UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

REPLY BRIEF OF THE NUCLEAR REGULATORY COMMISSION STAFF

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I. INTRODUCTION

The Nuclear Regulatory Commission Staff ("Staff") herein files its reply to "Applicants' Joint Proposed Findings of Fact and Conclusions of Law ("Applicants Proposed Findings") dated August 30, 1976. The Licensing Board has granted the parties the opportunity to file a reply brief,though not required to do so by the Commission's Rules of Practice. Due to the Board's expression of its desire for the length and timing of the reply brief, the Staff has selectively responded to only certain portions of Applicants' Proposed Findings. The fact that Staff has not responded to other portions does not mean that Staff does not contest these portions. but that Staff will rely on the "Proposed Findings of Fact And Conclusions of Law of NRC Staff" filed August 23, 1976 or that the basis for Applicants' proposed finding is on its face clearly insubstantial.

A. Applicants' Significant Reliance On Extra-Record Material

In support of their proposed findings of fact, Applicants cite and substantially rely on documents which are not in evidence. 1/ The Staff feels that such a procedure and attempt to use extra-record documents to support findings of fact is both inappropriate and improper. The Board's consideration of those documents as part of the basis for their decision in this case would violate the Administrative Procedure Act, which provides in pertinent part:

> (e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title... When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. 2/

In addition, reliance on such documents undermines the very purpose of the procedure of offering documents for receipt into evidence, of hearing objections by other parties, of requiring offers of proof, and of the Board ruling thereon, and of filing expert testimony in advance. Finally, this

1/ Beginning on page 4 of Applicants' Joint Proposed Finding of Fact and Conclusion of Law, and numerous times thereafter, Applicants cite Penn, Delaney and Honeycutt, Coordination, Competition and Regulation in the Electric Utility Industry, NUREG-75/061 (1975). This document states that while the authors are staff economists in the Office of Antitrust and Indemnity of the NRC, the views expressed therein do not necessarily represent those of the Commission and the report has neither been approved nor disapproved by the NRC. Other extra-record citations, by way of example only, are: (1) Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy, 72 Colum. L. Rev. 64 (1972) (Applicants' Joint Proposed Findings, p. 5); (2) 1 FPC, National Power Survey (1964) (Applicants' Joint Proposed Findings, p. 8 and numerous subsequent pages); (3) FPC, National Power Survey (1970) (Applicants' Joint Proposed Findings p. 32, et seq.)(Although only parts of the FPC's 1964 or 1970 National Power Survey were received into evidence, Applicants feel free to cite portions not in evidence.) (4) Breyer and MacAvoy, Energy Regulation by the Federal Power Commission (1974)(at p. 30 et seq).

2/ §7(d) of the Administrative Procedure Act, 5 U.S.C. §556(e)(emphasis added).

attempt by Applicants serves only to demonstrate that Applicants cannot support the findings of fact they urge upon the Board by testimony and exhibits in evidence .

For the above reasons, the Staff hereby moves this Board to strike from Applicants' Joint Proposed Findings of Fact all citations to documents not properly received into evidence. Alternatively Staff requests that the Board disregard those extra-record materials in arriving at its decision.

B. Burden of Proof

Applicants take the position that the Staff, the Department of Justice, and the City of Cleveland have the burden of proof in this proceeding. [3/] Applicants are in error. Section 2.732 of the Commission's Rules of Practice [4/] explicitly places the burden of proof on Applicants, who sought by their application an unconditioned license and who now are the proponents of an order granting them an unconditioned license. It is the Staff's position that the parties opposed to an unconditioned license only have the burden of going forward with evidence sufficient to establish a prima facie case, after which Applicants have the burden of proof. [5/] In support of this position, the Staff hereby incorporates by reference its argument on burden of proof contained in Staff's Answer to Applicants' Motions for Orders Dismissing All, or Specific, Allegations Made by the NRC Staff, May 7, 1976, pp. 4-5. [6/]

3/ Applicants' Joint Proposed Conclusion of Law 30.01.
4/ 10 C.F.R. §2.732
5/ The Staff made this position clear at the November 1975 prehearing conference.
6/ See also Proposed Findings of Fact and Conclusion of Law and Brief in Support Thereof of City of Cleveland, pp. 172-73.

C. Summary of the Theory of Staff's Case

After a careful perusal of Applicants' Joint Proposed Findings of Fact and Conclusion of Law (and their unauthorized brief in support thereof), the Staff concludes that Applicants have either failed to comprehend the theory of Staff's case or have chosen to ignore it.[7/] In summary, the Staff has alleged and proven that (1) Applicants, individually and as a group, dominate the relevant markets;[8/] (2) each Applicant individually has abused its dominant position in the relevant market; (3) Applicants have abused their dominant position in the relevant markets by joint action in concert; (4) Applicants, individually and as a group, control access to essential resources; (5) Applicants, individually and as a group, have the power to deny and in fact have denied access to said essential resources; and (6) as a result of the foregoing, there exists a situation inconsistent with the antitrust laws including section 5 of the FTC Act and/or the policies underlying those laws. Furthermore, the Staff has alleged and proven that Applicants activities under an inappropriately conditioned license will maintain and indeed exacerbate this situation inconsistent with the antitrust laws.

7/ In addition, Applicants apparently do not understand the law basic to Staff's case.

8/ Applicants explicitly have admitted that they dominate the relevant markets. See Staff's Proposed Finding of Fact 1.013.

