UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	Docket Nos. 50-346A 50-440A 50-441A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

APPLICANTS' RESPONSE TO LICENSING BOARD'S ORDER REQUESTING CLARIFICATION

1. Following the Prehearing Conference in this consolidated proceeding held on June 25, 1974, the Atomic Safety and Licensing Board ("Licensing Board") requested a clarification from the parties hereto of their respective positions on specific issues identified by the Licensing Board "regarding the scope and extent of the proceeding, and, therefore, the scope and extent of discovery" (Order of June 28, 1974).

2. For the reasons set forth below, Applicants submit that "dominance by Applicants of a relevant market" is not alone sufficient ground for a finding by the Licensing Board that there exists "a situation inconsistent with the

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antitrust laws" within the meaning of Section 105c of the Atomic Energy Act (42 U.S.C. 2135(c)). In view of this position, the Licensing Board's Order of June 28 requires no response from the Applicants with respect to the inquiries set forth in paragraph 2B thereof.1/ Our negative response to the initial question does call upon the Applicants to address the final question raised by the Licensing Board in paragraph 2C of its Order. To assist in expediting the discovery and hearing process, we have discussed this issue below, although we find objectionable that Applicants

1/ In connection with the inquiries set forth in paragraph 2B, Applicants do reiterate that the pleadings in this proceeding, including the Perry Advice Letter, very explicitly limit the scope and extent of the antitrust hearing to alleged anticompetitive conduct directed against only the City of Cleveland, the City of Painesville and American Municipal Power-Ohio ("AMP-Ohio"). Accordingly, if the Licensing Board should ultimately determine that it is appropriate to condition the Davis-Besse and Perry licenses, the relief accorded in terms of a grant of access to Applicants' generating facilities should at most be directed only to these three entities, and not to "other electric entities" generally. Also, the pleadings have raised no issue whatsoever as to the matter of third-party wheeling generally. To the extent that the question of wheeling has been put in issue, it is in the limited context of the alleged denial of The Cleveland Electric Illuminating Company to wheel to the City of Cleveland 30 mw of PASNY power at the request of AMP-Ohio. Accordingly, any condition that goes to the matter of providing access to Applicants' transmission system by means of wheeling should be addressed only to the isolated transfer of PASNY power discussed in AMP-Ohio's petition to intervene and in the Perry Advice Letter.

In any event, under the AEC Rules of Practice, discovery is bounded by the contentions of the parties. Any enlargement of such contentions can be achieved only upon a showing of good cause. No effort to make such a showing has been made by any intervenor herein, the Department of Justice or the AEC Regulatory Staff.

have been directed by the Licensing Board to frame the other parties' issues for them.[2/]

The "Dominance" Question

3. As to the issue concerning the relevance in this proceeding of a showing simply that any one of the Applicants is "dominant" in a relevant market, there is obviously the threshhold inquiry of what is meant by the term "dominance." We assume that the Licensing Board has used that term to connote a situation wherein an Applicant enjoys a "dominant" position in a defined service area with respect to competitors therein only in the sense that it there serves by far the largest percentage of customers (50% or more) in the "relevant product market." We do not understand the definition of "dominance" to include any connotation of an exercise by said Applicant of control (either direct or indirect) over the business activities and conduct of its competitors. Nor do we understand that the Licensing Board equates the word "dominance" with the term "monopoly," or with the phrase "monopoly power" as defined in United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 389, 76 S. Ct. 994, 1004 (1956), to mean "the power to control prices or exclude

2/ Indeed, at the April 30, 1974 Prehearing Conference, the Licensing Board agreed that Applicants do not have any burden to frame allegations directed against them (Tr. 329-330).

competition." Clearly, a utility can enjoy a "dominant" position in its service area vis-a-vis other competitors without inevitably being a monopolist in its designated product market.

