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

MOTION OF APPLICANT DUQUESNE LIGHT COMPANY FOR AN ORDER DISMISSING SPECIFIC ALLEGATIONS MADE AGAINST IT BY THE NRC STAFF, THE DEPARTMENT OF JUSTICE AND THE CITY OF CLEVELAND [1]

Applicant Duquesne Light Company ("Duquesne") moves the Atomic Safety and Licensing Board (the "Board") to enter an order dismissing certain allegations made against it by the Staff of the Nuclear Regulatory Commission ("the Staff"), the Department of Justice ("DOJ"), and the City of Cleveland (the "City") (hereinafter sometimes referred to collectively as "the other parties").

In pleadings filed on September 5, 1975 (the "September 5 filings"), the other parties filed statements outlining the

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[1] Duquesne hereby incorporates the statement of Counsel for Applicants, Shaw, Pittman, Potts & Trowbridge, found in Applicants' Motion for an Order Dismissing All Allegations Made by the NRC Staff, the Department of Justice and the City of Cleveland, filed on April 20, 1976, as to the legal standards to be applied in passing on the instant motion.

nature of the cases they intended to make in this proceeding against the Applicants. The statements contained allegations and charges of certain behavior by Duquesne. On April 5, 1976, the other parties concluded the presentation of evidence against Duquesne in support of these allegations and charges. Based on the documents and testimony offered against it, Duquesne submits that certain of the allegations or charges ought to be dismissed, for the reasons given below.

I. THE ALLEGATIONS MADE WITH RESPECT TO DUQUESNE'S RELATIONS WITH THE BOROUGH OF ETNA AND THE BOROUGH OF SHARPSBURG SHOULD BE DISMISSED BECAUSE THEY ARE OUT OF TIME.

In its September 5 filing, at pp 6 - 7, DOJ alleged that:

> "Prior to the dates of the acquisiton of the Etna and Sharpsburg municipal systems, Duquesne refused requests from these municipalities to purchase power for resale with the effect of foreclosing competition and furthering Duquesne's goal of acquiring these systems."

The circumstances surrounding these acquisitons have no relevance to this proceeding because they occurred before September 1, 1965, and, thus, are out of time. The Board has already ruled as much in connection with the introduction by DOJ of the expert testimony of Harold Wein. Applicants objected to a reference by Dr. Wein to the acquistions of the Etna and Sharpsburgh municipal systems by Duquesne on the grounds that

they occurred before September 1, 1965. (Tr. 6572). The Board overruled these objections, but it did so only to preserve the integrity of other portions of the testimony which would have required amendment if the references were struck. In so ruling, the Board stated that "the Board will attach no significance to the particularities of the acquisitions of these systems." (Tr. 6604). Similarly, in the case of the acquisition of the Stryker Municipal System by Toledo Edison, which occurred after 1963 but before September 1, 1965, the Board stated:

> "I take it the basis for the objection to the phrase 'Stryker' in the fifth line is that the acquisition occurred prior to September 1, 1965". (Tr. 6602, lines 9 - 11)
>
> "[T]he Board will make no findings with respect to the particularities of the acquisition of the Stryker system.
>
> It is not necessary for the Applicants to respond at all to charges relating to the acquisition of the Stryker system"
> (Tr. 6603, lines 6 - 11)

The Board should further implement these rulings and make the record absolutely clear by dismissing the charges against Duquesne concerning the pre-September 1, 1965 acquisitions of the Etna and Sharpsburg systems.

II. THE ALLEGATIONS CONCERNING DUQUESNE'S RELATIONS WITH THE BOROUGH OF ELLWOOD CITY SHOULD BE DISMISSED.

On p. 7 of its September 5 filing, DOJ alleged that:

> "In 1966, Duquesne refused to sell Ellwood City power for resale, thereby foreclosing that system's competitive options and limiting its competitive viability".

A. The Allegation was not supported by the testimony offered.

The testimony on this charge consisted solely of that of Marvin Luxenberg. However, the alleged inquiry by the witness as to the availability of power from Duquesne was so vague and unspecific that the Board should not find that a bona fide and meaningful request for power was made. Mr. Luxenberg made the inquiry in a social setting. (Tr. 6405, line 5; Tr. 6414, line 25; Tr. 6415, line 1.). He could not recall of whom it was made. (Tr. 6405, line 11). He did not make it of a corporate officer. (Tr. 6405, lines 15 - 16). He had only one, short conversation on the matter and made no attempt to follow-up on the discussion. (Tr. 6416, line 9 - 13). He was not authorized or directed by the borough to make such an inquiry. (Tr. 6417, lines 10 - 12). He was so uninterested in the matter that he had not even undertaken to determine the location of Duquesne's offices. (Tr. 6416, lines 3 - 8). In light of these facts, the Board cannot and should not find that a request was made. If no meaningful request was made, none could be refused.

B. The alleged refusal had no anticompetitive consequences.

Assuming arguendo that Ellwood City made a meaningful request for wholesale power, and assuming further that it was refused by Duquesne, the evidence showed that there would have been good business justification for doing so. As NRC Staff Exhibit 85 demonstrated, Ellwood City is well outside Duquesne's service area. Further, the evidence indicated that Duquesne did not own any transmission lines in the vicinity of Ellwood City. Duquesne had no way of getting power to Ellwood City; nor was there evidence that Ellwood City itself had made any arrangements for getting the power to it. Duquesne was not physically capable of granting such a request by Ellwood City, even if the request had been made.

