchecked. 37/

4. Applicants' Monopoly Power in Transmission

Applicants have acknowledged their effective dominance over transmission in their stipulation that

> Each of the Applicants is clearly the largest in its service area in terms of miles of transmission line and in terms of capacity of its transmission lines. . . . It is over 75 [per cent]. (Tr. 448-49).

Applicants' transmission networks surround the smaller electric systems located within their respective service areas. 38/ Access

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37/ Buckeye Power, Inc. has one fossil fueled generating unit with capacity of 590 mw; approximately 196 mw of this capacity is used to serve loads in the Applicants' combined service areas. (Wein at pp. 75-76).

38/ Illustrative of this fact is the following stipulation by Applicants' counsel (Tr. 473):

> In terms of the municipal electric light power [sic.] of the City of Cleveland and in terms of Painesville, which are the only two I can specifically address, yes, we have all of the transmission lines surrounding those two cities today.

to these transmission networks is, therefore, essential to any utility seeking to enter the regional power exchange and to realize the benefits of coordinated operation and development enjoyed by Applicants. (See Section I.C., supra; Kampmeier at pp. 10-16). The foregoing, together with the fact that there is no available alternative to the use of Applicants' respective transmission networks, 39/ require that these networks be regarded as "essential facilities."

The absence of alternative transmission facilities into which smaller systems might be integrated is vividly demonstrated by the following table.

39/ The unnecessary cost and adverse environmental impact of constructing new and wholly-duplicative transmission facilities make this a somewhat less than feasible alternative. (Kampmeier at p. 38).

Table 13

TRANSMISSION FACILITIES (66 KV AND ABOVE)
IN APPLICANT'S SERVICE AREAS 40/

Company	Pole-miles	Percent
CEI	632	96.8
Others	21	3.2
	653	100.0
OE	2795	99.8
Others	7	.2
	2802	100.0
TE	493	99.2
Others	4	0.8
	497	100.0
Duquesne	380	100.0
Others	0	0.0
	380	100.0
PPC	453	100.0
Others	0	0.0
	453	100.0
CAPCO	4753	99.3
Others	32	.7
	4785	100.0

40/ Source: Prepared Direct Testimony of J. D. Guy, p. 23.

D. Applicants' Exclusionary Activities

It is clear that Applicants possess monopoly power in each of the relevant markets. This tribunal must, therefore, examine their activities by the stricter standards suggested by a long line of antitrust cases to determine the answer to the remaining critical question -- whether Applicants have actively pursued a policy which has had the practical effect of excluding competition. United States v. Aluminum Co. of America, supra; United States v. United Shoe Machinery Corp., supra. Here, Applicants' activities show them to have gone far beyond that degree of market control which is "economically inevitable" 41/ and to have used their positions of dominance in the generation and transmission of electric power to circumvent, contain and cut off that competition which is both possible and desirable in the sale of electric power at wholesale and retail.

Applicants have pursued courses of conduct designed to eliminate competition for wholesale and retail sales within their service areas. This conduct has included attempts to acquire and the acquisition of competing systems. They have misused their monopoly control over generation and transmission facilities by refusing to deal with their competitors, thereby denying them access to the benefits of coordinated operation and development which the Applicants themselves enjoy. Thus, Applicants have refused to

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41/ United Shoe, 110 F. Supp. at 345.

interconnect upon reasonable terms and conditions, refused to wheel power, refused membership in CAPCO, and refused to grant meaningful access to nuclear and fossil large-scale generation. Applicants have further extended their monopoly position by entering into territorial allocation agreements and wholesale contracts restricting the right of resale, and placing their wholesale customers which compete with them for retail sales in a price squeeze.

1. The Cleveland Electric Illuminating Company

a. Acquisitions

CEI is a product of the acquisition of at least 40 separate utility systems 42/; it has now acquired all but two of the competing utilities located in its service area: the municipal systems of the City of Cleveland ("MELP") and the City of Painesville. CEI has engaged in a long-term course of conduct to eliminate these remaining competitors.

Since at least 1960, CEI has wanted to acquire MELP. (Besse deposition at p. 55). Indeed, elimination of MELP as a competitor was a formal company objective which was set forth in CEI's annual five-year Planning Report beginning in 1963. The 1965 report 43/ listed as a CEI objective to "reduce" and "eliminate" MELP. The report goes on to relate the "progress" made toward achieving this objective and notes that the company is "on schedule."

42/ See Section I.A.1, supra.

43/ Department of Justice Document No. (hereinafter "DJ") 017586.

And the "Restated Objectives, Measures, Standards & Implementation Procedures and Target Dates 5Y GPR 1065" (DJ 017586) states:

> .. Cleveland and Painesville Municipal Electric System
>
> Objective
> To reduce and ultimately eliminate these tax-subsidized facilities (1963).
>
> * * *
>
> Implementation
> Group personnel will continue to prepare plans, and increase their contacts and efforts to enlist the active support of civic, business and educational groups and public officials (a) against any further expansion of these municipal facilities and interconnection between them, and (b) for interconnections with the Illuminating Company.
>
> Target Date
> Continuous.

CEI has taken various other steps evidencing its desire and intent to acquire MELP, including discussing problems in acquiring MELP (DJ 02191), taking surveys to determine whether the public favored the sale of MELP (DJ 013737 and 02231), corresponding with other companies concerning methods and techniques of acquiring or leasing municipal systems (DJ 014172, 010269, 013814, 06164, 0669), keeping a file on the acquisition of municipal systems (DJ 06139), studying the effects on CEI of acquiring MELP (DJ 014086), conducting a public relations campaign aimed at improving CEI's image and making the sale of MELP acceptable to the public (DJ 70001421, 017116, 017067), and, in a 1965

letter to Cleveland Mayor Locher, offering to discuss the sale of MELP to CEI (DJ 015576).

Similarly, CEI's interest in eliminating the Painesville system is shown by statements contained in its five-year Planning Reports for 1964 (DJ 017459) and 1965 (DJ 017586). The "Restated Objectives, Measures, Standards & Implementation Procedures 5Y GPR 1064" (DJ 017562) contains the following statement:

> 2. Painesville Municipal Light Plant Objective
>
> To plan and take action to acquire this government-owned electric system.

Measure	Standards
Annual progress in providing Illuminating service to nonpublic installations.	Number of nonpublic installations served by the government facilities on September 1, 1964.

> Implementation and Target Dates:
>
> Interconnection under appropriate conditions appears to be the most promising way for obtaining this objective.
>
> Such interconnection agreement will be attempted in connection with obtaining political clearance for the Eastlake-Nursery line through Painesville.
>
> Target date for obtaining an interconnection agreement is six months after the present target date for clearing this line or July 1, 1965.

CEI's continuing intent to acquire the Painesville system was shown by its making estimates on a purchase price in 1971 (DJ 02116 and 02117) and 1972 (DJ 03925).

b. Interconnection With MELP

CEI has attempted to disadvantage and weaken its competitors -- thereby making them easier prey for its acquisition attempts -- by a series of refusals to deal which have denied its competitors the benefits of coordinated operation and development.

Thus, CEI has refused to interconnect its system with that of MELP except upon wholly unreasonable terms and conditions.

In 1962, after Mayor Locher announced a plan to expand MELP, CEI wrote to the Mayor and proposed an interconnection. This offer was conditioned, however, on MELP equalizing its rates with those of CEI 44/ and was based on the premise that such an interconnection would make unnecessary MELP's planned expansion. (DJ 016391). 45/ This offer, with the condition of rate equalization, was renewed in 1963 (DJ 016407), 1965

44/ Aware that MELP's major competitive advantage was its lower rates (DJ 04731, 04741, 04745, 02968), CEI has not only attempted to fix the prices at which MELP sells power, as discussed above, but has attempted to persuade MELP to provide free municipal service (DJ 02481) which would require MELP to increase its rates to make up for the lost revenues.

45/ Concurrent with its offers of interconnection, CEI opposed MELP's expansion plan (DJ 016407, 016280). CEI argued that MELP could purchase power from CEI more cheaply than MELP could generate power with a new unit. (Howley deposition at p. 3., Hauser deposition at p. 87). It is not at all clear in the CEI studies that MELP could not generate power cheaper than it could purchase it. (DJ 016707, 016706, 016708).

(DJ 015576 and 015574) and 1966 (DJ 016244). This attempt by CEI to set rates would, if agreed to by MELP, constitute a price fixing agreement which is a per se violation of Section 1 of the Sherman Act.