The nature and theory of Staff's case, summarized above, has been presented to Applicants and the Board on numerous occasions, including but not limited to: Staff's September 5, 1975, Nature of the Case to be Presented by NRC Staff, Staff's Trial Brief, dated November 10, 1975; Staff's Answer to Applicants' Motions for Orders Dismissing All, or Specific, Allegations Made by the NRC Staff, dated May 17, 1976; and the Proposed Findings of Fact and Conclusions of Law of NRC Staff, dated August 23, 1976. Thus there is no reasonable justification for Applicants apparent lack of understanding of the nature of Staff's case. For example, and only by way of example: (1) It is not necessary to prove a monopoly, or the possession of monopoly power, either in an abuse of dominance case, or in a denial of access to essential resources case; (2) contracts, combinations, and conspiracies are not one in the same and it is not necessary to prove a conspiracy to prove group action inconsistent with the antitrust laws; (3) it is not true that only restraints of trade proven to be unreasonable are unlawful - many practices have been held to be per se violations of the antitrust laws without the necessity for inquiry into their reasonableness; and (4) it is not the law that private action in furtherance of regulatory policy is ipso facto lawful.

D. Consolidation of Davis-Besse 2 and 3 Proceedings with Perry 1 & 2 Proceeding; Opportunities for Discovery

At Applicants' Proposed Findings of Fact (APFF) 10.03, Applicants note that on February 14, 1973 the Department of Justice for the first time "charged" Applicants other than CEI with anticompetitive behavior. Applicants further note that this Board subsequently ordered consolidation of the Davis-Besse 2 and 3 proceeding with the ongoing Perry 1 & 2 and Davis Besse 1 consolidated proceeding on the last day of discovery in Perry, contending that this denied Applicants meaningful discovery on the Davis-Besse 2 and 3 "charges" without adequate notice or discovery (Applicants' Brief at pp. 14-17).

In order to put this claim in proper context, it should first be recalled that Toledo Edison, Ohio Edison (and Penn Power) and Duquesne Light were all party participants to both the Davis-Besse 1 and the Perry 1 and 2 proceedings, and in the context of those proceedings were subject to the discovery process by the NRC Staff (as well as the Department of Justice and the City of Cleveland.).

Assuming for argument that the Davis-Besse 2 and 3 advice letter focused on all the Applicants, whereas previous advice letters had a somewhat narrower scope, at the first pre-hearing conference of the Davis-Besse 2 and 3 proceeding, Applicants agreed that not only the parties but the issues in controversy in Davis-Besse 2 and 3 should be identical to those established in the Davis-Besse 1 and Perry 1 and 2 proceeding (Prehearing Conference of May 14, 1975, Davis-Besse 2 and 3, Tr. pp. 4-12; 16-18). Further, Applicants then indicated that they favored consolidation of the Davis-Besse 2 and 3 proceeding with the ongoing Davis-Besse 1 and Perry 1 and 2 pro-

ceeding (Davis-Besse 2 and 3, Tr. 10, 12, and 18). Shortly thereafter by motion dated June 16, 1975, the Staff moved the Commission for an order authorizing the presiding Perry 1 and 2 licensing board to consolidate all the above proceedings. By Reply dated June 18, 1975, Applicants filed with the Commission an answer stating that they had no objection to consolidation of the proceedings with the now identical issues, expressing a reservation over the specificity of ultimate issues. On July 30, 1975 the Board ordered consolidation pursuant to authority conferred upon it by the Commission.

At no time did Applicants engage in any discovery against the Staff in the Davis-Besse 2 and 3 proceeding! As early as April of 1975, approximately two months after receipt of the Davis-Besse 2 and 3 advice letter, the Staff filed its response in support of the petitions to intervene by the State of Ohio, which was concerned with more than one Applicant and the City of Cleveland (NRC Staff's Reply In Support of Petitions To Intervene Filed By State of Ohio and the City of Cleveland, dated April 25, 1975).

As the Appeal Board noted in Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1) 2 NRC 858 at 870 (1975):

> Like the Federal Rules of Civil Procedure, this agency's Rules of Practice provide that discovery may be "limited by order", or may "not be had", or even "may be had only by a method of discovery other than that selected by the party seeking discovery." (citing 10 C.F.R. §§2.740(a), (h) and (c) as compared with Rule 26(a) (b) and (c) of the Federal Rules of Civil Procedure).

In Davis-Besse 2 and 3, the Board ordered discovery and furthermore imposed no limit on the scope of Applicants' discovery. As noted by the Appeal Board, it is basic that the purpose of discovery is to "afford a party broad access to relevant information." Commonwealth Edison Company (Zion Station, Units 1 and 2) 7 A.E.C. 457 at 462 (April 25, 1974). The fact simply is that Applicants engaged in no discovery against the NRC Staff, the lead party seeking license conditions in this proceeding, although the opportunity to do so was not only granted but encouraged by the Board. Even in the Perry Units 1 and 2 proceeding, Applicants were satisfied with a pre-documentary discovery response to interrogatories and request for documents by Staff, and Applicants never engaged in any follow up, or any depositions[9/] relative to the Staff or to the materials produced by Staff.

E. Applicants Have Misquoted and Mischaracterized The Ecomomic Testimony of Dr. Hughes

In their discussion of the competitive issues raised in applying antitrust policy to the electric utility industry, Applicants acknowledge the "moderate and well-reasoned position of Dr. Hughes" (Brief at pp. 202-203); they further declare that they are "in complete accord" with his views presumably because... "Dr. Hughes' goal has been fully accomplished with respect to all electric entities in the CCCT" (Brief at pp. 111 and 112).

9/ Mr. Mozer's field report on his visit to CEI was produced at that time. Mr. Mozer and Dr. Guy also accompanied Staff counsel at certain depositions in the Perry proceeding.

To have reached the conclusion that Dr. Hughes' testimony has supported their case, Applicants have relied upon a substantial amount of imagination in addition to quoting Dr. Hughes out of context in some instances, and of misquoting him in other instances.

