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

REPLY BREIF OF ~~THE~~ DEPARTMENT OF JUSTICE

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September 22, 1976

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REPLY BRIEF OF THE DEPARTMENT OF JUSTICE

INTRODUCTION

On August 23, 1976, the "Findings of Fact and Conclusions of Law of the United States Department of Justice" (hereinafter "Department's Findings") were filed with the members of the Atomic Safety and Licensing Board. On August 30, 1976, Applicants filed with the Licensing Board "Applicants' Joint Proposed Findings of Fact and Conclusions of Law" (hereinafter "Applicants' Findings"). All parties exchanged pleadings on September 8, 1976.

The Department does not propose to address issue by issue the matters raised in Applicants' Findings. 1/ Virtually all of the arguments raised by Applicants have been dealt with, and the appropriate portions of the record cited, in the Department's Findings. Here, the Department will merely highlight certain erroneous contentions raised for the first time in Applicants' Findings. While we do not intend to engage in a point-by-point discussion of Applicants' citations to the record in this proceeding, we would point out that those citations contain numerous serious inaccuracies. 2/ For example, Applicants cited Dr. Wein

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1/ On August 30, 1976, Applicants moved for leave to file "Applicants' Joint Brief in Support of Their Findings of Fact and Conclusions of Law" (hereinafter "Applicants' Joint Brief"). That pleading was made available to the Department on September 8, 1976. On August 31, 1976, the Licensing Board issued an Order stating that it would defer acting upon Applicants' Motion For Leave to File Applicants' Joint Brief, and that the parties adverse to Applicants were not required to respond to Applicants' Motion until notified by the Board. As of the date of the present filing, the Board had taken no further action on Applicants' Motion. The Department has not undertaken, in the limited time and space available for reply briefs, to respond to Applicants' 697 page unauthorized pleading.

The Department asserts that it will be prejudiced if Applicants' Motion for Leave to File is granted. In endeavering to meet the page limitation on findings and conclusions ordered by the Licensing Board, the Department, of necessity, did not undertake the type of detailed exposition of the law and facts undertaken by Applicants in Applicants' Joint Brief. Nor is such an exposition possible in the context of this reply brief. To grant Applicants' Motion for leave to file Applicants' Joint Brief would permit Applicants to comment on the law and the record in a manner not afforded the Department.

2/ Applicants have also cited and relied upon non-legal publications, such as the National Power Survey, Coordination, Competition and Regulation in the Electric Utility Industry and Energy Regulation by the Federal Power Commission, which were not introduced into evidence in his proceeding. Many of the cited portions of these publications are in the nature of expert testimony on highly controversial matters. Because the Department was not afforded the right of cross-examination concerning these publications, they should be disregarded.

for the Finding that "Non-captive wholesale sales by Ohio Edison and Toledo Edison are both subject to price influence by Ohio Power," (Applicants' Findings, Finding of Fact 31.12) although Dr. Wein's testimony at the pages cited by Applicants supports the opposite conclusion.

Below is a discussion of those of Applicants' contentions which the Department believes merit reply.

Applicants' conclusion that "captive" wholesale sales must be excluded from the wholesale market (Applicants' Findings, Conclusion of Law 31.16) is not supported by their cited authorities. Those cases cited by Applicants hold only that "in-house" or "captive" requirements of non-parties to an acquisition may be omitted from the relevant market when considering the effect on competition of the acquisition. They do not hold that such captive sales should always be left out of the relevant market. For example, the Federal Trade Commission, in British Oxygen Co., 3 CCH Trade Reg. Rep. ¶20,910 (1975 while excluding captive sales from the relevant market, distinguished United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945), on the facts and pointed out:

> Alcoa was virtually the sole supplier of ingot to non-integrated fabricators of products (sheet, foil, rod, bar) that Alcoa also produced. The fact that Alcoa was in competition with its customers and could impose, as it did at times, a cost-price squeeze was an important element of the monopolization case against it. The vertical integration of Alcoa played a quantitatively different role in the Aluminum industry compared with the backward integration of industrial gases users. 3 CCH Trade Reg. Rep. ¶ 21,063 at 20,910.

It is clear that the facts in the present proceeding are more nearly analogous to those in Alcoa, supra, and United States v. Greater Buffalo Press, 402 U.S. 549 (1971) (See Department's Findings L-48) than to the facts of those cases cited by Applicants, and that Applicants' "captive" sales should be included in the wholesale-for-resale firm power market.

Applicants have made several arguments designed to show that wholesale competition cannot exist in Ohio and Pennsylvania. As will be shown, these arguments are without merit.

