

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

PREHEARING FACT BRIEF OF THE
TOLEDO EDISON COMPANY

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Counsel for The Toledo Edison Company

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE HEARING OFFICE AND LICENSING BOARD

In the Matter of:)	
)	
The Toledo Edison Company and)	
The Cleveland Electric	)	Docket Nos. 50-345A
Illuminating Company	)	50-350A
(Dowd-Beane Nuclear Power	)	50-191A
Station, Units 1, 2, and 3))	
)	
The Cleveland Electric)	
Illuminating Company, et al.	)	Docket Nos. 50-345A
Henry Nuclear Power Plant,	)	50-191A
Units 1 and 2))	

Tentative Witness List of
The Toledo Edison Company

Pursuant to the Sixth Prehearing Conference conducted on October 2, 1975, The Toledo Edison Company hereby submits a tentative list of fact witnesses in the above-captioned proceedings.

It is anticipated that the following persons are your employees of The Toledo Edison Company will testify with regard to the matters set forth herein; however, The Toledo Edison Company reserves the right to call any additional witnesses and submit to the hearing additional testimony in support of its position on the operating practices of the above-captioned units.

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such documents and records which were kept in the normal course of business should the opposing parties refuse to admit or stipulate to these facts and, further, to testify with respect to any matter raised by any of the opposing parties at the forthcoming hearing.

Witness

General Area of Testimony

Anthony March, Jr.

The relationship between the Toledo Edison Company and the various electric utilities operating in the Toledo area.

John H. ...

The relationship between the Toledo Edison Company and the various electric utilities operating in the Toledo area.

William ...

The relationship between the Toledo Edison Company and the various electric utilities operating in the Toledo area.

Herwin ...

The relationship between the Toledo Edison Company and the various electric utilities operating in the Toledo area.

W. ...
(Retired)

The relationship between the Toledo Edison Company and the various electric utilities operating in the Toledo area.

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William Schulz

The relationship between The Toledo Edison Company and: Buckeye Power, Inc., various cooperative and municipal electric systems, and Consumers Power Company.

James Sullivan

The relationship between The Toledo Edison Company and C&D.

John Sullivan

The relationship between The Toledo Edison Company and: various cooperative and municipal electric systems, Buckeye Power, Inc., Consumers Power Company, and C&D.

Respectfully submitted,

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December 1, 1973

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OFFICE SECRETARY OF PUBLIC
 NUCLEAR REGULATORY COMMISSION

BEFORE THE APPOINTED SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
The Toledo Edison Company and)	
The Cleveland Electric	)	Packet Nos. 50-5401,
Illuminating Company	)	50-5001,
(Devin-Beane Nuclear Power	)	50-5011,
Station, Units 1, 2, and 3))	
)	
The Cleveland Electric.	)	Packet Nos. 50-4001,
Illuminating Company, et al.	)	50-4111,
(Harry Dick or Louis Pratt,)	
Units 1 and 2))	

Tentative List of Documentary Exhibits
of the Toledo Edison Co., Inc.

Pursuant to the Sixth Procedural Conference held on
 April October 1, 1975, The Toledo Edison Company hereby submits
 a Tentative List of Documentary Exhibits in the above-captioned
 proceeding.

Respectfully submitted,

Michael M. Bielecki
 Michael M. Bielecki
 Fellow, Henry R. ...
 300 Madison Avenue
 New York, New York 10017
 Telephone: (212) 213-1111
 ALLEGEDLY ...
 COUNSEL

December 1, 1975

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FOR THE COMPANY
INTERNAL SECURITY OF THE UNITED STATES

<u>TSO</u> <u>Doc. No.</u>	<u>Type of</u> <u>Document</u>	<u>Artist, Title, etc.</u>	<u>Date</u>	<u>No. of</u> <u>Pages</u>
1	Letter	To John Davis from Robert McCabe, Jr.	12-5-67	1
2	Copy of letter	To Robert McCabe, Jr. from John Davis.	12-19-67	1
3	Letter	To Richard Dickie from Donald Turner.	12-19-67	3
4	Letter	To John Davis from Robert McCabe, Jr. re George W. Fickel.	1-2-68	2
5	Copy of letter	To Robert McCabe, Jr. from D. B. Manteloff re George W. Fickel.	1-25-68	1
6	Letter	To John Davis from Robert McCabe, Jr. re George W. Fickel.	2-6-68	1
7	Letter	To Robert McCabe, Jr. from John Davis re Richard Dickie.	2-23-68	1
8	Letter	To John Davis from Robert McCabe, Jr. re George W. Fickel.	2-29-68	1
9	Minutes	Of Executive Committee meeting held 2-19-68.	2-29-68	5