As an example of how Dr. Hughes' has been misquoted in order to serve Applicants' purposes, consider the following: Beginning at p. 108 of their Brief the Applicants introduce their discussion of "The Competitive Framework" with this sentence: "Competition is generally understood to be the rivalry for customers (see Hughes 3676 (5-6))."[10/] Compare this statement with what Dr. Hughes actually said: "My definition of market competition at retail would be any rivalry for customers." (Id.) (Emphasis supplied).

By omitting the words "at retail" Applicants attempt to mislead the Board into thinking that Dr. Hughes did not distinguish, in both his prepared testimony and cross examination, the significant differences between retail and wholesale competition, and the subsequent issues for public policy which arise from these differences. Dr. Hughes presented testimony on this point in his prepared testimony (NRC 207, pp. 36-38), and after a long series of questions on cross examination reiterated his view:

10/ Applicants use a similar technique when referring to a publication of NRC Staff economists, which has not been introduced in evidence in this proceeding. Coordination, Competition, and Regulation in the Electric Utility Industry NUREG-75/061). For example, Applicants refer to p. 13 of this publication as source for the following statement: "As the foregoing discussion reflects, there is generally very little competition in the electric utility industry." The actual statement reads: "It is generally recognized that the scope of competition is more limited in the electric utility industry than in other sectors of the economy." (Emphasis supplied).

"The way in which competition does or can enter into bulk power markets differs from the way competition can and does enter into retail markets. That distinction is fundamental to the issues before the Board here..." (Hughes: Tr. 3901).

In addition to misquoting Dr. Hughes, Applicants have misinterpreted his views and quoted him out of context. Applicants' technique has been to rely on Dr. Hughes for the first part of a statement and, following a semicolon, to rely on Messrs. Gerber and Pace for a conclusion.

For example, note APFF 22.02 which attempts to convey the impression that the only efficient organizational structure of the industry is one in which the firms are completely integrated to include the three distinct functions of generation, transmission and distribution:

> These economic characteristics give rise to obvious planning efficiencies and significant economies of vertical integration that can be realized only when an electric utility performs all three production functions. (Hughes 3899-900; A-189 (Gerber) 10-11; ...") (Emphasis supplied.)

The record reads as follows:

> Hughes: So, in general, generation and transmission tend to be integrated. (Tr. 3900).
>
> Gerber: "Thus, the vertically and horizontally integrated structure of the electric utility can be explained by the economic forces which impacted upon the industry during its development period." (App. 189, p. 12).

Thus, neither Dr. Hughes nor Mr. Gerber testified that significant economies can be realized in today's technologically-advanced electric utility industry if and only if its members are vertically and horizontally integrated.

Dr. Hughes explained that while there exists "basic technological things that lead to economies of scale" which are manifested at both the bulk power level and the distribution level, "those manifestations differ in their organizational implications at the local level in distribution and at the level of the bulk power networks. The organizational questions that arise in the bulk power network are more complex." (Tr. 3094) "At the bulk power level much larger scales of operation are considered opening up the possibility for coordination." (Tr. 3901). "So that one could achieve technological economies associated with network integration or coordination without having the organizational monolith that one usually associates with natural monopolies." (Tr. 3902).

Thus, the Applicants are absolutely wrong when they attribute to Dr. Hughes the idea that market forces will inevitably lead to natural monopolies at the bulk power level and that competition at the bulk power level "is also not economically or socially desirable." (See APFF 37.24). Nowhere in the entire record does Dr. Hughes even hint that he entertains such a thought.

Dr. Hughes' "moderate and well-reasoned position" is best understood by his own words:

> "My own view is that what is at stake here is less a matter of encouraging wide-spread competition in electric power supply although I believe that broader licensing conditions would encourage some such competition and some of it would be constructive. But I don't think the competition encouraging aspect is perhaps as relevant as the aspect of freeing up the options of choice that power systems have and encouraging a pattern of dealing among those power systems that will tend to get them to capture the combined benefits that can be achieved so that one would have a pattern of market behavior in the State of Ohio that would be more inclusive with respect to capturing the full benefits of coordinating and integrating development." (Tr. 3771).

Applicants are also in error by attributing to Dr. Hughes the proposition that "the switching of wholesale suppliers may result in an inefficient use of resources, causing the existing customers of both the present supplier and the new suppliers to bear unnecessary and excessive costs while the few customers shifting back and forth receive preferential treatment." (See APFF 23.15). Again Dr. Hughes' "moderate and well-reasoned position" best speaks for itself:

By Mr. Reynolds:

> Q. Dr. Hughes, at the end of the day yesterday you had indicated that in your view some balance between cooperative and coordinating behavior and competitive behavior has to be struck.
>
> You indicated that maybe the toughest and most fundamental issue this hearing is concerned with.
>
> What criteria, in your view, would be relevant in striking the balance that you have in mind?

> A. Well, one criterion would be that where the competition would have the effect of leading to duplicating facilities, to high transaction cost[s], and that sort of thing, without producing compensating benefits in terms of a stimulus to greater efficiency or a more inclusive result in terms of the efficiency of the bulk power system, one would want to draw the line there. (Tr. 3788).

In summary,with this distorted and confused view of Dr. Hughes' testimony regarding competition in the CCCT market, it is no wonder that Applicants declare "that Dr. Hughes' goal has been fully accomplished with respect to all electric utilities in the CCCT." (Brief at 112) In support of this conclusion Applicants erroneously attribute to Dr. Hughes the view (1) that a change in the CCCT market structure would have the effect of duplicating facilities; (2) would lead to high transaction costs, or (3) that competition would be inefficient.[11/](See Brief at pp. 109-10).

