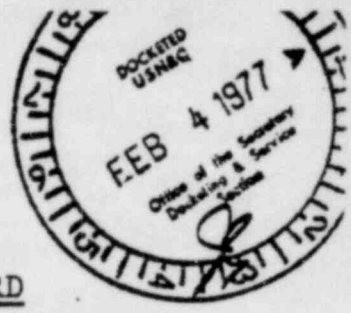

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	Docket Nos. 50-346A 50-500A 50-501A
	)	
(Davis-Besse Nuclear Power Station, Units 1, 2, and 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	)	Docket Nos. 50-440A 50-441A
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

MEMORANDUM OF THE BOARD RELATING
TO THE CITY OF CLEVELAND'S MOTION FOR
CLARIFICATION OF LICENSE CONDITIONS

On January 12, 1977, the City of Cleveland moved the Board to issue an Order clarifying license conditions set forth in its decision of January 6, 1977, by requiring Applicants to make available to entities in the CCCT full and partial requirements power at wholesale. In support of its motion, the City noted the Board's determination that relief focus upon providing access to power from nuclear units in a manner which allows it to be used without restraint and with the availability of necessary bulk power service alternatives. The City indicates that the Board cited the prepared testimony of the Staff's expert witness, Dr. Hughes,

NRC 207, p. 32, in support of its determination. The City contends that Dr. Hughes, in turn, referred to the prefiled testimony of Staff's expert witness Mozer, NRC 205, p. 69-71, for a partial compilation of bulk power services. Since Mr. Mozer included full requirements and partial requirements power at wholesale in his listing, the City contends that license conditions explicitly should make available wholesale power options.

Applicants respond by claiming that they find large numbers of matters addressed in the Initial Decision which require "clarification." However, they neglect to identify any single item which allegedly requires clarification. Applicants further state that the proper course for resolving differences with respect to license conditions is through the administrative appeal process.* Applicants' response therefore fails to address or to controvert the City's assertion

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* We can appreciate a conclusion that for conditions which Applicants contend are unnecessary or inappropriate, application for relief should be addressed to the Appeal Board. Clarification of conditions, however, seems the type of issue which in the initial instance might be addressed to the Licensing Board.

relating to the need for clarification respecting wholesale sales and Applicants have taken no position as to whether any ambiguity is present in the license conditions of January 6, 1977.

Justice indicates without amplification that it supports the City's motion for the reasons stated therein. The Staff concurs in the result of the City's motion but indicates that present license conditions, properly interpreted, already contemplate the relief sought by the City. The Staff refers to License Condition 10 which states that pre-emption of options to heretofore deprived entities shall be regarded as inconsistent with the purpose and intent of these conditions.

In fashioning the License Conditions of January 6, 1977, the Board considered the attachment of a condition specifically requiring Applicants to sell all requirements and partial requirements wholesale power to other entities in the CCCT. We agree that both types of sale commitment properly may be included within the definition of a bulk power services market. As noted in our opinion, that market consists of a grouping or bundling of services which

provides alternatives for generating and distribution entities to design a low-cost and efficient method of overall power supply. Options may be tailored to meet the individual requirements of differing entities.

It was our intention to set license conditions which provide for a necessary array of bulk power services sufficient to enable previously deprived entities to overcome artificial restraints which have been applied against them. At the same time, it should be apparent that we have not included each and every separate component making up the bulk power services array as an item of relief specifically ordered in the license conditions. For example, we have not required Applicants to engage in staggered construction either singly or jointly with other entities in the CCCT. Rather, with reference to the record as a whole, we tried to select those components of the bulk power services market which would be effective in renewing competitive opportunities.

We have made available a mechanism whereby Applicants' competitors can obtain access to nuclear power. We have made that option viable by assuring these entities that they can obtain maintenance power and emergency power. We

have required Applicants to provide transmission services necessary to allow competing entities to coordinate with one another and thus increase the utility of their nuclear power option. The inclusion of transmission services also gives these competing entities an opportunity to market excess power elsewhere, to enter into economy interchanges, and to obtain partial firm requirements from outside sources. In addition, we have provided for membership in CAPCO so that if competitive entities conclude that the CAPCO agreement is discriminatory in providing benefits to CAPCO members which other entities cannot achieve even with access to additional bulk power service options, they can avail themselves of the benefits provided under the CAPCO agreements.