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<u>REC'D</u> <u>Doc. No.</u>	<u>Type of Document</u>	<u>Author, Title, etc.</u>	<u>Date</u>	<u>No. of</u> <u>Pages</u>
10	Office Memorandum	From Stratman Cooke re handling of Delivery volume 75-23.	1-28-70	1
11	Memoandum	To the Files from Charlie Jack re settling in Seyon, Ohio, on January 28, 1970.	2-2-70	2
12	Letter	To Howard Cummins from Marvin Neck.	6-3-70	2
13	Office Memorandum	To Marvin Neck from Stratman Cooke.	6-14-70	2
14	Office Memorandum	To Marvin Neck from Stratman Cooke.	9-17-70	2
15	Letter	To Howard Charles from Marvin Neck.	9-24-70	1
16	Letter	To Marvin Neck from General Comarias.	10-6-70	1
17	Identification notes	Re reviewed and indexed by Sayers, and and ZECO.	12-7-70	2
18	Notes	To Marvin Neck from Stratman Cooke re number of 75-23. Also re administrative of 88-1019 re 75-23. Also re 88-1019.	Undated	2
19	Letter	To Roger Kelly from Marvin Neck.	3-15-71	1
20	Memoandum	To Marvin Neck from Stratman Cooke.	7-20-71	2

POOR ORIGINAL

7570
Doc. No.

Type of
Document

No. of
Pages

Subject, in brief, etc.

Date

21	Letter	To J. S. Heifner from Marvin Reck.	3-10-71	1
22	Letter	To David Goo from P. Byron Wortman.	12-17-71	1
23	Letter	To John Hayes from Marvin Reck.	1-17-72	3
24	Office Memorandum	To William Schrambert from John Gloor.	2-3-72	2
25	Memorandum Notes		3-6-72	1
26	Letter	To Powers June and J. Robert Gillingly from W. Royce Mason.	7-3-72	1
27	Letter	To John Davis from John Foglio.	11-27-72	1
28	Letter	To the wife of Napoleon Levy H. Royce from the Identification and Furnishing and Delivery of Physicals under Arrest December 1, 1972.	12-15-72	1
29	FPC Electric Cards	Electric Cards from the Police Station, Chicago, Illinois.	12-22-72	22
30	Letter	To John Davis from John Foglio.	12-22-72	1
31	Memorandum	of the ...	1-6-73	2

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<u>Tab. No.</u>	<u>Type of Document</u>	<u>Author, Title, etc.</u>	<u>Date</u>	<u>No. of Pages</u>
32	Letter	To U. S. Department of Justice from Edward Conklin,	1-12-73	6
33	Accident	Of William H. Lewis, Jr.	1-19-73	6
34	Notes	From a meeting with Edward Kinney taken by me & Gary.	2-2-73	1
35	RPC Electric Facility	The Toledo Edison Company has discussed tariff currently applicable to the municipalities of Bowling Green, Maumee, Wapakoneta, Napoleon and Sanduskyville, Ohio.	3-1-73	21
36	Letter	To Keith Hansen from Leslie Perry.	3-5-73	1
37	Notes	From a meeting between Robert Deach, Jr. and Keith Hansen called by Anthony Deach, Jr.	3-13-73	1
38	Letter	To William H. Lewis from Robert Dworkin.	3-14-73	3
39	Letter	To Springfield City Council from Springfield.	3-21-73	1
40	Letter	To Springfield from Springfield.	5-2-73	2
41	Letter	To Robert Deach, Jr. from Springfield.	5-23-73	2

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<u>BUCC</u> <u>Doc. No.</u>	<u>Type of</u> <u>Document</u>	<u>Author, Title, etc.</u>	<u>Date</u>	<u>No. of</u> <u>Forms</u>
42	Letter	To John Clear from H. P. Conway.	6-6-73	1
43	Letter	To Marvle Koch from F. Byron Northman.	6-21-73	1
44	Memorandum	Re William Scarborough from John Clear.	6-25-73	1
45	Letter	To V. Byron Northman from Charles Koch.	7-16-73	2
46	Letter	To G. S. Conway from John Clear.	7-19-73	1
47	Letter	To V. Byron Northman from Charles Koch.	7-21-73	1
49	Contract	Wholesale price schedule with Bowling Green, Ohio.	7-23-73	3
49	Contract	Wholesale price schedule with Northfield, Ohio.	7-23-73	4
50	Contract	Wholesale price schedule with Napoleon, Ohio.	7-23-73	4
51	Letter	Re Marvle Koch from William Scarborough.	7-24-73	1
52	Letter	To V. B. Conway from John Clear.	8-27-73	1
53	Letter	Re John Clear from F. Byron Northman. William Scarborough from John Clear.	9-21-73	1

POOR ORIGINAL

2027
Pg. No.

Type of
Document

No. of
Pages

Date

No. of
Pages

54

Letter

To H. L. Denny from M. Wynn Owen.