II. Specific Replies To Applicants' Proposed Findings of Fact

At Applicants Proposed Finding of Fact 33.06 ("APFF 33.06") Applicants contend that mututality is required for the viability of a power pool and that mutuality is [only] present if the pool participants expect that the benefits a party derives and the responsibilities he undertakes will accrue similarly to all other parties. Mr. Slemmer, Applicants' expert on power pooling,described this concept of mutuality as meaning "we [the pool members] want to do the best job we can in operating the pool. That is the mutuality of interest." (Slemmer: Tr. 8986). Further, witness Slemmer conceded that it

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11/ Other misquotes and mischaracterizations of a similar nature permeate Applicants' Proposed Findings, for example, APFF 20.04, 22.02, 22.07, 22.09, 23.03, 23.12, 23.15, 33.08, 33.40, 37.24 and 37.27.

makes no difference from the standpoint of basic engineering if one pool member takes more than it puts into the pool (Slemmer: Tr. 8988-Tr. 8989).

At APFF 33.06 in addition, Applicants contend that monetary compensation is no substitute for the return of like services. In reply Staff would point to Slemmer at Tr. 8977-Tr. 8988, and Tr. 9000 (pools are "premised on" mutual emergency support but dollars can be adequately used as payment for emergency service and interchange energy.) See also Slemmer Tr.9021.

In reply to APFF 33.08 that the wholesale power rate can provide the full benefits of power pooling to smaller electric utilities, there is abundant opinion testimony in this record to the contrary. Hughes: Tr. 4077-4078; Hughes Tr. 4135-4137; NRC 207, pp. 44-44; Mayben: Tr. 7599-7600; and Wein Tr. 7326. Those whose sole supply is through the wholesale power rate wish it were otherwise. For example, McCabe: Tr. 1738; Cheesman (on behalf of WCOE): Tr. 12,195. With respect to APFF 33.10 concerning the lack of detail in the record with respect to New England Power Pool example, see Slemmer Tr. 8970-Tr. 8974.

Supplementing APFF 33.13 and 33.14 it follows from Applicants' proposed findings that CAPCO is a power pool overwhelmingly committed to the planning, construction, and operation of predominantly large-scale, nuclear base-load units and integrating that nuclear capacity into a bulk power supply system. The nuclear power is delivered to Applicants over a network of extra-high voltage transmission lines specifically designed and constructed by Applicants for that purpose.

In reply to APFF 33.15 that the CAPCO arrangements do not require wheeling among Applicants, the record is overwhelmingly to the contrary. Applicants, as members of CAPCO, wheel power for each other (NRC 184, p. 18; NRC 185, Art. 1; Mozer NRC 205, pp. 33-35; Rudolph deposition DJ 558, pp. 213-14; Masters deposition DJ 567, pp. 44-45; Sullivan deposition DJ 578, pp. 238-40; DJ 588), both over joint facilities (i.e., "CAPCO transmission") (Mozer NRC 205, pp. 33-35; Firestone App. 122, p. 11; Schaffer Tr. Tr. 8552, 8580-82, 8604-05) and over the Applicant's individually owned facilities (NRC 185, Art. 5; Mozer NRC 205, pp. 33-35; Firestone App. 122, p. 15; Schaffer Tr. 8552; Arthur Tr. 8380). Applicants also engage in coordinated operation with utilities outside the CCCT (Mozer NRC 205, pp. 24, 27-35, 37-46, Exhibits HMM-4, 7, ?; Masters deposition DJ 467, pp. 116-19). The availability of transmission service in CAPCO allows each member of the Pool to engage in any advantageous transaction with non-CAPCO systems, even though the CAPCO member may not be directly interconnected with the non-CAPCO system. Thus, DL can secure energy from Consumers Power Company by utilizing TE's interconnection with Consumers, together with the CAPCO transmission operated by TE and OE (Masters deposition DJ 567, pp. 44-45; Fredrickson deposition DJ 573, pp. 177-78; Mozer NRC 205, pp. 33-35; Hughes Tr. 3690-91; NRC 224.)

Applicants, individually, also provide transmission services (Masters DJ 567, pp. 37-38, 42-43; Lindseth deposition DJ 568, p. 25; Fredrickson deposition DJ 573, pp. 177-78; Mansfield deposition DJ 572, p. 132; Keck DJ 576, pp. 105-06; Kozak DJ 579, pp. 16-19; Moran DJ 583, p. 13; DJ 135, pp. 1-10; DJ 136, pp. 3-4; DJ 137; DJ 167, pp. 3-6; DJ 508, pp. 1-6, 17-18;

DJ 507, pp. 1-90, 129-35; NRC 205 Mozer, pp. 31-43, Exhibits HMM-4,7) and receive such service from others (Masters DJ 567, pp. 37-38, 42-43; Keck DJ 576, p. 103; Sullivan DJ 578, pp. 150-52; Dempler Tr. 8860-61; DJ 135, pp. 12-19; DJ 137; DJ 167, pp. 6-8; DJ 507, pp. 91-119; DJ 508, pp. 9-14; Mozer NRC 205, pp. 31-43, Exhibits HMM-4, 7). (Source, DJ proposed findings, pp. 23-24).

At APFF 33.18-33.21 Applicants set out a number of pre-conditions which they feel are a prerequisite to meaningful participation in power pools. Yet, Mr. Slemmer would not exclude non-generating electric utilities from power pool membership (Tr. 9036-7); would not exclude electric utilities with generation but with no transmission (beyond distribution lines) from power pool membership (Tr. 9038); and similarly feels it is possible that an electric utility could offer benefits to a pool even if that entity had both no generation and no transmission (Tr. 9039). In any event final equalization of differences in generation, transmission, and reserves can be made up by money as a working part of any pool (Slemmer: Tr. 9043). Mr. Slemmer would not exclude qualified municipal and cooperative electric systems from pool membership. (Tr. 9039).

Supplementing APFF 33.24 regarding Mr. Slemmer's concept of "leaning or riding" (an undefined term not discussed in engineering articles (Slemmer: Tr. 9032)), Mr. Slemmer has conceded that the mere fact that one pool member has the ability to provide more emergency support than the others does not mean others are "leaning" or "riding" on him (Tr. 9032-9033; Tr. 9034). Any reserve deficits a particular pool member has can be made up by purchases either from pool members or outside of the pool (Slemmer: Tr. 9033-9034). Thus, there is no necessity that deficits be satisfied from intra-pool

transactions (Id.).