Starting in at least 1964, CEI began to be aware of the possibility that the FPC might order an interconnection (DJ 017459). Thus, from at least 1966, CEI began to study possible methods of interconnection with MELP (DJ 016200). Although CEI officials appeared resigned to interconnecting with MELP eventually, they determined to do so on terms and conditions which would bestow on MELP as few as possible of the benefits of such coordination. 46/

In the Spring of 1969, MELP, needing to install pollution control devices, requested help from CEI in the form of an interconnection to facilitate the installation of these devices. CEI's notes of a May 1969 meeting state that at that time MELP stated its desire to secure a permanent interconnection which would allow parallel operation of the two systems, while CEI was interested in giving the most limited help possible. (DJ 016169).

A June 17, 1969 memo written by Loshing, then Treasurer of CEI, indicates that CEI realized that a permanent

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46/ This would appear to be in accord with the company's determination that "interconnection under appropriate conditions" was the best way to acquire a municipal competitor. (DJ 017459).

interconnection would give MELP the reliability it needed to remain competitively viable and that, unless CEI could obtain a "proper" charge, MELP would derive a "tremendous economic benefit" from such an interconnection. The memo noted that either of these results of a permanent interconnection would make CEI's acquisition of MELP more difficult and evaluated the courses of action open to CEI:

> These facts lead to the rather obvious conclusion that there are three courses of action open to us: (1) avoid an interconnection and run the risk of an FPC dictated interconnection, hoping that the financial and service problem will eliminate MELP as a competitive threat. (2) Take the initiative in establishing an interconnection with proper standby charges, to give them reliability but increase the financial pressure on them. (3) Make an all-out effort to purchase MELP now while the reliability and financial pressures are still present.
>
> None of the above alternatives seem to have a direct bearing on the short-term question of helping MELP achieve installation of precipitators other than these negotiations may trigger the permanent interconnection question. (DJ 016110).

Negotiations continued, but no further progress was made. Then, during Christmas week of 1969, MELP suffered a major outage on its largest generation unit and contacted CEI to seek help in meeting its load. A CEI memo, dated December 29, 1969, from Bingham to Loshing discussed the various alternatives open to CEI. (DJ 03790). The memo indicated CEI must make an offer which could not be "proven inadequate with relative ease" to avoid MELP's resort to some other course which would be even more "distasteful" to CEI, i.e., seeking

an FPC-ordered interconnection. The memo recommended that CEI offer MELP a 69 kv interconnection because it would be of such limited capacity as to preclude parallel operation and because it could be installed on a temporary, rather than a permanent, basis. Both of these factors were "important" to CEI and both eliminated any possibility of MELP's obtaining any economic benefits from coordination.

After a number of drafts, a letter agreement forming the basis for a load transfer arrangement and dated January 20, 1970, was signed by CEI and MELP. (DJ 014930). This letter, and the three amendments to it (DJ 15-265), constitute the load transfer agreement. The agreement did not provide for an interconnection between the two systems, but simply provided a means by which MELP was able to transfer whole blocks of load to CEI; it therefore provided no coordinating benefits to MELP. When MELP needed the load transfer points energized, it was necessary to contact the CEI dispatcher who in turn would contact legal counsel for CEI to obtain permission. (Titas deposition at pp. 50-51). This resulted in delays in providing MELP with the necessary relief, caused "blackouts" for MELP's customers, and provided an additional sales point for CEI.

In early 1969, the FPC ordered a 69 kv nonsynchronous interconnection. This interconnection was normally operated open with no power flowing between the systems. As with the load transfer arrangement, it was necessary that CEI be

contacted before the 69 kv interconnection was closed. (Titus deposition at pp. 17-18).

At the same time it ordered the 69 kv interconnection, the FPC also ordered CEI to begin negotiations with MELP on a permanent 138 kv synchronous interconnection which would allow parallel operation of the systems for the first time. This interconnection went into effect in early 1975. Although this interconnection does operate closed, none of the benefits of coordinated operation are available to MELP, since the only power CEI will sell is extremely high cost emergency power, even though MELP has been purchasing what CAPCO would regard as "Limited Term Power".

c. Refusal to Wheel

In 1973, MELP had the opportunity to obtain 30 mw of low cost power from the Power Authority of the State of New York (hereinafter "PASNY"), but was unable to do so because of CEI's refusal to wheel that power across its system.

Pursuant to a license granted under 16 U.S.C. §836, PASNY operates an 1800 mw power generating plant in Niagra Falls. Ten percent of the power generated by this plant has been set aside for preference customers in neighboring states. In 1972, MELP decided to try to obtain the 30 mw of preference power still available. On March 5, 1973, an agreement was signed between American Municipal Power, Inc. of Ohio (hereinafter "AMP-O") and MELP

whereunder AMP-O agreed to bargain for PASNY power on behalf of MELP. (DJ 014495). 47/

On May 1, 1973, AMP-O sent a letter to CEI (DJ 014618) which indicated that AMP-O had an application before PASNY for 30 mw of power, and that PASNY had requested more information on the delivery arrangements. It stated that AMP-O had asked Pennsylvania Electric Company (hereinafter "Penelec") to wheel the power to the Ohio-Pennsylvania border and asked CEI to wheel it from that point to MELP. A June 12, 1973 letter from AMP-O to CEI (DJ 014628) stated that Penelec had agreed to wheel, and that before AMP-O could work out a full financial plan, it would have to have some assurance that CEI would wheel.

On August 8, 1973, CEI officials met and decided to refuse AMP-O's request to wheel. Notes taken by counsel for CEI state:

> At a meeting in the Company on August 8, 1973, at which Messrs. Rudolph [President], Ginn [Executive Vice President], Williams [Executive Vice President], Hauser [Corporate Solicitor], Lansdale [corporate director and outside counsel in private antitrust action], Charnoff [outside counsel in NRC antitrust proceeding], Davidson [Vice President-Engineering], and Lester [senior rate engineer] attended, it was decided that the Company should refuse the request of AMP-Ohio to wheel PASNY power or wheel power from any other third party. (DJ 014323).

By letter dated August 30, 1973 (DJ 014634), CEI wrote to AMP-O as follows:

47/ Because the statute prohibited an individual utility from bargaining on its own for PASNY power, it was necessary that a bargaining agent be appointed for MELP.

> This letter will advise you that after review, The Illuminating Company has concluded that at this time it is not willing to commit itself to enter into a transmission agreement to wheel power generated by the Power Authority of the State of New York and to deliver it in Ohio to the City of Cleveland.
>
> In reviewing the request of AMP-Ohio, many factors were considered including very importantly, the following:
>
> As you may know, The Illuminating Company competes with the Cleveland Municipal Electric Light Plant on a customer-to-customer and street-to-street basis in a sizeable portion of the City. This competitive situation is clearly unique. Economic studies indicate an arrangement to transmit the PASNY power would provide the Municipal system electric energy at a cost which would be injurious to the Illuminating Company's competitive position. (Emphasis added).

One could hardly expect to find a more dramatic example of a refusal to deal by a monopolist -- indeed, a refusal explicitly motivated by anticompetitive intent and clearly intended to be exclusionary in effect. 48/ Thus, at the same time CEI refused to allow MELP access to the benefits of coordinated operation with CEI, the company used its monopoly power in transmission to disadvantage its retail competitor by foreclosing MELP's access to alternative sources of bulk power supply and coordination.

d. CAPCO and Coordinated Operation and Development

CEI, in conjunction with the other members of CAPCO, denied membership in that pool to the Pitcairn municipal system. By letter of December 18, 1967, CEI notified Pitcairn that,

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48/ An affidavit submitted by CEI in this proceeding goes to some length to prove that CEI had and has sufficient transmission capacity available to wheel the PASNY power. (DJ 017621).

speaking only for itself, CEI found Pitcairn's participation in CAPCO to be "highly impractical." (DJ 010275). A CEI memo dated January 11, 1968 (DJ 010280), states that TE had received a "second letter" from Pitcairn and goes on to state that the matter would be discussed in detail with counsel for the CAPCO companies at a Drafting Committee meeting. It is a fair inference from this memorandum and the fact that correspondence between Pitcairn and the other CAPCO companies was found in CEI's files that CEI acted in concert with the other CAPCO companies in denying Pitcairn pool membership. 49/

CEI has also refused MELP access to the benefits of the overall program of coordinated operation and development which flow from membership in the CAPCO Pool to which CEI belongs. In addition, the company has refused to grant MELP meaningful access to large-scale generation.