55

Letter

To John Clark from A. A. Denny

56

Notes

From a meeting between Anthony Beach,
Jr. and Dwight Hamilton taken by
Anthony Beach, Jr.

57

Memorandum

To William Ashworth from Anthony
Beach, Jr.

58

Memorandum

To George G. W. Payne from
William Beaufort, Anthony Beach,
Jr. and Paul Grant from William
Beaufort.

59

Letter

To George G. W. Payne

60

Contract

Agreement between Paul Grant,
Ohio.

61

Contract

Agreement between Paul Grant,
Ohio.

62

Letter

To William Ashworth from George
G. W. Payne.

63

Letter

To William Ashworth from George
G. W. Payne.

8-10-73 2

8-31-73 1

10-21-73 2

12-20-73 1

1-22-74 1

1-23-74 2

4-25-74 3

4-26-74 3

5-17-74 1

5-20-74 2

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<u>Doc. No.</u>	<u>Type of Document</u>	<u>Author, Title, etc.</u>	<u>Date</u>	<u>No. of Pages</u>
64	Letter	To Paul Antonson Lister, George Zeeb, Jr.	6-12-74	1
65	Letter	To Gregory Zeeb, Jr., from Paul Antonson	7-17-74	2
66	Letter	To H. P. Perry, Gen. W. Perry, Fern.	9-13-74	1
67	Notes	From a meeting between Gregory Zeeb, Jr. and Gregory Zeeb, Jr. and Gregory Zeeb, Jr.	2-11-75	1
68	Memoandum	To Randall Quince from Gregory Zeeb, Jr.	3-7-75	1
69	Agreement	With the City of Savannah.	4-1-75	5
70	Memoandum	To Randall Quince from Gregory Zeeb, Jr.	4-17-75	1
71	Order	Of the Federal Reserve Bank of Atlanta	6-17-75	5
72	Letter	To the Public Works Commission from Gregory Zeeb, Jr.	10-6-75	3

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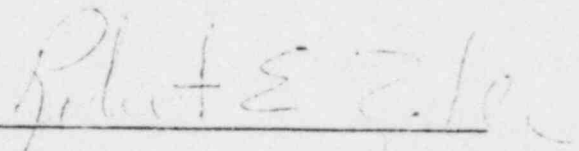
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Units 1, 2, and 3))	
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THE CLEVELAND ELECTRIC ILLUMINATING)	Docket Nos. 50-440A
COMPANY, ET AL.)	50-441A
(Perry Nuclear Power Plant,)	
Units 1 and 2))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Tentative List of Documentary Exhibits of The Toledo Edison Company" and "Tentative Witness List of The Toledo Edison Company" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to those persons in the Washington, D.C. area and by mailing a copy, postage prepaid, to all others, all on this 1st day of December, 1975.



Robert E. Zahler

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UNITED STATES OF AMERICA
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Units 2 and 3))	50-501A

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PREHEARING FACT BRIEF OF THE
TOLEDO EDISON COMPANY

A. Introduction

The Toledo Edison Company ("Toledo Edison") is submitting this separate prehearing fact brief to present a short statement dealing with: (1) the growth and development of Toledo Edison; and (2) the specific charges of anticompetitive conduct alleged against Toledo Edison by the Department of Justice ("Department"), the NRC Staff ("Staff"), and the City of Cleveland ("Cleveland"). With respect to the legal issues involved in this proceeding and the allegations directed against the Central Area Power Coordination Group ("CAPCO") generally, Toledo Edison fully supports and hereby incorporates the positions taken in the "Prehearing Brief for the Applicants."

B. The Growth and Development of the Toledo Edison Company is the Result of Natural Economic Forces.

1. Early History

Around 1890, a Toledo lawyer, Albion E. Lang, and two Chicago financiers, Norman B. Ream and William E. Hale, joined together to give impetus to the new and emergent electrical business. Even at this early date the inefficiencies resulting from the multiplicity of separate transit and electrical systems in and around Toledo were well recognized. Thus, in 1896 these gentlemen were able to acquire, for the purpose of consolidation, an electric company and several horsecar lines. The new company was called the Toledo Consolidated Street Railway Company ("Consolidated"). With the additional power produced by the newly constructed Water Street electric station, the electrification of Consolidated's car lines commenced. At that time, a three-wire system of electric distribution, licensed by Thomas Edison, was utilized. The license from Thomas Edison carried with it permission to use the inventor's name in the licensee's corporate title, and made possible the use of the name Toledo Edison in later years.

