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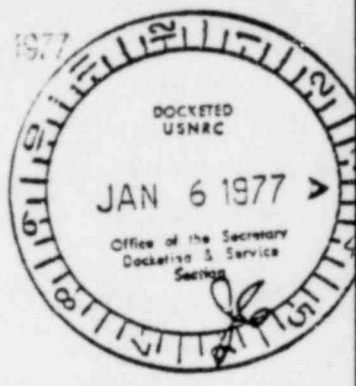

ATOMIC SAFETY AND LICENSING BOARD

Douglas V. Rigler, Chairman
John M. Frysiak, Member
Ivan W. Smith, Member

In the Matter of	)	
	)	
The Toledo Edison Company	)	
The Cleveland Electric Illuminating Company	)	Docket Nos. 50-346A
	)	50-500A
(Davis-Besse Nuclear Power Station, Units 1, 2, and 3)	)	50-501A
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A
	)	50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

INITIAL DECISION (ANTITRUST) January 6, 1977

Appearances

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For the Department of Justice

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For the U.S. Nuclear Regulatory Commission Staff

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This proceeding involves a determination pursuant to Section 105(c) of the Atomic Energy Act of 1954, as amended*, as to whether conditions must attach to the licenses of five nuclear facilities in order to prevent activities under these licenses from creating or maintaining a situation inconsistent with the antitrust laws or the policies underlying those laws. We conclude that relief is necessary and appropriate and accordingly set forth the conditions

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* 42 U.S.C. §2135(c)(1970).

to attach to such licenses.

BACKGROUND

On August 1, 1969, the Toledo Edison Company ("TECO") and the Cleveland Electric Illuminating Company ("CEI") filed a joint application before the Atomic Energy Commission for a license to construct and operate a 906 MW nuclear generation facility designated Davis-Besse Unit 1. The station is to be located in north central Ohio on the shores of Lake Erie, approximately 21 miles east of the City of Toledo. A construction permit, conditioned upon antitrust review pursuant to Section 105(c)(8) of the Atomic Energy Commission Act of 1954, was issued on March 24, 1971.

On July 6, 1971, the City of Cleveland ("Cleveland") filed a Petition to Intervene in the Davis-Besse 1 proceeding and requested an antitrust hearing. On July 9, 1971, the Attorney General advised the AEC that no antitrust hearing would be required provided certain controversies then under negotiation between CEI and Cleveland were resolved satisfactorily. On February 7, 1972, the AEC Regulatory Staff ("Staff") recommended that Cleveland's Petition to Intervene be granted and a hearing held to determine whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws.

On January 21, 1974, the AEC issued an order directing this Licensing Board* to consider Cleveland's Petition to Intervene

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* The membership of the Board has changed since the original appointment by the AEC.

in light of the Commission's two Waterford decisions* which had been issued since receipt of Cleveland's Petition to Intervene. Concurrently, the Board was directed to consider whether consolidation of two related proceedings, the Perry I and II license application and the Beaver Valley** license application, would be appropriate.

Perry involved the joint application of TECO, CEI, The Ohio Edison Company ("Ohio Edison"), Pennsylvania Power Company ("Penn Power") and The Duquesne Light Company ("Duquesne") for a permit to construct and operate two nuclear units to be located near Lake Erie, approximately 35 miles northeast of Cleveland, each having a net electrical output of 1205 MW. The Attorney General had advised the AEC on December 17, 1973, that the Perry application raised antitrust questions, the resolution of which required hearing. Petitions to intervene in the Perry proceeding were filed on February 13, 1974, by Cleveland and by AMP-O (American Municipal Power-Ohio). In addition, the State of Ohio petitioned to participate pursuant to provisions of 10 C.F.R. Section 2.715(c).

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* Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3) CLI-73-7, 6 AEC 48 (1973) (Waterford I); and CLI-73-25, 6 AEC 619 (1973)(Waterford II).

** By Order of March 15, 1974, the Petition to Intervene in the Beaver Valley proceeding was denied.

On March 15, 1974, the Board granted the petitions of Cleveland to intervene in the Davis-Besse I and Perry proceedings and, with the support of all parties, ordered the consolidation of those proceedings.

On June 25, 1974, the second prehearing conference in the consolidated Davis-Besse 1 and Perry proceeding was held to discuss the issues and matters in controversy and the scope of discovery pursuant to them. After consideration of the Joint Statement of the Staff, Justice and Intervenors, and the Applicants' Response and Objections, the Board, on July 25, 1974, issued Prehearing Conference Order No. 2. This Order established Issues and Matters in Controversy which, although formulated by the Board, were based in part upon certain joint stipulations. These issues were admitted for purposes of discovery notwithstanding Applicants' objection that the issues as set forth in Prehearing Conference Order No. 2 were too broad in nature to enable them to prepare adequately to respond to the allegations being made.

On August 9, 1974, an application was filed on behalf of Applicants Ohio Edison, CEI, TECO, Duquesne and Penn Power for a license to construct and operate two additional units, designated Davis-Besse II and III, each rated at 906 MW, to be located at the Davis-Besse site. On February 14, 1975, the Attorney General responded to this application by requesting that an antitrust hearing be held. Separate petitions to intervene were filed by

the State of [illegible] and Cleveland on March 13, 1975. On May 6, 1975, Cleveland was granted leave to intervene and Ohio was recognized as a participant.

On September 10, 1975, AMP-O moved for leave to withdraw its petition to intervene in the Davis-Besse and Perry proceedings. This motion was granted on September 18, 1975.

At the initial prehearing conference on the Davis-Besse II and III applications held on May 14, 1975, the subject of consolidation of those proceedings with the pending Davis-Besse I and Perry I and II proceedings was considered. All parties favored consolidation, although Applicants indicated a continuing reservation with respect to the statement of Issues and Matters in Controversy which had been formulated by the Board in Davis-Besse I and Perry. It was Applicants' position that although an objection of record should be noted with respect to their contention that the Issues in Controversy were framed too broadly, they were ready to proceed on the basis of those issues. Tr. of Davis-Besse II and

III, p. 10, l. 13-15; Tr. p. 12, l. 16-21.*

On July 30, 1975, the NRC ordered consolidation of the Davis-Besse II and III proceeding with the Davis-Besse I and Perry I and II proceeding.

Notwithstanding our conclusion that Applicants, through Petitions to Intervene, advice letters, and prehearing conferences, were well aware of the allegations to which they must respond, the Board took action to insure that Applicants were specifically apprised not only of the dimensions of the case against them, but in addition, were informed as to how the product of the discovery process would relate to these charges. By its Fourth Prehearing Conference Order of April 29, 1975, the Board required all opposition parties to file no later than September 5, 1975, a Statement of the Case to be Presented. Such a statement is not required by the procedural rules of the Commission but was done pursuant to to the specific requests of Applicants for this additional con-

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* During this prehearing conference, the Board canvassed the parties to ascertain what additional discovery, if any, would be required by the adoption of the Issues and Matters in Controversy established for the Davis-Besse I proceeding in the Davis-Besse II and III proceeding. Tr. of Davis-Besse II and III, p. 3-16. Based upon the response of the parties, it was the Board's conclusion that only limited additional discovery would be required and that adjustments to the discovery schedule then in effect in the Davis-Besse I proceeding would provide satisfactory opportunity for the parties to prepare for hearing while at the same time avoiding delay. Davis-Besse II and III Tr. p. 19. We are satisfied that ample opportunity was provided Applicants to consider the effect on the issues of the limited and carefully controlled additional discovery which we permitted.

cession.* Applicants were given until September 12 to respond to their opponents' September 5 filing. A prehearing conference was held on September 18, 1975 to consider Applicants' objections and comments to the opposition parties' September 5 filing. The Board indicated that opposition parties should conform the introduction of evidence to the allegations of the September 5 filing and that attempts to introduce evidence not encompassed within these filings would be conditioned upon a showing of good cause.**

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* For a comprehensive discussion of Applicants' request for this filing, see the Memorandum and Order of the Board Amending Schedule for Commencement of Hearing and Filing of Briefs dated November 21, 1975.

** On a limited basis, the Board did grant permission to opposition parties to enlarge some of the specific charges made in the September 5 filing or to present additional evidence relating to certain of the basic issues set forth in Prehearing Conference Order No. 2. On each such occasion, the Board considered Applicants' objections and the good cause showing of the amending party and made a determination as to whether and to what extent it would permit such amendments. Permission to amend was granted in instances where Applicants produced additional documents contemplated by prior discovery orders but which Applicants had failed to produce timely, or where opposition parties only recently developed specific evidence supporting charges of unlawful conduct. In each such instance, the Board considered the question of prejudice to the Applicants, if any, and whether the public interest would be adversely affected by excluding evidence relevant to the proper decision of the Issues in Controversy. On each occasion in which we permitted the amendment of the September 5 filing, we were convinced that no prejudice or, at the least, no material prejudice would result from our ruling and that there was a clear public interest requirement that the amendment be allowed. Many of these amendments related to Ohio Edison (which was one of the Applicants producing relevant discovery materials subsequent to the expiration of its discovery deadlines), and even in the case of Ohio Edison the overall effect of the evidence introduced as a result of these amendments was not material to the

(Footnote continued on next page)

Citations to the Record

Throughout this decision, the Board has used symbols and abbreviations to refer to exhibits, proposed findings of fact and the transcript. Staff papers are identified by "NRC"; The Department of Justice (Justice) by "DJ"; Cleveland by "C"; the Applicants by"App." ; Transcript as "Tr."; proposed findings of fact, "ff"; and Applicants' main brief as "App. Brief."

For convenience, the name of the witness or deponent sometimes has been listed before a reference to the transcript or exhibit; e.g., "Pandy Tr. 4896", and "Mansfield DJ 287." We frequently refer to the Staff, Justice and City together as "opposition parties."

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* (Footnote continued from preceding page)

overall result reached by this Board.

See DJ 617, a February 26, 1976 response by Applicant disclosing the existence of certain maps setting forth territorial allocation agreements between TECO and its competitors and indicating the destruction of certain relevant files in 1970 and 1971 by direction of a vice president of TECO. Obviously, Applicants could not be allowed to limit the proofs against them by failing to produce, timely, documents clearly within opposition parties' discovery requests.

In each limited instance in which an amendment was permitted, Applicants were granted, upon request, additional discovery and time to prepare a response to the amendment.

PREAMBLE

The principal issue in these proceedings is whether dominant electric companies in a relevant market area which do not compete with one another may make competitive benefits, including coordination and pooling, available to each other while denying these benefits to smaller actual or potential competitive entities within the market. This issue becomes of statutory concern to the Nuclear Regulatory Commission when the benefits to be shared or denied include power generated from proposed nuclear stations which power will have a substantial competitive impact upon the delivery and sale of electric energy in the relevant market.

SYNOPSIS

As set forth in Prehearing Conference Order No. 2, the hearing addressed the maintenance or creation of a situation inconsistent with the antitrust laws arising from the structure of the electric power industry in relevant areas of Ohio and Pennsylvania, and how the conduct of the parties affects that structure. Thus, Broad Issue "A" addressed the question of whether the structure of the relevant market and Applicants' position in that market gives them the ability, acting individually or jointly, to hinder or prevent other electric entities from achieving access to the benefits of coordinated operation and access to the benefits of economy of size of large electric generating units. If the answer to the structural question was determined to be affirmative, Broad Issue "B" then addressed the question of whether Applicants' ability has been used, is being used, or might be used to create and maintain a situation inconsistent with the antitrust laws or their underlying policies.

The Board then set forth eleven Matters in Controversy bearing upon the resolution of Broad Issues "A" and "B" including the definition of appropriate geographic and product markets in which to consider the questions posed in the two broad issues, and the extent, if any, to which Applicants stipulated dominance of bulk power transmission facilities and bulk power generation in

their combined service areas gave rise to the ability and exercise of ability to hinder competition. Matter in Controversy 10 addressed Applicants' policies with respect to providing or denying access to nuclear facilities to other electric entities and whether those policies deprived such other entities from realizing the benefits of nuclear power. Matter in Controversy 11 considered the connection between activities under the proposed licenses and the other ten Matters in Controversy.

The first Matter in Controversy was whether the combined CAPCO Company Territories (CCCT) constitute an appropriate geographic market for antitrust analysis in these proceedings.* As amplified in our discussions under finding of fact 24, we hold the CCCT area to meet the test of relevant geographic market and it is within the confines of that market that we discuss the principal issues herein. Within that market, there was stipulation, subsequently supported by the evidence, as to Applicants' dominance (market share in excess of 90%) over both bulk power transmission and bulk power generation. See finding 5, infra.

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* The Combined CAPCO (Central Area Power Coordination Group) Company Territories (CCCT) refers to the region bounded by the outer perimeters of the present service areas of the five CAPCO members (Applicants), as shown on the map submitted by CEI as Exhibit F to Information Requested by the Attorney General for Antitrust Review in connection with the Perry Nuclear Power Plant Units I and II. (The map is entitled "Principal Facilities of CAPCO as of October 31, 1969" and was prepared by Duquesne).

We also have concluded (finding 21, infra) that bulk power services, regional power exchange transactions and retail power transactions constitute relevant product markets.

The existence of a situation inconsistent with the anti-trust laws turns largely upon the fashion in which Applicants deal with one another in comparison to their treatment of other electric entities in the CCCT area. The five Applicants are the sole parties to a comprehensive power pooling arrangement, the CAPCO agreement, which provides that operation and development of their systems be conducted to the maximum extent possible as a unified system. CAPCO companies are signators to a broad Memorandum of Understanding which has been supplemented by a series of individual agreements relating to transmission and operation of the respective systems of individual Applicants. The five nuclear stations involved in this license proceeding all are being constructed pursuant to the master CAPCO plan which calls for joint planning, construction and ownership of a series of new generating stations. Applicants also jointly are planning the construction of a series of high voltage transmission lines to add to the extensive network which now provide the only means of transmitting large quantities of electricity within the CCCT.

The combined generating capacity of the Applicant companies is approximately 13,000 megawatts. The addition of the five nuclear units involved in this proceeding will add another 4,500 MW to

overall generating capacity within the area; and, notwithstanding the extensive capital outlays associated with the construction of these units, Applicants are of the opinion that these units will produce economies of scale and will provide for long term generation costs well under average system costs which could be obtained either compared to the cost of operating their present generating equipment or in comparison to new generation relying upon fossil-fueled units. Thus, the operation of the Davis-Besse and Perry stations will have a substantial effect upon both the supply and the cost of electricity within the CCCT area.

In connection with their joint participation in the CAPCO pool, Applicants have agreed to and have extended to one another extensive benefits resulting from reserve sharing, emergency power interconnection and sales, staggered construction, economy interchanges, firm power sales and third party wheeling. Either by agreement or inaction, Applicants have not engaged in competition with one another in the sale of electric energy in the State of Ohio and have relied upon provisions of Pennsylvania law designating service territories for utility companies in following a policy of non-competition among and between electric entities in the State of Pennsylvania. Thus, the benefits of the CAPCO pool have been shared by companies which, in any meaningful sense, do not compete with one another, and some of which have avoided competition pursuant to agreement and understanding between themselves.