It is correct that we did not specifically require Applicants to sell wholesale all requirements power. Such a license condition may have been appropriate were we convinced that its absence at this time would work to the detriment of competitive entities in the CCCT. It is our understanding, however, that all Applicant companies now make available wholesale power under rate schedules filed with the FPC. Ohio Edison, for example, sells to numerous communities within its service area. Toledo Edison likewise

offers wholesale contracts to a sizable number of municipal systems. Duquesne now sells full requirements wholesale power to Pitcairn, the only remaining independent entity within its service area. Pennsylvania Power sells to a small number of municipal systems in its area. Since June 30, 1976, CEI has been supplying the City of Cleveland with wholesale power pursuant to a tariff on file with the FPC.* Thus, at the time we fashioned our License Conditions, we were not aware of any deprivation arising through a refusal to sell all requirements wholesale power.**

In contending that no "situation inconsistent" will be created or maintained by the licensed activities, Applicants argue that the best and cheapest access to the benefits

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* Controversies may remain with respect to the terms and conditions under which such power is offered. Without some showing of greater impact on these proceedings, it is our view that the FPC is the proper forum for resolution of any such differences.

** We assume that the CEI wholesale schedule will permit Painesville to utilize this option. However, even if CEI is not obligated to offer direct wholesale service to Painesville we have required the establishment of an interconnection and the availability of emergency and maintenance power. The transmission requirement also allows Painesville to purchase firm power from Cleveland or entities other than CEI if it so desires.

of nuclear generation for non-Applicant entities is by wholesale purchases from Applicants. App. ff. 38.03. Applicants assert that those entities who "choose to take wholesale from Applicants pursuant to FPC approved rates receive their power at Applicants' system-wide average embedded costs (A-190, Pace, 10)." They say that in this manner access to the benefits of nuclear generation is provided. Applicants state further that, "The availability of the wholesale power option to existing electric entities precludes a finding of maintenance [of a situation inconsistent with the antitrust laws]" Id. In addition, the clear import of Applicants' economist witness, Dr. Pace, is that wholesale power is and will be freely available to the non-Applicant CCCT entities. App. 190, pp. 7-18.

Moreover, in their Reply Brief at page 10, Applicants assure the Board that ". . . the savings which Applicants realize by virtue of this lower cost factor [cost of nuclear units] will be passed through equally to all of Applicants' wholesale customers in the wholesale rate" [citations omitted and underlining supplied.]

The foregoing are only examples of Applicants' assurances that the option is available to non-Applicant entities within the CCCT to purchase full requirements wholesale power upon terms which they contend are functionally equal to direct access to nuclear units. This argument has pervaded Applicants' case. The Board has taken Applicants at their word. We conclude that Applicants have a policy, and have represented such a policy to this Board, that they will continue to sell power at wholesale to entities within the CCCT. In an effort to impose license conditions no more restrictive than reasonable to afford the required relief, the Board has depended upon the Applicants' good faith in these representations. If we have erred in so doing to the future detriment of Applicants' competitors we would foresee a requirement that the license conditions be modified to provide specifically for wholesale power sales. But we do not believe it is essential now to anticipate a breach of Applicants' assurances.

Although the omission of an express requirement that Applicants sell full requirements wholesale power was deliberate, the City's motion for clarification has suggested to us the need for further comment in one particular

area. We refer to any condition imposed by Applicants on the sale of wholesale power that the purchaser take full requirements or nothing. The record in these proceedings fully supports a finding that such a condition is anti-competitive and would tend to create and maintain a situation inconsistent with the antitrust laws. Section 3 of the Clayton Act, 15 USC §14, prohibits conditioning the sale of supplies and commodities upon the condition, agreement, or understanding that the purchaser not use or deal in the supplies or commodities of a competitor where the effect of such condition may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Such conditions also may constitute agreements in restraint of trade in violation of Section 1 of the Sherman Act, 15 USC §1. A refusal to sell partial requirements power thereby would maintain an anticompetitive situation because it would discourage competitive entities from the gradual buildup of their system. Moreover, those entities on the border line of meeting their present demands and requiring some additional power during a transition period in which additional supply sources are brought on line might be forced to abandon generation altogether.

Applicants' actions in the CCCT in the past have had such an intense dampening effect on competition as to cause us to nurture any fledgling competition and to preserve such competition as already exists. Otherwise, nuclear power from Davis-Besse and Perry will contribute to and strengthen the monopolization of bulk power services in the CCCT.

Accordingly, we do extend clarification to License Condition 1(b) which prohibits Applicants from entering into any agreement or understanding requiring the receiving entity to give up any other bulk power service option or to

deny itself any market opportunity. An insistence that a wholesale power sale be on an all or nothing basis would violate Condition 1(b).

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Douglas V. Rigler, Chairman

John M. Frysiak, Member

Ivan W. Smith, Member

Dated this 3rd day of February 1977
At Bethesda, Maryland.