By a letter to CEI of April 4, 1973, MELP requested CAPCO membership. (DJ 06955). In a second letter, dated April 13, 1973, MELP requested participation in the Perry units. (DJ 06954). On August 3, 1973, MELP revised its request and asked for participation in Perry, Units 1 and 2, Davis-Besse, Unit 1 and Beaver Valley, Unit 2, in order to add blocks of capacity more suitable to its load growth. (DJ 06942).

49/ This inference is confirmed by the "consensus" reply of Applicants to the request. (DJ 119679). See Section III.D.3.d, *infra*.

On August 8, 1973, at the same company meeting where CEI decided not to wheel PASNY power to MELP, the company officials decided to deny MELP's request for CAPCO membership and for participation in Davis-Besse and Beaver Valley. (DJ 014323).

By letter of September 10, 1973, MELP again contacted CEI, enclosing a newspaper article which indicated that CAPCO was building five plants: four nuclear and one coal burning. MELP reiterated its earlier requests for admission to the CAPCO Pool and stated its desire "to participate in the planning, construction, power delivery arrangements and other coordinated aspects of power generation and transmission . . . ." (DJ 302740). 50/

On November 12, 1973, another CEI meeting was held concerning MELP's requests. The minutes of this meeting (DJ 014323) indicate that CEI was concerned that the Department might give adverse antitrust advice to the NRC on the application for Perry, Units 1 and 2. The minutes indicate that no decisions were reached but, at this meeting, no one proposed "a flat no" to MELP's requests.

On December 7, 1973, a special CAPCO Executive Committee meeting was held in Cleveland to discuss MELP's membership in

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50/ This letter appears to be MELP's only request to participate in large-scale fossil, as well as nuclear, generation.

CAPCO. The minutes of that meeting (DJ 04545) reiterate MELP's proposal for participation in four CAPCO nuclear units, note MELP's request for an immediate answer and CEI's response that no answer could be given until the other members of CAPCO were consulted. It was agreed that Duquesne, OE and TE would communicate their position concerning CAPCO membership to CEI by December 10 and that CEI would communicate this to MELP at a meeting scheduled for December 13, 1973.

By letter of December 10, 1973, Duquesne responded to MELP's request for CAPCO membership, stating that it was answering only for itself and not for the other CAPCO companies. Duquesne stated that it saw no advantage in MELP's entrance into the pool but saw serious disadvantages, including problems with replanning and renegotiating existing arrangements if MELP were to enter CAPCO. It suggested that MELP's needs might better be served by a separate arrangement with CEI. (DJ 012252).

On December 13, 1973, a meeting was held between CEI and MELP. CEI's Vice President and General Counsel noted Duquesne's response and stated that the letter reflected the position of all of the CAPCO companies on CAPCO membership for MELP. (DJ 014323). He then distributed a letter (DJ 06936) which stated that CEI would "enter into negotiations" with MELP concerning the latter's participation in the four nuclear units.

While not a "flat no" to MELP's request for participation, CEI's offer to negotiate was subject to a sufficient number of anticompetitive conditions to ensure that MELP could not accept it. First, CEI demanded a right of first refusal to purchase all power from the nuclear units which MELP did not require for its own use or for sale to its retail customers. This condition would have foreclosed MELP's opportunity to enter the wholesale market as a supplier of bulk power, as well as its opportunity to employ this surplus power in a program of coordinated operation with other utilities. CEI's second precondition to MELP's participation was that MELP would not sell electric power at retail "below cost." Obviously, computation of the "cost" of electric power which a utility sells to different classes of retail customers is far more difficult than a similar computation for a retailer of some manufactured item. Indeed, CEI has at times maintained that MELP should adopt retail rates which provide for a "cost" comparable to the taxes paid by CEI. (DJ 015494). Clearly, the ambiguity of this term in the electric power industry is great enough to give CEI a virtual veto over its competitor's rates. The third and final precondition established by CEI was that, prior to beginning to negotiate, MELP must withdraw any and all requests for antitrust review relating to any of the nuclear units. This demand could, should negotiations fail to provide a satisfactory result, leave MELP without either participation or an effective remedy.

e. Interconnection With Painesville

As indicated in CEI's Planning Report, the company believed that an "interconnection under appropriate conditions appears to be the most promising way" to obtain the objective of acquiring the Painesville system. (DJ 017453).

In August 1970, Mr. Davidson wrote to Mr. H. L. Williams (Vice President-Engineering) regarding the Painesville municipal system. He indicated that CEI assistance to MELP might "precipitate" a review of the Painesville situation and described possibilities for acquiring all or part of Painesville's customers:

> The latter category, acquisition of PVM system load, is basically Marketing oriented. This area might be more appropriate for possible 'negotiation' with Painesville in return for CEI tie-in. According to our present information, the PVM system served electrical load in Painesville, Painesville Township, Perry and Perry Township. Method and cost of transferring some PVM distribution lines to CEI supply was not reviewed at this time. (DJ 03937).

An October 1972 CEI document indicated that if Painesville went to the FPC, it could almost certainly get an interconnection and that the precedents set with MELP could apply to Painesville. One of the solutions suggested was to "arrange for some limitation of their service area in exchange for CEI providing the interconnection at reduced cost (See map)." (DJ 06397, but no map was produced).

In November 1972, a memo on Painesville was sent by Mr. Williams, Vice President-Engineering, to CEI's president.

(DJ 012582). This memo went over the Painesville situation in detail and reiterated CEI's fear of an FPC ordered interconnection. The memo then discussed various alternatives, including purchase of the Painesville system, and recommended that CEI either interconnect with Painesville and require the latter to carry a 25 mw reserve (which CEI could use as a CAPCO reserve in its program of coordinated operation) or interconnect and take payment in the form of customers in Perry Township. By letter dated January 2, 1974, CEI made a proposal in accord with the latter recommendation (DJ 80000118) which was refused by Painesville.

By letter to Painesville dated June 27, 1974, concerning the negotiations on the interconnection, CEI refused to wheel when it stated that the company "could not agree to the Transmission Service Schedule [proposed by Painesville] which is third party wheeling." (DJ 012702).

On January 13, 1975, Painesville and CEI entered into an interconnection agreement. (DJ 013953).

In 1973, Painesville requested participation in the Perry units. (DJ 06034). This request was never explicitly granted or denied. 51/

51/ CEI's territorial allocation agreement with OE is discussed in Section III.D.4.d, infra.

2. Duquesne Light Company

a. Acquisitions

Duquesne has had a history of acquiring the competing municipal distribution systems located within its service area. Since 1960, Duquesne has acquired the distribution systems of the Boroughs of Etna (1960), Sharpsburgh (1964) and Aspinwall (1967). (DJ 139673). In addition, during at least the period of 1966 through 1968, Duquesne attempted to acquire the distribution system of Pitcairn, the only remaining municipal system within its service area. (DJ 116961, 118381, 116870, 116940, 118360).

Duquesne's policies concerning the acquisition of municipal systems were made explicit in a speech dealing with the acquisition of the Aspinwall system, entitled "The Acquisition of Small Municipal Electric Systems" by a representative from Duquesne's Sales Division (DJ 117907):

> It is our Company's philosophy to try to purchase municipal systems because they can be a potential threat to the well being of the Company . . .
>
> * * *
>
> [s]ome value be assigned to the fact that we got rid of a municipal system with all of its future potential implications.

This policy was also confirmed in an intracompany memorandum dated December 5, 1966 to Fleger (Chairman of the Board and Chief Executive Officer) from W. F. Gilfillan (Vice President-Sales Division):

I believe it would be to our advantage to continue these conversations which could lead to negotiations to purchase Pitcairn's distribution system. This would clean up the remaining municipal electric system in our service area. (DJ 116961).

b. Refusals to Sell Wholesale Power

Prior to its acquisition of their distribution systems, Duquesne refused to sell bulk power at wholesale to the Boroughs of Etna, Sharpsburg (DJ 118287) and Aspinwall (DJ 115382, 118550, 118561), and in 1966, refused to sell wholesale power to Ellwood City, a municipality located in PPC's service area. (Witness Luxenburg).

From at least 1966 through 1968, Duquesne adamantly refused to sell wholesale power to Pitcairn (DJ 118373, 118043, 118356, 118360, 119667).

In 1968, Pitcairn filed an antitrust action against Duquesne and in 1970 filed a complaint against the company under Section 203 of the Federal Power Act. Pursuant to the 1971 settlement of these proceedings, Duquesne contracted to supply wholesale power to Pitcairn; this contract was to remain in effect for a three-year term, and thereafter continue on a year-to-year basis. (DJ 134594).