Finally, again assuming that such a request was made and refused, it is clear that such a situation was irrelevant to the issues in this proceeding. The law of Pennsylvania defined exclusive service areas for electric utility corporations. See "Prehearing Brief of the Department of Justice", dated November 26, 1975, pp. 33 - 34. An electric utility company may not provide electric service outside of this state-defined service area. As NRC Staff Exhibit 85 demonstrated, Ellwood City is outside Duquesne's service area. Thus, Duquesne was prohibited by law from selling electricity in Ellowwd City. In these circumstances, a refusal by Duquesne to sell

wholesale power to Ellwood City could not possibly constitute monopolization or any other form of anticompetitive behavior. Compare Lorain Journal Co. v. United States, 342 U.S. 143 (1951), United States v. Otter Tail Power Company, 410 U.S. 366 (1973). Duquesne could hardly monopolize a market if, by law, it could not even sell in that market.

III. THE ALLEGATION CONCERNING DUQUESNE'S RELATIONS WITH THE BOROUGH OF ASPINWALL SHOULD BE DISMISSED.

On p. 7 of its September 5 filing, DOJ alleged that:

> "In the period 1965 to 1966 prior to its acquisition of the Aspinwall municipal electric system, Duquesne refused a request by Aspinwall to purchase power for resale with the effect of foreclosing competitition and furthering Duquesne's goal of acquiring this system."

A. Allegations that Duquesne refused to sell Aspinwall power for resalewere unsupported by the testimony and should be dismissed.

The Record establishes that Duquesne did not refuse to sell Aspinwall power for resale. It is clear from DJ Exhibits 173 and 174 that Duquesne's response to Aspinwall's inquiry was that Duquesne could not sell Aspinwall power for general resale. However, this is not a "refusal". One can hardly refuse a request if one does not have the power to grant it. Duquesne stated that it could not, under state law, provide the service in which Aspinwall expressed interest. There is no evidence that Aspinwall disagreed with this position. Duquesne's statement of its legal obligations and duties does not constitute a refusal.

B. The alleged refusal had no antitrust significance because of the state law context in which it was made.

As described in Duquesne's Pre-Hearing Fact Breif, dated December 1, 1975, Duquesne was prohibited from selling base-load power for resale by Rule 18 of its tariff. At the

time of Aspinwall's inquiry, Rule 18 provided as follows:

> "18. REDISTRIBUTION. All electric energy shall be consumed by the customer to whom the Company furnishes such energy, except that (1) a customer operating a separate office building or separate apartment building and (2) any other customer who, upon showing that special circumstances exist, obtains the written consent of the Company may redistribute electric energy to tenants of such customer, but only if such tenants are not required to make a specific payment for such energy. This rule shall not affect any practice undertaken prior to June 1, 1965"

Thus, Duquesne was prohibited by its tariff from selling base-load power for resale.

In 1966, the same year as the inquiry by Aspinwall, the legality and propriety of this rule was specifically reviewed and approved the the Pennsylvania Public Utility Commission ("Pa. PUC") Pennsylvania Public Utility Commission, et al. v. Duquesne Light 42 Pa. P.U.C. Rep. 706 (1966). The Pa. P.U.C., which had jurisdiction of such matters at that time, specifically found that, with respect to Duquesne, such a rule was in the public interest. It stated, 42 Pa. P.U.C. Rep. 706 (1966):

> "Respondent has convincingly established the facts which make it abundantly clear that it (respondent) has reached a stage of development where it must stop the growth of resale practice and limit the growth of the practice of redistribution. Otherwise, respondent's revenue, income available for return and rate structure, as well as respondent's consumers and public generally, will be unduly and adversely affected.
>
> "Respondent has convincingly demonstrated that the purpose to be accomplished by the rule and the manner in which it shall be accomplished is in accordance with and conforms to well-established principles. There is no trace of any intention to discriminate improperly or to achieve an improper objective." (emphasis added)

Duquesne had every right to conform to this rule and to refuse to provide wholesale service to Aspinwall. Indeed, as long as Rule 18 was in its tariff, Duquesne was required by Pennsylvania law to refuse such a request. If it had done otherwise and, thus, violated its tariff, it and its officers would have been subject to criminal and civil penalties imposed by 66 P.S. §§ 1491 and 1492. 2/

Adherence by Duquesne to its tariff cannot be construed as an anticompetitive practice. Washington Gas Light Co. v. Virginia Electric Power Co., 438 F. 2d 248 (4th Cir. 1971); Gas Light Co. of Columbus v. Georgia Power Company, 440 F. 2d 1135 (5th Cir. 1971). Furthermore, if Aspinwall felt that Rule 18 was unjust, it had the power, under 66 P.S. § 1391, to petition the Pa. P.U.C. and obtain the type of service it desired. It would obtain such service if the Pa. P.U.C. felt that such service was in the public interest. Aspinwall failed to exhaust its administrative remedies. Duquesne cannot be faulted for not doing what it could not do unless and until Aspinwall successfully exercised these remedies. Furthermore, Duquesne was under no antitrust obligation to seek an amendment to its tariff that would allow it to sell wholesale power to Aspinwall. Business Aides, Inc., v. Chesapeake & Potomac Telephone Co. of Virginia, 480 F. 2d 754 (4th Cir. 1973). For this reason, the allegation should be dismissed.