Applicants individually and through their combination as the CAPCO group, with minor exceptions, have refused to make available to other electric entities in actual or potential competition with individual Applicant companies the benefits achieved through membership in CAPCO.* During the period immediately preceding the formation of CAPCO (1967), and continuing thereafter, Applicants' dominance of electrical generation in the CCCT area has continued to grow. This increase in market share has not been passive or accidental but has been the result, at least in part, of policies such as refusing to engage in third party wheeling, emergency interconnection or reserve sharing with non-CAPCO entities in the CCCT. These policies caused, or contributed substantially to the decision of certain isolated generating systems within the CCCT to abandon electric generation.**

Certain of the actions employed by Applicants to increase

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* Certain Applicants refused to make available to competing electric entities many of these benefits such as third party wheeling, reserve sharing and emergency or economy interchanges, even prior to the formation of CAPCO, while at the same time extending these benefits to each other.

** We do not find that Applicants' policies were solely responsible for the demise of many of these isolated systems. Some of these systems may have been too small to operate efficiently and economically. Other systems may have succumbed to the prolonged effects of management inefficiency or failure to maintain and service their electric plants. The problem raised by the antitrust laws, however, arises from evidence of several activities of Applicants which hastened or contributed in a substantial manner to the elimination of these electricity generating competitors.

their dominance in and of themselves constitute violations of the antitrust laws. These include territorial allocations, attempts to fix prices, refusals to deal and group boycotts. Applicants' mutually supporting actions have increased the dominance of each individual Applicant within its own service territory and their reinforcing actions thus may constitute monopolization, attempted monopolization and a combination to monopolize. Dominant companies whose increased dominance in relevant markets is not thrust upon them but results from a continuing series of collective and individual actions may be said, within the context of the issues in controversy, to be using their dominance to hinder or impede the ability of other electric entities in those markets to compete.

The situation as described above is inconsistent with the antitrust laws; and, where the plant construction of a series of nuclear generating stations is undertaken in a fashion calculated to further increase that dominance, activities under the license can be said to maintain a situation inconsistent with those laws. Even were we to find that despite Applicants' dominance they had undertaken no anticompetitive acts so that no present situation inconsistent with the antitrust laws exists, there would be concern if the proposed nuclear construction suddenly reduced or hindered the ability of lesser entities to compete with Applicants. Artificial barriers imposed by Applicants to prevent competitors from gaining access to or the same type of benefits from the nuclear

plants as they contemplate for themselves would result in the creation of a situation inconsistent with the antitrust laws.

This synopsis sets forth succinctly the considerations which apply to our resolution of the Issues and Matters in Controversy. Our conclusion that Applicants have a prolonged history, both individually and collectively, of misuse of their dominant position within the CCCT and their respective service areas to achieve anticompetitive results and what to us is a clear nexus between activities under the license and the anticompetitive situation Applicants have nurtured within the CCCT convinces us that the imposition of license conditions is necessary to effect the statutory purpose of Section 105(c).

LEGAL STANDARDS

As we commence our review of the record and findings of fact, we shall enumerate briefly the legal standards to be applied in resolving the Issues in Controversy. Our charter, of course, is derived from Section 105(c) of the Atomic Energy Commission Act of 1954 as amended ("the Act").* Section 105(c) requires the Commission "to make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws." A situation is not limited to a particular anticompetitive act but may be comprised of "patterns of anticompetitive conduct." Kansas Gas & Electric Co. and Kansas City Power & Light Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 572 (1975).** Thus, in Waterford II, supra, note p. 3, the Commission noted that its statutory mandate to consider antitrust issues is not "automatically limited to the construction and operation of the facility to be licensed." Rather, "the relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case." ***

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* 42 U.S.C. Section 2135(c)(1970).

** See also Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), LPB-73-5, RAI-73-2, 85, 86 (1973) holding that it is the competitive situation as a whole with emphasis on the structure of the market rather than isolated individual acts which determine whether a situation inconsistent with the antitrust laws exists.

*** Waterford II at 620-21.

It is within this framework that we approach our task of deciding whether activities under the license will create or maintain the prohibited situation.*

The Issues in Controversy focus upon the exclusionary activities of Applicants. The stipulation of their dominance renders any exclusionary conduct suspect. United States v. Philadelphia National Bank, 374 U.S. 321, 363, 371 (1963). Joint activities to restrain or limit competition or to exclude competitors and would-be competitors violate Section 1 of the Sherman Act. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-25, n. 59 (1940); Northern Pacific Railroad v. United States, 356 U.S. 1 (1958). When companies possessing the dominant share of a relevant market act jointly in these respects, Section 2 of the Sherman Act is violated. American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Griffith, 334 U.S. 100, 104-108 (1948); United States v. Paramount Pictures, 334 U.S. 131, 154, 155, 160, 165, 167-73 (1948). The demise of competition in the affected market need not be accomplished instantaneously or as a result of any particular act. "Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by

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* The Congressional intent not to grant the valuable asset of nuclear licenses where they would further inhibit competition is not contingent upon proof of actual violation. The antitrust laws encompass Section 5 of the FTC Act and its prohibition on unfair trade practices. See Joint Committee Report, S. Rep. No. 91-1247, 91st Cong., 2nd Sess. (1970)(hereinafter "Joint Committee Report"), p. 14; FTC v. Cement Institute, 333 U.S. 683 (1948); FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953); FTC v. Brown Shoe Co., 384 U.S. 316 (1966); Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965).

driving them out in large groups." Klor's v. Broadway-Hale Stores, 359 U.S. 207, 213 (1959).

Section 1 Activities

With respect to conspiracies prohibited by Section 1 of the Sherman Act, it is established that the agreement or understanding to accomplish the act in restraint of trade itself constitutes a complete violation and that no overt acts in furtherance of the conspiracy need be alleged or proved. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-25, n. 59 (1940); United States v. Trenton Potteries, 273 U.S. 392, 402 (1927); Nash v. United States, 229 U.S. 373, 378 (1913). Since the creation of potential power to injure competition standing alone may act to restrain competition, it is no defense to assert that no steps were taken to carry out the illegal agreement. United States v. Central States Theatres Corp., 187 F. Supp. 114, 147 (D. Neb. 1960). However, proof concerning the accomplishment of the objectives of a conspiracy may be persuasive evidence of the existence of the conspiracy itself. American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); Eastern States Retail Lumber Dealers Assn. v. United States, 234 U.S. 600, 612 (1914).

Uniting in support of the anticompetitive purpose rather than entry into a formal agreement is the measure by which conspiracies and combinations are to be analyzed. Interstate Circuit v. United States, 306 U.S. 208, 227 (1939); United States v. Masonite,

316 U.S. 265, 275 (1942). Consultation between and among the conspirators with respect to particular acts is not a necessary element to establish a conspiracy. A direct exchange of words is not required and the essential agreement, combination or conspiracy may be implied from a course of dealing or other circumstances. Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210 (1921).

Per Se Offenses

Although not only violations of the antitrust laws are encompassed within the Commission's mandate on antitrust review (which includes activities of Applicants which are inconsistent with the policies underlying the antitrust laws), our task is made easier by reference to certain activities which, if found to have occurred, constitute per se violations of the antitrust laws. These include practices:

> . . . which because of their pernicious effect on competition and lack of any redeeming virtue 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.

Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958). A specific intent to restrain trade is not an element of a per se offense. The objectives or motives of the conspirators are not relevant or material if the actions undertaken constitute per se violations of the Sherman Act.

Among the activities condemned as per se violations are territorial and customer allocations among and between competitors.

United States v. Topco Associates, 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Northern Pacific Ry. v. United States, 356 U.S. 1 (1958); Otter Tail Power Co. v. United States, 410 U.S. 366, 378 (1973).

Another activity deemed per se illegal is that of price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Northern Pacific Ry. v. United States, 356 U.S. 1.

Group boycotts or concerted refusals to deal also are forbidden and are not "saved by allegations that they were reasonable in the specific circumstances." Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

Rule of Reason

In addition to those activities deemed per se unreasonable and therefore in violation of the antitrust laws, other agreements and combinations may be found to violate the Sherman Act if, upon analysis, it is determined that the agreement imposes an unreasonable restraint on trade. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). In circumstances where the challenged activity does not fall into the category of a per se offense, we are required to determine whether the activities are intended to effect some legitimate business purpose of whether the primary thrust of the agreement is to produce an adverse effect upon competition.*

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* In our findings, we hold certain of Applicants' activities to be in the nature of per se violations of the antitrust laws. In other instances we have held that the anticompetitive purpose and result of particular activities is unreasonable and therefore violative of the Sherman Act notwithstanding the existence of certain neutral or not anticompetitive aspects of these activities.

The "inherent nature or effect" of a contract, agreement or combination or its "evident purpose" to restrain trade injuriously may violate the statute. United States v. American Tobacco Co., 221 U.S. 106, 179 (1911). Illustrative of unreasonable agreements are restraints in alienation, United States v. Arnold Schwinn & Co., 388 U.S. 365, 379 (1967), and refusals to deal.

We note also that activities, each reasonable in isolation, may violate the Sherman Act if their collective or bundled effect is to work an unreasonable restraint on trade. United States v. International Business Machines, 1975 Tr. Cas. ¶60,445 (S.D.N.Y. 1975).

Even unilateral refusals to deal may violate the Sherman Act if the refusal stems from a predatory purpose and involves coercive tactics with monopolistic ends. Lorain Journal v. United States, 342 U.S. 143 (1951). Where the refusal to deal is made by only one party, that refusal may be outlawed if it is the product of joint consultation among competitors or if it involves the exchange of information by like-minded companies to achieve a particular exclusionary result. United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Griffith, 344 U.S. 100 (1948).

Section 2 Offenses - Monopolization

The offense of monopoly under Section 2 of the Sherman Act has two elements:

> (1) The possession of monopoly power in the relevant market.
>
> (2) The willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). In Grinnell, the Court reiterated* its definition of monopoly power as "the power to control prices or exclude competition" and "the existence of such power ordinarily may be inferred from the predominant share of the market." Id at 571.

In situations where the existence of market power may be ascertained, the use of that monopoly power to foreclose competition or gain a competitive advantage violates the antitrust laws. Otter Tail v. United States, 410 U.S. 366, 377. Of vital importance with respect to the Issues in Controversy in this proceeding is the Court's affirmance in Otter Tail of the District Court determination that a utility was engaged in the illegal use of monopoly power where it had

> . . . a strategic dominance in the transmission of power in most of its service area and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply. 331 F. Supp. 54, 60 (D. Minn. 1971)

The use of monopoly power to destroy threatened competition

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* See United States v. duPont & Co., 351 U.S. 377, 391 (1956).

of "the attempt to monopolize" clause of Section 2 of the Sherman Act.* Id at 377. Also important is our consideration in this proceeding of the Court's holding in Otter Tail that agreements not to compete with the aim of preserving or extending a monopoly are illegal.**

In finding that a particular practice violates Section 2 of the Sherman Act, it is not necessary for the transgressor to have achieved complete monopoly. Otter Tail v. United States, supra; Associated Press v. United States, 326 U.S. 1 (1945).

Moreover, an actual effect on prices or exclusion of competition need not be proved.

> . . . [T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.

American Tobacco v. United States, 328 U.S. 781, 811 (1946).

A company possessing monopoly power cannot willfully act to maintain or expand that power without violating the antitrust laws. The willful maintenance of monopoly power can be established merely by showing that "transactions neutral on their face" have an exclusionary effect on the market, without a specific showing of

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* Lorain Journal v. United States, 342 U.S. 143, 154; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375.

** Citing Schine Chain Theatres v. United States, 344 U.S. 110, 119.

anticompetitive motivation. United States v. Aluminum Company of America, 148 F.2d 416, 432 (2nd Cir. 1945)*; United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 346 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954). Thus, a monopoly which results from a party's conduct is sufficient for a finding of monopolistic intent. United States v. Griffith, 334 U.S. 100, 105-106 (1948).

The existence of a business motivation or justification cannot legitimate the misuse of monopoly power. United States v. Arnold, Schwinn & Co., supra at 375; Otter Tail Power Co. v. United States, supra, at 380 (1973). None of the transactions engaged in by a defendant need be illegal in and of themselves if they are part of a course of conduct which maintains a monopoly. See American Tobacco v. United States, supra; Aluminum Company of America, 148 F.2d at 431-32; United Shoe, 110 F. Supp. at 342.

Section 2 of the Sherman Act also prohibits conspiracies and combinations to monopolize. American Tobacco Co. v. United States, 147 F.2d 93, 111 (6th Cir. 1944), aff'd, 328 U.S. 781 (1946). A combination or conspiracy to monopolize would include an agreement or understanding which was intended to, or by its inherent nature would, control prices or exclude competitors in any relevant

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* See Joint Committee on Atomic Energy, Hearings on S.3323 and H.R. 8862 to Amend the Atomic Energy Act of 1946, 83rd Cong. 2d Sess., Part 2, at 441-443, 495-498, 629, 641-642 (1954).

market.* It is not necessary that the agreement was intended to, or by its inherent nature would, exclude all possible competition. American Tobacco v. United States, 328 U.S. 781, 788-789 (1946); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961). An intent to exclude competition or control prices can be inferred from the conspiractors' course of conduct if they possess a predominant share of a market in relation to their competitors. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); United States v. Paramount Pictures, 334 U.S. 131, 174 (1948); United States v. Griffith, 334 U.S. at 107, n. 10 (1948); American Tobacco v. United States, 328 U.S. at 796-97. Selective refusals to deal can be exclusionary and therefore violate Section 2 of the Sherman Act if the non-dealing firm possesses monopoly power. A company with a lawful monopoly in one market may not expand that monopoly in another market by a selective refusal to deal. Lorain Journal v. United States, 342 U.S. 143; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

Refusals to deal whether unilateral or group imposed violate Section 2 of the Sherman Act where the refusing company(s) denies access to a "bottleneck" resource. "Bottleneck" resources are those to which access is essential if the utilizing party is to

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* An agreement or conspiracy which violates Section 1 may also violate Section 2. See United States v. Socony-Vacuum Oil Co., 310 U.S. at 220, n. 59; United States v. Griffith, 334 U.S. at 106.

function as an effective competitor. When combinations of companies give each other access to these facilities and deny access to their lesser rivals, a Sherman Act Section 2 violation may occur. Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal Railroad Association, 224 U.S. 383 (1912); Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484 (1st Cir. 1952), cert. denied, 344 U.S. 817 (1952); Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973).

The competitive advantage afforded by the "bottleneck" service need not be indispensably necessary to competitive survival; it is sufficient that without it the excluded competitor is at a "competitive disadvantage." Associated Press v. United States, 326 U.S. at 17-18. This was stressed by Judge Learned Hand for the three-judge District Court in Associated Press, in a passage quoted with approval by the Supreme Court:

> Most monopolies, like most patents, give control over only some of the means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose . . . . And yet that advantage alone may make a monopoly unlawful. 326 U.S. at 17, n. 17.

Unfair Trade Practices

Unfair trade practices may result from the imposition of a "price squeeze" on competitors. A price squeeze occurs when the differential between wholesale rates and retail rates prevents

an entity purchasing electricity at wholesale from competing with its supplier for retail customers. The retail competitor most often affected is the competitor for industrial consumers. Deliberate imposition of a "price squeeze" may be classified as an unfair trade practice. FPC v. Conway, 425 U.S. 957, 99 S. Ct. 1999 (1976); City of Mishawaka, Indiana v. Indiana & Michigan Electric Co., 1975 CCH Tr. Cas. ¶60,318 (N.D. Ind. 1975).