The described refusals to sell wholesale power were made pursuant to and are illustrative of an explicit company policy (DJ 119667): ". . . Duquesne Light Company has not in the past nor does it intend to in the future supply power to Municipalities on a wholesale basis." (Memorandum dated January 23, 1968 to O'Nan, Manager-Sales Division, Industrial and Governmental Sales Department, and Schmidt by John Merriman, Director,

Government Sales Section. (DJ 118360; see also DJ 118381 and 119667).

The refusals to deal described above constitute a misuse of Duquesne's monopoly power in generation and transmission to foreclose competition in the sale of power at retail. The success of these exclusionary activities may be inferred from Duquesne's acquisition of those systems which were unable to purchase wholesale power from the company.

c. CAPCO and Coordinated Operation and Development

In addition to Duquesne's refusal to supply Pitcairn with wholesale power, the Company also refused to extend to Pitcairn any of the benefits of coordinated operation and development. Duquesne refused to provide an emergency interconnection on reasonable terms and conditions, refused to allow Pitcairn to purchase partial requirements bulk power from Duquesne, and refused to enter into a coordinated operating agreement with Pitcairn. (DJ 118356, 118360, 118362, 118043). In a meeting with Pitcairn concerning its request to join the CAPCO Pool, Duquesne also rejected Pitcairn's suggestion that, if it would not be allowed to participate in all the CAPCO units, the municipal system would like a share of some single nuclear unit; the then-new Beaver Valley nuclear unit was specifically mentioned. (DJ 119670).

Duquesne also joined in the refusal of the CAPCO Pool members to allow Pitcairn to become a member of CAPCO and thus gain

access to the benefits of coordinated development provided by the pool. 52/

As indicated above, Duquesne also refused MELP's request for CAPCO membership.

3. The Toledo Edison Company

a. Acquisitions

The present TE is an amalgamation of at least 190 companies which have been acquired by mergers and acquisitions. (Wein at p. 70, DJ 30011805). These mergers and acquisitions, which date back to the turn of the century, have continued up to the present time with TE's acquisition of the Liberty Center distribution system in 1974. (Wein at p. 71).

In addition to these purchases and acquisitions mentioned above, TE has made numerous attempts to acquire other electric utility systems in whole or in part. Since 1960, TE has offered to purchase the following competing municipal systems: Bryan (1968); Clyde (July 1964, acquired 1965); Edgerton (1961, 1965); Liberty Center (1961, 1963, acquired in 1974); Napoleon (1965, 1971); Pioneer (1964); Stryker (1962, acquired 1963); and Waterville (1961, 1967, acquired in 1968). (DJ 313000). In the same period, TE offered to make system surveys which

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52/ For a more detailed discussion of the positions of the various Applicants on Pitcairn's request for CAPCO membership, see Section III.D.3.d., infra.

might lead to the purchase of nine other municipal systems. (DJ 313000).

Thus, TE has evidenced an interest in purchasing every competing municipal system located within its service area. This is in keeping with the company's informal policy of attempting to serve all of the customers within its service area at retail. (Kozak deposition at p. 25, Cloer deposition at p. 13, Schwalbert deposition at p. 7).

b. Buckeye Agreements

TE has been a party to a plan designed to forestall the construction of transmission facilities by the distribution cooperatives located within the State of Ohio. In the early 1960's, these coops purchased wholesale power from the investor-owned utilities within the state. The coops founded Buckeye Power, Inc. to be used as a vehicle for forming their own electric system, and began to plan for the construction of generating and transmission facilities which would serve all distribution coops in Ohio. Ohio Power Company responded to this action by offering to sell Buckeye a 600 mw generator which is part of the Cardinal Plant. Buckeye eventually purchased this generator which now supplies power to all the coops in Ohio. (Witness Cummins).

The investor-owned utilities, however, were concerned that if Buckeye built a statewide transmission network, it

could be used to compete with the investor-owned utilities at wholesale for municipal customers. To forestall this coop construction program, some of the private utilities, including TE, entered into the Buckeye Power Delivery Agreement (DJ 302791) which, among other things, provided for the wheeling of Buckeye power by TE to the Buckeye member distribution cooperatives within TE's service area. (DJ 40000001 through 40000007; Witness Cummins). However, this, and ancillary agreements, place severe limitations on the use of Buckeye power. The Power Delivery Agreement provides that all Buckeye power must be consumed within the State of Ohio, a provision that has been enforced against the Southeastern Michigan Rural Electric Cooperative which is located in TE's service area. Similarly, the agreement precludes municipal systems from becoming members of Buckeye. Finally, the agreement incorporates by reference, and interprets to be applicable to wholesale customers, a section of the Ohio Revised Code which essentially states that a customer of one private utility cannot be served by another private utility without cutting himself off from power supplied by either utility for a period of 90 days. 53/ Thus, it is impractical for any municipal wholesale customer to receive Buckeye Power if it is being served by TE. (Schwalbert deposition at p. 46). TE's

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53/ Under Ohio law, the utility initially serving the customer has the option of invoking the 90-day cut off requirement.

municipal customers, most of which have no generation and therefore purchase all their requirements from TE, would have to suffer a 90-day blackout if they wish to obtain Buckeye power.

Even Bryan and Napoleon, two municipal systems in TE's service area which have generation and have considered obtaining Buckeye power, have been unable to do so. In both cases, TE refused to wheel Buckeye power unless the municipal systems were first isolated for 90 days.

In 1971, when Napoleon first broached the subject of Napoleon obtaining power from Buckeye, either by having TE establish a delivery point for Buckeye or by some other means, Mr. Cloer, TE's District Manager, stated "that Toledo Edison would not establish such a delivery point and would further resist every effort by Napoleon to obtain power from the Tricounty [the Buckeye member coop in Napoleon's area] and Buckeye." (DJ 14000001; Moran deposition at p. 43). Napoleon was also told at that time that if Napoleon entered into an agreement with Buckeye, TE would not allow its system to be operated in continuous synchronism with that of Napoleon (DJ 14000001). Napoleon's negotiations with Buckeye continued. Napoleon then contacted TE and advised them that the City would like to have Buckeye power wheeled to it by TE. Napoleon was informed that TE would wheel only if Napoleon disconnected for 90 days and ran as an isolate system. (DJ 300008; Cloer deposition at p. 26). TE cited as support for its position the provision

in the Buckeye Agreements (DJ 302791) which was discussed above. Napoleon informed TE of its intent to cut off for 90 days. (DJ 300008; Cloer deposition at p. 26). The City then asked for a waiver of the 90-day provision (DJ 311751), but was refused (DJ 311752; Cloer deposition at p. 60). Finally, faced with numerous complaints from its citizens (DJ 14000072, 14000077, 14000081, 14000083) and a new and better wholesale offer from TE, Napoleon decided to continue as TE's wholesale customer. (DJ 14000093; Cloer deposition at p. 27).

In 1970, the Bryan municipal system contacted Buckeye Power, Inc. in an attempt to obtain bulk power at wholesale from the North Western Cooperative, which is a distribution cooperative member of Buckeye and is located in Bryan. (DJ 90000001). Discussions of this transaction continued for some time thereafter (DJ 90000003 and 13000001) but, because of restrictions in the Buckeye Agreements, Bryan was unable to obtain power from Buckeye. (Witness Cummins). Thus, TE has taken advantage of the Buckeye Agreements in order to foreclose Buckeye from competing at wholesale for TE's municipal customers. 54/

54/ This restrictive provision of the Buckeye Agreements which requires a 90-day cut off was inserted by private utiltities in order to prevent Buckeye from competing for wholesale municipal loads served by these private utilities. (Schwalbert depositition at pp. 44-45).

c. Restraints on Alienation

TE has included restrictions on sales-for-resale in its contracts with its wholesale customers. The company's contracts with each of the following municipal systems contain or have contained restrictions on the resale of power purchased by the municipal utility from Toledo: Bowling Green (DJ 305302); Bradner (DJ 305325); Custar (DJ 305339); Edgerton (DJ 305353); Elmore (DJ 305367); Genoa (DJ 305388); Haskins (DJ 305402); Liberty Center (DJ 305416, acquired in 1974); Montpelier (DJ 305430); Oak Harbor (DJ 305451); Pemberville (DJ 305465); Pioneer (DJ 305479); Woodville (DJ 305493). Eight of these contracts are still in effect today.