C. Such alleged refusal is not relevant to this proceeding because it has been mooted by later events.

Even assuming that a refusal by Duquesne to sell power for resale was a situation inconsistent with the anti-trust laws, it is clear from the Record that such a situation, even if it existed at one time in the past, has ceased.

Whatever Duquesne's policy with respect to sale for resale might have been when the Pa. P.U.C. had jurisdiction of the issue, it is clear from the Record that Duquesne's present policy is that it will sell base-load power for resale. NRC Staff Exhibits 21, 22, and 23, and Applicants Exhibit 49 (DL) comprise the wholesale power contract between Duquesne and the Borough of Pitcairn. The Record discloses absolutely no request since 1966 for wholesale power which has not eventually been satisfied. Further, the Record discloses no evidence of overreaching by Duquesne in its wholesale power relations with Pitcairn. On the contrary, since the inception of the wholesale power contract, the relations between Pitcairn and Duquesne have been entirely cordial. (Tr. 1741, lines 12-17). Pitcairn has felt no need to seek assistance of any governmental agency whatsoever in its contractual relations with Duquesne. (Tr. 1741, lines 25; Tr. 1742, lines 1 - 4.) Finally, Pitcairn does not feel that it is likely that Duquesne will terminate the contract or refuse to deal. (Tr. 1659, lines 12 - 20).

Under such circumstances, any request for wholesale power which may have been made in the past has absolutely no relevance to this proceeding.

Consumers Power Company (Midland Plants, Units 1 and 2) LBP - 75 - 30, NRCI - 75/7, 29 (July 18, 1975). The Licensing Board therein stated, at p. 62:

> "If, in fact, such a situation ceased to exist prior to the close of the record, activities under the license cannot maintain the nonexistent situation".

The Board went on to note at pp. 63 - 64:

> "[a] factor in determining mootness as to a discontinued contractual activity would be the present jurisdiction of the FPC.
>
> "The Board concludes that a situation is "maintained" if the situation is in existence on the close of the record or if there is a reasonable expectation that the wrong will be repeated based on some cognizable danger of recurrent activity beyond the mere possibility of such a happening. In making its determination of cognizable danger of recurrent activity, the Board will consider subsequent events that make it absolutely clear that the behavior could not reasonably be expected to reoccur, including but not limited to evidence of continuing activities which no longer exhibit the behavior, changes in status of the Applicant which prevents or obviates any necessity or reason for the behavior, observation of the demeanor of any witness testifying to cessation of such activities, or other additional factors which would bear on the cessation of the activities."

It is apparent from the record that the test for mootness of an issue as set forth in Consumers Power is satisfied here. First of all, the FPC now does have jurisdiction over such

transactions. Second, there is clear evidence in the Record that Duquesne's policy now is to sell wholesale power for resale. Third, Duquesne's own customers have testified that they do not believe that Duquesne will reverse this policy. For these reasons the allegations that Duquesne has refused to sell wholesale power should be dismissed as moot.

IV. THE ALLEGATIONS CONCERNING DUQUESNE'S RELATIONS WITH THE BOROUGH OF PITCAIRN SHOULD BE DISMISSED.

At p. 7 of its September 5 filing, DOJ alleged that:

> "In 1968, Duquesne refused to sell power for resale to Pitciarn. In 1968, Duquesne refused to sell partial requirements power to Pitcairn. In 1968, Duquesne refused to enter into an interchange agreement with Pitcairn. In 1968, Duquesne refused to interconnect with Pitcairn for any purpose other than supplying standby emergency power. In 1968, Duquesne refused the request of Pitcairn for participation in a nuclear unit. In 1968, Duquesne, by agreement with the other CAPCO members, refused CAPCO membership to Pitcairn in order to further Duquesne Light Company's goal of acquiring that system. These activities have had the effect of foreclosing Pitcairn's competitive options, decreasing its competitive viability and furthering Duquesne's goal of acquiring this system."

At pp. 4 and 5 of its September 5 filing, the NRC Staff made the following allegations:

> "Duquesne Light Company -
>
> (a) Refusal to sell bulk power at wholesale to the Borough of Pitcairn.
>
> (b) Refusal to interconnect or reach an interconnection agreement with the Borough of Pitcairn.
>
> (c) Refusal to permit access to the Beaver Valley Nuclear Unit #2 to the Borough of Pitcairn.
>
> (d) Refusal to permit the Borough of Pitcairn access to bulk power services through power pool membership."

It further alleged, at p. 14:

> " d. That Duquesne Light Company has denied and has the ability to continue to prevent other electric entities such as the Borough of Pitcairn, from achieving the benefits of coordinated operations and development without appropriate license conditions. In addition, Duquesne had denied access to the benefits of the economy of size from the Beaver Valley No. 2 nuclear unit to Pitcairn."

A. Allegations that Duquesne refused to provide wholesale power as requested by Pitcairn were unsupported by the testimony and should be dismissed.

The formal written requests made of Duquesne by Pitcairn are contained in DJ Exhibit 1 and NRC Staff Exhibit 1. The request contained in NRC Staff Exhibit 1, relating to membership in CAPCO, will be dealt with later. The request contained in DJ Exhibit 1, relating to a request for wholesale power, will be dealt with here.