An unfair trade practice might occur through a refusal to establish a synchronous interconnection with electric entities engaged in the generation and sale of electricity at retail while agreeing to establish such interconnections with self-generating industries not engaged in the retail sale of electricity. Likewise, insistence by a wholesale supplier upon ownership and control over connection facilities paid for by the seller's customers may constitute an unfair trade practice in circumstances where the integrity of the selling system's facility would not be adversely affected by customer ownership or where operational safety reasons offered in support of the ownership demand are found to be artificial, contrived or unreasonable.

The imposition of unfair or unworkable conditions in a contract also may constitute a refusal to deal and render such conditional "offers" to deal mere sham.

FINDINGS OF FACT

1. Applicants involved in this proceeding are five investor-owned electric utilities:

a) The Toledo Edison Company (TECO) - The Toledo Edison Company is a vertically integrated utility serving an area of 2,500 square miles in northwest Ohio. Its 1973 electric operating revenues were $126,415,000 and its net income exceeded $23,500,000. Its 1973 net generating capacity was 1045 MW served by 493 pole-miles of company owned transmission line of 66 KV and above. NRC 207, p. 26-27, NRC 157.

b) The Cleveland Electric Illuminating Company (CEI) - The Cleveland Electric Illuminating Company is a vertically integrated utility serving an area of 1700 square miles in northeastern Ohio. Its 1973 electric operating revenues were $293,000,000 and its net income exceeded $49,000,000. Its 1973 net generating capacity was 3896 MW served by 632 pole-miles of company owned transmission line of 66 KV and above. NRC 207; NRC 157.

c) Duquesne Light Company (Duquesne) - The Duquesne Light Company is a vertically integrated utility serving an area of 800 square miles in the Pittsburgh area. Its 1973 electric operating revenues were in excess of $241,753,000 and net income exceeded $51,800,000. Its 1973 net generating capacity was 2518 MW served by 380 pole-miles of company owned transmission line of 66 KV and above. NRC 207; NRC 157.

d) The Ohio Edison Company (Ohio Edison) - The Ohio Edison Company is a vertically integrated utility serving an area of 7463 square miles in central and northeastern Ohio. Its 1973 electric operating revenues were in excess of $383,238,000 and its net income exceeded $16,135,000. Its 1973 net generating capacity was 3650 MW served by 2795 pole-miles of company owned transmission line of 66 KV and above. NRC 207; NRC 157.

e) Pennsylvania Power Company (Penn Power) - The Pennsylvania Power Company is a vertically integrated utility serving an area of 1515 square miles in northwestern Pennsylvania. Its 1973 electric operating revenues were $53,742,000 and its net income exceeded $8,600,000. Its 1973 net generating capacity was in excess of 608 MW served by 453 pole-miles of company owned transmission line of 66 KV and above. NRC 157.

Penn Power is a wholly owned subsidiary of Ohio Edison and for many years has been operated with Ohio Edison as a single integrated system. App. 214; White, Tr. 9495-96. There would be only one company were it not for the fact that both Ohio and Pennsylvania required utility service at retail to be provided by domestic corporations. White, Tr. 9496-9650. The two companies are operated without any significant policy differences other than those required by state law. White, Tr. 9650.

CAPCO

2. Since September 14, 1967, the five Applicant companies have been parties to a pooling and coordination agreement entitled CAPCO* Memorandum of Understanding. NRC 184. In 1973 the total CAPCO net dependable capacity was 11,735 MW transmitted over a system consisting of 4,753 pole-miles of transmission line 69 KV and above. CAPCO structure and organization is set forth in NRC 214.

3. The CAPCO pool was formed to enable Applicants to coordinate installation of generation and transmission in order to further reliability and to take advantage of scale economies. NRC 184, p. 1; Fleger, Tr. 8617; Schaffer, Tr. 8537; White, Tr. 9498, 9712-14; Williams, Tr. 10,351-52; App. 122, p. 9 (Firestone); App. ff 33.11.

4. To achieve these goals, Applicants engage in a construction program of jointly committed generating units under a one-system planning concept. NRC 184, Section 2.2; Schaffer, Tr. 8535; App. 122, p. 9-10 (Firestone); NRC 205, p. 11-12 (Mozer); App. ff 33.12, in part. The five nuclear facilities which are the subject of this proceeding are part of a larger 14 facility construction program implementing the CAPCO planning guidelines. NRC 158,

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* Central Area Power Coordination (Group).

question 12; App. 122, p. 13-14; App. ff 33.13. Complementing the generation construction program is another joint program, again making use of the one-system concept to construct sufficient transmission facilities to permit performance of the arrangements described in the CAPCO Memorandum of Understanding.* NRC 184, section 4.3; NRC 185, section 1.01; Schaffer, Tr. 8550; App. 122, p. 11; Applicants Proposed Finding of Fact 33.14, in part.**

5. Within their respective service areas, each individual Applicant is dominant with respect to generation, transmission, and sale of electric energy.

a) Generation. In 1973, CEI controlled 94.11% of all generating capacity in its service area (DJ 587, p. 65(a)); Duquesne 99.90% (DJ 587, p. 74); Ohio Edison 96.61% (DJ 587, p. 69, NRC 164, pp. 4-5); Penn Power 100% (DJ 587, p. 69, NRC 166, pp. 4-5); Ohio Edison and Penn Power 97.08% (DJ 587, p. 69); TECO 95.68% (DJ 587, p. 73).*** In 1973, Applicants controlled 95% or more of

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* Applicant Ohio Edison has described these transmission facilities as the "backbone" of the CAPCO system. NRC 157, Ohio Edison Annual Report 1973.

** Prior to January 1, 1975, Applicants coordinated their operations by means of previously executed bilateral agreements between or among Applicants. App. 122, p. 15-16; NRC 205. Subsequent to January 1, 1975, the CAPCO basic operating agreement, NRC 202, became effective and governs relevant operations of the Applicants. App. 122, p. 11-12, 16; NRC 202, section 1.01, 20.01; Firestone Tr. 9234-38; App. ff 33.16, in part.

*** The exhibits upon which these figures are based exclude sales and generating capacity of Buckeye Power in the service areas of Ohio Edison and TECO.

all existing generating capacity in the CCCT (DJ 587, p. 76).*

b) Transmission. CEI controls 96.8% of all transmission facilities 66 KV and above within its service area; Duquesne 100%; Ohio Edison and Penn Power 99.8%; TECO 99.2%. On a combined basis, Applicants control 99.3% of transmission facilities 69 KV and above in the CCCT (1973 figures)(Guy, NRC 133, p. 27; Hughes, NRC 207, pp. 26-27).

c) Retail Sales. In 1973, CEI accounted for 96.41% of the retail sales of firm power in its service area (DJ 587, p. 65(a)); Duquesne 99.93% (DJ 587, p. 74); Ohio Edison 94.17% (DJ 587, p. 69, NRC 164, p. 22); Penn Power 96.95% (DJ 587, p. 69, NRC 166, p. 22) and TECO 94.55% (DJ 587, p. 73).** Collectively, Applicants accounted for 95% of retail sales of firm power in the CCCT in 1973 (DJ 587, p. 76).***

d) Wholesale Sales. In 1973, CEI accounted for 96.41% of firm power sales at wholesale for resale within its service area (DJ 587, p. 65(a)); Duquesne 100% (DJ 587, p. 69; NRC 162, p. 22);

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* There is evidence of record concerning Applicants percentage of generation which differs slightly, though insignificantly, from the percentages set forth above; CEI controlled 94.4%; Duquesne 100%; Ohio Edison 97.9%; Penn Power 100%; TECO 96.1% and the CAPCO collectively 97.1% (Hughes, NRC 207, pp. 26-27; Guy, NRC 133, p. 28).

** See Footnote *** preceding page.

*** This percentage figure does include Buckeye Power sales and generating capacity.

Ohio Edison and Penn Power 99.03%, DJ 587, p. 69; and TECO 98.60%, DJ 587, p. 73.* Applicants' combined sales of wholesale sales for resale accounted for 97.06% of all such sales made in the CCCT in 1973, DJ 587, p. 76.

Thus, there is ample support in the record for the stipulation of Applicants' counsel that:

> [E]ach of the applicants dominate [sic] the generation of bulk power in their service areas . . . . Each of the applicants is dominant as to the generation of power in their service areas . . . . I don't think we could dispute that even if we wanted to. Tr. 440-41,

and

> Each of the applicants is clearly the largest in its service area in terms of miles of transmission line and in terms of capacity of its transmission lines. Tr. 448.

6. Pooling carries with it benefits of coordinated operation and coordinated development.** Slemmer, App. 121, p. 8. All Applicants recognized that the financial viability and the reliability of each of their individual systems would be enhanced through pooling arrangements. Williams, Tr. 10,351-52. Moreover,

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* See Footnote ** on preceding page.

** By coordinated operation is meant:

> . . . such activities as interconnection, reserve sharing, transmission services, integration of generation resources, and the exchange or sale of firm power and energy, deficiency power and energy, emergency power and energy, surplus power and energy, economy power and energy, maintenance power and energy, and seasonal and diversity power and energy. Kampmeier DJ 450,pp.10-13; Mayben C 161, p.17; Slemmer App. 121, pp.8, 15-16. "Coordinated development" includes but is not limited to joint planning and development of generation and transmission facilities. Kampmeier DJ 450,pp.9, 14-15; Mayben C 161, p.18.

the Northeast electrical blackout of 1960 served as an impetus for electric utilities to enter into at least limited pooling arrangements which would provide for emergency interconnection. These efforts were encouraged by the Federal Power Commission. Firestone, App. 122, p. 4-5; Slemmer, App. 121, p. 20-21.

7. The pooling arrangements contemplated by the CAPCO group, however, were more comprehensive in nature and intended effect than merely to provide for emergency service. Among the principal objectives were arrangements for the sale of partial firm power from one entity to another during periods of shortage, or maintenance outages or to permit staggered construction. Williams, Tr. 10,352; Firestone, App. 122, p. 11, 12, 15-17. Staggered construction permits individual utilities to purchase unit output or fractional shares of large generating stations with the remaining output assigned to other pool members so that each company can obtain the benefits of economies of scale associated with the construction of large units even though its anticipated needs and load growth would not permit or require the construction of a large scale unit. Williams Tr. 10, 351-52; Hughes, NRC 207, p. 12-13. Nuclear units which Applicants expect to provide low cost base load power offer special opportunities for CAPCO member companies to achieve the benefits of economies of scale. As Dr. Hughes testified:

> Nuclear power has different economic characteristics from other generating sources, characteristics which give nuclear units an advantage in particular

> situations. For instance, nuclear units have particularly low operating costs making them highly suitable for base load operation. Nuclear units also differ from other generating modes with respect to their environmental effects, safety features, the reliability of fuel supply and other factors.
>
> The fact that applicants are adding these units rather than alternative generating sources is an indication that the nuclear units were viewed by the applicants as superior to the alternatives available at the time of decision. Otherwise, the alternatives would have been chosen. Indeed, applicants' own documents* indicate they have believed nuclear generation to be a distinctly superior choice for expanding base load capacity over the fossil-fueled alternatives. To the extent that this belief is correct, the nuclear units will contribute to the effectiveness of the applicants' bulk power supply systems and enhance the economic advantage these systems enjoy over alternative sources, thus enhancing their market power.

In the absence of the CAPCO agreement, these CAPCO member companies could not achieve the same economies of scale as they are able to by virtue of the CAPCO staggered construction agreements.

8. An integral part of the plan to provide economies of scale in the generation of electric energy is the agreement among CAPCO members to transmit power between and among their

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* CEI Annual Report for 1972, p. 11, and "CAPCO Base Load Generating Capacity Requirements Following Perry #2, 1981-1984," Planning Committee Report #5, June 14, 1973.

respective systems.* This transmission is necessary in order to make available to co-owners the output of the various CAPCO generating stations including the Davis-Besse and Perry nuclear units. Without the construction of extra high voltage transmission and without the commitment to make transmission over these lines available to the other members of the CAPCO pool, the advantage of utilizing nuclear units for low cost base load power would be reduced. This in turn would affect the overall cost of production of electric energy to the respective CAPCO member companies which in turn would affect the rates at which these companies sell power to their customers. Thus, there is a discernable relationship between the CAPCO agreement for joint ownership of nuclear facilities and use of high voltage transmission lines and the competitive stance of the individual members of CAPCO. These advantages were known to and recognized by Applicants. NRC 157, Ohio Edison Annual Report 1973.

9. Although access to transmission facilities is a necessary concomitant of reliable and economic energy production, Kampmeier, DJ 450, p. 51; Mozer, NRC 205, p. 78, small systems frequently find it infeasible to construct duplicative transmission facilities.

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* Of course, the establishment of a physical interconnection is an essential first step in providing access to other sources of power. Williams, Tr. 10,353. Conversely, refusal to interconnect denies generating entities of the opportunity to obtain the benefits of coordinated development and operation.

Both economic and environmental considerations prevent such construction. Applicants' construction of the high voltage transmission grid necessitated in large part by the Davis-Besse and Perry plant additions, together with the existence of excess capacity on their present systems, DJ 358, render the construction of duplicative transmission lines essentially impossible. Kampmeier, DJ 450, p. 38; Mozer, NRC 205, p. 57-61, 65-68; Tr. 3271, 3356-57; Caruso, Tr. 10943-10956. Both Ohio* and Pennsylvania** require environmental review with respect to the construction of new transmission facilities.

10. The inability to obtain access to the benefits of coordinated operation and coordinated development because transmission is not available for purposes of power exchange can serve as a severe competitive impediment to entities lacking that access. As the Staff's economic expert Dr. Hughes noted:

> Control over transmission is important because transmission is an essential resource that can constitute a bottleneck limiting the ability of affected power systems to achieve the potential economies of scale, integration, and coordination of bulk power networks.

Hughes, NRC 207, p. 13.

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* Ohio Revised Code Section 4906.01, 4906.04, 4906.10.

** Department of Environmental Resources v. Public Utility Commission, 335 A.2d 860 (1975).

11. In addition to the utilization of individual company transmission lines as part of the CAPCO arrangement for the production and transmission of low cost nuclear energy, the CAPCO companies also utilized their high voltage transmission to afford each other additional benefits such as the sale of economy energy.* Further, CAPCO member companies were willing to and by contract are committed to engage in wheeling** for one another.*** NRC 194, p. 18; NRC 185, Art. 1, 5; Rudolph, DJ 558, p. 213-14; Masters, DJ 567, p. 37-38; p. 44-45; Sullivan, DJ 578, p. 238-40; Schaffer, Tr. 8552, 8580-82; 8604-06; Frederickson, DJ 573, p. 177-78; Masters,

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* Economy energy reflects the purchase by one system from another of electrical energy in circumstances in which the generating system's incremental cost of production is less than that of the purchasing system. The usual manner in which such sales of economic energy are made is on a "split the savings" basis in which the price represents the average of the cost of production to the selling system and the cost of production of the purchasing system. Thus, each party to the transaction realizes a financial benefit.

** Although different witnesses defined third party wheeling using different words, we found there to be no substantial difference in concept. We may utilize the definition set forth in the 1970 National Power Survey of the FPC which defines wheeling as "Transportation of electricity by a utility over its lines for another utility."

*** At least two Applicants, CEI and Duquesne, are dependent upon transmission services from adjacent utilities to obtain power generated from their own plants which are located beyond their services areas. Dempler, Tr. 8807; Bingham, Tr. 8232-33.