Provision number [illegible] in each of these contracts contains the restriction on resale of power purchased from TE at wholesale. While the precise language varies from contract to contract, these clauses generally consist of agreements not to compete for existing customers or agreements on which new customers can be served by a wholesale customer e.g., a new customer may only be served from existing lines. The admitted reason for these competitive restraints is to prevent the municipal customers of TE from securing any customers which could be served by TE. (Moran deposition at pp. 82-83).

d. CAPCO and Coordinated Operation and Development

TE refused to engage in even limited coordination with the Waterville municipal system in an effort to further its goal of

acquiring that system. In 1966, the Waterville utility was an isolated system which was experiencing reliability problems. (DJ 311298, 311302, 311244, 311245, 306631, 311292; Cloer deposition at p. 12). In November of that year, Mr. Cloer, TE's "spokesman" in Waterville (Cloer deposition at p. 7), told a member of the City's Board of Public Affairs that TE was reluctant to sell Waterville wholesale power since this would make the Waterville system more reliable and it was TE's desire to purchase the light plant. (DJ 306631). In June of 1967, a written request from Waterville's consulting engineer, asking whether TE would sell Waterville partial or total requirements bulk power at wholesale (DJ 306609), was met by a refusal from TE. (DJ 306607). Prior to a Waterville referendum to determine whether to sell the light plant, TE actively participated and urged such a sale. (DJ 311244 and 306614). In 1968, TE achieved its goal of acquiring the Waterville system.

TE has foreclosed the efforts of its municipal competitors to engage in coordinated development of generating facilties. On at least two occasions, TE representatives have stated that TE would not consider joint ownership of large-scale generating facilities with the Napoleon municipal system. (DJ 14000001).

Finally, TE has participated in the exclusion of utilities from the CAPCO Pool, thereby denying them access to the benefits of coordinated operation and development. On at least two occasions, TE has received requests from other electric

utilities for admission into CAPCO. These requests have come from the Borough of Pitcairn and from MELP.

Pitcairn wrote to all CAPCO companies on December 5, 1967 and requested admission to CAPCO. Shortly thereafter, the CAPCO companies met and worked out carefully orchestrated responses to Pitcairn's request. Although these responses, and subsequent responses to other letters from Pitcairn, appeared to reflect independent action by each company, draft responses to Pitcairn were circulated among the CAPCO companies and discussed before they were sent to Pitcairn. (DJ 302006-33).

TE's files contain Pitcairn's original requests to TE (DJ 302008), OE (DJ 302013), and PPC (DJ 302029), as well as OE's December 12, 1967 acknowledgment of the letters sent to it and PPC (DJ 302012).

By letter dated December 19, 1967, TE responded to Pitcairn's request stating:

> It is the view of Toledo Edison that the Borough's participation in any pool involving these companies would be impractical for a number of reasons. Moreover, if Pennsylvania law is anything like that of Ohio, we believe that any such participation would not be legally permissible. (DJ 302006).

The letter indicates that copies were sent to the other company presidents. A draft of a response by Duquesne, dated December 18, 1967, was sent to TE. This draft was reviewed by Mr. Henry, TE's counsel, who, on December 19, 1967, sent a note to TE's president which stated "This goes into detail, contrary

to consensus at last meeting. It is to be discussed at Thursday meeting. If you have any thoughts, call me Wednesday." (DJ 302017).

By letter dated December 22, 1967, CEI forwarded a copy of its Pitcairn response that membership would be "highly impractical" to the other CAPCO presidents. (DJ 302031). By letter dated January 2, 1968, OE and PPC jointly responded that "It is inconceivable to me how there could be any advantage to the members of CAPCO in having the Borough of Pitcairn as a member of the CAPCO pool." (DJ 302011). Copies were sent to all other companies.

On January 2, 1968, Duquesne responded that "no useful purpose would be served by the discussions you request." (DJ 302009). The response is considerably shorter and less detailed than the earlier draft which Duquesne circulated to the other Applicants. It stated that membership for Pitcairn is "impracticable" and that

> The Borough could not contribute to the objectives of reliability and economy for which the pooling arrangement was created. On the other hand, the participation of the Borough would create complications and difficulties without any compensating advantages. (DJ 118365).

This reply was handed to representatives of CEI, TE and OE/PPC at a CAPCO attorneys' meeting in Cleveland on January 3, 1968. (DJ 105059).

On January 2, 1968, Pitcairn wrote to CEI and TE requesting further discussion of the matter. (DJ 302026 and 302027). On January 11, 1968, Pitcairn wrote to OE requesting further discussions (DJ 302030) and sent copies to the other CAPCO companies. Duquesne responded to Pitcairn's letter to OE on January 22, 1968:

> As I advised you in my letter of January 2, participation in the arrangement by the Borough of Pitcairn would be impracticable.

A marginal note on this letter says "(This reply represents the consensus of the Attorneys for the CAPCO companies)". (DJ 119679).

On January 25, 1968, TE responded to Pitcairn's January 2 letter, stating that TE's opinion, expressed in its earlier letter, was unchanged but if Pitcairn wished to discuss the matter, its representative could meet with someone in Toledo at a convenient time. (DJ 302025). Copies were sent to other CAPCO companies.

OE responded to Pitcairn's January 2 letter on January 30, 1968 indicating that further discussion could be had with OE's General Counsel. (DJ 302010). Copies were sent to the other CAPCO companies.

On January 30, 1968, CEI wrote to Pitcairn and indicated that, if it wished to discuss the matter further, it should contact Mr. Greenslade, a company attorney. (DJ 302014). Copies were sent to the other CAPCO companies.

By letter dated February 6, 1968, Pitcairn again wrote to TE, this time requesting copies of the CAPCO agreements so that the City's representative could be prepared to discuss Pitcairn's admission to the CAPCO Pool. (DJ 302023). On February 15, 1968, Duquesne responded to this request:

> The memorandum of understanding is preliminary to definitive agreements, which are in the process of preparation and when completed will be submitted to the appropriate regulatory agencies for approval. Therefore, we are unable to furnish you a copy of the memorandum of understanding. (DJ 302020).

Counsel for CEI responded to this request on February 21, 1968, saying that they must decline to supply a copy since the request was premature. (DJ 302021). On February 28, 1968, also TE responded:

> Inasmuch as no agreement has been executed among the five member companies of the CAPCO group, obviously I cannot meet your request. We are presently in the process of preparing an agreement based on a somewhat broad memorandum of understanding. (DJ 302022).

By letter of February 29, 1968, Pitcairn wrote TE indicating that it would continue discussing the matter with Duquesne. (DJ 302024).

MELP has also requested admission to the CAPCO Pool. Although the initial request was made to CEI, a formal request and a proposal were sent to TE on August 3, 1973. (DJ 300433). Toledo never responded to MELP's request. 55/

55/ See Section III.D.1.c, supra, for a full discussion of MELP's attempt to join the CAPCO Pool.

e. Territorial Allocation Agreement

The Southeastern Michigan Rural Electric Cooperative, which has customers both in Ohio and Michigan, has for years tried to obtain power from TE to serve the Michigan portion of the Coop's load. Prior to 1968, TE sold the Coop wholesale power to serve the Ohio portion of its load, but refused to sell it power to serve the Michigan portion of its load, which was then supplied by Consumers Power Company. (DJ 16000081, 16000080, 16000059). At two meetings in 1966, Mr. Schwalbert of TE told representatives of the Coop, as well as Messrs. Badner and Darling of the Rural Electrification Administration, that TE would not sell power to serve the Michigan load because of an understanding or agreement with Consumers Power Company that neither company would serve customers located in the service area of the other (DJ 16000061, 16000064, 16000066; 16000078; Witnesses Badner and Darling). 56/ Since, from cost and engineering viewpoints, TE was the best source of bulk power for the Coop, the Coop again tried to obtain TE power in 197[illegible]. (DJ 301927, 16000052). Again, TE refused to sell at wholesale. (DJ 301926). A similar request is presently under discussion. (Williamson deposition at p. 40).

56/ Two additional reason were given: (1) desire to avoid FPC jurisdiction, and (2) prohibition by the Buckeye Agreements of sales across a state line. These reasons were later deemphasized by TE.

f. Price Squeeze

TE has had and presently has a policy of attempting to equalize the rates charged to its municipal wholesale customers with the rates charged to its industrial customers (Moran deposition at pp. 56-57; DJ 30000002; and 14000001; Witness Lewis). The effect of this has been to make it economically difficult, if not impossible, for the municipal systems to compete with TE in the retail market for large industrial customers. (Wein at pp. 29-30).