By the turn of the century, the development of the interurban industry had produced a profound effect on Toledo-area utilities. In 1901 one of the large interurban syndicates, the Lake Shore Electric Railway connecting Cleveland with Toledo,

Detroit, and intermediate points, acquired Lang's system and organized the Toledo Railways and Light Company ("Rail-Light"). In 1907, Rail-Light absorbed a gas and electric company; however, the gas properties were subsequently disposed. Thereafter, in 1912 the Cities Service Company owned by Henry L. Doherty acquired Rail-Light.

By 1921, the electric business had grown so large that the Rail-Light management decided to separate its transportation and electric operations. The Community Traction Company was organized to operate the streetcar business, and the name of Rail-Light, which retained the electric business, was changed to "The Toledo Edison Company."

In the years that followed, the growth of Toledo Edison reflected the decline of the interurban industry, for as interurban lines were abandoned, Toledo Edison acquired their electric distribution properties within the Toledo area. Although several small municipal electric systems, as well as some privately-owned electric companies, became a part of Toledo Edison, its general service area has not changed appreciably since 1938. The growth that has occurred in the succeeding years is primarily attributable to an increase in customer demand as opposed to an increase in geographical service area.

2. Decision to join CAPCO

In November 1964, when the original CAPCO arrangement was executed, Toledo Edison believed that the arrangement was

responsive to its particular needs. As then constituted, CAPCO was a loosely-knit voluntary coordination arrangement the primary purpose of which, as set forth in Article I, was to " * * * seek and realize all benefits practicable to be effected through coordination in the operation and development of their respective generating and transmission systems." (Buckeye Power Delivery Agreement at 3).

The great Northeast power failure of November 9, 1965, resulted in a dramatic increase in public concern over system reliability. In response to this, American Electric Power ("AEP"), a dominant force in the original CAPCO arrangement, insisted that CAPCO address itself solely to the assurance of reliability. This resulted in the organization of the East Central Area Reliability Coordination Agreement ("ECAR") in 1967, which was devoted solely to reliability and which included all the original CAPCO members, and others. However, the signatories to the present CAPCO agreement were still in need of a coordinating group to achieve economies of scale as well as reliability, whereas the other members of the original CAPCO group had already formed such groups; these included AEP, the Allegheny system, the Michigan pool, the Indiana pool, and the CCD pool. Accordingly, a new CAPCO group was formed (consisting of Applicants who retained the old CAPCO name). They entered into a Memorandum of Understanding which provided for the construction of large jointly-owned generating units (which they could not separately afford) and necessary transmission

facilities. The goal was to provide adequate reserves to insure reliability and to achieve economies of scale.

C. Requests to Join CAPCO

One of the allegations directed against Toledo Edison is that it refused the Borough of Pitcairn's request for membership in the CAPCO pool, thereby denying Pitcairn access to the benefits of coordinated operation and development.

The facts surrounding this situation have, however, been completely distorted. Contemporaneously with its request for membership in CAPCO, Pitcairn, with a load of only a few megawatts, was attempting to get supplemental power from the Duquesne Light Company ("Duquesne"). As part of its strategy, Pitcairn's counsel wrote a form letter to the chief executives of each CAPCO company requesting membership. In response, Toledo Edison advised that it was of the opinion that it would be wholly impracticable for an operation the size of Pitcairn to participate in CAPCO. Thereafter, on February 29, 1968, Pitcairn's counsel, Mr. McCabe, wrote a letter to Mr. John K. Davis, former President of Toledo Edison, in which he stated:

I have discussed the matter of the Borough of Pitcairn membership in the CAPCO power pool with the Duquesne Light Company on a preliminary basis, and feel that the most beneficial approach would be to complete my discussions with them before imposing upon your time. [emphasis added]

After what were apparently unsuccessful negotiations with Duquesne, Mr. McCabe, contrary to his stated intention, did not contact Toledo Edison to pursue the matter further, but instead commenced an antitrust action against Duquesne in federal court. Subsequently, he filed with the Federal Power Commission ("FPC") an application pursuant to Section 202(b), 16 U.S.C. §824a(b), and the matter was finally resolved. Accordingly, it is clear that Toledo Edison never, by implication or otherwise, refused membership in CAPCO to Pitcairn; Toledo Edison simply did not have an opportunity to discuss the matter with Pitcairn.

Toledo Edison would like to remind this Licensing Board that Applicants' proposed license conditions, already on file with the Board (and attached to the "Prehearing Brief for the Applicants" as Exhibit A), provide a broad range of benefits to those electric entities who chose to take advantage of them. To date, Toledo Edison has not received a single request from any municipal electric system, or for that matter from anyone, requesting participation in, or access to, the nuclear power units being licensed in this proceeding. In light of Toledo Edison's willingness to provide access to nuclear power, and the failure of any electric entity to seek such access, it is indeed anomalous that our adversaries in this proceeding rest their allegations of exclusionary conduct on half-hearted requests, like that by Pitcairn.