4. With this understanding of the Licensing Board's initial question set forth in paragraph 2A of its June 28 Order, Applicants believe that, under the applicable court decisions, the only response that can properly be given thereto is a negative one. The essential thrust of the issue concerning dominance per se is directed to Section 2 of the Sherman Act, as amended (15 U.S.C. 2), which by its terms is addressed to "[e]very person who shall monopolize * * * any part of" interstate commerce. Perhaps the clearest statement of the type of conduct which Congress intended to proscribe under this statute is set forth in United States v. Grinnell Corporation, 384 U.S. 563, 570-571, 86 S. Ct. 1698, 1704 (1966), where the U. S. Supreme Court declared:

> 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 growth or development as a consequence of a superior product, business acumen or historic accident. [Emphasis added.]

5. A showing by the complaining parties in the present proceeding of an Applicant's "dominance" in a particular product and geographic market at most bears only on the first of the two elements outlined above. That first element is addressed to monopoly power, which implies control exceeding that associated with "dominance." Such a showing would indicate, without necessarily establishing, that the "dominant" Applicant possesses monopoly power in the relevant market. But even the possession of monopoly power -- if indeed that be the case -- is not, in and of itself, "a situation inconsistent with the antitrust laws," within the meaning of Section 105c of the Atomic Energy Act.

6. It has long been recognized that Congress did not intend to condemn a competitor which has achieved "dominance" in a specified market solely as a result of "its superior performance, its research and its economies of scale * * *." United States v. United Shoe Machine Corporation, 110 F. Supp. 295, 345 (D. Mass. 1953), affirmed per curiam, 347 U.S. 521, 74 S. Ct. 699, (1954). In such circumstances, to use the words of Judge Learned Hand in United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945):

> * * * although the result may expose the public to the evils of monopoly, the Act does not

> mean to condemn the resultant of those very forces which it is the prime object to foster: finis opus coronet. The successful competitor having been urged to compete, must not be turned upon when he wins.

7. Accordingly, as the United Shoe decision made clear (110 F. Supp. at 344), practices which are "the inevitable consequences of ability, natural forces, or law" do not run afoul of the Sherman Act, even where such practices result in monopoly power. What is proscribed by the statute is "monopolizing" (United States v. Aluminum Company of America, supra, 148 F.2d at 430), which has consistently been interpreted to mean either the unlawful acquisition of monopoly power (American Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125 (1946)), or the wrongful use of such power, although perhaps legally acquired, to control prices or exclude competition (United States v. Griffith, 334 U.S. 100, 106-107, 68 S. Ct. 941, 944-945 (1948)). "In either event, there must be some affirmative showing of conduct from which a wrongful intent can be inferred." Union Leader Corporation v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960), certiorari denied, 365 U.S. 833, 81 S. Ct. 747 (1961). As stated in United States v. Griffith, supra, 334 U.S. at 106-107, 68 S. Ct. at 944:

> "Anyone who owns and operates the single theatre in a town, or who acquires the exclusive

> right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate §2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under §1.

8. Such a showing plainly is not satisfied by demonstrating only that the entity under antitrust scrutiny is "dominant" in the relevant market. The Ninth Circuit accurately observed in Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), certiorari denied as as to monopolization issue, 387 U.S. 932, 87 S. Ct. 2056 (1967), reversed on other issue, 389 U.S. 384, 88 S. Ct. 528 (1969): "* * * size alone does not constitute an offense under the Sherman Act; nor does the mere possession of monopoly power." Thus, even if the dominance in question gives the challenged entity a monopoly position, there is no inconsistency with the antitrust laws if the monopolist's resultant status was "thrust upon it." United States v. Aluminum Company of America, supra, 148 F.2d at 429. The judicial decisions under Section 2 clearly accept as legally permissible the possession of monopoly power as a result, for example, of "superior skill, foresight and industry";[3/] economies of

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3/ United States v. Aluminum Company of America, supra, 148 F.2d at 430; see also United States v. United Shoe Machine Corporation, supra, 110 F. Supp. at 344; United States v. E. I. du Pont de Nemours & Co., 118 F. Supp. 41, 214-217 (Cont'd)

scale;[4] purposive government intervention;[5] the lack of more than one entrant;[6] or changes in costs or consumer tastes which drive all but one competitor from the market.[7]

9. Nor do the courts discourage vigorous and fair competition among those seeking to enter into or survive in a market which cannot support more than one supplier -- even though the survivor will inevitably possess monopoly power. Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir. 1972), certiorari denied, 409 U.S. 1001, 93 S. Ct. 325 (1972); United States v. Hartke-Hanks Newspapers, Inc., 170 F. Supp. 227 (N. D. Tex. 1959). "In other words, a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it." Union

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3/ Cont'd.
(D. Del. 1953), affirmed on other grounds, 351 U.S. 377, 76 S. Ct. 994 (1956); John Wright & Associates, Inc. v. Ulrich, 328 F.2d 474, 478 (8th Cir. 1968).