It is apparent from the Record that Pitcairn was attempting to obtain a source of power it could use in emergencies. Its November 20, 1967 letter to Duquesne, DJ Exhibit 1, requested an "emergency interconnection". Furthermore, Mr. McCabe testified that the Borough was attempting to protect itself against a "double contingency outage". (Tr. 1824 - 1825.) Protecting itself against a "double contingency outage" was one of Pitcairn's major problems and its need for power was because of such contingency. (Tr. 1824, lines 10 - 15.). Pitcairn wrote the letter of November 20, 1967 in order to resolve this problem. (Tr. 1824, lines 23-25, Tr. 1824, lines 1-8.)

It is clear from the Record that a source of emergency power would have satisfied Pitcairn's request. McCabe stated (Tr. 1641, lines 25; Tr. 1642, 1-5):

> "[i]n trying to protect ourselves against the danger of double contingency outage if Duquesne would not sell us power on a regular basis for resale, if they would sell us power on an emergency basis at a fair and reasonable rate, it gave us another possible approach in dealing with them."

The Record establishes that Duquesne did, in fact, offer to sell Pitcairn emergency power. Mr. McCabe testified that Duquesne at all times made it clear to Pitcairn that Duquesne would provide power under Rate M. At Tr. 1826, lines 9 - 13, it is stated:

> "Q. Am I correct that Duquesne did, throughout your negotiations with them, make it clear to you that service under their published tariff known as Rate M would be available to you?
>
> "A. I would say that that is a correct statement..."

And again, at Tr. 1826, lines 23 - 24:

> "Q. ...But there was no doubt in your mind that the service itself would be made available to you?
>
> "A. That's correct."

This was precisely the type of service that would have satisfied Pitcairn's need to plan for a "double contingency

outage". McCabe stated (Tr. 4202, lines 21 - 25; Tr. 4203, lines 1 - 2):

> "A. Now leaving aside the question of cost per Kilowatt hour, isn't it a fact that Rate M power would have enabled you to plan for a double contingency outage?
>
> "A. Cost aside?
>
> "Q. Cost aside.
>
> "A. Yes."

Here, Mr. McCabe himself admitted that the type of service which Duquesne always stood ready to provide was the type of service which would have satisfied the Borough's needs. The evidence in the Record does not establish that Duquesne refused to sell power requested by Pitcairn. Quite to the contrary, the Record conclusively establishes that Pitcairn refused to buy power. Duquesne, by contrast, stood ready to sell wholesale power under the only schedule in its tariff which permitted the sale of power for resale.

B. Duquesne's failure to offer Rate M service on terms and conditions other than those provided in Rate M does not constitute a situation inconsistent with the antitrust laws.

It is clear from the Record that Pitcairn was not objecting to the type of service that Duquesne was offering

under Rate M. See IV, A, above. It was, instead, objecting to the price of the power to be sold under Rate M. (Tr. 1642, Tr. 1826). In effect Pitcairn wanted Duquesne to sell emergency power on a discriminatory and preferential basis, in contravention of its filed tariff. Indeed, this is the way Mr. McCabe himself characterized Pitcairn's requests. At Tr. 1619, lines 14 - 17, he stated:

> "[W]e [Pitcairn] suggested...if they [Duquesne] would consider making arrangements with us on an emergency basis independent of their filed tariff which was Rate M for emergency interconnection." (emphasis added)

However, as discussed in III. A., above, Duquesne would have violated state law if it had sold power on a basis independent of its filed tariff. To do so would have subjected the Company and its officers to civil and criminal penalties. Indeed, Pitcairn was making an unlawful request. Duquesne's refusal to accede to such a request had no antitrust consequences. Adherence by Duquesne to its tariff cannot be construed as an anticompetitive practice. Gas Light Company of Columbus, supra; Washington Gas Light, supra.

Moreover, if Pitcairn felt that the price provided in Rate M was unreasonable, under 66 P.S. §1391 it could have petitioned the Pa. P.U.C. to have the rates changed. Duquesne's failure to act affirmatively to seek a modification of the Rate M price, merely because Pitcairn objected to it, was not an anti-competitive practice. Business Aides, supra. (Pitcairn, of course,

had a legal right to challenge the Rate M rate, but it did not.) Indeed, if Duquesne had attempted so to modify its tariff, it might very well have been charged with discrimination against other classes of customers, which would have been a violation of the Pennsylvania Public Utility Law. 3/

3/ The price charged under Rate M has no antitrust consequences and is irrelevant to this proceeding for yet another reason. Although it might be argued in other circumstances that a high price under Rate M might constitute a price squeeze, under Pennsylvania law there could be no price squeeze whatsoever. Under Pennsylvania law, a municipal electric system has absolute monopoly power within the boundaries of the municipality. Service within the municipal limits by the municipal system is not subject to Pa. P.U.C. regulation. Furthermore, under 53 P.S. §47471, the municipality has absolute authority to prohibit a private electric utility from providing service within its boundaries. Thus, it could charge whatever rates, and provide whatever service, it desired and run no risk whatsoever that a competitor would take away its customers. To the extent that the municipal electric system serves outside municipal boundaries, it does so subject to Pa. P.U.C. regulation and, thus, subject to the exclusive service areas of the private utilities in the vicinity. 66 P.S. §§ 1141 and 1171. Thus, there can be no competition between the private utility and the municipal system, either within or without the municipal limits. Duquesne could not very well have put into effect a price squeeze with respect to Pitcairn if it could not have served Pitcairn's customers.