DJ 567, p. 37-38; 42-43; Lindseth, DJ 568, p. 25; Keck, DJ 576, p. 105-06. If low cost energy is available outside of tne CAPCO system, a CAPCO member company desiring to purchase such energy can request other members of the CAPCO pool to make available transmission facilities necessary to complete the transaction.*

12. Transmission facilities of CAPCO member companies also may be made available to assist or provide for the flow of energy between systems outside of CAPCO. Interconnections with outside systems and pools are operated in an open position and synchronized fashion so that energy continually is flowing into and out of the CAPCO system depending upon the generation and load occurring in neighboring systems. Power flows throughout the CAPCO system are monitored, and this information is available for billing purposes to compensate for sales of electrical energy and the use of transmission services. Bingham, Tr. 8211-14.

13. Operation of substantial power pools through closed switch interconnections provides an opportunity to absorb instantaneous load shifts caused by the introduction of a new load or the sudden outage of a generating facility by dispersing the additional power requirement among several systems.** The ability of interconnecte

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* This assumes that capacity is available on the lines of the member company being asked to provide the transmission service. In point of fact, CAPCO companies have engaged in this type of wheeling for one another. Masters, DJ 567, p. 44, 45; Schaffer, Tr. 8552.

** Footnote on next page.

systems to absorb instantaneously large increases in load detracts from Applicants argument that engineering and safety reasons preclude operating a closed switch interconnection with small generating entities in the CCCT. Bingham, Tr. 8261.65.

14. There is no evidence that since at least as early as 1965 any Applicant company:

a) has engaged in any program of staggered construction with any competitive electric entity within its service area;

b) has engaged in any form of third party wheeling to provide power to any electric entity within its service area.

c) has engaged in any sale or purchase of economy energy with any electric entity within its service area.

15. At the time of formation of CAPCO, the advantages of coordinated development and coordinated operation were known to and anticipated as benefits of association by the CAPCO member companies. Further, the existence of competitive systems within the CCCT also was known during CAPCO's formative period. The difficulties of operating in isolation and the reduction in competitive potential also were understood by Applicants. White, DJ

** Footnote from preceding page.

CEI's engineering witness, Mr. Bingham, testified to an instance in which the nationally famous 1000 MW "Big Alice" generating unit of Con Ed went off line and the effect was felt for sizable distances. Mr. Bingham recalled an immediate 200 MW change in flow on one of the CEI lines with which it was interconnected with other systems. Tr. 8262-63.

572, p. 168.*

16. For virtually all non-CAPCO systems in the CCCT area which wish to acquire bulk power and energy from non-CAPCO sources that would compete with supplies from CAPCO systems, cooperation of one or more Applicants is a prerequisite to such competition. Hughes NRC 207, p. 39-40.

17. In practice, coordination does not rule out a useful role for competition. Power systems can and do choose between different alternatives in putting together the overall power supply package on which they rely. For a large area, there are often many ways of developing an efficient overall bulk power supply plan or pattern of development. The existence of a diversity of approaches and the freedom to shop for options provide a degree of competitive stimulus to search for new and better power supply alternatives. Hughes NRC 207, p. 40.**

18. There has been a substantial contrast and discrepancy between the bulk power services and pooling arrangements Applicants

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* Q: In terms of being able to serve new loads coming in quickly, would it be fair to say that an isolated system is at a disadvantage, particularly if it is a small isolated system?

A: Sure.

Schwalbert DJ 577, p. 19.

** See also Id at 41.

have been willing to make available to one another either as a result of the CAPCO agreement or as a result of prior understandings and agreements between individual Applicant companies and what they have been willing to make available to other electric entities within the CCCT.

19. The dominant companies within the CCCT are the five CAPCO companies and each is dominant within its own service area. These companies have been willing to deal with each other in a more favorable basis than they have with competitive electric entities within the CCCT and/or their respective service areas.

RELEVANT MARKETS

20. Matter in Controversy No. 3 set by the Board in Prehearing Conference Order No. 2 of July 25, 1974, asked whether a relevant product market for purposes of analyzing a cognizable antitrust situation might consist of (1) regional power exchange transactions within power pooling arrangements involving exchanges and/or sales of electric power for resale; (2) bulk power transactions involving individual contracts for sale for resale of firm electric power or for emergency, deficiency or other types of wholesale power; (3) retail power transactions involving sales of electricity to ultimate consumers. Matter in Controversy No. 1 inquired as to whether the Combined CAPCO Company Territories (CCCT) constituted an appropriate geographic market within which to analyze a cognizable antitrust situation, and Matter in Controversy No. 2 inquired with respect to the presence and boundaries of any relevant geographic submarkets.

In their post hearing proposed Findings of Fact and Conclusions of Law, each of the opposition parties* has urged upon us the establishment of relevant geographic markets consistent with those postulated in Matter in Controversy No. 1 - the CCCT - and submarkets under Matter in Controversy No. 2 consisting of the individual service territories of each Applicant. Applicants

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* Justice ff 4.04-07; City ff 41.0; Staff 1.001-12.

contend that for purposes of analyzing allegations relating to monopolization and violations of Section 2 of the Sherman Act, the record is insufficient to determine the geographic boundaries of any wholesale or bulk power supply market. App. ff 31.11.

With respect to Matter in Controversy No. 3, Justice and the City requested a finding that regional power exchanges constitute the relevant product market as does the retail distribution market while the Staff suggests that an appropriate product market of bulk power services be utilized. Applicants contend that there are no relevant retail markets in this proceeding, App. ff 31.02, and that there is but a single bulk power or wholesale market relevant to this proceeding which is composed of two distinct submarkets: (1) short-term support power consisting of emergency power, maintenance power, economy power, etc., and (2) long-term dependable capacity consisting of dependable or firm capacity, staggered construction, etc. App. ff 31.10.

All parties have cited a relevant product market as one which may be defined in terms of "commodities reasonably interchangeable by consumers for the same purposes which make up that part of the trade or commercial monopolization of which may be relevant." United States v. duPont, 351 U.S. 377 (1956). Market definitions must "correspond to commercial realities," Brown Shoe Co. v. United States, 370 U.S. 294, 336, 337 (1962), and the analysis of market composition must be "pragmatic" and factual rather than

"formal" or legalistic. Id at 336.

> The area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and which the purchaser can practicably turn for supplies.

United States v. Philadelphia National Bank, 374 U.S. 321, 359 (1963). As Applicants point out, functional interchangeability does not require complete identity of use, United States v. Chas. Pfizer & Co., 246 F. Supp. 464, 469 (E.D.N.Y. 1965) and there is "no barrier to combining in a single market a number of different products or services when that combination reflects reality." United States v. Grinnell Corp., 388 U.S. 563, 570-71 (1966).*

Although no opposition party has urged verbatim acceptance of the markets postulated in Matters in Controversy No. 3, their proposed definitions either encompass substantial portions of the markets propounded therein or suggest definitions without appreciable substantive differences. Applicants alone among the parties reject the substance of the definitions although even their proposed "bulk power market" approach in many respects adopts concepts set forth under Matter in Controversy No. 3(a)(regional power exchange transactions) and 3(b)(bulk power transactions).** With respect to the

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* The proposed findings and conclusions of all parties indicate a common recognition as to what cases set forth appropriate standards for considering the establishment of relevant markets. The parties' differences arise over whether those standards have been met.

** Applicants at least consider the possibility that retail power markets exist but concentrate on arguing that for reasons of regulatory law and economic reality as well as a lack of nexus, such markets should not be recognized.

bulk power or wholesale power market which includes elements of both the regional power exchange transactions market and bulk power transactions market, Applicants' proposed market definition appears to turn on the duration of the contemplated sales. They ask us to consider as separate submarkets short-term and long-term power supply contracts and services.

Product Markets

21. The Board concludes that relevant product markets for purposes of this proceeding exist with respect to bulk power services, regional power exchange transactions and retail power transactions. Regional power exchange transactions are essentially the equivalent of the regional power exchange market as described in the testimony of Dr. Wein, an expert sponsored by Justice whose testimony on relevant markets was adopted by Cleveland. Similarly, retail power transactions are essentially the same as the retail distribution of firm power market described by Dr. Wein.*

We have chosen to utilize "bulk power services" as an appropriate product market rather than the "bulk power transactions involving individual contracts for sale-for-retail of firm electric power or for emergency, deficiency or other types of wholesale power"

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* The Board considers Dr. Wein's proposed market definitions to have been enumerated rationally and in accordance with applicable legal guidelines. Our analysis of the situation inconsistent and our findings would not be different had we adopted without change the definitions suggested by Justice.

as originally set forth in Matter in Controversy 3(b).* In reaching this conclusion, we have focused upon the pre-filed written testimony of the Staff expert economic witness, Dr. Hughes, (NRC 207) whose analysis we find to be persuasive**, cogent in presentation and consistent with the market concepts developed by witnesses (including many of Applicants witnesses***) during the hearing.

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* No party may claim surprise at the Board's consideration of a "bulk power services market" rather than a "bulk power transaction market" since the bulk power services market described by Staff expert witness Hughes was set forth in pre-filed expert testimony. All parties were aware more than 7 weeks prior to the commencement of the hearing exactly what the relevant product market contentions of the Staff would be as well as the rationale behind these contentions. As the direct and cross-examination of Dr. Hughes confirms, the scope and rationale of his testimony was well understood.

** Dr. Hughes was examined during a four day period with respect to this direct written testimony. Our conclusion that bulk power services is an appropriate defined market was re-inforced by his testimony taken as a whole.

*** In App. 121, the prepared testimony of Wilbur Slemmer, p. 5, this witness sua sponte discussed the concept of optimizing "bulk power supply." His testimony queried whether options such as interconnections and pooling arrangements can have a direct and immediate effect on costs and benefits. He then discussed various transactions which should be included for the proper coordination of "bulk power supply." Included are "emergency support, economy interchange, coordinated maintenance schedule, coordinated planning and various other arrangements such as diversity interchange and short-term firm power sales as elements affecting a broader group of services which he characterizes as bulk power supply. This is consistent with the Board's finding that a relevant market in these proceedings is "bulk power services."

Mr. Slemmer's testimony further supports the Board's previous finding that it is not essential that each element or

(Footnote continued on next page).

We agree with the Staff contention that bulk power services consist of various intermediate outputs, not all of which have some impact on the effectiveness of delivered bulk power services. Indeed, it is the assimilation of various competitive alternatives that lends credence to the selection of various combinations of power transactions components into one product market. NRC 207, p. 19.* The grouping together of discrete but related services into one comprehensive market comports with the recent holding of the Supreme Court that:

> In short, the cluster of products and services termed commercial banking has economic significance well beyond the various products and services involved.**

*** (Continued from preceding page)

option in the bundle of services which make up a bulk power service be available simultaneously. He states that pool arrangements involve a number of different types of transactions and that:

> . . . all of these transactions should be considered as part of an overall package. It is misleading to consider the operation of a pool arrangement on the basis of only one of the many transactions.

App. 12, p. 16. Moreover, pools vary considerably in the types of transactions which are provided and the utilization of the transactions by members of the pool. Id.

* Our conclusion that bulk power services constitute a relevant product market for purposes of these proceedings is consistent with that of the licensing board in Midland in which the board defined the market as that of "coordination services." Consumers Power Co., (Midland Plant, Units 1 & 2), NRCI-75-7, 29, 45 (July 18, 1975).

** United States v. Phillipsburg National Bank, 399 U.S. 350, 361 (1970)

The proper mix of the various elements (or inputs as described in the language of Dr. Hughes) will have a vital effect upon the form and cost of bulk power services offered. At the same time, it is not necessary for a competitor in that market to utilize each input possibility. Rather, it is important that competitors within that market have available a panoply of options in order to design bulk power services responsive to the needs and budgets of their customers and potential customers.

22. With respect to regional power exchange transactions, there is ample evidence that these large scale transactions play an important role in terms of bulk power supply within a given service area and in terms of the price of power for customers of that area. Regional power exchanges play an essential role in providing reliability to subregional systems and may affect cost and prices of other services since the regional exchanges effect reserve carrying requirements and costs of system operation.* We therefore find that there is a relevant product market consisting of regional power exchanges, but for purposes of our analysis of situations inconsistent, their market is deemed less important than the bulk power service market. Conclusions reached with respect to that market are in no sense inconsistent with our recognition of the

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* Regional power transactions have the ability to permit utilities to obtain economy or low cost energy in preference to operating their own generating facilities during peaking periods.

regional power exchange market.

23. The Board concludes that retail power transactions also constitute a relevant product market. Here, the product or service is discrete and easily identified. It is a product market in which there are no competitive alternatives.* Moreover, the market is peculiarly susceptible to identification and accurate measurement. Service will be supplied to a large but fixed number of customers, each of whose consumption may be measured accurately.

Carefully analyzed, Applicants' attack on the establishment of a retail power transaction market will be seen as a contention that retail sales cannot meet the standards necessary to define either a relevant geographic or product market. Applicants further argue that we should hesitate to hold that there is a retail power transaction market because even if such a market exists, there would be a lack of nexus between activities under the license and anticompetitive acts on the part of Applicants designed to affect the retail market. Although we discuss nexus in more detail in findings 215 through 221, infra, we need not pause for long to dispose of the nexus contention as it is directed to the relevant market issue. There are several instances of record in which power

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* It may be argued that there is a degree of competition between gas and electric for heating, cooking and a few other purposes. Nonetheless, customers rely on gas for partial fulfillment of energy needs but must also purchase electricity to supply the remainder of their energy needs. Accordingly, retail electric power transactions remain in the unusual category of services for which there is no effective substitute.

to be generated at the Davis-Besse and Perry sites itself is the subject of attempted retail restraints. For example, Joseph Pandy, Director of Utilities of Painesville, Ohio, indicated that CEI has attempted to require Painesville to relinquish the right to serve retail customers in Perry Township - the very site of the Perry plant. According to Mr. Pandy, the grant of an unconditioned license at Perry could result in a situation where power from those units is marketed only through CEI which situation will arise not through any superior efficiency on behalf of CEI but because of activities in which it engaged for the purpose of forcing Painesville out of the Perry retail market. Pandy, Tr. 7134-35.

Another example of a direct relationship between the generation of the nuclear power at issue and retail sales is found in the testimony of William Lyren, the City Engineer of the City of Wadsworth, Ohio, a community of 14,500 people with a service area covering a population of 18,500. According to Mr. Lyren, Ohio Edison has refused to make available base load power including power from Davis-Besse and Perry, if that power is to be resold by the City of Wadsworth or other members of an association of municipalities known as WCOE (Wholesale Customers of Ohio Edison) to present industrial customers of Ohio Edison. The effect of this prohibition by Ohio Edison would be to eliminate or restrain competition in the retail market by municipalities which otherwise are permitted under the Ohio statutory scheme to compete for industrial customers on

the basis of cost or superior service. This restriction relates directly to Applicants' activities under the license. Lyren, Tr. 2014, 2030-31, 2338.

In concluding that retail power transactions constitute a relevant product market for purposes of this proceeding, we have not focused upon individual sales to specific customers except in special instances where the particular sale was illustrative of a policy or reflected some special importance. We have not considered it to be within the mandate of this Commission pursuant to Section 105(c) to act as the arbitor of individual retail customer disputes nor to attempt to resolve all charges of unfair competition in the retail market. Thus, we imposed some restrictions on the introduction of evidence relating to capture and recapture of retail customers in the City of Cleveland. The parties were informed that the Board was not concerned with individual incidents, but we did accept evidence relating to plans to dominate the retail market or to eliminate competition in that market generally. CEI's long range planning forecasts setting targets for the capture of competitors' customers or describing as evidence of the company's policy with respect to retail power transaction market.*

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* We emphasized to the parties at the time of receipt of this evidence that we did not condemn fair and open competition between CEI and the City of Cleveland. The mere fact that CEI hoped to induce customers of the City to become CEI customers for reason of better service or lower price seems to us not to involve the creation or maintenance of a situation inconsistent with the antitrust laws. After all, the objective of those laws is to foster competition. Our concentration has been on instances in which this competition is conducted unfairly or in furtherance of an attempt to monopolize retail power transactions. See DJ 188.