4/ United States v. Aluminum Company of America, supra, 148 F.2d at 429-430; Union Leader Corporation v. Newspapers of New England, Inc., supra, 284 F.2d at 584.

5/ United States v. United Shoe Machine Corporation, supra, 110 F. Supp. at 430; United States v. Grinnell Corporation, 236 F. Supp. 244, 248 (D. Mass. 1964), affirmed, 384 U.S. 563, 86 S. Ct. 1698 (1966).

6/ Union Leader Corporation v. Newspapers of New England, Inc., supra, 284 F.2d at 584.

7/ United States v. Aluminum Company of America, supra, 148 F.2d at 430.

Leader Corporation v. Newspapers of New England, Inc., supra, 284 F.2d at 584. As recently stated in Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 511 (E. D. Pa 1972), quoting from Ovitron Corporation v. General Motors Corporation, 295 F. Supp. 373, 378 (S. D. N. Y. 1969):

> "[T]he natural monopolist is entitled to compete vigorously and fairly in a struggle for a market which cannot support more than one supplier."

10. Moreover, Section 2 does not forbid the lawful possessor of monopoly power from thenceforth engaging in "active, enterprising and dynamic" business activity; nor does it require him to remain in a state of "passive stagnation" (Att'y Gen. Nat'l Comm. Antitrust Rep. 60 (1955)). Indeed, where natural-monopoly characteristics of an industry preclude direct competitive stimuli, it is especially important to encourage rather than discourage innovative and dynamic activity by the existing firm. Cf. United States v. Philadelphia National Bank, 374 U.S. 321, 372, 83 S. Ct. 1715, 1746 (1963). And where competition for survival in a natural-monopoly market does arise, nothing in the Sherman Act "can limit a defendant's right to defend itself." Union Leader Corporation v. Newspapers of New England, Inc., supra,

284 F.2d at 587. "When one has acquired a natural monopoly by means which are neither exclusionary, unfair, nor predatory, he is not disempowered to defend his position fairly." American Football League v. National Football League, 323 F.2d 124, 131 (4th Cir. 1963).

11. These fundamental principles of antitrust law have a special significance in the present context. The business of generating, transmitting and distributing electric energy is subject to comprehensive state and federal regulation. Precisely because of this extensive regulation, the electric power industry operates, as the U. S. Supreme Court observed recently in Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 759, 93 S. Ct. 1870, 1878 (1973), "within the confines of a basic natural monopoly structure * * *."

12. The competitive components of the industry can essentially be grouped into three categories: the municipal electric systems, the rural electric cooperatives and the private utilities. Municipal electric systems are generally restricted by state regulation in the scope and extent of their operations,[8/] and the possible entry into the market

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8/ For example, the Municipal Electric Light Plant of the City of Cleveland is limited by the Ohio Constitution, Art. XVIII, Sec. 6, to supplying its services and products "to the municipality or its inhabitants." The constitutional provision also states that a municipality "may also sell and (Cont'd)

by other public and private utilities located outside the municipal community being served is subject to careful scrutiny in virtually every state by local public officials. Rural electric cooperative systems, on the other hand, which have their genesis in the Rural Electrification Act of 1936 (7 U.S.C. §901 et seq.), provide power only to rural areas and are by federal statute forbidden from serving customers located within a municipality having a population of more than 1,500 (7 U.S.C. §904). The activities (including pricing) and operations of the private utilities are, of course, subject to both state and federal regulation. Except in isolated instances such as the situation presented here in the City of Cleveland, private utilities generally do not engage in direct door-to-door competition with municipal systems for retail customers; nor do they compete directly with the rural cooperatives.9/ Moreover, the economies of

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8/ Cont'd.
deliver to others * * * the surplus product of any other utility in an amount not exceeding * * * fifty per cent of the total * * * product supplied by such utility within the municipality * * *." As construed by the Ohio courts, the language quoted above was "clearly intended to limit municipalities primarily to the furnishing of services to their own inhabitants and to prevent such municipalites from entering into the general public utility business outside their boundaries in competition with private enterprise." State ex rel. Wilson v. Hance, 169 Ohio 457, 159 N.E. 2d 741, 744 (1959).