D. Toledo Edison's Contractual Obligations

Some of the contractual obligations of Toledo Edison have been challenged in this proceeding as anticompetitive. It is only by means of the various contracts Toledo Edison enters into that it is able to carry on the business of a public utility. In all cases the challenged contracts have been filed with and approved by the appropriate regulatory agency. As the "Prehearing Brief for the Applicants" makes quite clear, from a purely legal standpoint, such contracts cannot be found to be inconsistent with the antitrust laws without first making sure that the regulatory policies underlying those contractual obligations are afforded full weight. Furthermore, as a factual matter, Toledo Edison will demonstrate at the hearing that the allegations are without support.

1. Rate Policy

The Department claims that by designing the rates it charges to municipal wholesale customers to be equal to or less than the rates applicable to large industrial customers, Toledo Edison has eliminated the ability of its municipal customers to compete for industrial loads.

Toledo Edison acknowledges that it has generally attempted to equalize the rates in question, but only because such a policy is lawful, reasonable, and has no anticompetitive purpose or effect. As Toledo Edison will demonstrate, its

currently approved rates for municipal and industrial customers are not the same, but, in fact, the industrial rates are substantially higher. Moreover, Toledo Edison will show that even if the rates in question were equalized, the competitive position of its municipal customers vis-a-vis Toledo Edison would not be damaged. Its municipal customers have in the past, are presently, and assuredly will continue in the future to actively and successfully compete for industrial loads.

The charge completely ignores the fact that all of Toledo Edison's wholesale or retail rates must be approved by either the FPC or the Public Utilities Commission of Ohio, which bodies are charged with the responsibility for insuring that its rates are reasonable and just. Whatever difference there is among rates charged to different classes of customers has its genesis in the different costs to provide the particular class of service.

2. Buckeye Agreement

It is also charged that Toledo Edison, all other investor-owned utilities in the State of Ohio (except the Cleveland Electric Illuminating Company which had no electric cooperatives within its general service area and Ohio Edison Company which gives effect to the objectives of the contract indirectly), and Buckeye Power, Inc. ("Buckeye"), are parties to an agreement which is itself anticompetitive in nature, or has been enforced in a manner inconsistent with the antitrust laws.

The purpose of this agreement was to enable Buckeye, which is an organization owned by all of Ohio's distributing cooperatives, to build a large generating unit and provide for transmission of this power to its member cooperatives by wheeling the power over the lines of the investor-owned companies, thus saving the great cost of a separate transmission system.

The antitrust question presented herein arises from a provision in the agreement requiring observance of the Ohio anti-tying statute, Ohio Revised Code Section 4905.261. This section prohibits a utility from serving a customer presently being served by another, unless and until such customer first disconnects from the former for a period of ninety consecutive days prior to taking service from another utility, including a cooperative. The reasons for the inclusion of this provision in the agreement were well founded, since not only was this required by state law, but, moreover, the utilities providing wheeling services were entitled to some assurance that an agreement for the benefit of the cooperatives would not be turned into an instrument for taking the municipal customers of the private companies.

Toledo Edison denies that the challenged provisions are either unlawful or anticompetitive. In this regard, it should be noted that when the Power Delivery Agreement was submitted to the FPC, an objection was made to the anti-tying clause by certain public power interests; whereupon it was submitted for clearance under the antitrust business review procedure provided for by the

Department of Justice. On December 19, 1967, the Department approved the antipirating clause in a letter to Richard M. Dicke, counsel for the Ohio Power Company ("Ohio Power"), on the basis that, as used in Ohio Revised Code Section 4905.261, the term "consumer" applied to any customer whether served at wholesale or retail. Although the Department reserved the right to "reconsider" the issue, if subsequently there was a differing judicial interpretation, Toledo Edison knows of no such determination. Indeed, the only relevant judicial pronouncement, although not exactly on point, holds that the term "consumer" includes an operator of a shopping center when he resells electric power to his tenants. Shopping Centers v. P.U.C.O., 3 Ohio St. 2d 1, 208 N.E. 2d 923 (1965). In addition, Toledo Edison will demonstrate at the hearing that it has never enforced this agreement in any manner inconsistent with the antitrust laws.

3. Wholesale Contracts

Both the Staff and the Department allege that Toledo Edison is a party to certain wholesale contracts which are anti-competitive in nature. Toledo Edison acknowledges that certain bilateral agreements contain voluntarily accepted provisions which could, if rigidly adhered to, limit the municipality and Toledo Edison itself, from distributing power under certain circumstances. However, Toledo Edison will demonstrate that neither party has rigidly enforced those provisions. As a result, those provisions have not in fact damaged the competitive position of

any municipality, and hence have not produced any anticompetitive effects.