GEOGRAPHIC MARKETS

24. We find that the relevant geographic market for purposes of these proceedings is the CCCT. All parties including Applicants recognize the CCCT to be a cohesive area within which to operate a regional power pool and interconnection network which functions on the single system concept.* Williams Tr. 10,353-56.** Applicants argue that the regional power exchange market should take into account areas where Applicants and their neighboring systems can seek alternative sources of bulk power supply services. App. ff 31.10. Thus, Applicants' expert Dr. Pace contends that a regional power exchange market is an artificial formulation. App. 190, Pace p. 30-31, 14-26, 1-9. Because individual entities within the CCCT area may turn to suppliers outside of that area such as Ohio Power (Ohio), the PJM pool (Pennsylvania, New Jersey, Maryland), Consumers Power (Michigan), Applicants argue and Dr. Pace concludes that it is impossible to identify a separate regional geographic market. However, according to Dr. Pace, a particular system's alternatives are limited geographically by the distance such a system

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* Although we have made a determination that the CCCT constitutes an appropriate and relevant geographic market, we did not rest upon that finding but kept before us throughout the Hearing the possibility of competitive alternatives feasibly available to Applicants' competitors. The evidence demonstrated conclusively that feasible alternatives are not present and that when Applicants' competitors attempted to achieve coordination with non-Applicant companies, Applicants frustrated such attempts.

** Footnote on next page.

could reach without incurring transmission costs so great as to eliminate the alternative sources from practical consideration. App. 190, p. 35.

We have no difficulty in the proposition that a regional power exchange market larger than the CCCT may exist in which utilities within the CCCT are participants. The presence of a larger regional market, however, does not preclude recognition of a market consisting of the CCCT ch is relevant for purposes of this proceeding. The "one-system" concept suggests that the CAPCO pool or its present members may be regarded by adjacent buyers and sellers as a separate regional market. As to Dr. Pace's observation that alternatives are limited only by the cost of transmission, there is ample evidence that smaller entities within the CCCT already are affected by an inability to obtain transmission from alternate sources. See finding 9, supra. The City of Cleveland, for example, contends that the alternative of obtaining PASNY power is nullified by the cost of constructing high voltage transmission lines to a pick-up point beyond the territory of CEI at which another utility,

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** (Footnote from preceding page)

Mr. Williams testified both in terms of proximity of prospective pool members and the need for interconnection which will appear repeatedly in our discussion of individual Applicant activities.

> The obvious thing, of course, is to deal with companies close by. If you are going to have coordinated operation, you need to have interconnections so that you can bring power in and out of the system.

PENELEC, is willing to deliver power. Likewise, the City of Napoleon was limited in its option to utilize Buckeye Power because it was dependent upon the transmission facilities of TECO.

25. We also find that the individual service territories of each Applicant constituted a relevant geographic market. The same considerations of denial of alternate sources of bulk power services which we observe within the CCCT as a whole apply to the acts of individual Applicants within their service territories and they have the same effect of requiring competitive entities to operate in isolation.

Individual Applicant Activities

Having described the CAPCO setting, and defined the relevant markets for purposes of this proceeding, we now turn to an analysis of the acts and practices of each of the Applicants which are alleged to result in the creation or maintenance of the situation inconsistent within those markets.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

26. Within CEI's 1,700 square mile service area there are only two municipal electric systems, Cleveland and Painesville. Both municipal systems distribute electric power to retail customers and both also own generation facilities, App. 111; DJ 587, p. 64.

Prior to 1965, CEI acquired a number of municipal electric systems, Rudolph, DJ 558, p. 31. Such acquisitions were the result, in part, of CEI's seeking "economies of central station generation," Besse, DJ 559, p. 64.

27. Over the years it has been a CEI company objective to acquire Cleveland, DJ 509; DJ 510; DJ 558, p. 31; DJ 560, p. 11; DJ 329; DJ 331; NRC 143. This corporate desire is further evidenced by the repeated detailed studies made by CEI concerning Cleveland's acquisition, DJ 354; DJ 355; DJ 560, p. 10; C 74, p. 25; C 134; C 135.*

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* Since the close of the record in this proceeding CEI has made a proposal to Cleveland for acquisition of the municipal system which the City Administration has accepted and forwarded to the City Council for consideration. Upon learning of this development the Board issued an Order on September 20, 1976, directing the parties to indicate how, if at all, their proposed findings would be affected by the acquisition, if consummated. Each party responded and indicated that no change in proposed findings would be made. Accordingly, we have not reopened the hearing to receive any evidence on the effect of the proposed acquisition. The Board is of the opinion that consummation of the acquisition would not alter in any material fashion its findings nor would it eliminate the need for relief.

28. The acquisition of the Painesville municipal system was also a CEI company objective, DJ 361; DJ 363; DJ 364; DJ 371; DJ 509; DJ 510; DJ 600; C 73; NRC 143.

29. In the City of Cleveland, Cleveland Municipal Electric System (MELP) serves approximately 20% of the electric customers. The remaining electric customers are serviced by CEI, Tr. 2783.

30. Historically, CEI and MELP have competed on a door-to-door basis in a sizeable portion of the city, NRC 70, for residential and industrial customers, Tr. 2783. See also DJ 340; DJ 341; DJ 346; DJ 558, pp. 58-59; pp. 120-122; DJ 560, p. 14; DJ 563, pp. 36-37; DJ 604; DJ 605; C 11; C 12; C 13; C 14; C 19; C 90; C 160.

31. Rates and quality of service were and are the principal elements of competition between these utilities, with Cleveland traditionally offering lower rates and CEI greater reliability, DJ 558, pp. 121-124; DJ 559, pp. 57-60; DJ 565, pp. 21-23; DJ 566, p. 62.

32. To counter MELP's advantage of lower rates CEI provided promotional considerations such as free internal wiring or free upgrading of electric facilities in areas where it is in competition with MELP while not giving such allowances in areas where there is no competition, DJ 558, pp. 16-17; Tr. 10,323-10,325. Such practice is a form of cutthroat competition, Wein, Tr. 6622-6623.

33. CEI's competitive edge of greater reliability stemmed from the benefits of coordinated operation and development made available through CEI's parallel interconnections with other utilities and through participation in CAPCO, DJ 329; DJ 352; Rudolph, 558, pp. 124-127, pp. 150-151; C 11; C 12; C 13; C 14; C 154; C 155; C 156; Tr. 10,351; Tr. 10,369-10,370. In competing with MELP for retail customers CEI has stressed the factor of reliability and economies from interconnections and CAPCO participation in nuclear units made possible through its membership in CAPCO. Wyman, DJ 566, pp. 151-152; C 154; C 155; C 158; C 13; C 14; C 15.

Refusal to Interconnect Except Upon Unfair Terms

34. MELP having its service area completely surrounded by CEI is electrically isolated from utilities other than CEI, Tr. 2726-2727. Access to power supply sources outside its own system is possible only over CEI's transmission system. Similarly disposition of any excess capacity is possible only through the use of CEI's transmission system. See NRC ff 1.094.

35. CEI was aware that a parallel interconnection between CEI and MELP would improve the reliability of the MELP system and make it more competitive. Rudolph, DJ 558, p. 177; Lindseth, DJ 568, p. 62; Gould, DJ 569, p. 24. CEI also knew that MELP could not feasibly interconnect with any other utility, DJ 295.

36. Earlier, in the 1960's CEI did offer to interconnect with MELP but only on the condition that MELP would fix its rates at the level of rates set by CEI and that Cleveland would reduce its charges to the City for street lighting service. Lindseth, DJ 568, p. 14; DJ 293; DJ 294; DJ 295; DJ 330.* Though CEI protests as in the words of

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* Such conditional offers to interconnect were made on a number of occasions, beginning in 1962. See DJ 293-299; DJ 341; DJ 560, p. 24, pp. 233-234; DJ 568, pp. 13-15; DJ 621; C 6; C 71; C 96; C 99; C 100; C 111.

then President Lindseth, DJ 568, p. 14, that CEI acted from a desire to utilize

> "the tax exemption of the Municipal Light Plant for the benefit of all the taxpayers of the City of Cleveland instead of those who were the customers of the Municipal Light Plant, which we proposed could be achieved by the equalization of rates and a corresponding reduction of street lighting charges, which were against the general fund"

nonetheless, its larger motivation was clear. CEI considered an increase in the rates charged by MELP as essential to a successful acquisition of MELP, DJ 599.

37. CEI also believed that if MELP would fix its rates at CEI's level, this not only would eliminate the major reason for customers leaving CEI to take service from MELP, DJ 558, pp. 128-130; DJ 560, p. 132; DJ 565, p. 67; DJ 569, p. 97; C 110, but also would result in customers switching from MELP to CEI, DJ 560, p. 22.

38. CEI's attempt to fix MELP's rates and street lighting charges in exchange for interconnection constitutes a per se violation of the antitrust laws. CEI's assertion (with which we do not agree) that it acted only from a desire to benefit the public is immaterial to our finding. See our discussion on Legal Standards, p. 20 infra.

39. These conditional offers to interconnect, had they been accepted by Cleveland, would have worked to forestall expansions of MELP's generating plant. In 1962, Cleveland proposed to construct a 75 mw boiler and an 85 mw steam turbine generating unit. In 1968, Cleveland proposed to install three dual-fired turbine generating units. On each occasion CEI offered to interconnect and sell firm power to Cleveland to obviate the need for expansion. DJ 293; DJ 295; DJ 297; Tr. 10,659; Tr. 10,863. CEI's attempt to forestall MELP's expansion is a form of destructive competition for had the plan been effected, CEI would have pre-empted Cleveland's opportunities to increase its productive capacity to supply final markets*, DJ 587, pp. 32-34.

40. In 1963, CEI also acted to forestall a proposed interconnection between the Cleveland electric system and the municipal electric systems of Painesville and Orrville. Reacting to a public announcement of the proposal, CEI renewed its earlier offers to interconnect with Cleveland making both the proposed three-city interconnections and expansion of the municipal system unnecessary, DJ 295. This offer, made to forestall construction of competing

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* With this finding CEI might argue that it has been placed in the proverbial position of "being damned if it does and damned if it doesn't." Certainly not every offer to interconnect can be said to be anticompetitive, but here we do not have a benign situation. CEI's offer to interconnect was motivated by a desire to forestall construction of greater generating capacity by the City. The record is replete with references to CEI's avowed policy to eliminate MELP as a competitor. The offer here constituted a means toward that end.

transmission lines by Cleveland, Tr. 10864; DJ 568, pp. 58-60; C 94, was anticompetitive in purpose and intent. DJ 587, pp. 32-34.

41. Though Cleveland had "long desired an interconnection between (MELP) and CEI", it could not accept CEI's interconnection offers "with this coercive limitation" (rate equalization) but remained interested "in an interconnection of the two systems in the interest of public welfare and the mutual benefit of the two systems" and was "willing to consider an interconnection on a business basis without unfair strings attached", DJ 297.*

Despite Cleveland's announced desire to interconnect "without unfair strings attached",** CEI did not modify its policy of requiring rate-fixing as a precondition to interconnection. DJ 330; DJ 568, p. 61.

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* This February 17, 1965, letter of Mayor Locher to Mr. Besse, President of CEI, also pointed out that rate equalization was unrelated to interconnection and could be effectuated, as CEI was aware, by councilmanic and Board of Control action.

** See C 49, p. 7; C 50, p. 5 for further evidence of CEI's awareness that Cleveland desired an interconnection with CEI.

42. In 1969, by letter dated August 14, Cleveland requested that CEI furnish MELP with a minimum of 30,000 kw standby power starting March 1, 1970, through July 1, 1970. DJ 333. MELP needed the standby power to shut down one of its generators to install pollution control equipment, DJ 331; DJ 561, p. 25. This formal request was preceded by discussions between representatives of the two utilities. From these discussions CEI knew that Cleveland wanted a permanent, synchronous interconnection in order to achieve the full benefits of coordinated operation and development. DJ 331; C 127; DJ 561, p. 27. CEI also knew that an offer which was inadequate to solve MELP's problem might force Cleveland "to pursue some other approach which likely would be most distasteful" to CEI, DJ 334. What CEI was concerned about was that FPC might step in and order an interconnection, DJ 560, p. 137. Studies concerning the ramifications of interconnecting were made and the findings were summarized in an in-house memorandum dated June 17, 1969, DJ 331.

CEI understood that a strong permanent interconnection would give MELP the system reliability it sorely needed.

CEI also learned that with a proper standby charge* attached to the backup capacity, MELP would not get any financial relief, but rather would incur higher expenses. This would increase the pressure on Cleveland to obtain rate relief and improve CEI's relative rate competitive picture. However, should the FPC impose a mutual standby, pay-only-when used interconnection, or should CEI settle for less than a proper standby charge, MELP would enjoy system reliability and also realize substantial reductions in operating expenses. This would deprive CEI of both of the necessary factors (financial and reliability) in order to purchase the Cleveland system, DJ 331, p. 4.

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* The term "proper standby charge" as used is innovative and unique. CEI wanted to sell only emergency power but at greater than traditionally industry prices. The June 17, 1969, memo from Loshing to Howley (DJ 331, p. 3) cautions "The charge for emergency standby service is a most vital point and one that may be difficult to obtain. Although such a capacity reservation charge is quite common between private utilities for short-term reservations, it is not common for emergency service. The typical emergency provision is for mutual support and there is generally no charge except for out-of-pocket costs plus 10%. This, of course, is based on the premise that there is, in fact, something approaching mutual standby."

These facts left CEI with three possible courses of action:

1. Avoid an interconnection and run the risk of FPC dictated interconnection hoping that the financial and service problems will eliminate MELP as a competitive threat;

2. Take the initiative in establishing an interconnection with proper standby charges, to give Cleveland reliability but increase the financial pressure on them; and,

3. Make an all out effort to purchase the Cleveland system while reliability and financial pressure are present, DJ 331, p. 4.

The bottom line of these findings was the observation that CEI would assume an indefensible position* if it refused to cooperate with Cleveland, DJ 331, p. 4.

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* In the case of FPC intervention.

43. CEI offered Cleveland an 11 kv load transfer arrangement which was temporary help without parallel operation. DJ 331, May 29, 1969, memo; C 82.

No action was taken until the holiday season of December 1969, when Cleveland experienced a major generating outage. Hauser Tr. 10,539.*

In January of 1970, CEI and Cleveland agreed to participate in a three-phase plan in which the first two phases related to a load transfer service and the third phase would provide a permanent parallel** tie in, NRC 195; App. 198.***

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* "Then toward the Fall of 1968 (sic), really not much happened until the holidays in 1969, Christmas, New Year's time, the municipal system had a serious system outage and then these plans that were developed for the period in which precipitators and other air pollution control equipment was to be installed were dusted off to provide in the shortest possible time, some assistance to the customers of the municipal light plant."

** Phase III clearly contemplated a parallel interconnection, DJ 336.

*** "The City understands further that . . . CEI has pledged its good faith and has committed itself to effect such a permanent tie-in between our respective facilities."