In APFF 33.25-33.28 (and Applicants' Conclusion of Law 33.04), Applicants contend that the CAPCO P/N method of allocating capacity is not unduly restrictive, is the best and most accurate method available, is equitable and reasonable, and was not adopted for the purpose or with the intent of excluding competition. The Staff has proven the contrary. (Staff's Proposed Findings of Fact 1.304 and 1.324 and Conclusion of Law 7.08). The only other point with respect to the P/N method which deserves mention now is Applicants' attempt to support their argument by statements which are false and on which no evidence was introduced by any party. Specifically, in responding to the Staff's challenge to the P/N ratio as being extremely sensitive to even small changes or errors in the denominator, and in trying to explain away Mr. Firestone's admission regarding that sensitivity and his lack of knowledge of the error analysis associated with the P/N method, (See Staff's Proposed Findings of Fact 1.320-1.322) Applicants state: "The simple answer to that complaint is that the computer can perform the calculations to any degree of accuracy desired." (Applicants Brief p. 313 n.191). There is absolutely no evidence in the record that any computer can perform the calculations to any degree of accuracy desired. In fact, that proposition is patently false and if the Board has any doubts about the falsity of that absurd statement, the Staff is available to open the record for the limited purpose of introducing authoritative treatises or expert witnesses or both to establish beyond any doubt the patent falsity of the proposition. 12/

12/ Applicants seem to have assumed, without proving or introducing any evidence, that the numerical techniques used in the P/N method are stable and converge. Even assuming arguendo that the numerical techniques are stable and converse, no computer, using even the stable, convergent numerical techniques, can perform calculations to "any degree of accuracy desired."

In reply to APFF 33.36 it should be noted that Duquesne's "studies" of the feasibility of Pitcairn's request for CAPCO membership were prepared (i) approximately two years after the concerted refusal (Dempler: Tr. 8906-8910; (ii) expressly for antitrust litigation (Dempler: Tr. 8088-redirect); with the likely assistance of and revisions by counsel (Dempler: Tr. 8750-52; 8758).

In reply to APFF 33.37(d) to the effect that Pitcairn's generating costs were so high that it would have been uneconomic for CAPCO companies to purchase Pitcairn's excess energy, it must be recalled that if Duquesne had been willing to coordinate with Pitcairn, or if Duquesne had not refused to sell wholesale power to Pitcairn, or if Duquesne had not denied access to the Beaver Valley nuclear unit to Pitcairn, Pitcairn would have been able to avail itself of certain advantages of economies of scale in generation (Staff's PFF 1.030-1.051; 1.065-1.075; 1.087-1.091). The fact that Pitcairn's generating costs were "so high" did not prevent Duquesne from making Rate M power available to Pitcairn at twice the cost of Pitcairn's self-generated power. See Staff's PFF 1.055-1.063.

With respect to the CEI's counterproposal (DJ 188) discussed in APFF 33.49, CEI did not "offer participation in the specified nuclear facilities" as Applicants contend but, merely "committed itself to enter into negotiations with the City" (See Staff's Proposed Conclusions of Law, p. 39) if four anticompetitive conditions were agreed to: (1) that CEI would have the right of first refusal to purchase any nuclear power which

was surplus to the City's immediate needs (DJ 188; DJ 291, pp. 18-22); (2) that the City would not seek "to promote tie-in arrangements" permitting it "to compete with CEI"; (3) that the City agree to price fixing of retail rates (see also DJ 188; DJ 291, pp. 18-21); and (4) that the City commit itself to withdraw any formal or informal petitions or requests for antitrust review or opposition in any administrative agency or court proceeding pertaining to the nuclear units. (DJ 188; See also DJ 291, pp. 00014340-00014343.)

With respect to APFF 34.12 and 34.14 regarding competition between CEI and Painesville, Applicants point to no authorities, exhibits, or record references for their statement that there is no competition within the municipality. Indeed, there is no authority for that statement. As to competition between CEI and Painesville see Staff's Proposed Findings of Fact 1.115-1.126, especially 1.117; also see Pandy Tr. 3118 and 3139-3141 (competition for industrial loads); Pandy Tr. 3714 and 3141-3143; 3156; (competition in area of Perry nuclear plant); Pandy Tr. 1372-3173; Pandy Tr. 3180; NRC 137; App. 195 [13/] pp. 41-42 ("Its competition and its rough competition."); DJ 371; DJ 510, pp. 3950A, 4052A; DJ 604-605.

13/ All citations to this exhibit must be in the face of, inter alia (i) Mr. Milburn's state of mind following the deposition (Hart: Tr. 12,772-12,808, especially Tr. 12,773 wherein Mr. Milburn posed questions concerning many of the topics previously covered in his deposition, which when coupled with his September 1975 apparent refusal to sign his deposition (NRC 223) directly bears on the weight of the exhibit; (ii) the stipulation among counsel to remove certain profane language of the deponent reflecting the demeanor of the witness during the deposition. As an example of the reliability of the deposition testimony, see Reply to APFF 34.43.

In APFF 34.24 Applicants contend that CEI has "made available" to Painesville transmission services. Applicants have apparently carefully avoided the word "offered." Mr. Hauser claimed that he discussed such a service for Painesville but conceded on cross-examination that approximately six months after that discussion, he had not even forwarded to Painesville a draft transmission service schedule. (Hauser Tr. 10,878-10,879).