Moreover, as an outgrowth of a recently concluded FPC case, Docket No. E-7929, there are now in effect two general rate tariffs which do not contain such provisions. As of this date, these tariffs already apply to Toledo Edison's principal municipal customers (Bowling Green, Bryan, Montpelier, Napoleon, Pemberville and Woodville) and will take the place of the remaining municipal contracts as they expire -- the latest terminating on December 28, 1976. Thus, even should this Licensing Board find that some of the contracts were suspect, which Toledo Edison believes is not the case, the issue has already been litigated before the FPC and the new FPC tariffs already provide the necessary remedy.

E. Alleged Territorial Allocation

The Department and the Staff both allege that Toledo Edison is a party to an understanding or agreement with the Consumers Power Company whereby each has agreed not to serve potential customers in the general service area of the other. The Department, in addition, claims that the agreement or understanding has prevented the Southeastern Michigan Electric Cooperative ("Southeastern") from obtaining power at wholesale from Toledo Edison.

Toledo Edison denies that it was, or is, a party to any such understanding or agreement. This allegation is merely an

attempt to resurrect an issue which was raised, and lost, in the Consumers proceeding (Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329A and 50-330A). While Toledo Edison was not a party to the Consumers proceeding, under the long-recognized doctrine of Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942), Toledo Edison may make defensive use of the decision in Consumers to collaterally estop the government -- in the present proceeding the Department of Justice and the NRC Staff -- from relitigating the issue before this Licensing Board.

Moreover, Toledo Edison is convinced, based upon the barren discovery efforts of the opposition and the testimony elicited during the course of numerous depositions, that the sole basis for these charges is the field reports of two Rural Electrification Administration representatives purporting to describe the events of a meeting which took place in February, 1966. As the deposition interrogation made clear, there is no merit whatsoever to those reports.

While Toledo Edison acknowledges that it has on several occasions declined to serve that portion of Southeastern's system which is located in Michigan, those decisions were entirely unilateral applications of Toledo Edison's business judgment. At first, Toledo Edison had not acknowledged FPC jurisdiction and accordingly would not sell across a state line. Later, after it conceded FPC jurisdiction, Toledo Edison considered that the small quantity of power involved simply did not justify entangling itself with small distributors in a foreign jurisdiction -- something

with which it had no prior operating experience. At the present time, however, Toledo Edison has agreed in principle to make this sale. The negotiations surrounding this decision will be more fully explained at the forthcoming hearing.

It should also be noted that if Southeastern or the government had a complaint about Toledo Edison's decision not to serve this small customer, they had a clear remedy under Section 202(b) of the Federal Power Act, 16 U.S.C. §824a(b) (authority of the FPC to order interconnection). The amount and type of interstate wholesale service to be provided by a utility is squarely within the jurisdiction of the FPC. Consistent with the position advanced in the "Prehearing Brief of the Applicants" the Licensing Board should be especially careful to reconcile the regulatory policies of the FPC with the policies underlying the antitrust laws prior to finding an antitrust inconsistency from this inaction on the part of Toledo Edison. This is certainly not a situation where Toledo Edison's decision not to provide service would have antitrust aspects since dominance or a transmission bottleneck, the foundation of the Department's claim as to a duty to sell, was absent, since power was and is available not only from Toledo Edison, but also from Consumers Power and Detroit Edison.

F. Acquisition of Municipal Power Systems

While from time to time, Toledo Edison has found itself

in the position of being able to bid on municipal systems which, in the determination of the municipalities involved, were no longer desirable to operate, Toledo Edison rejects the implication that these acquisitions were in furtherance of any monopolistic or otherwise anticompetitive scheme or design. Toledo Edison has never acted in a manner which was calculated to place any municipality in the position where it had no option but to sell its system. In fact, Toledo Edison will show that it only analyzes the economic and technological feasibility of purchasing a municipal system after it has first received an official request to do so by the municipality's governing body or by interested citizens. Then, if a Toledo Edison purchase proposal is submitted, it is the electorate, who under Ohio law ultimately decides if their system should be sold or retained. Such acquisitions therefore come within the protection afforded under the doctrine of Parker v. Brown, 317 U.S. 341 (1943).