44. However, it was CEI's private intention to avoid a permanent parallel interconnection, C 82; DJ 334.* CEI studies showed that this could be accomplished if a 69 kv overhead tie limited to 40 mva be proposed. It was thought that this number was low enough so that parallel operation would not be feasible when MELP's 80 mva unit was on line. Agreeing in principle on a 69 kv interconnection would place CEI in a position of being hard put to avoid future demands to increase capacity. CEI believed that

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* "From our standpoint, the important factors are limited capacity (preclude parallel operation) and if possible a temporary tie." And again "a permanent underground tie (to be avoided like the plague) . . ."

this risk would be minimized if the capacity was limited to 40 mva. The greater risk to CEI was in proposing a solution which could be proven inadequate with relative ease, DJ 334, December 29, 1969, memo.

45. CEI delayed in reaching a mutual agreement on an intertie. In July of 1970 Cleveland requested a meeting, reminding CEI that a preliminary report on the tie was due by September 1, 1970, and that construction of the tie would take eighteen months. On the advice of CEI's legal officer, Mr. Hauser, the meeting was not scheduled, DJ 337.

Some nine months later, upon being hired as Cleveland's Commissioner of Light and Power, Mr. Hinchee requested a meeting with CEI's engineers to determine what progress had been made concerning the synchronous interconnection. At the meeting he was advised that "no real engineering investigation" was undertaken and was supplied with some vague sketches, then just drawn, as to what might possibly be done, Tr. 2567. As a result, Cleveland filed a complaint with the FPC requesting that an interconnection be ordered, App. 18; Tr. 2568-2569. CEI countered by filing a notice of termination of the load transfer service, App. 18.

46. On July 8, 1971, CEI agreed to begin a study of a permanent synchronous interconnection, DJ 6. With the permanent, synchronous intertie now being inevitable, CEI sought to maximize Cleveland's economic burden, Rudolph, DJ 558, p. 93; C 138. A CEI brainstorming session concluded that a two-step approach would accomplish this, i.e. first install a 69 kv, 40 mva, temporary tie,* followed by a 138 kv permanent interconnection, C 138. When Cleveland experienced an outage in February of 1972, CEI proposed the 69 kv nonsynchronous connection to the FPC, Tr. 10,566; Tr. 10,865. On March 8, 1972, the FPC ordered the 69 kv temporary interconnection to be followed by a 138 kv synchronous interconnection.

47. Originally, the 11 kv load transfer arrangement was set up to supply Cleveland with maintenance power while MELP installed environmental control equipment on its boilers, Tr. 2525-2526; Tr. 2801. After this was accomplished, CEI refused to supply MELP anything other than emergency power, Tr. 2801.** When Cleveland needed

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* Such an interconnection was recommended by Mr. Bingham in the December 29, 1969, memo, DJ 334 supra.

** Applicants' assertion that Cleveland could have used this service to enable it to correct its operating deficiencies and generating problems, App. ff 34.34 is not correct.

power from CEI, the load transfer was operated in such a way as to cause an outage on MELP's system. Titas, DJ 564, pp. 90-93; Mayben, C 161, p. 10; C 82; App. 134; App. 159; Tr. 10649-10651; Tr. 2626; Tr. 2665; Tr. 2761-2763. From an operational viewpoint no outage need have occurred. See Firestone, DJ 575, p. 54. The load transfer points (five in number) were electrical connections with substation feeders that could be switched either to Cleveland's system or the CEI system, but could not be served by both systems, Tr. 2523-2524. CEI imposed severe operating problems, unnecessary restrictions and administrative delays on MELP before it could utilize the transfer system, Tr. 2526-2761. Whenever MELP realized the need for emergency power and the necessary activation of a load transfer point, MELP was required to contact CEI and obtain the necessary clearance. CEI personnel in turn would have to obtain clearances from higher ups within the organization before entering the field. After all clearances were secured, a single crew would be dispatched (instead of two crews to coordinate the dual switching operation) to the designated substation to switch over the system manually. Tr. 2561; Tr. 2566; Tr. 2760-2761. As a result of this

procedure delays of various lengths were frequent.* The resultant loss of power proved damaging to MELP's relationship with its customers, Tr. 2526; Tr. 2566. CEI was aware that MELP outages resulted in the conversion of customers from Cleveland to CEI, DJ 344-350; DJ 352; DJ 559, p. 60; DJ 560, pp. 132-133; DJ 563, pp. 36-37; DJ 566, p. 62; DJ 569, pp. 24, 94-95; C 11-12; C 14-15; C 19; C 159, p. 59, and solicited the affected MELP's customers after these outages, DJ 352; Tr. 2691-2695.

CEI's load transfer procedures were arbitrary, cumbersome and not in keeping with modern prudent engineering practices, Tr. 2565. The administrative delays were not necessitated by the actual operation of the system and a more efficient way to operate the load transfer system was available, Tr. 2565. The switching operation could have been accomplished with only a three to five second service interruption without jeopardy to either system, Tr. 2565.

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* CEI required the approval of each load transfer by its legal officer, Mr. Hauser. This requirement obviously caused delays, at times as much as two hours, DJ 564, pp. 52-62. It was CEI's policy to provide load transfer service to Cleveland only when required by the terms of the FPC order, DJ 558, p. 118.

48. On occasions when CEI lacked sufficient generation* to supply Cleveland, Tr. 10698; App. 134, it did not attempt to reach any other bulk power supplies nor did it offer to transport power to Cleveland from some other source with which it was interconnected, Tr. 10703-10704.

49. A further onerous feature of CEI's operation of the 11 kv load transfer was the requirement that a block of load be transferred at one time. Cleveland was required to pay for an entire block of load regardless of the fact that it had the capacity to supply a portion of the load needed, Tr. 2763. The evidence does not establish whether the requirement was unreasonable.

50. MELP efforts to improve the load transfer system and make it more efficient were rejected by CEI. For example, when MELP suggested that radio be used rather than telephone to expedite clearances, CEI rejected this time-saving proposal without explanation, Tr. 2761-2762; Tr. 2565; Tr. 2567.

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* It would seem that not every CEI's declination to supply Cleveland with power was on the grounds that it lacked power. At least on one occasion Mr. Hauser requested CEI's operating people to come up with justification for terminating service at a load transfer point, C 79.

51. Although the 69 kv was constructed to operate synchronously, CEI required that it be operated as an additional transfer point, Lester, DJ 561, pp. 27-28; C 140; App. 45. The FPC order required only a nonsynchronous tie-in but did not prevent synchronous operation, Tr. 2569-2570; App. 19; App. 20. After the FPC order, CEI unilaterally adopted a policy that required all of the load transfer points on the 11 kv system to be energized before Cleveland could receive any electric service over the 69 kv interconnection, Tr. 2570; Tr. 2803-2804. This requirement reduced MELP's flexibility in operating its generating equipment, Tr. 2803-2804.

52. Administrative delays by CEI in energizing the 69 kv were worse than the delays encountered with the 11 kv system. Connection at 69 kv required CEI executive clearance and would at times require up to 12 hours notice before CEI would take any action on MELP's request, Tr. 2570-2571. MELP's system would experience brownouts, blackouts, or voltage reductions while awaiting CEI approval of a request for power over the 69 kv tie, Tr. 2669-2670.

53. In December of 1972, Cleveland experienced a major outage which lasted several hours. CEI refused to sell emergency power to MELP over the 69 kv tie unless it also agreed to a tie-in sale by executing a contract for the purchase for street lighting service, Tr. 7496-7498; Tr. 10,572-10,573.

54. Cleveland was forced to take power over the 11 kv and 69 kv load transfer points on conditions that prevented the municipal system from performing necessary maintenance on its generating units. The 11 kv load was not energized until Cleveland was utilizing all of its capacity, Tr. 2670; Tr. 10,688. The 69 kv load transfer point was not energized until all 11 kv load transfer points had been energized, C 145; Tr. 2670. MELP was thus prevented from taking units out of service for maintenance. This lack of maintenance care caused a deterioration of the municipal system, which affected its reliability, thereby causing it severe competitive injury. C 161, pp. 13-14; Tr. 2666; Tr. 2692-2693.

55. There is evidence in the record that some lack of maintenance and delay in achieving interconnection was due also to MELP's own ineptness and negligence, App. ff 34.29; App. ff 34.35; App. 65; App. 66; App. 67; App. 69; App. 70; App. 143; App. 144; DJ 315; Hauser, Tr. 10,573-10,587. But we do not (nor are we required to) apportion the blame for the

deterioration of the city's system. MELP's negligence does not redeem CEI's anticompetitive motivation and conduct.

56. CEI and Cleveland reached an agreement for a permanent interconnection, NRC 204, only after over five years of negotiation under "Phase III" of the plan adopted in January of 1970. This agreement requires Cleveland to carry a reserve margin of 70 per cent which places an "unusual and unjustifiable burden" on Cleveland, NRC 205, pp. 50-52. This agreement also makes it possible for CEI to supply emergency power to Cleveland without seeking lower cost alternatives through the company's interconnections, Kampmeier, DJ 450, pp. 45-46. The extremely limited coordination provided for in this agreement effectively denies Cleveland the full benefits of coordinated operation and development, DJ 450, pp. 45-46; NRC 205, p. 50-57.

Refusal To Wheel

57. Because MELP was isolated electrically from utilities other than CEI, Tr. 2726-2727, and because it was able to obtain only emergency power from CEI, Tr. 2797-2798, it was essential in order for it to remain a viable competitor of CEI that Cleveland have power wheeled to it over CEI's transmission system, Tr. 2621-2622.

58. In 1973, AMP-O obtained a commitment for 22.7 mw of relatively inexpensive hydroelectric power from the Power Authority of the State of New York (PASNY) which had been allocated to the State of Ohio. DJ 8; DJ 11; DJ 393; DJ 396; Tr. 2677; Tr. 4694-4708. This power was to be made available to the City of Cleveland by AMP-O. DJ 8; DJ 11; C 167. PASNY would wheel power to the New York State border and AMP-O would arrange wheeling over the lines of Pennsylvania Electric Company (PENELEC) and CEI. PENELEC agreed to wheel the power for AMP-O, Tr. 2568-2579; Tr. 2679. CEI refused to wheel the PASNY power for AMP-O from PENELEC to Cleveland, NRC 70; Tr. 2579; Tr. 2580, stating:

> As you know, the Illuminating Company competes with the Cleveland Municipal Electric Light Plant on a customer-to-customer and street-to-street basis in a sizeable portion of the City. This competitive situation is clearly unique. Economic studies indicate an arrangement to transmit PASNY power would provide the municipal system electric energy at a cost which would be injurious to the Illuminating Company's position. *

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* Pursuant to an agreement between AMP-O and Allegheny Electric Cooperative, the Cooperative will receive AMP-O's PASNY allocation until transmission can be arranged to Cleveland, C 166. Allegheny has defended this agreement in the FPC successfully, C 167.

PASNY power could have been purchased and delivered to Cleveland for less than the cost of Cleveland's own generation, DJ 8. CEI also has advised Cleveland that it would not consent to third-party wheeling on any terms, DJ 291. CEI does not dispute that sufficient transmission capacity is available for the proposed wheeling of PASNY power, Tr. 4702-4703.

59. Although CEI claims that it modified certain aspects of its anti-wheeling policy* after the proceeding herein began, Tr. 10,768, it appears that CEI's new wheeling policy retains certain elements of its earlier policy.

During the Spring of 1975, Cleveland ascertained that seasonal power was available for sale by Buckeye Power, Inc., Tr. 4703-4704. Cleveland also located bulk power supplies from the cities of Orrville, Ohio and Richmond, Indiana, Tr. 4690-4691. Richmond had available 50 mw of capacity and associated energy which

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* CEI's position with respect to wheeling PASNY power for Cleveland has never changed, Tr. 10,780-10,781.

it was willing to sell to Cleveland. Ohio Power Company agreed to wheel the power through its territory and Indiana and Michigan Power Company agreed to wheel the power through its territory if CEI would agree to wheel the power, Tr. 4709-4711; DJ 193. The City of Orrville had power which it was willing to sell to Cleveland as soon as it perfected its interconnection with Ohio Power Company, Tr. 4712. CEI has not agreed to wheel this power. Tr. 4707-4709; Tr. 4713-4714; Tr. 4924. CEI's announced policy was that it would wheel any power for Cleveland "as to which there is no legal or conspiratorial impediment which would prevent this company making a like purchase at a like price", App. 75.

60. CEI contends that for the past ten years it has been feasible for Cleveland to construct a transmission facility from its Lake Road Generating Plant to any one of four interconnection points with utilities other than CEI, App. ff 34.25. This contention is based on the testimony of witness Mr.Caruso, Applicants' expert. In the 1960's CEI took the position that it would be economically unsound for Cleveland to construct a transmission line to Orrville and Painsville, Lindseth, DJ 568; pp. 58-60, pp. 155-158; DJ 295.

Cleveland did study the problem. Its studies showed that Cleveland was completely surrounded by high density residential and commercial areas and that construction of separate transmission lines from Cleveland was simply not feasible, particularly in view of the fact that it would duplicate already existing and operating CEI facilities, Tr. 2594-2595. Existing CEI transmission facilities have surplus capacity available, DJ 358.

It would be impractical for Cleveland to construct transmission lines across CEI territory because of (1) cost,* (2) environmental problems, and (3) the unlikelihood of obtaining siting approval for what would be duplicating transmission facilities, NRC 205, pp. 57-58.

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* Mr. Caruso compared the cost of construction with the high cost of emergency power sold to Cleveland by CEI, C 161, p. 14; Tr. 7715-7716, rather than with the cost of a bulk power supply available through coordinated operation and development or even the cost of wholesale firm power. He stated that the factor of greatest uncertainty in his study was the cost of right of way, Tr. 10929-10930.

Access to Nuclear Power

61. Commencing March 1971, Cleveland requested participation in nuclear generation available to CEI through its CAPCO membership. For CEI's response see Finding 202 infra. For purposes of immediate discussion we note the conditions CEI attached to its limited offer of access. This offer, made two and one-half years after Cleveland's initial request, included the following anticompetitive provisions: (1) CEI was to have a "right of first refusal" on nuclear power which was surplus to Cleveland's immediate needs. DJ 188; DJ 291, pp. 18-22 -- (this would have prevented Cleveland from selling this surplus or using it to engage in coordinated operation with any other utility, Tr. 7612, Tr. 7618); (2) Cleveland could not sell power to retail or wholesale customers "below cost", DJ 188; DJ 291, pp. 18-21, which would give CEI control over Cleveland's rates, Tr. 4884-4885, since CEI would be the one to determine what constituted "cost", Tr. 5408; (see Tr. 10,762-10,763); (3) prior to beginning negotiations over access, Cleveland had to withdraw all formal and

and informal requests for antitrust review of CEI's conduct, as well as drop its opposition to CEI's practices and policies in all administrative hearings and proceedings, DJ 188; DJ 291, pp. 18-22. These conditions were rejected by Cleveland, DJ 189. In spite of repeated proposals between February 1974 and July 1975, DJ 192; App. 63; App. 66; App. 68; App. 71-72; App. 74, nuclear access remained conditioned on a "right of first refusal" by CEI. Even if a "right of first refusal" had not been insisted upon,* Cleveland would not have been able to sell surplus nuclear power due to CEI's rejection, App. 97, of Cleveland's proposal, DJ 177; NRC 141A, Schedule A; App. 79, that the company "wheel out" power (i.e. transmit power from the nuclear units to an entity other than Cleveland.) To date, no meaningful offer of access has been made by CEI.