At APFF 34.43, Applicants contend that CEI is not responsible for the delay in reaching an interconnection with Painesville, based upon App. Ex. 195 and 196. App. 196 was written to the NRC by Mr. Milburn at the request of CEI (App. 197). In fact, App. 197 makes clear that Mr. Howley of CEI discussed the statements in the Davis-Besse 2 and 3 advice letter with Mr. Milburn twice before Mr. Milburn agreed to write App. 196. However, at Mr. Milburn's deposition, taken less than four months after writing Applicants 196, Mr. Milburn first denied having spoken to Mr. Howley in more than a year, and subsequently was not able to recall such a discussion when confronted with Mr. Howley's letter to him indicating at least two such discussions had taken place (App. pp. 195, pp. 5-6).
The Painesville delays Mr. Milburn is referring to in App. 196 were delays in 1964 and 1965 (App. 195, pp. 9-11). Mr. Milburn however, was of the view that the delays in reaching an interconnection between 1969 and 1974 were caused by CEI management (NRC 138) and states that the statements in the Davis-Besse 2 and 3 advice letter may be true (App. 196).

At APFF 35.31 (and Proposed Conclusions of Law 35.10), Applicants contend that Toledo Edison's ("TE") transmission of its power over Bowling Green's 69kv line is pursuant to an oral understanding or agreement and is neither unreasonable nor anticompetitive. In fact, there is no agreement, oral or otherwise, between TE and Bowling Green with respect to TE's use of Bowling Green's 69kv transmission line. (McKnight: Tr. 11,997-98, 12,006). Thus, in effect, Bowling Green wheels for TE without being compensated in any way for that service while TE refuses to wheel for Bowling Green. (Staff's Proposed Finding of Fact 1.293). This is an example of Toledo Edison's abuse of its dominant position in the relevant market and constitutes only one element of a situation inconsistent with the antitrust laws. (Staff's Proposed Conclusion of Law 7.06(12).

At APFF 36.11, Applicants cite Mr. Mayben for the proposition that non-Applicant CCCT entities in Ohio Edison's service area did not wish to become a member of CAPCO. Mr. Mayben, on the same page (Tr. 12579) explains why: "because we were aware that [CAPCO membership] would carry with it the obligation of the P/N formula..."

At APFF 36.12 and 36.13, Applicants contend that non-Applicant CCCT entities in OE's service area did not express "an interest in, or desire for ownership or any other form of direct participation" or request access to CAPCO generating units. NRC 222, a letter from counsel for the OE's wholesale consumers states, "it is implicit in our [WCOE] negotiations with Ohio Edison that participation in any of the Company's proposed nuclear generation facilities is contemplated in our settlement agreement goals."

At APFF 36.44 there is no basis cited, nor is there any support in the record for the statement (in connection with OE's anticompetitive financing restriction) that Newton Falls was initially unwilling to build and finance the interconnection line. There is evidence to the contrary that OE was adamant that OE must own and that Newton Falls must prepay the entire costs of the line. NRC 79 (FPC investigation); Craig at Tr. 2890-2891, Tr. 2256, Tr. 2876. OE maintained its adamant stance on ownership and financing of the line until soon after the FPC investigation of the Newton Falls-OE empasse. (NRC 79). NRC 81 is so vague as to not constitute an offer by OE to vary its current practice implementing the financing restriction (See Staff's Proposed Findings of Fact, section 1.239, n.23); in fact NRC 81 states that contractual provisions in question (the financing restriction) is "based on the Rules and Regulations set forth in our Company's operating procedures and is consistent with offers made to other municipalities."

At APFF 36.55, Applicants contend that the primary reason Orrville contracted with Ohio Power rather than Ohio Edison was additional costs necessitated by OE's insistence on a loop plan rather than T-tap interconnection. Orrville's consulting engineer identified a number of reasons why Orrville interconnected with Ohio Power rather than OE. Those reasons included the following: OE refused to wheel (Lewis: Tr. 7959; 11,341, 11,345, 11,444-11,445); OE insisted that it own the interconnection facilities although Orrville would be required to prepay the cost (Lewis: Tr. 7960; 7980) thereby, inter alia precluding Orrville from serving

industrial loads outside the City (see Staff's Proposed Findings of Fact 1.252 para. 3), OE refused Orrville a short-term power schedule (Lewis: Tr. 7966; Tr. 11,346-7); OE refused a synchronous interconnection (Lewis: Tr. 7980). On the other hand Ohio Power agreed to provide transmission services (Lewis: Tr. 7986); required less expensive and extensive interconnection equipment (Lewis: Tr. 7987); offered a synchronous interconnection (Lewis: Tr. 7980); and permitted Orrville to own the interconnection facilities (Lewis: Tr. 8015) thereby permitting financing with municipal bonds (Lewis: Tr. 8013).

At APFF 36.106 and 36.118, Applicants attempt to limit the purposes of the WCOE-OE study to a partnership arrangement allowing WCOE to lower costs by participating in OE generation. With respect to the joint effort to "re-align their long-term power supply relationships" (App. Ex. 7) a partnership arrangement was but one of the possible alternatives (Mayben Tr. 12,527; Cheesman Tr. 12,190). The purpose of the study was not just to lower costs to WCOE but to develop a power supply program over which WCOE could be able to maintain some degree of control or have some degree of imput into the implementation and operation of its power supply other than remaining a full requirements customer (Cheesman: Tr. 12,195). Participation in nuclear units was implicit in, and specifically contemplated by, the settlement agreement by WCOE (NRC-222). WCOE never anticipated that its agreement to study the "realignment of long-term power supply relationships" would prohibit it from looking beyond OE for participation in generation (Mayben: Tr. 12,570; see citations in Staff's Proposed Findings of Fact 1.190).

To APFF 36.107 should be added: That Duncan letter and attachment included third-party wheeling, picking and choosing unit participation, and study of possible OE financing cooperation and was based upon Mr. Mayben's and Mr. Duncan's understanding of the rate case settlement meetings, documents relating to the settlement, notes of questions and answers between OE and WCOE and the settlement agreement itself (Mayben: Tr. 12,530).