9/ Competition between the cooperatives and private utilities was never contemplated by Congress. As pointed out in Rural Electrification Administration v. Northern States Power Co., 373 F.2d 686, 695 (8th Cir. 1967), certiorari denied, (Cont'd)

scale associated with the construction and operation of conventional and nuclear power plants necessarily limits the number of private utilities engaged in the generation, transmission and distribution of electric power. Thus, the dominance of private utilities in their respective service territories is characteristic of this regulated industry.

13. Congress plainly was aware at the time it was considering the present antitrust legislation that "the electric power industry has a substantial monopoly element in it, particularly at the retail distribution level * * *."10/ Unlike a comparable situation in an unregulated market, however, the possession by private electric utilities of monopoly power in their service territories does not warrant any necessary inference that these utilities could control prices or exclude competitors from their service areas. Control of retail rates in the electric energy industry rests largely with State Commissions. The Federal Power Commission essen-

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9/ Cont'd.
387 U.S. 945, 87 S. Ct. 2079 (1967), as a "general proposition * * * Congress [in the rural electric cooperative program] is not interested in using government power to supplant private enterprise." Thus, the clear policy of the Rural Electrification Administration in making federal loans for the construction of cooperative generation and transmission facilities has been to discourage competition with private utilities. See, e.g., S. Rep. No. 497, 88th Cong., 1st Sess. 8 (1964).

10/ Hearings on Prelicensing Antitrust Review of Nuclear Power Plants Before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess., Pt. 1, at p. 7 (hereinafter "Hearings") (statement by Roland W. Donnem, then Director of Policy Planning, Antitrust Division, Department of Justice.

tially controls wholesale rates; it also has the authority to require the interconnection and sale of power among systems.[11/] As the Supreme Court observed in United States v. Marine Bancorporation, Inc., 42 L. W. 5210, 5217 (1974), the existence of monopoly power in an industry subject to extensive "federal and state regulatory restraints" may well be entirely permissible under the antitrust laws.

14. Accordingly, Congress was not prepared to adcpt antitrust legislation which would have labeled as anticompetitive virtually every private utility in the regulated electric power industry by assuming the existence of a situation inconsistent with the antitrust laws simply on a showing of "dominance" in a relevant market. Indeed, a bill to this effect, introduced by Representative Moss, was explicitly rejected by the Joint Committee of Congress on Atomic Energy. See Electric Power Coordination Bill, H.R. 12585, 91st Cong., 1st Sess. (1969). Rather, Congress enacted the present legislation, which provides for a preliminary investigation by the Department of Justice into antitrust matters in connection with each application for a license to construct a nuclear facility -- and, where deemed appropriate by the

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11/ For example, the Federal Power Commission ordered CEI to provide an emergency interconnection with the City of Cleveland, and, to that end, CEI has completed construction, at the City's expense, of a new 69 kv interconnection with the City's Municipal Electric Light Plant.

Atomic Energy Commissio[n] authorizes a subsequent antitrust hearing by the Commiss[ion] to determine, on a case-by-case basis, whether the activities of the "dominant" applicant under the particular nuclear license being sought would "create or maintain a situation inconsistent with the antitrust laws." Section 105c of the Act.