Since sales are pursuant to invitations for bids which must come from the municipality, it is obvious that Toledo Edison is powerless to make the decisions to sell. Yet, under such circumstances, a failure of Toledo Edison to bid would defeat the desires of the municipality. The individual municipalities, facing a rundown, outmoded and inefficient system, with competing uses for their limited funds, have in many instances decided to use the sale of their system as an appropriate vehicle for obtaining more reliable service and procuring funds necessary to

proceed with other needed projects such as sewage treatment plants, and the like. How the purchase of a municipal system under these circumstances can be in violation of even the spirit of the antitrust laws is difficult to discern. The purchase of a failing municipal electric business by Toledo Edison, when requested to do so by the business itself, and with ratification by public vote, contravenes neither the spirit nor the letter of the antitrust laws.

G. Dealings with Municipal Power Systems

1. Napoleon

The Department makes various charges against Toledo Edison relating to its dealings with the City of Napoleon, Ohio ("Napoleon"). Those charges are apparently based on an affidavit of Mr. William Lewis, an engineering consultant for Napoleon. Toledo Edison is of the opinion that the Department's reliance upon the Lewis affidavit is an attempt to limit and misdirect the focus of the Licensing Board's attention to individual and isolated matters. This affidavit is not only an incorrect focal point, from which Toledo Edison's conduct can only be misconstrued but, moreover, it is not an accurate portrayal of the events described therein.

(a) Alleged refusal to construct joint facilities

It is claimed that Toledo Edison twice refused to consider joint ownership of large-scale generating facilities

with Napoleon. But as Toledo Edison will demonstrate at the hearing, it has been willing to explore the feasibility of such arrangements under its general policy of considering any proposal that might benefit its customers and shareholders. Moreover, whether the charge is true or not, it would be necessary for this Licensing Board to substantially expand present anti-trust authority to arrive at the conclusion that a privately-owned public utility is required to enter into business with another utility simply because it may have received such a request. We know of no decision so holding and any such requirement might well constitute an unconstitutional taking of property without due process. Finally, to the extent that the charge relates to the joint construction of non-nuclear, large-scale generating facilities, there is no nexus between the allegation and the Licensing Board's responsibility to review "activities under the [nuclear] license."

(b) Alleged refusal to engage in coordinated operations

The Department charges that on at least three separate occasions between September, 1971, and March, 1972, Toledo Edison refused to engage in coordinated operations with Napoleon, and in addition, that Toledo Edison's "dominance of transmission facilities", has prevented Napoleon from engaging in coordinated activities.

This charge is evidently based on the Lewis affidavit, and is a complete misconstruction of what he said. The question was whether Toledo Edison would continue to operate in

parallel if Napoleon took power from Buckeye. The senior Toledo representative at the meetings responded, according to Mr. Lewis, that it was a matter for further consideration. In fact, as Toledo Edison will demonstrate at the forthcoming hearing, it was willing to operate in parallel when requested to do so by the appropriate party. Thus, Toledo Edison's stipulated dominance has no bearing in the context of this charge and is merely irrelevant material aimed at coloring the Licensing Board's decision.

If this reference to coordination is intended to mean something other than what the Lewis affidavit charges, then Toledo Edison now submits that Napoleon had nothing to offer by way of coordination. In the first place, unless Toledo Edison could receive, as well as supply power, no "true" coordination can take place, since bilateral assistance is an essential element of any such arrangement. Second, since Napoleon had insufficient capacity to take care of its own customers' needs, a coordination agreement was simply not feasible. Third, Toledo Edison knows of no antitrust principle which would require it to accede to such requests. And finally, these types of transactions are within the jurisdiction of the FPC and must, as has been pointed out earlier, be reviewed in that regulatory context.

(c) Alleged refusal to wheel power

The Department claims that on several occasions between September, 1971, and March, 1972, Toledo Edison refused to wheel

power from Ohio Power's transmission facilities to Napoleon, except upon anticompetitive terms. Such a claim demonstrates a complete misunderstanding of the Buckeye Agreement.

Under the terms of the agreement, Buckeye power cannot be distributed directly to any municipality; rather power which is generated at Buckeye's Cardinal plant is distributed solely to its member cooperatives via the transmission network of Ohio Power and other intermediate utilities. The member cooperatives then distribute this power to their customers, including the municipalities.

At the hearing, the facts will show that the distribution cooperative of Buckeye in the area, Tricounty, would not even have served Napoleon until Napoleon complied with the Ohio antipirating statute, R.C. §4905.261. Moreover, when Tricounty properly requested a new delivery point from which it would distribute Buckeye power to Napoleon, Toledo Edison acknowledged its contractual obligation and proceeded to make arrangements necessary to meet that request. As with the previous two allegations reliance on the Lewis affidavit is erroneous and without merit.

2. Waterville

The Department alleges that Toledo Edison refused to sell wholesale power to the City of Waterville, Ohio ("Waterville"), and that the refusal was designed to, and did, eliminate Waterville as an independent producer of electric power.