At APFF 36.109 Mr. White is cited as quoting Mr. Mayben during the October 1974 meeting as saying the delivery of OE power to WCOE gives WCOE all the transmission WCOE needs. However, Mr. Mayben testified to the effect that the prepayment concept if fully implemented will not accomplish the ends sought by WCOE based on the fact that OE removed from the study criteria any consideration of importation or exportation on power of or by WCOE. (Mayben: Tr. 12,130; Tr. 12,533-12,534).

At APFF 36.119 the relationship between the WCOE negotiations and nuclear participation is again discussed. See NRC-222. At Applicants Brief p. 599 it is contended that if nuclear participation alone had been the subject, OE's "proposals, counterproposals discussions and negotiations would have been far different." In the face of this concession and, for a detailed analysis of those proposals which "would have been different," see Staff's Proposed Findings of Fact 1.195-1.201. Also regarding OE prohibitions on the resale of nuclear capacity by WCOE members discussed at the bottom of Applicants' Brief, p. 601, an important addition to Applicants' citations which Applicants have omitted is Lyren: Tr. 2338 (on clarification by the Board). See also Cheesman: Tr. 12,155 and Tr. 12,229.

At APFF 36.111 Applicants contend that OE indicated at the conclusion of the August 1975 WCOE meeting that it would consider a specific request for wheeling. Yet it appears that Mr. White never told WCOE that OE would consider a specific request for wheeling. (White Tr. 9706-9707). Further, WCOE representatives did not conclude that OE would in fact consider such requests for wheeling (Cheesman Tr. 12,180-Tr. 12,181). Allegedly, the willingness of OE to "consider" "specific" requests for wheeling was made to Mr. Stout of Cuyahoga Falls after the WCOE meeting, but Mr. Stout did not inform R.W. Beck of this (Cheesman Tr. 12,273), which might reasonably be expected.

In reply to APFF 36,124, OE contends that the refusal of OE to permit WCOE to "pick and choose units" did not completely eliminate access to existing OE generation. The evidence is overwhelmingly to the contrary: NRC 44, Appendix, February 29, 1975 letter from Firestone to Messrs. Duncan and Cheesman p. 1, para. 1; NRC 44, Appendix June 17, 1975 Firestone letter p. 2, para. "2"; Mayben: Tr. 12,568; Cheesman: Tr. 12,152, Tr. 12,167-8; Lyren: Tr. 2011, Tr. 2298.

At APFF 36.127 OE now characterizes the joint study as an "independent" study by Beck. See Staff's PFF 1.185-1.87 and 1.191-1.192. See also White Tr. 9783.

Supplementing APFF 37.08-37.09, it should be noted that while the Borough of Pitcairn provides electric service to residents of the Borough, so does Duquesne provide electric service to a small number of customers within the Borough. (Staff's PFF 1.026).

Supplementing APFF ...21, 37.25, 37.27, 37.28, there is competition in Pennsylvania for customers when Duquesne acquires a municipal electric system and then serves the municipal's former customers. See Fleger: Tr. 8653-8654.

Concerning the contentions in APFF 37.49 that Duquesne "voluntarily" provided emergency service to Pitcairn, the fact is that Duquesne only provided emergency service to Pitcairn after Pitcairn filed before the FPC requesting a temporary emergency interconnection (McCabe: Tr. 1653-1654) and subsequent to a meeting between the parties with the FPC Staff (NRC 212).

At APFF 37.52, Duquesne contends that termination of the bulk power for resale it provides Pitcairn is not a likelihood, although the contract between the parties permits termination upon 30 days notice as of the end of any contract year. (NRC 23). Duquesne also contends that it has offered access to nuclear facilities although the record establishes that Duquesne has not offered, communicated or suggested such policies to Pitcairn (McCabe: Tr. 1718-1719), the last remaining electric utility in the area served by Duquesne (McCabe Tr. 1690).

In reply to APFF 38.04 concerning the proposition that a group of municipal or cooperative systems could build a small coal-fired plant, Applicants have omitted the following record citations which directly go to the feasibility of such a plant: Kampmeir: Tr. 6119-6123; DJ 511, p. 92; Gerber Tr. 11,542-11,553, 11,560-11,572 (on examination by the Board); Gerber Tr. 11,572-Tr. 11,503. Also directly relevant is the testimony of Mr. Pandy that both the State of Ohio Air Pollution Regulations as well as the U.S. Clean Air Act make it difficult to install new coal-fired (or oil-fired) generation in the Painesville area. (Pandy: Tr. 3119).

III. Specific Replies To Applicants' Proposed Conclusions of Law

A. Nexus

Applicants state that there is no evidence in the record establishing the relationship between the Applicants' activities under the license and the situation inconsistent with the antitrust laws. [14/] Staff's Proposed Findings of Fact 3.01-3.16 and Proposed Conclusions of Law 7.11-7.12 clearly establish that the nexus requirement is satisfied.

Applicants once again argue that there must be a nexus between the activities under the license and each element of the situation inconsistent with the antitrust laws. [15/] As noted by the Staff before, [16/] Applicants' position on nexus has been rejected by this Board, by the Appeal Board, and by the Commission itself. For the purpose of answering Applicants' persistent position on nexus, the Staff hereby incorporates by reference its Proposed Conclusions of Law 7.11 and 7.12 and the discussion thereafter.

14/ Applicants' Joint Proposed Finding of Fact 38.01 and Conclusion of Law 38.01.
15/ Applicants' Joint Proposed Conclusion of Law 20.02.
16/ Staff's Answer to Applicants' Motions For Orders Dismissing All, or Specific, Allegations Made by NRC Staff, May 17, 1976, at p. 10.