15. This statutory scheme clearly contemplates that something more than the mere fact of an applicant's "dominance" in a relevant market must be found to warrant the imposition by the Licensing Board of license conditions under Section 105c. Such "dominance" can be shown in virtually every instance. But, as indicated above, if that "dominance" was not unlawfully obtained and has not been improperly used with an intent to control prices or exclude competition, it suggests no inconsistency with the antitrust laws.[12/]

12/ The Department of Justice clearly has not relied on a finding of "dominance" alone as a basis for recommending to the Commission that an antitrust hearing be held. For example, the Attorney General's Advice Letters in connection with Beaver Valley Unit 2 and Davis-Besse Unit 1, involving the present Applicants, recommended against convening an antitrust hearing. The contrary recommendation in the Perry Advice Letter was based on allegations of anticompetitive conduct by one of the present Applicants, CEI. No suggestion was made therein that the Department's recommendation in Perry differed from its earlier recommendations because of CEI's alleged "dominance" in its service area. Nor did the Department find troublesome as a matter of antitrust policy the fact that the other Applicants herein held, at the time of the Perry Advice Letter, a dominant positi[on] with respect to the generation of electric power in their respective service areas.

16. Nor can it reasonably be argued that because Congress framed the antitrust statute in terms of inconsistencies, rather than in terms of direct violations, the Commission need only look to "dominance." In the first place, there is, as already pointed out, nothing inherently "inconsistent with the antitrust laws" by being the "dominant" competitor in a relevant market -- even if such "dominance" suggests the existence of monopoly power -- so long as the private utility in such a position did not attain that status unlawfully and has not used its "dominance" improperly with the intent to control prices or exclude competitors.

17. Equally significant, however, is the fact that Congress indicated clearly at the time of enactment of Section 105c that its intent was not to fashion more lenient standards for anticompetitive conduct which would operate independently of the antitrust laws. Thus, the Joint Committee of Congress on Atomic Energy ("Joint Committee") rejected the efforts of the Department of Justice and the AEC General Counsel to retain in the 1970 legislative amendment the language in the 1954 Act which required the Attorney General to advise whether a proposed commercial license "would tend to create or maintain a situation inconsistent with the antitrust laws" (emphasis added).13/ Instead, it adopted the

13/ This standard, it was argued, would "authorize the AEC to range more widely in condemning situations as improperly (Cont'd)

identical language that was proposed in an early draft of the 1954 legislation, observing that the deletion from that early draft of the words "tend to" imposed a standard which "was intended to be the equivalent of an actual violation of the antitrust laws" (H. Rep. No. 91-1470, 91st Cong., 2d Sess. 11 (1970)). In this regard, the Joint Committee's report on the bill that was ultimately enacted stated (id. at 14):

> At the opposite pole [from the view that the AEC should ignore antitrust matters] is the view that the licensing process should be used * * * to further such competitive postures, outside the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system. The Joint Committee does not favor, and the bill does not satisfy, either extreme view.

18. It is therefore apparent that Congress intended the Commission to be guided solely by the actual provisions and the established policies of the antitrust laws in making a determination whether "activities under the license would create or maintain a situation inconsistent with the antitrust laws * * *." The administrative determination of an

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13/ Cont'd
non-competitive than would be authorized by the antitrust laws themselves." Hearings, pt. 1, at p. 90 (AEC General Counsel); id. at p. 122 (Department of Justice).

inconsistency with Section 2 of the Sherman Act thus depends, no less than the judicial decisions in this area, on proof of both of the elements identified by the U. S. Supreme Court in United States v. Grinnell Corporation, supra.

19. As explained by the Commission in its Statement of General Policy in connection with antitrust review in licensing proceedings (10 C.F.R. Part 2, App. A, Para. X(i)), any finding of antitrust inconsistency must "be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws" (emphasis added). Such a "reasonable probability of contravention" cannot legitimately be said to exist where all that has been shown is that a private electric utility, which is subject to extensive state and federal regulation, is dominant in a relevant market -- even if it can properly be inferred from the extent of such dominance that the private utility possesses monopoly power.

Additional Elements of Proof

20. We therefore turn (although not without objection to being required to frame the antitrust issues in this proceeding) to the Licensing Board's final question in paragraph 2C of its June 28 Order, concerning "what showing is necessary,

in addition to the showing of dominance, in order to reach a conclusion that there is 'a situation inconsistent with the antitrust laws' under Section 105c."

21. As a general matter, to establish that a dominant entity in a designated market is subject to antitrust remedies under the applicable federal statutes, it is, on the one hand, sufficient to show, as we have previously indicated, that said entity willfully achieved its superior market position by unlawful means. As the U. S. Supreme Court stated in United States v. Aluminum Company of America, supra, 148 F.2d at 429:

> This notion has usually been expressed by saying that size does not determine guilt; that there must be some "exclusion" of competitors; that the growth must be something else than "natural" or "normal"; that there must be "wrongful intent," or some other specific intent, or that some "unduly" coercive means must be used.