Applicants have erroneously contended that the Ohio Anti-Pirating Statute (Ohio Revised Code, Section 4905.261) applies to wholesale customers (Applicants' Findings, Conclusion of Law 31.05(c)). As we have previously stated, the states of Ohio and Pennsylvania have no authority to raise barriers to wholesale competition (Department's Findings L-5, L-6). Nor are we aware of any case which holds that a sale at wholesale in interstate commerce to an electric utility, be it a municipal system, a cooperative system, or an investor-owned utility, could or would be within the jurisdiction of the Public Utilities Commission of Ohio (PUCO). There is no question in this proceeding of the interstate nature of the Applicants' wholesale sales (p. 412 NRC 161, 165, 167, 169; Applicants' Finding 37.14). The distinction between sales to shopping centers (which were the subject of the authorities on which Applicants rely) and wholesale sales to electric utilities is one clearly recognized by Applicants who have not undertaken

to file rate schedules for sales to shopping centers with the Federal Power Commission (p. 412 of NRC 161, 163, 165, 167, 169).

Applicants assert that Orrville does not have excess power available for sale to non-Applicant entities within the CCCT, and that even if such power is available, Orrville's contracts with Ohio Power and AMP-O do not provide for its transmission (Applicants' Findings, Findings of Fact 23.17). Applicants' assertion is untrue. With the benefits of coordinated operation and development available through its contractual arrangements with Ohio Power and AMP-O, Orrville will have excess power available for sale to other electric entities (Lewis Tr. 7973-75; App. 183, p. 3 of study and Table 6; App. 186, §§0.06-0.07; App. 186a, §0.05). These contracts also provide for the transmission of power from Orrville to other electric entities. The record shows that under the terms of the Orrville-Ohio Power Agreement, the point at which Orrville's 138 kv transmission line connects with Ohio Power's facilities is an interconnection point as well as a delivery point (App. 186, §1.02), and that Ohio Power has agreed to transmit power from Orrville as provided in the AMP-O-Ohio Power Agreement (NRC 141A, Schedule A, p. 33-35). Because Orrville's agreement with Ohio Power specifically states that Orrville may, from time to time, provide power to AMP-O (App. 186, §0.07), the only possible reading of this agreement is that it, in conjunction with the AMP-O-Ohio Power Agreement, provides for the transmission of that power.

Applicants have also argued that there is no potential for wholesale competition in Pennsylvania because of Pennsylvania's limitation of the condemnation power of public utilities (Applicants' Findings, Findings of Fact 22.09). Even if Pennsylvania, through its limitation of a public utility's ability to exercise its power of eminent domain to build transmission lines, could legally raise a barrier to competition for wholesale sales, such a barrier is easily overcome if wheeling services are available.

Applicants have also attempted to convey the impression that there can be little retail competition in Ohio and Pennsylvania and that any such retail competition would be one-time competition. These contentions are not supported by the record.

Two forms of competition at retail are competition for large industrial customers and competition for franchises -- for the opportunity to serve "blocks" of retail customers (Department's Finding 3.09). 3/

Franchise competition can exist because a municipality which is served at retail by one of the Applicants may condemn the facilities of that Applicant and establish its own municipal

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3/ Other forms of retail competition are also present (Department's Findings 3.09).

electric system. 4/, The municipal system may obtain a supply of bulk power either by (1) self generation, (2) purchase at wholesale from its former supplier, (3) purchase at wholesale from another supplier or (4) any combination of the above. 5/

Municipalities have the power of condemnation in both Ohio and Pennsylvania (Department's Findings p. 33 fn. 4). The City of Cleveland, for example, has considered using this power to condemn CEI distribution facilities (App. 205, 206). There is no evidence that a Pennsylvania municipality may not use its power of condemnation in the same manner. Pennsylvania law does not prevent such condemnation and, at most, requires that prior to condemnation of the facilities of a public utility, a municipality obtain a certificate of public convenience and necessity (66 P.S. §1122(e)). The most recent ennunciation of the standards which must be met to obtain a certificate of public convenience and necessity is set forth in Metropolitan Edison Company v. P.S.C., 127 Pa. Super. 11, 191 A. 678 (1937). This 1937 case, the only

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4/ Even if a municipal system exercised its powers of condemnation to establish a municipal distribution system, competition for service to the municipality would still exist. This is so because the voters, who are the customers of the municipal system, can at any time abolish the municipal system upon a determination that they can obtain better rates or service from the former supplier (Wein Tr. 6998).