C. A refusal by Duquesne to sell wholesale power to Pitcairn was without antitrust consequesnces and was irrelevant to this proceeding, and allegations concerning any such matter should be dismissed.

Insofar as it is alleged that Duquesne refused to provide Pitcairn with a type of wholesale service other than that provided under Rate M, those allegations should be dismissed because the alleged refusal would have been required by state law. Thus, such action could not constitute an anti-competitive practice. See III. A., subra. See also Duquesne's Pre-Hearing Fact Brief, pp. 34 - 50.

Furthermore, Duquesne respectfully submits that the alleged refusal had no relevance to this proceeding. Under the laws of Pennsylvania (See footnote 3, supra, and Duquesne's Pre-Hearing Fact Brief, pp. 34 - 39), there was no competition between a municipal system and a private utility and there was no possibility of it.

Moreover, it is clear from the record that, as a factual matter, there was no competition between Duquesne and municipal systems. At Tr. 4204, lines 8 - 12, Mr. McCabe testified that Pitcairn's cost for purchase power from Duquesne was lower than Pitcairn's cost of generated power. At Tr. 4204, lines 24 - 25, Mr. McCabe testified that Pitcairn did not lower its electric rates when it began to receive this lower-cost power from Duquesne. Mr. McCabe did testify that

Pitcairn had not raised its rates (other than passing through fuel cost adjustment), which he argued had the effect of a reduction when compared to the behavior of the other utilities (Tr. 4205, lines 14 - 20). However, it is clear that he was being somewhat less than candid in taking credit for this since Duquesne had never raised the rate (other than passing through fuel cost adjustment) to Pitcairn. (Tr. 4207, lines 6 - 21). The upshot of it is that Pitcairn has never lowered its rates since it began receiving the lower-cost power from Duquesne. (Tr. 4207, lines 2 - 5). This is exactly contrary to what one would expect if the legal structure permitted competition. One can conclude that this behavior is the result of Pitcairn's absolute, unregulated monopoly power. There is no need for this Board to do something to "foster" competition because there is none. Unless this Board or the Commission has the power to regulate municipal power rates in Pennsylvania, the Record suggests that requiring Duquesne to give access to municipals to wholesale power will benefit municipal coffers, not municipal customers.

D. Allegations that Duquesne refused to permit Pitcairn to have access to Beaver Valley # 2 were not supported by the testimony and should be dismissed.

The evidence concerning this alleged request is contained in Mr. McCabe's testimony of a meeting he had with Messrs. Munsch and Dempler on February 21, 1968 (Tr. 1636 - 1638) and in the last full paragraph on p. 5 of NRC Staff Exhibit 17.

It is clear from the Record that this inquiry does not even rise to the dignity of a request for participation in a nuclear facility.

In the first place, it is obvious from the record that the request was not for access to Beaver Valley #2. At Tr. 1636, lines 24 - 25, Mr. McCabe testified that his request for access was to "one of the CAPCO units to be built at Beaver Valley". However, this does not identify the unit as Beaver Valley #2. This can be seen from the last page of the Duquesne Light Company 1973 Annual Report, contained as part of NRC Staff Exhibit 157. (A copy of this page is attached as Appendix I.) Both Beaver Valley #1 and Beaver Valley #2 are located in Shippingport, Pa., which is situated in the Beaver Valley, so-called because of the proximity of the Beaver River. However, so also are Bruce Mansfield #1, #2, and #3. Thus, there are 5 plants located at "Beaver Valley". Mr. McCabe could have been requesting access to any one of 5 units or, realistically, to none of them, considering the casual nature of his remark. Mr. McCabe further testified that Duquesne was taking most of the unit to which he was referring in mentioning access. (Tr. 1839, lines 14 - 23). As can also be seen from Appendix I, Duquesne's share in Beaver Valley #2 is very small when compared to its share of Bruce Mansfield #1 or Beaver Valley #1. On that basis, the inquiry may have been made with respect to either of these two units, but certainly it was not

made with respect to Beaver Valley #2. Unfortunately, Mr. McCabe did not know whether the unit to which he was requesting access was nuclear or non-nuclear. (Tr. 1638, lines 9 - 11.) So, it is impossible from the Record to define further to which unit Mr. McCabe was referring, a situation inconsistent with any definitive determination that access to Beaver Valley #2 was demanded.

The discussion above underscores the fact that the inquiry was informal and was casually made. It was made in the context of a hypothetical exploration of participation by Pitcairn in CAPCO. NRC Staff Exhibit 17. Further, the purpose of the inquiry was to obtain power. (Tr. 1840, line 6, which should read "A. Our interest was in obtaining power".) The so-called "access inquiry" was oral, not written. It was not directed to an officer of Duquesne. There is no evidence of any earlier or later inquiries. Such an inquiry, phrased in terms of an alternative to the formal, written requests by Pitcairn for CAPCO membership a nd for purchase power, and obviously subsidiary to those requests, made in such a casual, off-hand manner, should not be accorded any significance by this Board.