4. Ohio Edison Company

a. Acquisitions

OE has been engaged in a long-term program of acquiring competing municipal utility systems located within its service area. 57/

On October 31, 1972, OE purchased the Norwalk municipal system, thereby eliminating Norwalk as a competitor in the retail and wholesale markets. (DJ 213317, 213318, 213319). On January 13, 1970, Norwalk inquired whether OE would be interested in purchasing the City's generation system if the City were to decide to purchase all of its requirements for electric power and energy from OE. The company responded that:

> The company would not be interested in purchasing the city's steam generation units except in the

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57/ For a more expanded discussion of OE's acquisitions, see Section I.A.4, supra.

> event the city should decide to sell its entire electric system, that is, both generation and distribution facilities. (DJ 213312).

OE also acquired the competing municipal electric system of Hiram, Ohio. In 1962, prior to the acquisition, OE offered a a substantial subsidy to Hiram's largest customer to induce it to switch over to OE in order to further the company's goal of acquiring Hiram's system. This customer was Hiram College, which, by OE's calculations, utilized 39 1/2% of the output of Hiram's plant in 1962. (DJ 206874). An OE internal memorandum dated July 18, 1969 (DJ 218628; see also DJ 206874) indicates that OE offered to absorb part of the cost of building the college distribution system:

> Since this statement was probably made in order to enhance the acquisition of the Hiram facilities in 1962, the cost of the [college] distribution system over $20,000 would have been absorbed by us.

b. Buckeye Agreements

Although OE refused to join the other private utilities in Ohio in the Buckeye Power Delivery Agreement, 58/ it entered an agreement directly with Ohio Power Company on June 20, 1968, which provided for the delivery of power from Buckeye Power, Inc. to the distribution cooperatives located wholly or partially within OE's service area. (DJ 207313). This agreement contains the same restraint on Buckeye's ability to compete for municipal wholesale

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58/ See the discussion of Buckeye Power, Inc. in Section III.D.3.b, supra.

customers as was discussed earlier concerning the Power Delivery Agreement to which TE is a party.

c. Restraints On Alienation

OE has had, or presently has, wholesale contracts with seven cooperative and 21 municipal electric systems. Beginning in at least 1956 and continuing until August 29, 1973, OE's contracts with its wholesale customers contained unlawful restraints upon alienation, as well as customer and territorial allocation provisions violative of the Sherman Act. Although the individual contracts contain some variation in the type of restrictions imposed, they can be categorized into several general groups.

OE's contracts with distribution cooperatives, which were in effect from 1958 to 1968, contained flat restrictions on resale to any purchaser of power at wholesale. 59/ (DJ 15-310 through 15-316). These restrictions foreclosed all possible competition between OE and the coops for wholesale customers.

Similarly, OE's wholesale contracts with municipal systems, most of which were in effect until August 1973, contained restrictive provisions. Some contracts contained flat restrictions on resale (DJ 15-317, 15-318, 15-325, 15-328 through 15-333), while some contracts imposed the same restriction on resale by requiring

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59/ In 1968, these cooperatives began to purchase power from Buckeye Power, Inc. As indicated in the preceding section, OE secured contractual restrictions which continued to foreclose the ability of both Buckeye and its member distribution cooperatives to compete with OE at wholesale.

OE's written permission to serve such a customer (DJ 15-321 and 15-335), and some limited the "availability" of power to the municipal system's service to its retail customers or for municipal purposes. (DJ 15-323 and 15-324).

Another form of restriction contained in OE's wholesale contracts in effect froze the service area boundaries between the municipal systems and OE, and prohibited either from encroaching upon the other's territory, except that OE might serve within the municipal system's territory with its written consent. 60/ (DJ 15-341 through 15-357, 15-364, 15-366 through 15-368).

OE also contractually eliminated -- generally by customer allocation agreements -- the ability of its wholesale municipal customers to compete with it for industrial customers at retail. Several types or categories of restrictions are contained in its contracts with its municipal customers.

The first type of restriction reserved to the company the right to serve any new industrial customer whose capacity requirements or peak demand exceeded a specified amount. 61/ (DJ 15-320, 15-322, 15-324, 15-326, 15-325, 15-328, 15-331,

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60/ Although this is a restraint upon the alienation of wholesale power purchased under the contract, it is also a territorial allocation agreement.

61/ In some cases, the contract allows the municipal system to retain industrial customers already being served by them regardless of the amount of power brought.

15-335). Another category of restriction reserved to the company the right to serve directly any new industrial customer having a specified contemplated demand, unless "the Company shall agree that the village may serve such customer." (DJ 15-321 and 15-334). Finally, some contracts prevented the municipal system from serving any new industrial customer outside the "present limits" of the municipality, without the consent of the Company. (DJ 15-330, 15-323, 15-329). All of these restrictions operated to eliminate competition at retail between OE and municipal systems for large industrial loads.

The imposition of such contractual restraints of trade in the retail and wholesale markets is only possible by virtue of OE's dominance in generation and transmission.

d. Territorial Allocation Agreements

OE's territorial allocation agreements with various utilities have foreclosed competition in the retail and wholesale markets. 62/

In 1964, Ohio Power Company refused to sell bulk power at wholesale to Beach City, which was at that time renegotiating its wholesale contract with OE. (DJ 18000028). One year later, Ohio Power Company and OE jointly surveyed the territories served by each in order to establish a common territorial boundary line.

62/ See also the discussion in the preceding subsection concerning territorial allocation agreements between OE and its wholesale customers.

(DJ 18000030). Press accounts from OE's files indicate that Ohio Power Company in 1970 refused to sell wholesale power to Norwalk, a municipal system located in OE's service area. (DJ 215426).

In 1965, OE entered into an agreement with Ohio Power Company that, should Buckeye Power, Inc. be dissolved, the rural electric distribution cooperatives purchasing Buckeye generated power from Ohio Power (through OE's transmission facilities) would again become OE wholesale customers. The substance of this agreement is found in an OE memorandum dated November 18, 1965. (DJ 208570). Paragraph 8, entitled "Future Status," reads:

> Mr. Dissmeyer [of OE] asked what would happen if we proceeded with a buy-sell arrangement with Ohio Power and at some future date the REC's were disbanded because they were not economic. Mr. Lacopo and Mr. Martinka [of Ohio Power Company] agreed that in such case the load areas in question would revert back to Ohio Edison.

Since at least the mid-1960's, OE has had an agreement with CEI that restricts competition between the two companies with respect to new customers. This agreement is referred to in an OE internal memorandum dated April 4, 1974. (DJ 218259). In that memorandum, R. G. Zimmerman, Vice President, Sales, paraphrases a statement of D. Davidson, Vice President, Engineering, as follows:

> . . . Mr. Davidson stated that ten years or more ago the two companies had had difficulty at certain boundaries and it was concluded that the company with the lowest cost should serve; and if this was not agreeable to both parties, it was to be referred to the respective V.P.'s.

e. CAPCO and Coordinated Operation and Development

In 1965, OE refused to sell the Newton Falls municipal electric system power for resale, thereby denying it the benefits of coordination. During 1965 Newton Falls hired a consulting engineer to conduct a survey and consider the following alternatives:

(1) Purchasing another generator;

(2) Selling the generation system and buying wholesale power from OE; or

(3) Selling both the generation and distribution system.

In response to the engineer's inquiry, OE flatly refused to sell Newton Falls electricity for resale, and expressed an interest in buying the entire system. 63/ (DJ 206175).

In 1966, OE attempted to foreclose competition with Buckeye Power, Inc. in supplying bulk power by offering its member distribution coop, Firelands Rural Electric Cooperative, a new delivery point if it would withdraw from membership in Buckeye Power, Inc. An OE memorandum, dated November 28, 1966, concerning an OE meeting to discuss Fireland's request for a new delivery point, stated:

> RJD [R. J. Dreisbach of OE] mentioned that this was the only delivery point where the R.E.C. would own transmission and that it was contrary to the terms of the Buckeye Power Agreement. After discussing the problem fully, it was felt that RJD should try and stall in giving an answer to this problem and if possible use this request as a wedge to see just how Mr. Harmony felt toward Buckeye Power. It was suggested that we tell Mr. Harmony that what he is asking was contrary

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63/ OE audited the light plant records and formulated an initial bid. Newton Falls ultimately decided to purchase another generator.

to the Buckeye Agreement that had been prepared for signature and indicate that if Buckeye was not in the picture, possibly something could be worked out. (DJ 217830).