22. On the other hand, where the dominant entity has obtained monopoly power lawfully (see pp. 7-8, supra), the courts have looked beyond the means by which dominance was acquired to determine whether the dominant utility has "used its monopoly power in the cities in its service area to foreclose competition, or gain a competitive advantage, or to

destroy a competitor * * *." Otter Tail Power Company v. United States, 410 U.S. 366, 377, 93 S. Ct. 1022, 1029 (1973). As the Otter Tail decision makes clear (410, U.S. at 380, 93 S. Ct. at 1031, footnote omitted), what is condemned under the Sherman Act are the efforts of a dominant private electric utility "to substitute for competition anticompetitive uses of its dominant economic power" (emphasis added).

23. In granting antitrust jurisdiction to the Atomic Energy Commission under Section 105c, Congress did not alter these accepted standards for proving an antitrust violation. It did, however, very specifically limit the scope of administrative review in this context to "activities under the license" that was being sought for construction and operation of a particular nuclear plant. Under Section 105c, the Commission is authorized to consider only the effect of the applicant's activities "when the license is issued or thereafter * * *." H. Rep. No. 91-1470, 91st Cong., 2d Sess. at p. 14. As the legislative history of the 1970 amendment shows conclusively, the Commission's jurisdictional grant of prelicensing antitrust review authority was not intended to reach "* * * beyond the scope of the specific activities for which an application for a license has been made to the Commission."

Hearings, Pt. 1, at p. 97; see also id., Pt. 1, at pp. 144, 145, 283; Pt. 2, at pp. 365-366, 532, 625. And this jurisdictional limitation was explicitly recognized by the Commission itself in its Waterford decisions.[14/]

24. Thus, in addition to a showing of "dominance," "in order to reach a conclusion that there is 'a situation inconsistent with the antitrust laws' under Section 105c" (Order of June 28, 1974), there must be a showing that such dominance in the relevant market (i) was secured by unlawful means (United States v. Aluminum Company of America, supra) and would be maintained by the construction or operation of the Davis-Besse and Perry plants, or, alternatively, (ii) is intended to be used in connection with the generation and transmission of the nuclear power so as to wrongfully "foreclose competition, or gain a competitive advantage, or to destroy a competitor * * *" (Otter Tail Power Company v. United States, supra).

25. Such a showing necessarily must focus on the "activities under the license" -- in this case the Davis-Besse and Perry licenses. It is those activities, and those activities alone, which Congress required the Commission to

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14/ In the Matter of Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), Docket No. 50-328A, Memorandum and Order of February 23, 1973 (RAI-73-2-48), and Memorandum and Order of September 28, 1973 (RAI-73-9-619), respectively (hereinafter referred to as "Waterford").

scrutinize to determine if they would "create or maintain a situation inconsistent with the antitrust laws." See Waterford, September 28, 1973, supra, RAI 73-9, at p. 621. Clearly, this inquiry is not furthered in any meaningful sense by allowing discovery and evidentiary consideration of other activities which are wholly unrelated to the generation and transmission of power from the proposed nuclear plants. For example, allegations of past anticompetitive practices by CEI in connection with the retail distribution of electric power in the City of Cleveland, even if proved, do not suggest, even inferentially, "a situation inconsistent with the antitrust laws" which will be "maintained" by construction and operation of the Davis-Besse and Perry facilities. That "situation," if it exists at all, exists independent of the construction and operation of the proposed nuclear plants; it is the result of other alleged activities relating solely to retail distribution (such as the purported harassment of the City's customers (City's Pet. para. 26)) -- activities which will not be affected in any way by the addition to the CEI system of Davis-Besse and Perry power. Indeed, such alleged activities at the retail distribution level fall outside "the context of the bulk power supply system within which it [Applicant] operates," which the AEC Regulatory Staff offers as a "meaningful" definition

of the phrase "activities under the license."[15/]