Pircairn made this request when Pitcairn itself knew that Duquesne was deficient in generating capacity. (Tr. 1850, lines 5 - 17.) Pitcairn believed, at the very time that Pitcairn was making an inquiry about access to a CAPCO unit, that Duquesne needed to contruct all the generating capacity it could.

Certainly it is preposterous to think that Duquesne could have wanted to sell generating capacity if it, itself, did not itself have sufficient capacity for its own needs. Indeed, if Duquesne had done so it would have violated the duty imposed by state law to provide electricity at the lowest cost possible. Pitcairn itself could hardly have believed that it was making a sensible request, worthy of serious consideration, in those circumstances. Moreover, Duquesne's behvaior would have been perfectly reasonable even if it had refused such a request, considering the sound business reasons it had for doing so.

Finally, the Board should not find that this incident in 1968 is probative evidence of Duquesne's policies now with respect to access to nuclear units. This inquiry was made more than two years before the enactment of §105(c) of the Atomic Energy Act. It was made in the context of written requests which asked for something entirely different from access. In these circumstances, this Board should give this incident no weight in evaluating Duquesne's present and future policy.

E. The allegation that Duquesne refused to sell power for resale to Pitcairn should be dismissed because it is mooted by later events.

As was previously discussed in III. B, supra, Duquesne presently sells power for resale to Pitcairn. There is no evidence in the Record to the effect that relations with its present, or future, wholesale customers will give rise to any antitrust concerns. There is no evidence in the Record of any overreaching or other anticompetive behavior by Duquesne in its present relations with Pitcairn.

To the contrary, Pitcairn is satisfied with its relations with Duquesne. (Tr. 1741, line 25; Tr. 1742, lines 1-4; Tr. 1659, lines 12-20).

Pitcairn's 1968 antitrust action was discontinued with prejudice. (Tr. 1655, lines 8-10). Pitcairn was thereby barred from ever re-litigating the issues in that suit, which are also issues involved in this proceeding. The settlement it reached with Duquesne was a final settlement of all its differences with Duquesne. It is unwarranted for the other parties to come in now and litigate such a stale situation, even in the less strict context of these administrative proceedings. It is unreasonable and judicially uneconomical for the other parties to force Duquesne to relitigate the matter. It is unseemly for the other parties to argue that the present situation, to which Pitcairn

itself agreed at a time when it was fully prepared to litigate the antitrust issues, should be the basis for sanctions on Duquesne. These allegations should be dismissed as moot under the rule set forth in Consumers Power, supra.

F. The allegations concerning Duquesne's response to Pitcairn's request for membership in CAPCO, or for an "interchange" arrangement, should be dismissed because there were good business reasons for Duquesne's response and no testimony of an anticompetitive motive.

Duquesne's response to Pitcairn's request for pool membership is contained in NRC Staff Exhibit 6, a letter dated January 2, 1968 from Philip A. Fleger to Robert M. McCabe, Jr. In that letter, Mr. Fleger stated that Pitcairn's proposed participation would be "impracticable"; that Pitcairn could make no contribution to the pool's objectives of economy and reliability and that Pitcairn's participation would create complications and difficulties without any compensating advantages. No testimony has been offered to the contrary; rather the evidence in the Record to date confirms the validity of Duquesne's observations and its sound business reasons in rejecting Pitcairn's request to join CAPCO.

It is clear from the cases that legitimate business reasons would justify a refusal of Pitcairn's request. A per se rule is not to be used in analyzing such refusals, even if the CAPCO members had agreed among themselves to exclude Pitcairn. United States v. Insurance Board of Cleveland, 144 F. Supp. 684 , 698 (N.D. Ohio, 1956). A refusal, even a group refusal, is lawful if there is economic justification. See Worthen Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119 (8th Cr. 1973); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062. As the Licensing Board said in Consumers Power, supra, NRCI -75/7 at 66:

> "To coordinate with a competitor without any net benefit would injure either the public served or the stockholders or both and would be a waste of the assets of the corporation. The officers and directors are obligated to do just the opposite."
>
> "From the above, we conclude as a matter of law, that the management of Applicant is forbidden from entering into alleged coordination agreements which said management beleives will result in a net detriment to Applicants."

Consumers Power, supra., makes the touchstone of determination as to validity what Duquesne believed. It is apparent from NRC Staff Exhibit 6 that Duquesne believed that Pitcairn's participation in CAPCO would create a net detriment. This belief is repeated in NRC Staff Exhibit 12. This belief was then explained in detail by Duquesne's System Planning Engineer. NRC Staff Exhbit 17, pp.3-6.

The Record demonstrated that Duquesne believed that pool membership by Pitcairn would create problems. Duquesne believed that Pitcairn could not contribute to the pool objectives of reliability and economy and that participation in CAPCO by Pitcairn would create complications with no compensating advantages. The Record also demonstrated that these problems actually existed.

Applicants Exhibit 3 (DL)was a report prepared by Pitcairn's own consulting engineer less than 2 months before Pitcairn made its request for CAPCO membership. That very report indicated that Pitcairn's plant was inefficient.. At p.7, it states:

> "Pitcairn's generating costs are in excess of those experienced in plants of comparable size."

Pitcairn could not even operate its own equipment properly. How, then, could it be expected to participate in a complex arrangment like CAPCO?