At an October 7, 1974 meeting between representatives of OE and its wholesale municipal customers, John R. White, now President of OE, refused to include wheeling as part of the study of future arrangements between itself and its wholesale customers. (DJ 2 2487). At the same meeting, Mr. White rejected the possibility of participation by OE's wholesale customers in any specific generating unit or units. (DJ 2 2487). 64/

f. Price Squeeze

OE has eliminated competition by municipal systems, which are its wholesale customers, for industrial loads by charging the municipals a wholesale rate for power which is higher than comparable retail rates to industrial customers. (Kampmeier at p. 34). Moreover, OE has set the price of additional energy for municipal systems at a higher wholesale rate than the price for the same amount of energy under the lowest retail rate to industries. (Kampmeier at pp. 34-35). Thus, these municipal systems are unable to compete with OE in the retail market for industrial customers. This exclusionary practice by OE is only possible by virtue of its monopoly power in generation and transmission.

64/ OE's role with respect to requests by MELP and Pitcairn for CAPCO membership is discussed in Sections III.D.1.d and III.D.3.d, supra.

5. Pennsylvania Power Company

PPC's activities conform to those of its parent company, OE. Indeed, the two systems are considered as one for many purposes in CAPCO and, at times, OE's representatives speak for both companies. (See, e.g., DJ 302012 and 302011). 65/

a. Restraints on Alienation

Prior to 1966, PPC had restrictive provisions in its wholesale contracts with municipal systems which prevented the resale of power by wholesale customers to industrial retail customers, thereby eliminating competition in the retail market for such industrial customers. These contracts contained a provision which prevented the municipal system from selling power to any "single installation" for which the aggregate power requirements exceeded a certain amount. (DJ 218856). Some of these same contracts contained a provision which permitted the sale of power only to domestic and commercial customers, and to nonprofit cooperative associations for resale to ultimate consumers. (DJ 218856). Some contracts limited the availability of power thereunder to "energy for municipal uses and for reselling for Domestic and Commercial Purposes." (DJ 218856).

Since mid-1966, all of PPC's contracts have contained restraints on alienation, which also constitute territorial customer allocation provisions. Under these contracts, a

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65/ The history of PPC's recent acquisitions and acquisition attempts is set forth in Section I.A.5, supra.

municipal wholesale customer may not provide service to a customer of PPC without the company's consent, nor may PPC provide service to a customer of the municipal system without the latter's consent. 66/ These contracts are in effect today.

In addition, by letter agreement with Ellwood City dated July 30, 1966, PPC maintained the right to serve in certain named areas which might in the future be annexed by Ellwood City, while waiving the right to serve in other areas undeveloped at that time. It was also agreed that Ellwood City could serve certain residential customers located in the Borough which were then being served by PPC. (DJ 219003).

b. CAPCO and Coordinated Operation and Development

PPC has pursued a course of conduct which has had the effect of eliminating competition from municipal systems. It has refused to sell wholesale power at rates which would allow resale to industrial customers, refused to file rates for service which would allow municipal systems to buy power for resale to industrial customers, refused to supply "maintenance" power, and refused to allow municipal systems access to or participation in the CAPCO Pool. 67/

66/ New Wilmington: DJ 15-411 superseded by DJ 15-420; Wampum: DJ 15-412 superseded by DJ 15-421; Zelienople: DJ 15-413 superseded by DJ 15-422; Ellwood City: DJ 15-414 superseded by DJ 15-423; DJ 15-416 superseded by DJ 15-424. The superseding contracts contain new tariffs, but have not eliminated any of the restrictive provisions.

67/ PPC's refusal to allow Pitcairn to join the CAPCO Pool is discussed in Section III.D.3.d, supra.

In March 1959, when asked whether it would sell power to the Grove City municipal system at PPC's published industrial rate for general resale, or more specifically for resale to a specific industrial customer (DJ 11000028), PPC refused. It specifically limited the possibility of sales to the municipal system to the "municipal resale rate" which was higher than the industrial rate. (DJ 11000029).

PPC has had, until recent regulatory action on the matter, a corporate policy of refusing to file a discount rate for high voltage service to its wholesale municipal customers, thereby restricting the municipal systems' ability to compete with it for industrial customers. The matter was brought before the Federal Power Commission (Docket No. E-8159) when PPC proposed general wholesale rate increases on April 30, 1973. On this issue, the Administrative Law Judge found, on April 23, 1975, that

> The rate schedules proposed or presently maintained by Penn Power for wholesale municipal service are or will be unjust and unreasonable, as well as unduly discriminatory, to the extent that they do not provide separate discount rates for service rendered at high voltage transmission levels demanded by its wholesale municipal customers. (Initial Decision at p. 10).

The Initial Decision was affirmed by an order the FPC issued on August 20, 1975.

When requested by Grove City municipal system to supply maintenance power in the period 1965-66, PPC refused; the request for partial requirements was made during the time the municipal

system needed to rehabilitate some of its generating units. (Witness Allen).

c. Price Squeeze

PPC like its parent company, OE, has discouraged and eliminated competition by municipal systems for industrial loads by charging the municipal systems a significantly higher rate for power than comparable rates to industrial retail customers. (Kampmeier at p. 35).

IV. MAINTENANCE OF THE SITUATION BY THE LICENSED ACTIVITIES

A. The Licensed Activities

The "activities under the license" include the integration of approximately 5100 megawatts of nuclear power into Applicants' respective systems for marketing in Ohio and Pennsylvania. Those megawatts of nuclear power -- supported by the tying of Applicants' individual systems into the CAPCO Pool, i.e., the regional power exchange -- are expected to be the cheapest available power to serve new and growing loads. (Williamson deposition at p. 38).

The large unit, base-load, nuclear electric power produced by the installations which are the subject of this proceeding, together with the power from Beaver Valley Power Station, Unit No. 2, will represent approximately 50% of Applicants' present generating capacity and will represent an even greater percentage of Applicants' base load capacity. (Kampmeier at p. 51). Moreover, Applicants project the utilization of still more nuclear

generation. Applicants are planning to bring on line, in 1982 and 1983, the Erie Power Station, Units 1 and 2, which will generate an additional 2400 mw of power. With a projected total of eight nuclear units, there can be little question that Applicants believe nuclear generation to be an extremely economic form of base-load electric power generation.

This belief is entirely reasonable, and reflects more than merely an understanding of the cost advantage of nuclear generation vis-a-vis alternative types of generation. The Congress has ennunciated changes in national fuel policy intended to turn electric utilities away from the use of natural gas or oil for generation of electric power. Public Law 93-319 (June 22, 1974), 15 U.S.C.A. §792, gave the Federal Energy Administrator the power to prohibit any power plant or major fuel burning installation from burning natural gas or petroleum products as its primary energy source.

Electric utilities are turning to nuclear power as the most economic form of large-unit base-load generation -- an advantage that will, it is predicted, "be maintained or even increased as time goes on." (National Power Survey, 1970, Part II-1-59).

The advantage of integrating low-cost nuclear generation into a multiple-plant, multiple-fuel, electric utility operation is obvious. Average cost is reduced. To the extent that Applicants are able to reduce their average cost while preventing their competitors from doing so, they improve their competitive position.

The power from the Perry and Davis-Besse units will be marketed to meet Applicants' load-growth requirements. By combining the unit, through high-voltage transmission lines, with other generating units owned by Applicants, 68/ the nuclear power can be marketed as "firm" power. As previously stated, the principal demand for electric power is for firm power. If these units were operated physically and contractually isolated from the remainder of Applicants' systems or from the CAPCO Pool, at most only 50% of the combined power available from the units could be marketed as firm power, as the remaining 50% would have to be held in reserve under the "single largest unit down" standard. Ultimately, the economic feasibility of such nuclear units depends on the connection of the unit through a high-voltage transmission network to other generating units for reserves, and to other load areas for purposes of load-growth pooling. Without each of Applicants' transmission systems and the CAPCO Pool, Applicants would not construct these nuclear units because they could not market the power as firm power.

B. The Nexus: The Licensed Activities Would Maintain The Situation

The Commission has emphasized that there must be a meaningful "nexus" between the activities under the nuclear license and the situation alleged to be inconsistent with the antitrust laws in order for those activities to be found to create or maintain

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68/ See Section I.C, supra.

that situation. 69/ A relationship or nexus between two things must be shown: (1) "a situation inconsistent with the antitrust laws"; and (2) "activities under the license." The requisite nexus is simply that the activities must "create or maintain" the situation.