Toledo Edison's corporate policy is to provide service to anyone. The evidence to be introduced at the hearing will show that in the context of the circumstances surrounding the negotiations with Waterville, the actions taken by Toledo Edison are entirely consistent with the requirements of the antitrust laws. To the extent that this one instance might be construed to be inconsistent with the antitrust laws or the policies underlying them, it was a unique and singular occurrence contrary to Toledo Edison policy. Furthermore, Toledo Edison does not believe that there is any legal principle which would compel it or any other public utility to sell wholesale power to every conceivable customer or in every conceivable situation.

Toledo Edison denies that there was any casual connection between Toledo Edison's statements on wholesaling power and the fact that the Waterville Municipal Electric System went out of business. The municipality's inquiry about wholesale power was only an alternative to the purchase of additional machinery and there is no evidence that the system would have continued in business even with wholesale service. Toledo Edison will provide testimony to show that Waterville elected to get out of the business of producing and distributing electricity primarily because its system was inefficient, outmoded, rundown, and mismanaged, and could not continue without the investment of substantial sums of money for upgrading and repairs -- an investment that Waterville was unwilling to make. Furthermore, the ultimate decision was a reflection of the will of the majority of its citizens who cast

their votes in a public election to authorize the system's sale

3. Bryan

The Department claims that Toledo Edison blocked Bryan, Ohio ("Bryan") from obtaining low cost power from the North Western Electric Cooperative, Inc. ("North Western") by refusing to allow its transmission lines to be used except on anticompetitive terms. However, there is simply not even a scintilla of evidence to support this claim. Unlike Napoleon, neither Bryan nor North Western ever requested Toledo Edison to wheel Buckeye power.

It is true that Bryan has discussed the possibility of obtaining Buckeye power. In a file memorandum written by Charlie Jack, a representative of Buckeye, and dated February 2, 1970, it is stated:

After considerable discussion of various arrangements that might be mutually advantageous, it became apparent that Mr. Eppard's [the former manager of the Bryan Municipal Electric System] true desire is to purchase a percentage of Bryan's future power needs from Buckeye through North Western Co-op.

However, irrespective of Mr. Eppard's "true desires", the most important factor underlying this meeting was set forth in the concluding paragraph of this memorandum which stated:

Mr. Cummins [the Executive Manager of Buckeye Power, Inc.] summarized the position of Buckeye with regard to service to the City of Bryan by saying that he felt we should continue to "keep in touch,"

advise each other of new developments, and try to explore various arrangements that appear to be mutually advantageous. However, he said, it appears little can be done until the City's contract with Toledo Edison expires. [emphasis added]

As described above, Bryan was not then in a position to act upon Mr. Eppard's desires, since its wholesale contract with Toledo Edison would not expire until 1973. But by 1973, Mr. Eppard had been dismissed from his post; and his successor, Robert Rataiczak, has to date given Toledo Edison no reason to believe that he intends to act upon his predecessor's "desires". Assuredly, if and when North Western, in compliance with the terms and conditions of the Buckeye Agreement, requests a delivery point from which to serve Bryan, Toledo Edison will, as it must, perform its contractual obligations.

4. Bowling Green

One of the charges made by the Staff is that Toledo Edison refused to wheel power to Bowling Green, Ohio. However, the Staff did not specify when or under what circumstances this refusal allegedly took place. This is a new charge interjected into this proceeding by the Staff's September 5 filing. As such, Toledo Edison has conducted no discovery in this regard. However, based upon information currently available, Toledo Edison does not believe that any such request was ever made.

H. Conclusion

As this prehearing fact brief demonstrates, and as the testimony at the forthcoming hearing will show, Toledo Edison has never engaged in conduct inconsistent with the anti-trust laws. Thus, there is no basis for imposing omnibus license conditions, like those suggested by our adversaries, on the construction permits and operating license sought by Toledo Edison, especially if those license conditions are merely a rehash of the "standard" conditions without concern for the specific circumstances of this consolidated proceeding. Moreover, Toledo Edison's offer of access, contained in the Applicants' proposed license conditions, makes available to any electric entity so requesting, all the benefits of coordinated operation and development that conceivably could be required by a Section 105c antitrust review.

Respectfully submitted,

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Dated: December 1, 1975

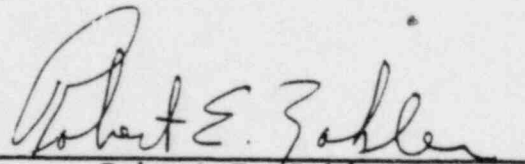
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Prehearing Fact Brief Of The Toledo Edison Company" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to those persons in the Washington, D.C. area and by mailing a copy, postage prepaid, to all others, all on this 1st day of December, 1975.


Robert E. Zahler

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