Pitcairn's own consulting engineer advised the borough that it would have to interconnect with the other utility at that utility's transmission voltage if it wanted to participate in a pool. Applicants Exhibit 3 (DL), p.10. As was explained to the Borough's representative at the meeting of February 21, 1968, this would have required that Pitcairn interconnect with Duquesne at 345 Kv. The small amount of power which Pitcairn had to offer would be absorbed by trans-

mission and transformation losses at this voltage level. NRC Staff Exhibit 17, p.4.

Further, Pitcairn's own consulting engineer concluded that, in order to participate in a pool, Pitcairn "would have to assume a new role and character of responsibilities" Applicants Exhibit 3 (DL), p.11 (first full sentence). Finally, the consulting engineer concluded that Pitcairn's generating costs rendered meaningless the arguments in favor of interchange agreements. As he himself admitted, this "would preclude Pitcairn's participation in one of the area power pools." Applicants Exhibit 3 (DL), p.14 (2nd full paragraph, last full sentence). Thus, Pitcairn's own consulting engineer recognized that Pitcairn was not suitable for membership in CAPCO or any other "interchange" arrangement. Participation in CAPCO by Pitcairn would indeed have been "impracticable".

This, alone, was sufficent to establish that Duquesne and, indeed, the other CAPCO companies, were justified in responding negatively to Pitcairn's request for pool membership. However, the record contains further evidence of this justification. The NRC Staff's expert witness, William Hughes, testified as follows with respect to Pitcairn's participation in a pool, at Tr. 3808, lines 3-7:

> "A. A 3 megawatt addition isolated and by itself for full membership in a CAPCO pool, I think the cost of that kind of accommodation would at least equal the benefits and would probably exceed.
>
> "That pobably isn't the way to go about it,..."

The Department of Justice expert witness, Harold Wein, in response to a question by Chairman Rigler, stated at Tr. 7129, lines 11-18:

> "[h]e said What would Pitcairn add? and I said Pitcairn would add 3 Mw. Well, is that important? I said, No, ...
>
> "Sure, Pitcairn wouldn't add anything. It would hardly be worth their while for either Pitcairn or CAPCO to consider that".

Thus, the experts of DOJ and the NRC Staff directly support and corroborate the position taken by Duquesne with respect to Pitcairn's request for membership in CAPCO.

Finally, the record demonstrates that Pitcairn's negotiating representative himself recognized that its participation in CAPCO would be impracticable. At the meeting on February 21, 1968 with Mr. McCabe, Duquesne representatives explained, in great detail, the engineering and other reasons why Duquesne felt it would be impracticable for Pitcairn to participate in CAPCO. NRC Staff Exhibit 17. Mr. McCabe indicated that the problems raised at that meeting were serious enough to warrant consultation with Pitcairn's engineer.

NRC Staff Exhibit 17, p.6 (2nd full paragraph, last sentence). Mr. McCabe reaffirmed this need to seek further consultation with Pitcairn's engineer in his letter of February 22, 1968 to Thomas J. Munsch, Jr. Applicants Exhibit 4 (DL), on p.2 of which he stated:

> "...I will consult with our consulting engineer so as to get his reaction to the points which I have outlined above. After he has carefully considered them, I will advise you as to whether or not he feels that we should meet with you and Mr. Dempler again to discuss any information which may be available to the engineer which I was either unaware of or unable to communicate because of my lack of engineering training."

This evidence demonstrated that even Pitcairn itself recognized that Duquesne was raising legitimate concerns and problems about CAPCO membership for Pitcairn which needed to be answered. The Record is clear that Pitcairn never responded to these concerns, despite the fact that it said it would do so. It never indicated that it had found a way to get around them. It never indicated that Duquesne's conclusions were wrong. One should conclude, on the basis of the evidence in the Record, that Pitcairn never responded because it knew Duquesne was right. Participation by Pitcairn was impracticable and would create complications with no compensating advantages.

Therefore, the allegations concerning Duquesne's response to Pitcairn's request for dismissal should be dismissed. Duquesne had valid business justification for behaving as it did, not an anticompetitive motive.

Respectfully submitted,

David McNeil Olds

David McNeil Olds

Joseph A. Rieser, Jr.

REED SMITH SHAW & McCLAY
747 Union Trust Building
P. O. Box 2009
Pittsburgh, Pennsylvania 15230

Suite 404 - Madison Building
1155 15th Street, N. W.
Washington, D. C. 20005

April 20, 1976

CAPCO

In 1967, Duquesne Light Company joined with four other electric utilities — see listing, Page 3 — to form the CAPCO (Central Area Power Coordination Group) power pool. Including the 650,000 KW CAPCO units now in operation, the following new facilities are planned or under construction that will provide the CAPCO companies with a total combined generating capacity of 23,842,000 kilowatts by 1983.