5/ Where all or a portion of the municipalities' power is obtained from a new supplier, wheeling by the former supplier would eliminate the need for wasteful duplication of facilities.

interpretation of 66 P.S. §1122(e), may not necessarily reflect a contemporary interpretation of the statute in question. 6/ Even if the 1937 standards are still applicable, it is likely that a municipality wishing to enter the utility business could meet those standards. That this is true is evidenced by DL's fear that some of the municipalities within its service area would condemn DL's distribution facilities for the purpose of setting up a municipal distribution system (DJ 251, 255).

Competition for large loads is not limited to competition for new loads as Applicants contend (Applicants' Findings, Finding of Fact 23.04). Because of the size of these loads, the expenditure by a competing utility to construct facilities needed to provide adequate service would be small in proportion to the revenue to be obtained (Moran DJ 583, pp. 21, 26). In fact, the record demonstrates that in some areas there has been competition for existing large loads (Dorsey Tr. 5256, 5253-54). In many other areas, competition for such loads has been prevented by restrictive provisions which appeared in wholesale contracts with municipal systems (Department's Findings 8.13-8.15, 8.17-8.18, 9.27).

6/ It should be noted that while 66 P.S. §1122(e) takes into consideration federal regulation of railroad carriers, it does not consider federal regulation of motor carriers or the Federal Power Act.

Applicants have also argued that retail competition in Ohio is further precluded because a full-requirements wholesale municipal customer has no surplus power and is therefore prevented by Article XVIII, Section 6 of the Ohio Constitution from selling power outside its corporate limits (Applicants' Findings, Finding of Fact 22.08(a), Conclusion of Law 31.05(a)). Applicants' argument is totally without merit. The question of whether a full-requirements wholesale municipal customer has surplus power has not been litigated in Ohio (White Tr. 9525-26, 9680-81). Mr. White, the only one of Applicants' witnesses to testify on this matter, stated that while he personally believed that a full-requirements wholesale customer does not have "surplus" power to sell outside its boundaries, he was aware that his interpretation could be wrong (White Tr. 9525-26, 9683, 9688-89). Mr. White also testified that OE had no company policy with respect to that provision of the Ohio Constitution (White Tr. 9683-84). We would also note that Bowling Green, a full-requirements wholesale municipal customer of TE, serves outside its municipal boundaries (DJ 166, p. 11,059; Hillwig Tr. 2426).

Pennsylvania municipalities may also compete for loads located outside their boundaries (Department's Finding L-9). The Pennsylvania statute establishing retail service areas for public utilities and electric cooperatives specifically

excluded municipalities from the operation of that law (Act No. 57, Session of 1975 (July 30, 1975)).

Applicants contend that they are subject to pervasive regulation by the Federal Power Commission (F.P.C.) (Applicants' Findings, Conclusion of Law 31.01, 37.08). The powers of the F.P.C. are, however, less broad than Applicants have asserted. The F.P.C. has no power to order wheeling. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); City of Paris, Ky. v. Kentucky Utility Co., 41 F.P.C. 45 (1969). Nor does the Federal Power Act specifically authorize the F.P.C. to order pooling or coordinated development. Power is available through an F.P.C. ordered interconnection only insofar as such power sales do not require installation of additional generation or impair the utility's ability to render adequate service to its customers. 16 U.S.C.A. 824a(b); Gainesville Utilities Department v. Florida Power Corp., 402 U.S. 515 (1971); Otter Tail Power Co. v. Federal Power Commission, 473 F.2d 1253 (8th Cir. 1973). It is therefore clear that the F.P.C. lacks the authority to order those elements of coordination necessary for pooling and coordinated development (Dempler DJ 570, pp. 148-149; Schaffer Tr. 8537; Department's Findings 2.13, 2.20-2.24).

Applicants have further stated that while exercising its regulatory authority, the F.P.C. must take into account antitrust considerations (Applicants' Findings, Conclusion of Law 31.01(c)). While this is true, the public interest standard applied by the

F.P.C. differs from the standard under 105(c) of the Atomic Energy Act, and, in any case, antitrust considerations are not determinative under the Federal Power Act. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). 7/ It is clear that the F.P.C. relies on "voluntary commercial relationships" to serve the public interest in the interstate distribution of power. Otter Tail Power Co. v. United States, 410 U.S. at 374.

The Applicants conclude that private action in direct furtherance of a regulatory policy is lawful (Applicants' Findings, Conclusion of Law 20.08). The Cantor decision cited by the Applicants in support of this proposition in fact supports the contrary view, that private action may be illegal notwithstanding regulation. In that case the Court held: "This court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it is permitted or required by state laws." Cantor v. Detroit Edison Co., 44 U.S.L.W. 5357, 5363 (1976). The other two cases Applicants use to support their conclusion 8/ hold that such private action is protected only

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7/ The limited antitrust jurisdiction of the F.P.C. is more fully discussed at pages 36-39 of the Memorandum of the Department of Justice in Response to Applicants' individual Motions to Dismiss which is herein incorporated by reference.