26. CEI's alleged denial to AMP-Ohio in 1973 of use of the CEI transmission system to wheel 30 megawatts of non-nuclear power to the City of Cleveland "at the present time" also is not related in any way to the Perry facilities,[16/] which will not even be available for the generation or transmission of nuclear power until at least 1979.[17/] This allegation concerning an isolated decision having no relationship to the construction and operation of the Perry facility, and made for very legitimate business reasons, is "too remote to have sufficient probative value to justify burdening the record * * *." Continental Ore Company v. Union Carbine & Carbon Corporation, 370 U.S. 690, 710, 82 S. Ct. 1404, 1416 (1962). It does not even super-

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15/ AEC Regulatory Guide 9.1, "Regulatory Staff Position Statement in Antitrust Matters," p. 9.1-2 (December, 1973).

16/ Since AMP-Ohio intervened only in the Perry proceeding, activities under the Davis-Besse license are of no relevance to its claim. It is, however, self-evident that the same conclusion with regard to the total absence of any relationship between the Perry plants and AMP-Ohio's assertions as to the denial of transmission of PASNY power apply with equal force to the Davis-Besse units.

17/ We note in this connection that AMP-Ohio has yet to explain to the satisfaction of the Licensing Board "the technical, economic and marketing relationships that [AMP-Ohio] asserts could lead to [AMP-Ohio] being unable to fulfill its commitment to [the City of] Cleveland," as it was ordered to do "before the start of discovery" in the Licensing Board's Final Memorandum and Order issued some three months ago, on April 15, 1974.

ficially concern "activities under" the nuclear licenses.

27. In point of fact, to the extent that the "activities under" the Davis-Besse and Perry licenses have the potential to "create or maintain a situation inconsistent with the antitrust laws," that potential exists only in the wholesale bulk power market. It is there that a denial of access to generation and transmission of nuclear power can theoretically be utilized so as to exclude competition or injure competitors.[18/] Presumably, a showing that a "dominant" Applicant, in order to accomplish such an anticompetitive objective, had wrongfully denied a request of another electric utility for access to the Davis-Besse or Perry plants (either in terms of ownership participation or unit power sales) would satisfy the antitrust standard under Section 105c. Such a willful denial of access to wholesale bulk power for an anticompetitive purpose, if proved, would, in all probability, be an activity under the license creating a situation inconsistent with the antitrust laws.[19/]

18/ Moreover, it is clear that the remedy devised to cure any such anticompetitive practice at the wholesale level would similarly be sufficient to remedy whatever possible retail abuses might be said to exist. Although counsel for the City of Cleveland was unwilling at the Prehearing Conference on June 25, 1974, to concede this point (Tr. 403-404), when pressed as to which of the alleged retail abuses set forth in the City's petition could not be remedied by curing any problems at the wholesale level, the City's counsel was unable to identify any (Tr. 404-410).

19/ There is no likelihood here that such a wrongful denial -- (Cont'd)

28. Thus, the central issue in this proceeding, as in all other proceedings that have been before the Commission under Section 105c, is the "access" issue. As the then Assistant Attorney General of the Antitrust Division stated in the Joint Committee's hearings on the 1970 amendment (Hearings, Pt. 1, at p. 145):

> We think that for some time to come the "access" issue will be predominant: In what circumstances and to what extent is the applicant for a Commission license obliged to make available to other electric utilities an opportunity to participate in the economic advantages of scale made possible by the nuclear units?

29. It is in this context that the Commission's antitrust inquiry into "activities under the license" should proceed. If the Applicant for a nuclear license is in fact

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19/ Cont'd.
assuming arguendo it could be proved -- would warrant a finding that an anticompetitive "situation" was being maintained by the dominant Applicant by activities under the license. No allegation has ever been made in this proceeding that any Applicant, including CEI, has ever denied a competitor's request for access to a bulk power facility owned by one or more of the Applicants. Nor would past history of the activities of these Applicants support any such contention. Indeed, on February 7, 1974, CEI offered to enter into a written agreement with the City of Cleveland for a permanent 138 kv synchronous interconnection, with a capacity of 100 MVA, connecting the City's Lake Road Plant and CEI's Lake Shore Plant for the purpose of supplying emergency service to the City. A draft Interconnection Agreement was forwarded to the City; more than six months have elapsed and CEI has still received no reply from the City regarding this offer.