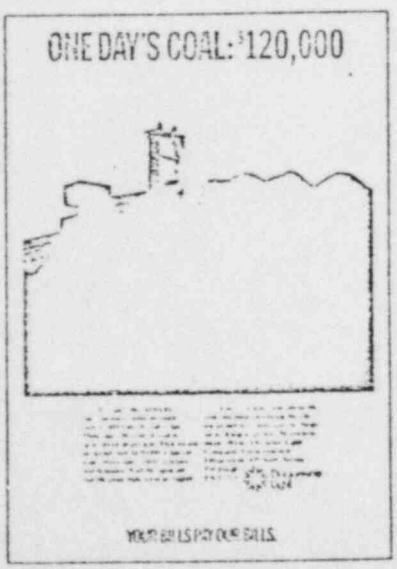
Unit	Type	Expected Net Demonstrated Capability (Kilowatts)	Year of Scheduled Completion	Company's Interest	
				Percentage Ownership	Kilowatts (Approximate)
Beaver Valley No. 1, Shippingport, Pa.	Nuclear	856,000	1975	47.5%	407,000
Bruce Mansfield No. 1, Shippingport, Pa.	Coal-fired	825,000	1975	29.3%	242,000
Davis-Besse No. 1, Port Clinton, Ohio	Nuclear	906,000	1976	None	None
Bruce Mansfield No. 2, Shippingport, Pa.	Coal-fired	825,000	1976	8.0%	66,000
Bruce Mansfield No. 3, Shippingport, Pa.	Coal-fired	825,000	1978	13.74%	113,000
Beaver Valley No. 2, Shippingport, Pa.	Nuclear	856,000	1979	13.74%	118,000
Perry No. 1, North Perry Village, Ohio	Nuclear	1,205,000	1979	13.74%	166,000
Perry No. 2, North Perry Village, Ohio	Nuclear	1,205,000	1980	13.74%	166,000
Davis-Besse No. 2, Port Clinton, Ohio	Nuclear	906,000	1981	13.74%	124,000
Erie No. 1, Erie County, Ohio	Nuclear	1,200,000	1982	13.74%	165,000
Davis-Besse No. 3, Port Clinton, Ohio	Nuclear	906,000	1983	13.74%	124,000
Erie No. 2, Erie County, Ohio	Nuclear	1,200,000	1983	13.74%	165,000

The CAPCO companies are also engaged in a program of installing short lead time generating units for peak load service. The Company has installed and owns 270,000 kilowatts of this capacity in the form of combustion turbine generating units and expects to install an additional 138,000 kilowatts by mid-1974. Other CAPCO companies have installed 320,000 kilowatts of this peaking capacity and are expected to install an additional 166,000 kilowatts by mid-1974.

Your Bills Pay Our Bills . . .

is a key theme of our 1973-1974 communications program. The Company's goal by using mass media, including newspaper, radio, TV and direct mail and displays, is to improve public understanding of the Company's huge construction program and the need for necessary rate increases.

To initiate the program, a survey was conducted among Company customers to determine their attitudes toward a rate increase. The Company surveyed again six months after the start of this program. We believe the shift in our customers' understanding of the need for rate increases is encouraging and we are continuing this communications program through 1974.



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

CERTIFICATE OF SERVICE

I hereby certify that copies of MOTION OF APPLICANT DUQUESNE LIGHT COMPANY FOR AN ORDER DISMISSING SPECIFIC ALLEGATIONS MADE AGAINST IT BY THE NRC STAFF, THE DEPARTMENT OF JUSTICE, and THE CITY OF CLEVELAND have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, air mail or by hand delivery, this 20th day of April, 1976.

Joseph A. Rieser, Jr.
Reed Smith Shaw & McClay
Suite 404 - Madison Building
1155 15th Street, N.W.
Washington, D. C. 20005
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

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

SERVICE LIST

Douglas V. Rigler, Esq.
Chairman, Atomic Safety and Licensing Board
Foley, Lardner, Hollabaugh and Jacobs
Chanin Building - Suite 206
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

Ivan W. Smith, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

John M. Frysiak, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Benjamin H. Vogler, Esq.
Roy P. Lessy, Jr., Esq.
Jack R. Goldberg, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Joseph J. Saunders, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

Steven M. Charno, Esq.
Melvin G. Berger, Esq.
Janet R. Urban, Esq.
Antitrust Division
Department of Justice
P. O. Box 7513
Washington, D. C. 20044

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
Michael D. Oldak, Esq.
Goldberg, Fieldman & Hjelmfelt
Suite 550
1700 Pennsylvania Ave., N.W.
Washington, D. C. 20006

James B. Davis, Esq.
Director of Law
Robert D. Hart, Esq.
1st Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

Frank R. Clokey, Esq.
Special Assistant
Attorney General
Room 219
Towne House Apartments
Harrisburg, PA 17105

Donald H. Hauser, Esq.
Victor A. Greenslade, Jr., Esq.
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Michael M. Briley, Esq.
Roger P. Klee, Esq.
Paul M. Smart, Esq.
Fuller, Henry, Hodge & Snyder
P. O. Box 2088
Toledo, Ohio 43603

Russell J. Spetrino, Esq.
Thomas A. Kayuha, Esq.
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

Terence H. Benbow, Esq.
A. Edward Grashof, Esq.
Steven A. Berger, Esq.
Steven B. Peri, Esq.
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, PA 15219

Gerald Charnoff,Esq.
Wm. Bradford Reynolds, Esq.
Robert Zahler, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D. C. 20036

Edward A. Matto, Esq.
Richard M. Firestone, Esq.
Karen H. Adkins, Esq.
Antitrust Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43215

Christopher R. Schraff, Esq.
Assistant Attorney General
Environmental Law Section
361 E. Broad Street, 8th Floor
Columbus, Ohio 43215

James R. Edgerly, Esq.
Secretary and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, PA 16103

John Lansdale, Esq.
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D. C. 20036

Alan P. Buchmann, Esq.
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115