This is the nexus required by the plain language of Section 105c(5). It is not necessary that the license activities themselves be inconsistent with the antitrust laws or their policies. 70/ It is not necessary that the license activities create a situation inconsistent with the antitrust laws where none was present before. It is not necessary that the effect of the license activities on the existing situation be an effect peculiar to nuclear power, or an effect which only the advent of nuclear power could bring about. It is not necessary that the license activities be the sole cause of maintaining a situation inconsistent with the antitrust laws. The only thing necessary is that the license activities be found to contribute in a significant manner to the maintenance of a situation inconsistent with the antitrust laws or their underlying policies.

69/ Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit No. 3), Dkt. No. 50-382A, Memorandum and Order of the AEC, RAI 73-9 (September 28, 1973).

70/ Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1), Dkt. No. 50-482A, Decision of Atomic Safety and Licensing Appeal Board, at 19-20 (June 30, 1975).

The evidence in this proceeding will show clearly such a nexus. It will demonstrate a situation inconsistent with the antitrust laws wherein Applicants have monopolized the wholesale and retail power markets over a large area of Ohio and Pennsylvania through activities which include their refusals to grant other electric systems coordinating access to their respective systems and to the regional power exchange market.

Second, the activities under the licenses clearly include the construction of the Perry and Davis-Besse units and, eventually, the operation of these units and the marketing of the power they will produce.

Finally, the nuclear power from these units will be integrated into each Applicant's system, coordinated with generation of other systems through the CAPCO Pool, i.e., the regional power exchange, and marketed by Applicants in the wholesale and retail markets in question. The power so generated will be more economical than any other form of new base load generating capacity, and their additional will strengthen and expand Applicants' respective systems and the regional power exchange of which they are a part. This will, in turn, increase Applicants' future ability to install and obtain low-cost power from large units. Concurrently, the Applicants continue to refuse reasonable access to coordinated operation and development to their competitors, thereby foreclosing them from applying for licenses to install their own large, low-cost base-load nuclear generation --

and from obtaining the benefits of the nuclear technology developed by the Federal Government. As a further consequence, it denies these competitors the low-cost power they will need to compete with Applicants' nuclear power for new and growth loads and to support their future competitive installation of large generating units.

Thus, the granting -- or denial -- of this license will have a clear and demonstrable impact on the anticompetitive activities of the Applicants, and on the capacity of the Applicants to maintain the anticompetitive situation for which they are responsible.

V. THE RELIEF APPROPRIATE TO ELIMINATE THE SITUATION

When it established these antitrust review procedures, Congress clearly intended that the Nuclear Regulatory Commission order relief to alleviate the concerns which gave rise to findings of antitrust inconsistency; in other words, Congress contemplated that the Commission would impose conditions which would eliminate the situation found to be inconsistent with the antitrust laws. This purpose is clear from the statute and the supporting legislative history.

Section 105c(6) of the Atomic Energy Act, 42 U.S.C. §2135c(6), provides:

> In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other

factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate. (Emphasis added).

The Report by the Joint Committee on Atomic Energy on the 1970 amendments to the Atomic Energy Act sets out authoritatively the role Congress intended for Section 105c(6):

> Paragraph (6) provides that if the Commission finds "the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a" that the Commission "shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest." On the basis of all its findings--the finding under paragraph (5) and its findings under paragraph (6)--the Commission would have the authority "to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate." While the Commission has the flexibility to consider and weigh the various interests and objectives which may be involved, the committee does not expect that an affirmative finding under paragraph (5) would normally need to be overriden by Commission findings and actions under paragraph (6). The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accommodating the other public interest concerns found pursuant to paragraph (6). Normally the committee expects the Commission's actions under paragraphs (5) and (6) will harmonize both antitrust and such other public interest considerations as may be involved. In connection with the range of Commission discretion, the committee notes that pursuant to subsection 105a the

> Commission may also take such licensing action as it deems necessary in the event a licensee is found actually to have violated any of the antitrust laws. Of course, in the event the Commission's finding under paragraph (5) is in the negative, the Commission need not take any further action regarding antitrust under subsection 105c. S. Rep. No. 91-1247, 91st Cong., 2d Sess. (1970); H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., 31 (1970). (Emphasis added).

At the relief stage, then, the Board must determine what is appropriate to eliminate the situation inconsistent with the antitrust laws. We note that the question of "nexus" at the relief stage under Section 105c(6) differs from that discussed above under Section 105c(5). Under Section 105c(6), the "nexus" or relationship the Board must consider is one of appropriateness -- i.e., whether the proposed license conditions are appropriate to eliminate the situation inconsistent with the antitrust laws.

What is appropriate relief in today's electric power industry is necessarily dictated by the particular complex of generation and transmission coordination arrangements, together with the nature and scope of the "situation inconsistent." Appropriate relief may, therefore, directly involve only the licensed units (e.g., if the "situation inconsistent" was comprised solely of a denial of access to the unit being licensed, then the provision of a meaningful opportunity for participation by other systems in the nuclear unit would constitute sufficient relief), or it may extend to any of the complex relationships which the Applicants themselves have woven to maintain or misuse

the monopoly positions which constitute a "situation inconsistent." As Mr. Kampmeier points out,

> Without an ability to participate in the coordination arrangements, and access to the nuclear and other power supplies and their transmission, the competitive position of the small systems would deteriorate very seriously, if not beyond the point of continued viability. . . . With the ability to participate fully in coordinated development and operation, and with access to the nuclear and other power supplies and their transmission, the small systems should be able to be competitive. (Kampmeier at p. 52).

The relief the Department will seek in this proceeding is the imposition of license conditions appropriate to eliminate the situation we allege to be inconsistent with the antitrust laws. The present situation is in substantial part the result of Applicants' denial to other systems of reasonable access to power exchange services. Applicants' installation of the nuclear units in question, while they continue to deny their actual and potential competitors the opportunity to install large-unit, low-cost, base-load nuclear generation, maintains this situation. The license conditions to be proposed are designed to provide those actual and potential competitors reasonable access to the power exchange services now controlled by Applicants so as to remove those restrictions imposed by Applicants on the development of power supply alternatives by their competitors.

The Department will propose that Applicants be required, as conditions of the licenses, to: (1) grant equal participation

(ownership or unit power purchase) in the subject nuclear units 71/ and all future nuclear units installed by the Applicants during the term of the instant licenses; (2) sell bulk power at wholesale for resale to any person engaging or proposing to engage in the sale of electric power at retail; (3) interconnect and share reserves with any electric utility in its area engaging or proposing to engage in the generation and transmission of electric power, on fair reserve-sharing principles equivalent essentially to those required by the Federal Power Commission in the Gainesville decision; (4) engage in coordinated development with any electric utility or group of electric utilities engaging in or proposing to engage in bulk power supply with which Applicants are or may feasibly be interconnected, by incorporating the load requirements of such utility or utilities into the collective load requirements of Applicants and cooperating in planning and construction of large base-load units to satisfy pooled load growth requirements, and to provide, for reasonable charges, the transmission services associated with such coordinated development; (5) provide wheeling services so that independent systems in Ohio and Pennsylvania may

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71/ The Department contends that, for such relief to be truly meaningful, it must include within its scope Beaver Valley Power Station, Unit No. 2. See Duquesne Light Company, et al. (Beaver Valley Power Station, Unit 2), Dkt. No. 50-412A, Decision of Atomic Safety and Licensing Appeal Board, at 21-23 (June 10, 1974).

coordinate among themselves and with other systems located outside this area; (6) provide other coordinating arrangements, such as maintenance power and economy energy, on reasonable terms; and (7) advise each major neighboring utility and each smaller utility in the relevant area that it will not directly or indirectly enter into, maintain, or enforce any contract, agreement, or understanding with any other electric utility system to limit, allocate, restrict, divide or assign the markets or territories in which any other electric utility may hereafter sell or supply firm power in bulk power exchange services.

The Department reserves the right to modify or supplement the relief requested above should the record disclose that such modification or supplementation is required to protect the public interest.

None of the relief of the Department will propose would in any way conflict or be inconsistent with the jurisdiction of the Federal Power Commission or any other regulatory agency.

CONCLUSION

The Department believes the evidence to be presented at this hearing will convincingly establish that the activities under Applicants' licenses which are the subject of this proceeding would maintain a situation inconsistent with the antitrust laws

and the imposition of license conditions appropriate to eliminate the situation will be necessary.

Respectfully submitted,

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November 26, 1975

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

CERTIFICATE OF SERVICE

I hereby certify that copies of PREHEARING BRIEF OF THE DEPARTMENT OF JUSTICE 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 delivery, this 26th day of November 1975.

Steven M. Charno

STEVEN M. CHARNO
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