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* Applicants' proposed license conditions, App. 44, which purport to set forth Applicants' offer of nuclear participation to non-CAPCO entities within the CCCT, provide an unfettered right of resale of surplus nuclear power, App. 44, p. 5.

62. These present conditions to nuclear access are an outrageous affront to the policies underlying the antitrust laws. On the basis of these attempts to stifle competition in the use of power from the plants involved in these proceedings we would be delinquent in our responsibility were we not to impose license conditions. There is no doubt that activities under the license would be directed to the maintenance and creation of situations wholly antagonistic to the policies of the antitrust laws.

63. In order to remain or to become a viable competitor Cleveland must have both access to nuclear power and third party wheeling, Tr. 2708-2711; NRC 207. The availability to Cleveland of alternate power supply sources would permit Cleveland to make more effective use of its power.

Painesville

64. The Painesville Municipal Electric System has 38 mw of coal-fired generation to serve a peak load of 25 mw. Painesville serves electric customers in the City of Painesville and in nine other communities around

Painesville, Tr. 3096-3097. The system is electrically isolated, Tr. 3097-3098, and could not engage in transactions with other electric entities without the use of CEI's transmission network, Tr. 3099-3100.

65. Painesville and CEI compete for industrial and residential customers outside the Painesville municipal limits, Tr. 3097.

66. Painesville has markets and customers for excess capacity, Tr. 3102. Those markets include the Cities of Cleveland and Orrville in Ohio and the Diamond Shamrock Corporation, Tr. 3101, and all three have expressed interest in purchasing power from Painesville, Tr. 3103. Painesville could not build its own transmission lines to either sell power to or purchase power from Cleveland or Orrville. In disposing of excess capacity Painesville would require an interconnection with CEI, Tr. 3103-3104.

Territorial Allocation Proposals

67. As early as 1962, CEI sought to prevent future competition with Painesville by offering Painesville a territorial allocation agreement which would have

eliminated competition and foreclosed the growth of the municipal system by alloting to CEI those areas where Painesville had the greatest potential load growth. Tr. 3623-3624A; NRC 144. The offer was renewed by Mr. Howley, CEI's General Counsel, in 1964 or 1965. Tr. 3625; 3627-3629. Again in 1974, CEI made a proposal for the exchange of customers and territory, NRC 144:

> It is still our thinking that we would build the line up to your property in exchange for certain described territory and customers.

This offer was, as were the previous ones, rejected by Painesville, Tr. 3177-3178; Tr. 3193.

Refusal To Interconnect Except Upon Unfair Terms

68. Reliability of service is a factor in competition between Painesville and CEI. After each outage, Painesville loses customers to CEI, Tr. 3179-3180. Since 1971, Painesville has experienced one or two serious outages each year and has experienced voltage reductions one or two times each year, Tr. 3099. Lack of an interconnection reduces Painesville's reliability, Tr. 3181. As a result of an agreement

with the Ohio Environmental Protection Agency limiting operation of certain of Painesville's generating units, Painesville will have no firm power without an interconnection, Tr. 3180. Painesville does not carry generating reserves typical of industry practice because the cost would be too great. An interconnection would provide adequate reserves, Tr. 3181.

69. Beginning in at least July 1971, Painesville requested an interconnection from CEI. NRC 134; DJ 365. At that time, CEI was aware of Painesville's need for coordinated operation and development, and believed that Painesville would press the request for an interconnection before the FPC. DJ 364; DJ 509; DJ 510; DJ 600. CEI therefore planned to structure its "negotiations" for an interconnection to further the company's goal of acquiring the Painesville electric system load, DJ 364. Once negotiations began, CEI considered conditioning the interconnection on customer trading, territorial allocation, limiting the municipal systems' service area, and an agreement not to compete, DJ 371.

70. CEI offered an interconnection to Painesville on anticompetitive terms for the specific purpose of eliminating competition. The company proposed that it supply an interconnection in consideration for CEI taking over Painesville's greatest load growth area, DJ 370; NRC 141, together with Painesville's promise not to seek to serve that area in the future, Tr. 3624A; Tr. 3133-3135. In addition, CEI explicitly conditioned interconnection on rate equalization, Tr. 3152-3153. Subsequent to Mr. Howley's insistence on rate equalization, but prior to execution of the interconnection agreement, Painesville raised its rates to the level of CEI rates. Tr. 3175; Tr. 3203; NRC 203.

71. CEI misused its dominance and monopoly power to secure an anticompetitive and oppressive interconnection agreement with Painesville. This contract contained a "special provision" whereby either party could cancel the contract on 90 days' notice on the grounds that the contract was not in the party's "best interests". NRC 203; Tr. 3123-3125. This contract does not provide for the parties to achieve the large benefits that can be gained by sharing reserves, nor does it provide for

any of the benefits of coordinated development, DJ 450, p. 47. In addition, the 25 mw maximum for maintenance power is a "serious burden" on Painesville, but only of negligible consequence to CEI. DJ 450, p. 46; NRC 205, pp. 53-54. Painesville entered the interconnection agreement because the City's power needs made it "desperate" for an interconnection, Tr. 3124-3125. These unconscionable terms deprive Painesville of most of the benefits of coordinated operation and development.

72. CEI delayed construction of the interconnection, further depriving Painesville of the benefits of coordinated operation and development. A dispute arose in September 1975, as to which party would bear certain costs of the interconnection, Tr. 3157-3158. All areas in this dispute involved construction to be done by CEI, Tr. 3158. The construction of the interconnection could be completed four to six months after the dispute is resolved, Tr. 3157.

Refusal To Wheel

73. In June of 1974, CEI refused a general request by Painesville to wheel third party power, NRC 141, thereby preventing its competitor from obtaining access

to the full benefits of coordinated operation and development. The interconnection agreement, NRC 140, provides only that, should CEI find it necessary to secure power for Painesville from an outside source, Painesville will reimburse CEI 110 per cent for its out-of-pocket costs; CEI alone determines this necessity, Tr. 3176-3177. This anticompetitive provision effectively prevents Painesville from reaching relatively inexpensive sources of power outside the CEI system and precludes "wheeling out" and resale of power to customers outside the Painesville service area, Tr. 3176-3177.

Access To Nuclear Power

74. Painesville cannot construct or finance a nuclear generating unit by itself. It must have the cooperation of CEI if it is to participate in nuclear generation, Tr. 3120. Painesville cannot build its own transmission lines to other utilities because it is in a highly urbanized area and the cost would be prohibitive. Moreover, it may be difficult to obtain approval of the Ohio Power Siting Commission because such lines would duplicate CEI's existing transmission facilities, Tr. 3174.

By letter of April 11, 1973, Painesville wrote to CEI expressing its interest in participating in the recently announced Perry nuclear units, NRC 136A. CEI responded on April 24, 1973, with an offer to discuss Painesville's request, NRC 136B. Subsequently CEI's representative advised Painesville that a simple interconnection agreement would provide Painesville with the same things it would get through participation. NRC 138; Tr. 3116; App. 195, pp. 22-24. At the time of Mr. Pandy's testimony in these proceedings, CEI had not made available to Painesville any terms or conditions for access to the Perry units including Applicants' policy commitments, Tr. 3162; Tr. 10869. In the Spring of 1976, Painesville renewed its request for participation and in return received from CEI a copy of the obviously insufficient participation agreement offered to the City of Cleveland over two years earlier which admittedly did not even reflect what CEI asserts to be its current wheeling policy, Tr 10718. Painesville is still interested in participating in the Perry nuclear units, Tr. 3158.

DUQUESNE

75. Since its incorporation in Pennsylvania in 1912, Duquesne Light has become the dominant, and in terms of generation and transmission, the only electric utility within its 800 square mile service area. NRC 157, Appendix N, p. 2-3. The present size and service area of Duquesne is a product, in part, of a series of mergers and acquisitions which have lead to a situation in which only one other distribution system, Pitcairn, has any retail customers within the Duquesne service area. DJ 587, p. 74.

76. Duquesne Light has regarded its municipal competitors as "a potential threat to the well being of the Company . . ." DJ 321, p. 2. For that reason, it was the Company philosophy "to try to purchase municipal systems." Id.

77. Since 1960, Duquesne has acquired three (Aetna, Sharpsburg and Aspinwall) of the then four remaining municipal systems located within its service area, NRC 158, p. 13, 27, 28; DJ 587, p. 74, and has attempted to acquire Pitcairn, the fourth and last municipal system. In July 1966, Duquesne representatives, with the knowledge of the Company's chief executive, indicated to officials of Pitcairn an intent to acquire its municipal system. DJ 242; DJ 243. In December 1966, Duquesne's President, Mr. Fleger, was informed by Mr. Gilfillan, vice president of marketing and customer services,

that acquisition of the Pitcairn system "would clean up the remaining municipal electric system in our service area." DJ 245. The following day, Mr. Fleger agreed that Duquesne should attempt to acquire Pitcairn, suggesting that the same procedure followed in Duquesne's acquisition of the Aspinwall system be utilized. DJ 246.

78. Subsequently, Duquesne employees, on numerous occasions, brought up the subject of acquiring the Pitcairn system in conversations with the village solicitor, Mr. McCabe. McCabe Tr. 1684-85, 1751; NRC 13. Duquesne officials suggested to Mr. McCabe that the sale of the Pitcairn system would involve a large legal fee for Mr. McCabe. McCabe Tr. 1684-85, 1751. Duquesne also approached members of the Pitcairn City Council and other Borough representatives to solicit the acquisition of the Pitcairn system. McCabe Tr. 1686; NRC 57; DJ 248; DJ 251.

79. Despite Duquesne's contention in this proceeding that there is no competition within its service area, Mr. O'Nan's prepared remarks relating to the acquisition of small municipal electric systems directly controverts the company's argument. Referring to the Borough of Aspinwall, which Duquesne attempts to dismiss in its Proposed Findings of fact as of no competitive significance*,

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* "The Aspinwall and Pitcairn municipal electric systems could not have been competitors of Duquesne because of their size and because of other reasons." App. ff 37.28. The contradictions between Applicants' proposed findings in the course of a contested license proceeding and Duquesne's policy memorandums and pronouncements made prior to these proceedings is apparent. In addition, we

(Footnote continued on next page)

Mr. O'Nan said:

> . . . [T]he diversity of the load and growth potential would indicate that the allocation of full generation and transmission facilities was conservative and some value be assigned to the fact that . . got rid of a municipal system with all of its future potential implications.

DJ 321, p. 4 (emphasis added).

Refusal to Provide Bulk Power Services

80. Concurrent with the acquisition policy of Duquesne which commenced at least as early as the summer of 1966,** Duquesne, between 1966 and 1968, denied requests by Pitcairn that Duquesne sell electric power on a wholesale basis or that Duquesne enter into some form of coordinated operation (e.g., an interchange agreement). DJ 242; DJ 245; McCabe, Tr. 1616; NRC 13; NRC 14; McCabe, Tr. 1619, 1622-23; NRC 16.

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* (Footnote continued from preceding page)

should note that Duquesne's argument that the Pennsylvania regulatory scheme inhibits competition does not take into sufficient account the possibility of potential competition nor the effects of yard-stick competition. Despite Duquesne's utterances to the contrary, it is abundantly clear that Duquesne was looking over its shoulder to see if the rate structure or load growth potential of the municipalities represented a competitive threat to its interests.

** The specifics of earlier attempts to acquire either the Pitcairn or other municipal electric systems within its service territory were not reachable through the discovery process since the Board had established a September 1965 limit on discovery except upon good cause shown. With respect to the acquisition policy of Duquesne, it has not been deemed necessary to make an exception to that policy.

81. The refusal to sell wholesale electric power to the Borough of Pitcairn was consistent with Duquesne's refusal in 1966 to sell either full or partial requirements frim power to Aspinwall. DJ 170. Mr. Fleger, Duquesne's president, indicated that:

> [W]e should reply to Donaldson (the solicitor of Aspinwall) emphatically that we will not sell power to Aspinwall for resale to their residents by the Boro. It should be an unequivocal "no" so there is no misunderstanding.

DJ 171. See also DJ 173; DJ 172; DJ 174. Another request for wholesale sales by Aspinwall in August of 1966 also was refused. DJ 201.

82. During the period when Duquesne refused to make wholesale sales to Aspinwall and Pitcairn, it was aware that prolonged litigation was an effective weapon in situations involving charges of inconsistency of the antitrust laws. DJ 254; DJ 169.

> We should make clear at all times that we will not provide electricity for resale. We will use whatever means are possible to resist this including court action, if necessary . . .

DJ 169; DJ 171; see also DJ 245.

83. Duquesne's decision not to sell wholesale power to municipalities within its service area represented the policy position of the company. NRC 13*; McCabe, Tr. 1616; NRC 16. This

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* ". . . Duquesne Light Company has not in the past nor does it intend to in the future supply power to Municipalities on a wholesale basis." NRC 13.

policy was in effect until Pitcairn commenced antitrust litigation against Duquesne in 1968, see Findings 88-90, infra, applied throughout the history of the Company.*

84. There is a direct relationship between Duquesne's policy decision not to supply electricity at wholesale to municipalities within its service area and the intent of Duquesne to acquire these systems. For example, in an internal memorandum of November 30, 1966, Mr. Gilfillan stated:

> It is our belief that with careful handling it is possible that the Borough can be induced to sell their distribution facilities to our Company. In our discussions, our representatives made it very plain that we will not sell the Borough power for redistribution and that we would resist any effort forcing us to do so with all the resources at our command.

DJ 245; see also DJ 242; NRC 13. Also see DJ 321, the Duquesne description of its "game plan" for the acquisition of small municipal systems featuring Aspinwall as the example. Page 4 of DJ 321 indicates that part of the negotiating strategy employed by Duquesne in inducing Aspinwall to sell its system was a consistent refusal to sell power on a wholesale basis to Aspinwall.

Refusal to Interconnect

85. In addition to its policy of refusing to sell electricity at wholesale to municipalities, Duquesne also refused

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* "Duquesne has never furnished wholesale baseload service to any municipality." NRC 19.

to establish interconnections with municipalities. Pitcairn requested a discussion relating to interconnecting and pooling in July of 1966, DJ 239. A meeting to discuss this request was held in August 1966, but at that meeting Duquesne informed Pitcairn that it would not sell power at wholesale and suggested the sale of the Pitcairn system to Duquesne. DJ 242. On November 20, 1967, Pitcairn wrote to Duquesne requesting an interconnection to provide emergency backup. DJ 1, McCabe, Tr. 1730. Duquesne offered only to sell power at Duquesne's rate "M", DJ 203, notwithstanding Pitcairn's request for a different schedule. Pitcairn declined to purchase power under rate "M" because it was too expensive* and because it was not available for base load. It was Mr. McCabe's observation that other municipalities which had purchased power under rate "M" had incurred excessive costs which costs became a factor in negotiating the sale of these systems to Duquesne. McCabe, Tr. 1827.

On January 23, 1968, Mr. McCabe met with Duquesne representatives and requested an interchange agreement with Pitcairn similar to the agreement which Duquesne had with other electric utilities. McCabe, Tr. 1627-28. This request was refused, Id. Pitcairn then made a written request of Duquesne for an interconnection, App. 114, which also was refused. NRC 16; McCabe, Tr. 1627-28.

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* The average cost of power under rate M would have been 30 mills per KW, Gilfillan, Tr. 8464.