B. Northern Pacific Railway Co. v. United States

Applicants demonstrate a fundamental misunderstanding of basic antitrust law when they argue that only restraints of trade proven to be unreasonable are unlawful and cite the Northern Pacific case[17/] to support their argument.[18/] Northern Pacific stands for the proposition that although the courts have construed section 1 of the Sherman Act to preclude only unreasonable restraints on competition, there are certain agreements or practices which

> are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness...avoids the necessity for ... economic investigation...in an effort to determine... whether a particular restraint has been unreasonable...[19/]

C. United States v. Pan American World Airways, Inc.

Applicants contend that the territorial allocation provisions of certain of Toledo Edison's wholesale municipal contracts[20/] do not constitute per se violations of the antitrust laws because those provisions are in furtherance of state law.[21/] In Cantor v. Detroit Edison Co.[22/] the Supreme Court made it clear that private action is

17/ Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958).
18/ Applicants' Joint Proposed Conclusion of Law 20.05; Applicants' Joint Brief, pp. 20, 25.
19/ 356 U.S. at 5 (emphasis added). See also Staff's discussion of Northern Pacific in the discussion following Staff's Proposed Conclusion of Law 7.07.
20/ See Staff's Proposed Findings of Fact 1.294 - 1.297.
21/ Applicants' Joint Proposed Conclusion of Law 35.12
22/ 44 U.S.L.W. 5357 (July 6, 1976).

not immune from the antitrust laws solely because it was taken in furtherance of a state requirement.[23/] Even in the absence of Cantor, however, there is no support for such a contention. United States v. Pan American World Airways, Inc.,[24/] cited by Applicants to support their contention, concerned a division of territories between competitors of equal bargaining strength[25/] which was consistent with "a definite policy of the [federal] government approving a sort of 'zoning' for the operations of the American international carriers"[26/] in the formative years of the international air transportation policy of this country,[27/] and therefore "consistent with the best interests of this country."[28/] Thus this District Court concluded that the division of territories was not a per se violation and not unreasonable "under the circumstances"[29/] of the existence of a federal policy whose importance was at least equal to that of the policy of our antitrust laws. In fact, in reviewing the District Court opinion, the Supreme Court stated that "divisions of territories [were] basic in this regulatory scheme"[30/] in the air carrier

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23/ See, specifically, the Supreme Court's statement that the careful use of language in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), setting forth the threshold inquiry in the so-called state action exemption "could not have been read as a guarantee that compliance with any state requirement would automatically confer federal antitrust immunity." 44 U.S.L.W. at 5363.

24/ 193 F. Supp. 18 (S.D.N.Y. 1961), rev'd, 371 U.S. 296 (1963).

25/ Id. at 31.

26/ Id. at 34.

27/ Id.

28/ Id. at 36.

29/ Id. at 22.

30/ Pan American World Airways, Inc. v. United States, 371 U.S. 296, 305 (1963)

field, and further noted that

> many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations that the [Civil Aeronautics] Act ... subjects to presidential rather than judicial review.

In contrast to those circumstances, the territorial allocations provision in the Toledo Edison's wholesale municipal contracts were between parties of unequal bargaining strength in an industry to which the Supreme Court has held the antitrust laws are applicable.[31/] Therefore the Panagra case should be distinguished from this antitrust proceeding.

D. Cantor v. Detroit Edison

The Staff submits that there is no pervasive economic regulation of the electric utility industry by either state or federal agencies, but even if there were, the antitrust laws would be fully applicable to the electric utility industry.[32/] Furthermore, the Supreme Court in Cantor v. Detroit Edison Co.[33/] was "asked to hold that private conduct required by state law

31/ Cantor v. Detroit Edison Co., 44 U.S.L.W. 5357, 5362 n. 35 (July 6, 1976).
32/ See Staff's Proposed Conclusion of Law 7.04 and the decision thereafter. See also Cantor v. Detroit Edison Co., 96 S.Ct. 3110, n.35 (1976).
33/ 44 U.S.L.W. 5357 (July 6, 1976).

is exempt from the Sherman Act." [34] The court declined to so hold. Rather, it stated:

> The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. [35]
>
> * * *
>
> There is nothing unjust in a conclusion that [an electric utility's participation in the decision is sufficiently significa to require that its conduct implementing the decision comparable conduct by unregulated businesses, conform able federal law. [36]

Thus it is not the law that "[p]rivate action that is in direct furtherance of a regulatory policy is lawful" [37] or that "[p]rivate action, the effect of which is to emeliorate regulatory policy, is lawful." [38]

Nor is it true that "Cantor v. Detroit Edison Co.... does nothing to undermine the Parker [39] immunity doctrine." [40] The Staff submits that Cantor, as well as Goldfarb v. Virginia State Bar, [41] clarifies the Parker v. Brown doctrine and greatly undermines the immunity which Applicants erroneously believed the Parker doctrine conferred.

34/ Id. at 5361.
35/ Id. (footnotes and citations omitted).
36/ Id. at 5362.
37/ Applicants' Joint Proposed Conclusion of Law 20.08.
38/ Applicants' Joint Proposed Conclusion of Law 20.09.
39/ Parker v. Brown, 317 U.S. 341 (1943).
40/ Applicants' Joint Brief, p. 104 n.69.
41/ 421 U.S. 773 (1975).

IV. CONCLUSION

The Staff believes that the evidence in this proceeding has clearly established that the Applicants' activities under the subject licenses will maintain and indeed exacerbate a situation inconsistent with the antitrust laws. The Staff therefore urges the Board to adopt the Staff's Proposed Findings of Fact and Conclusions of Law filed August 23, 1976 and to impose appropriate conditions on Applicants' applied for licenses as set forth in the Relief Section therein.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 22nd day of September 1976.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY BRIEF OF THE NUCLEAR REGULATORY COMMISSION STAFF in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or air-mail, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 22nd day of September 1976.

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