8/ Gordon v. New York Stock Exchange, 422 U.S. 659 (1975); United States v. National Association of Securities Dealers, 422 U.S. 694 (1975). It should be noted that the former case was captioned "Silver v. New York Stock Exchange" on p. 154 of the Applicants' Findings and Conclusions, but that the citation refers to Gordon. The Department assumes that Applicants intended to cite Gordon v. New York Stock Exchange, supra.

insofar as there is "plain repugnancy" between the regulatory statute and the antitrust laws, and that the antitrust laws with respect to the regulated activity are repealed only to the extent required to make the particular regulatory act work. The Supreme Court in Otter Tail applied this "plain repugnancy" standard to F.P.C. jurisdiction over the electric power industry and found that where wheeling and interconnection were ordered by a Federal Court to remedy an anticompetitive situation, there was no conflict with the authority of the F.P.C. 410 U.S. at 376. Thus, Applicants' conclusion 20.08 is wrong both as a general proposition and as specifically rejected by the Supreme Court with respect to the electric power industry.

Finally, three other minor points deserve mention. OE cites competition between itself and Ohio Power for service to Orrville in support of its statement that no agreements concerning wholesale service exist between OE and any other entity (Applicants' Findings, Finding of Fact 36.156). However, in 1965, while drawing boundary lines, OE and Ohio Power discussed the problem of which company should serve Orrville, but were unable to reach any conclusion (DJ 200, Attachment 3, p. 1 ¶¶ 1-3, p. 2, ¶ 5). Thus, any such competition for service to Orrville is not probative of an absence of territorial agreements.

Applicants have argued that municipal systems may be able to build small coal-fired plants and obtain power at a cost closely approximating the cost of power which Applicants will get from the

nuclear facilities being licensed (Applicants' Findings, Finding of Fact 38.04). The Department would first point out that Applicants have nowhere asserted that such a plan was feasible, but only that it may be feasible. This is, in fact, supported by Applicants' own expert witness (Gerber Tr. 11,562-64). 9/ Even Applicants' statement concerning the possibility of a municipality economically constructing and operating a small coal-fired plant is not supported by the record. Numerous assumptions made by Applicants' expert to reach the above conclusion are speculative and of questionable reliability. Thus, Mr. Gerber in reaching his conclusion used cost data which was admittedly inaccurate (Gerber Tr. 11,544, 11,559-60), did not consider the impact of inflation although recognizing it as an important cost factor (Gerber Tr. 11,582, 11, 549) and admitted that it was difficult to make that type of cost projection with a high degree of accuracy (Gerber 11,548). 10/

9/ There is evidence of record which indicates that within Ohio, because of antipollution legislation, it would be difficult for a municipality to install any new coal-fired generating capacity (Pandy Tr. 3119).

10/ To the extent that Mr. Kampmeier may have agreed with Applicants' contention, his agreement was based in part on cost figures provided by Applicants, some of which figures are unsupported by evidence of record. Mr. Kampmeier later testified that if the hypothetical 100 mw coal-fired plant were to burn western coal, and was to be built to meet current pollution control standards, the cost of power from the 100 mw coal-fired unit would be higher than the cost of power from a large nuclear unit (Kampmeier Tr. 6119-6123, DJ 511, pp. 91-92; Pandy Tr. 3119).

Applicants have also contended that non-Applicant entities within the CCCT would be in at least as good a position economically if they purchased power from Applicants at F.P.C. approved wholesale rates than if these entities were to have direct access to nuclear units (Applicants' Findings, Finding of Fact 38.03). The record, however, clearly demonstrates that as wholesale customers these entities would not have as much freedom of choice between bulk power supply options to meet their bulk power needs and that direct participation would result in the least expensive long range bulk power supply (Hughes Tr. 4077-78, 4090-92; Lewis Tr. 5632; Wein Tr. 6627-33, 7204-06, 7265-80, 7286; DJ 596; App. 105).

CONCLUSION

For the reasons set forth above and for the reasons set forth in the Department's Proposed Findings of Fact and Conclusions of Law filed on August 23, 1976, the Department respectfully submits that the Board should find that the issuance of an unconditional license for the Davis-Besse Nuclear Power Station, Units 1, 2 and 3, and the Perry Nuclear Power Plant, Units 1 and 2, would create or maintain a situation inconsistent with the antitrust laws and, accordingly,

attach conditions to those licenses which will eliminate that situation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY BRIEF OF THE DEPARTMENT OF JUSTICE have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand this 22nd day of September 1976.

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