willing to grant access to the only competing municipal system which requests access to the power generated by the nuclear facility, are the terms of access being offered sufficient to satisfy the needs of the requesting utility, or must there be a restructuring of those terms to accommodate the antitrust laws? This is the relevant question that provides the framework for, in the words of the Licensing Board, "the scope and extent of the proceeding, and, therefore, the scope and extent of discovery" (Order of June 28, 1974, para. 1). If the "activities under the license create or maintain a situation inconsistent with the antitrust laws," within the meaning of Section 105c, they do so, not because that Applicant is dominant in a relevant market, but because that Applicant has wrongfully declined to provide a requesting competitor with access to the nuclear facility, or has granted access on such terms that one can reasonably conclude an intent to exclude or destroy competition. This is the type of showing that Congress required under Section 105c.

30. It is with this in mind that we make reference once again to Applicants' proposed License Conditions, a copy of which is on file with the Licensing Board.[20/] These

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20/ See Applicants' Response to Joint Statement Regarding the Contentions and Matters in Controversy, dated June 7, 1974.

proposed conditions are particularly relevant to the present task of defining the scope of the antitrust inquiry in this proceeding. They do not simply represent negotiable terms of settlement; more significantly, they reflect Applicants' considered position with regard to affording the sole requesting electric utility access to the designated nuclear generation facilities. Applicants are on record with this Licensing Board as being receptive to a reasonable request for access to wholesale bulk power from the Davis-Besse and Perry plants. They do not oppose the concept of "access" generally, but in point of fact fully appreciate and accept the proposition that the City of Cleveland should be granted access on reasonable terms. Thus, there is no controversy in this case over whether the City of Cleveland -- the only "other electric entity" to make a request[21/] -- should be accorded some form of access to these nuclear units; all Applicants agree that it should. If there exists any real area of dispute for resolution by the Licensing Board, it necessarily centers only on the terms of that access.

21/ Neither the City of Painesville nor AMP-Ohio has made a request for access to the nuclear plants in terms of access to the generating facilities by means of ownership shares or unit power sales. Nor has a request been made of any of the Applicants by any electric entity, including the City of Cleveland, the City of Painesville and AMP-Ohio, for access to the Applicants' transmission system by means of third-party wheeling generally.

31. Before antitrust issues can, in any meaningful sense, be framed with regard to the terms of access, however, the parties claiming to be dissatisfied with Applicants' proposed terms must identify in what respects they consider those terms to be objectionable from a competitive standpoint. It may well be that the inclusion or exclusion of certain terms raise legitimate fact questions as to Applicants' intentions with regard to preserving or destroying competition in a relevant market. But this cannot be ascertained until the City, the Department of Justice and the AEC Regulatory Staff make known their objections.

32. Applicants' proposed License Conditions were delivered by hand to the other parties on May 22, 1974. Accordingly, they have had ample opportunity to formulate their respective positions with regard to the offered terms of access. In these circumstances, the Licensing Board should require the parties to define their objections thereto, within 5 days of the Licensing Board's order calling for such statement,[22/] in a manner which identifies the legitimate fact questions, if any, as to Applicants' intentions with regard

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22/ AMP-Ohio should also be required within the same 5-day period to furnish to the Licensing Board the information it was directed to provide in the Licensing Board's earlier Final Memorandum and Order of April 15, 1974 (See n. 17, supra).

to preserving or destroying competition. While such a schedule will necessitate a further postponement of discovery, the marginal delay is fully warranted if, as should be the case, it narrows the issues to the real matters in controversy, and thereby serves, in the final analysis, to shorten considerably the discovery and evidentiary process.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Gerald Charnoff

Counsel for the Applicants

Dated: July 12, 1974.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	Docket Nos. 50-346A 50-440A 50-441A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Response to Licensing Board's Order Requesting Clarification" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to each such person in the Washington, D. C. area, and by mailing copies, postage prepaid, to the others, all on this 12th day of July, 1974.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for the Applicants

Dated: July 12, 1974.

UNITED STATES OF AMERICA

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THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

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