86. Duquesne contends that it "repeatedly offered to supply Pitcairn with emergency service for resale under rate M of its tariff filed with the PaPuc", App. ff 37.45; that Pitcairn's objections to emergency service under rate M went only to price; App. ff 37.46, and that the record does not establish the price charge under rate M was unreasonable, App. ff 37.47.*

The parties are in disagreement with respect to whether rate M is reasonable or prohibitive in its terms. Rate M involved a minimal annual demand charge to Pitcairn of $23,400 at a demand rate of 1600 kva and $10,200 at 500 kva. The minimum term for which service could be obtained under rate M was three years, however, NRC 211, NRC 15, so that at a 1600 kva demand, Pitcairn would have had to pay Duquesne $70,200 for the use of any energy whatsoever in emergency situations. Gilfillan, Tr. 8472.** The

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* Certain portions of the above referenced proposed findings of Applicants are inaccurate and contrary to the record. E.g., the representation that such service satisfied Pitcairn's requests and needs and that Pitcairn itself treated this offer as responsive to its request. Thus, states Duquesne, it did not refuse to deal with Pitcairn. Exhibit NRC 18, a February 27, 1968, letter from Mr. Merriman, Director of Governmental Sales of Duquesne, to Mr. McCabe explicitly rebuts this contention:

> . . . I must advise you that the Company cannot undertake any responsibilities to meet an emergency except in a situation in which a contract under Rate "M" has been previously executed.

** Additional charges would be made for contract demands in excess of 1600 kva; NRC 211.

energy charge under rate M is three cents per kilowatt hour, NRC 211, or 30 mils. Duquesne's cost of energy production at the time rate M was offered was 2-5 mils. Dempler Tr. 8684. Thus, the Staff contends that energy offered under rate M was being sold at up to fifteen times its cost of production, Staff ff. 1.058.

Applicants argue that the rate M rate was not unreasonable because:

> If Pitcairn had agreed to take Rate M with the contract demand of 1600 kva (or 1600 KW if power factors are ignored), the Borough would have been able to recoup the minimal annual charge of $23,409 merely by taking 90 KW on a round-the-clock basis [footnote omitted]. This would certainly be above Pitcairn's lowest hourly demand.

App. Joint Reply Brief, p. 43. This argument is untenable and frivilous. Rate M by its very title is characterized as "emergency service" and is not intended to be provided on a long term round-the-clock basis. Duquesne never conceived of rate M service as equivalent to a firm power sale but rather took the position that it would offer only emergency service and not base load electric power, NRC 19. Duquesne's vice president, Mr. Gilfillan testified that the rate M service would be available only for emergency purposes. Gilfillan, Tr. 8466, 8486.

Duquesne also argues that what they acknowledge to be a "comparatively high energy charge", App. Reply Brief, p. 43, of three cents per KWH was justified. According to Duquesne, under

rate M it would have been obligated to provide Pitcairn up to 1600 KW of capacity on short-term notice. Since rate M contained no capacity charge, Duquesne's investment costs in providing this capacity necessarily would have to be recovered through the energy charge. Duquesne then argues that investment costs associated with any unused capacity would not be recovered. What strikes us as astounding about this argument is its clear implication that 1600 KW represents a significant amount of capacity.* If this is so, then Duquesne's arguments that it would achieve no benefit through interconnection and that there was no mutuality because Pitcairn had nothing to supply fails. Duquesne cannot have it both ways. It cannot regard 1600 KW of capacity (assuming an emergency on the Pitcairn system would require the full entitlement under rate M) as important when it is the supplier but inconsequential when it is the taker.

Finally, we find Duquesne's concern over the obligation to provide additional capacity of 1600 KW to be artificial and overstated since Duquesne had call on its CAPCO partners for substantial additional capacity.

87. Duquesne was not prohibited from selling wholesale firm power by State law.

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* Duquesne's 1968 net generating capacity was 1778 MW.

(A) The Federal Power Commission and not the State of Pennsylvania has exclusive regulatory jurisdiction over wholesale sales to municipal systems.* FPC v. Southern California Edison Co., 376 U.S. 205 (1964).

(B) Duquesne was aware that the FPC had asserted jurisdiction over such wholesale sales during the period when Duquesne was refusing to make such sales to Pitcairn. App. 263, p. 3-4.

(C) Wholesale firm power sales for resale are not prohibited by any Pennsylvania law or regulation of general applicability. See Justice ff law 6; law 9. Duquesne was aware that at least one Pennsylvania utility sold power to a municipal system for resale. DJ 168. The only arguable restriction on such sales by the company has been Rule 18 of Duquesne's own tariff which rule apparently does not prohibit such sales under Duquesne's rate M for emergency service. See Gilfillan, Tr. 8474-75. It is clear that Rule 18 was sponsored by or a product of a Duquesne filing which could have been amended to provide for firm power sales had Duquesne wished to do so. Gilfillan, Tr. 8476-77, 8507-09. As set forth in Cantor v. Detroit Edison Co., U.S. (1976), no defense is

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* Duquesne concedes this point. See prehearing fact brief of Duquesne Light Company at 49.

provided nor antitrust immunity obtained by anticompetitive acts initiated by electric utilities when these acts are not compelled by a state agency nor necessary to the survival of a valid regulatory purpose.

The refusal by Duquesne to sell wholesale electric power other than emergency power pursuant to rate schedule "M" and its refusal to establish an interconnection left Pitcairn in a completely isolated generating position. Mr. McCabe testified:

> Pitcairn is geographically located completely within the bounds of Duquesne Light's service area. Consequently, Duquesne Light was the logical place to turn to to attempt to acquire purchase power on some sort of a basis.
>
> The fact that the Burough of Pitcairn had to continue on an isolated basis detracted from the reliability of the burough system and deprived the Burough of being able to take advantage of the economies of scale which were being used by the electrical utility industry in general. Tr. 1652, 1653.

88. In reaction to what Pitcairn conceived to be Duquesne's refusal to deal with the Borough coupled with Duquesne's frequent requests to purchase the Borough's electrical system , Pitcairn initiated an antitrust action on July 23, 1968, in the United States District Court in Pennsylvania against the Duquesne Light Company. McCabe, Tr. 1647; NRC 20.

89. As a result of its operation on an isolated basis, the reliability of the Pitcairn electric system was affected adversely. In the autumn of 1970, while its largest generation unit was down

for scheduled maintenance, a broken crank shaft on another generator made it necessary for the Borough to request customers to reduce the amount of electric power being utilized. Pitcairn then instigated proceedings before the FPC on an informal basis with a request for emergency temporary interconnection. McCabe, Tr. 1654.

Wholesale Sales - Terms and Conditions

90. On October 13, 1971, Pitcairn and Duquesne entered into a settlement agreement which included inter alia an obligation of Pitcairn to dismiss with prejudice its antitrust action and to withdraw and discontinue with prejudice of the FPC proceedings (Docket E-7547). NRC 21. Duquesne agreed to file with the FPC a tariff for "municipal resale service for Pitcairn." Subsequently, Pitcairn ceased generation of electric power and has fulfilled energy requirements for its distribution system by purchase from Duquesne.*

91. Although the settlement agreement required Duquesne to sell firm power at wholesale to Pitcairn, Duquesne refused to operate in parallel with the municipal system. NRC 21, McCabe, Tr. 1658, 4169, 4176.

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* Documents were received into evidence reflecting Duquesne's assessment that Pitcairn had "a very good chance" of winning in the FPC and a 50-50 chance of prevailing in the antitrust action. DJ 254; DJ 260. The Board has not relied upon these documents nor attempted to assess the probabilities of Pitcairn's prevailing in either forum.

DENIAL OF ACCESS

92. In early 1968, Mr. McCabe and Mr. Meyers, Secretary of the Borough of Pitcairn, met with Mr. Munsch, the General Counsel, and Mr. Dempler of Duquesne for the purpose of exploring the feasibility of the Borough's becoming a party to the CAPCO power pool. In addition, the Pitcairn representatives made a request for access to CAPCO nuclear units specifically mentioning the Beaver Valley Station as a possibility. Mr. Dempler, on behalf of Duquesne, gave a negative answer to the concept of permitting non-CAPCO entities access to any individual generation unit owned by the parties to the CAPCO pool. Although this denial of access to nuclear power was specific as to Beaver Valley, the denial by its plain terms would be equally applicable to the Davis-Besse and Perry stations. Mr. Munsch stated that future pool facilities would be considered on a group basis. NRC 17.

93. Since the February 1968 meeting at which Duquesne expressed its interest in obtaining a joint ownership or unit shares in contemplated CAPCO nuclear units, Pitcairn never has been advised that access to nuclear units would be made available by CAPCO or any of the CAPCO member companies. McCabe, Tr. 1717-19. Pitcairn's interest in nuclear units continues unabated to the present. McCabe, Tr. 1716.

Mr. McCabe testified that:

> . . . participation in a [CAPCO] nuclear unit would involve Pitcairn actually buying a portion of that unit and taking power from that unit at the production cost subject to certain wheeling charges.
>
> I would anticipate that those charges would be less than the price which we currently pay Duquesne Light for power supply. I therefore would envision an economic benefit. McCabe,Tr. 1738.

94. There is a direct nexus between the refusal of Duquesne and the CAPCO group to make available access to CAPCO nuclear units and the issues in controversy in these proceedings.

95. Although Duquesne has refused to enter into interconnection agreements with municipalities located within its service area nor will it engage in wholesale power transactions with such municipalities, Duquesne has interconnections and does sell power to other private utilities in Pennsylvania. For example, Duquesne, through an interchange agreement with Penn Power (another Applicant), sells power to Penn Power. Gilfillan, Tr. 8438.

96. The actions of Duquesne in refusing to sell wholesale power at wholesale to municipalities, in refusing to interconnect and in refusing to supply emergency energy except pursuant to rate M* contributed substantially to the elimination of municipal electric systems, including Pitcairn and Aspinwall, as generating entities

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* This particular event is not material to our overall conclusion.

within the Duquesne service area. The actions of Duquesne in denying the foregoing bulk power services and in refusing to make available benefits of membership in the CAPCO pool including access to nuclear generating stations constructed to supply substantial quantities of base load power for that pool have deprived municipal entities in the Duquesne service area including Pitcairn of alternate sources of electrical supply. Duquesne's actions have induced and were intended to induce municipal generating entities within the Duquesne service area to abandon generation and to sell distribution facilities to Duquesne.

The refusal of Duquesne to entertain requests by a municipal system within its service area for membership in the CAPCO pool has had the effect of depriving that municipality of the opportunity to consider self-owed nuclear power as a competitive alternative to the purchase of bulk power requirements exclusively from Duquesne. The desire of Pitcairn to obtain access to nuclear power was known to Duquesne at the time its refusal to permit membership in CAPCO was made.

97. Although the discovery cutoff date of September 1965 did not permit or require examination into the circumstances of Duquesne's acquisition of other previously acquired generating entities within its service area until it reached its present position of 100% dominance over all electric generation and high voltage transmission within its service area, we find that its actions in refusing to sell

wholesale power to Aspinwall as part of a plan to achieve its intended objective of acquisition of the Aspinwall system and its refusals to deal with Pitcairn coupled with its desire to acquire that system constitute abuse of a dominant position and an anticompetitive use of monopoly power.

98. We find that Duquesne's refusal to permit Pitcairn to obtain membership (even on some modified basis) into CAPCO and the denial in the alternative of any other reasonable or bulk power services options taken together constitute a refusal to deal and denial of an essential resource the effect of which is to maintain a situation inconsistent with the antitrust laws.*

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* Denial of membership in CAPCO, standing alone, need not necessarily have brought us to this conclusion. Duquesne coupled denial of CAPCO membership with a refusal to provide other essential bulk power services.

OHIO EDISON AND PENNSYLVANIA POWER

99. In this decision, we have regarded Ohio Edison and Penn Power as a single entity except where differences in state law are relevant. As noted above in Finding 5, Ohio Edison and Penn Power own or control virtually all of the generation and high voltage transmission in their service areas. They account for 94% of retail sales and 99% of firm wholesale sales in their service areas.

Such overwhelming share of the relevant market permits the inference of monopoly power, Grinnell, supra, and these market shares may be the primary factor in measuring monopoly power, Griffith, supra.

Applicants urge, with particular reference to Ohio Edison, App. ff 31.19, 31.20, that market power may not be inferred from statistical high market shares where industrial, economic and legal barriers restrict the power to control prices or exclude competition.

The record of this case permits an examination of the validity of the market share inference. The record, as a whole, with respect to Penn Power and Ohio Edision demonstrates redundantly that the two companies possessed and used the power to control prices and other conditions of sale, the power to refuse

to engage in transactions which would otherwise be economically beneficial and to exclude competition. This power was used to increase their monopoly positions once the threshold of monopoly had been obtained and to consolidate and to maintain it. The use of their market power demonstrates that the power, in fact, exists and, within the context of the issues of this case, demonstrates that Ohio Edison and Penn Power's position in its service area has enabled them to prevent and they have prevented other entitities within their service areas from achieving the benefits of coordination and economies of scale.

The opposition parties urge that Ohio Edison and Penn Power may not escape liability as monopolists and that they have maintained and exacerbated a situation inconsistent with the antitrust laws by activities falling within three major categories: (1) anticompetitive acquisitions consolidating their service areas; (2) exclusionary practices insulating their service areas from competition from outside, such as territorial agreements and refusals to wheel outside power (in addition to the CAPCO boycott); and (3) repressive practices eliminating and preventing the growth of potential competition from within their service areas; for example, refusals to wheel, refusals to interconnect, refusals to sell power and price squeezes.

Acquisitions and Consolidation

100. Ohio Edison was incorporated in 1930 as a consolidation of five private utilities which also were formed from previous mergers and acquisitions. This consolidation predates the period under examination. With respect to the earlier mergers, the Board accepts the testimony of Dr. Gerber, App. 189, pp 8-10, that the consolidation experience within the Ohio Edison service area is attributable, at least in part, to natural scale economies, technological advances such as alternating current, and improved transmission techniques. Therefore, the Board draws no anticompetitive inference from the trend toward concentration prior to 1965 in Ohio Edison's service area.

Since that date, Ohio Edison has acquired the municipal systems of Lowellville, Norwalk, Hiram and East Palestine, Ohio.

101. In 1970, Norwalk, Ohio had a self-generating municipal electric system. Beginning in 1970, it began to consider several options to fill its electric power needs including (1) selling its generation station to the only potential buyer, Ohio Edison, but keeping its distribution system; (2) selling both the generating and distribution system; and (3) purchasing supplemental and standby power, DJ 422. Norwalk was at that time a

viable electric utility. In a free competitive environment, many options would have been open to it for survival.*

102. Ohio Edison refused to buy Norwalk's generation unless the distribution system was included, DJ 422. This, of course, would eliminate Norwalk as a potential customer for any other utility and would eliminate the possibility of resuming self-generation by Norwalk. Applicants assert that the generation was not useful to Ohio Edison. But Ohio Edison ultimately bought it and uses and credits this generation in fulfilling its own and CAPCO responsibilities, Firestone, Tr. 11,180, App. 172. Ohio Edison states that it ultimately purchased this generation with the distribution system simply because Norwalk desired to sell it, App. ff 36.91. Ohio Edison's reasonable business justification for the rationale for the transaction fails.

In mid-1970, Ohio Edison had its "newest program" in progress to acquire the Norwalk system, DJ 423. In 1971, Ohio Edison refused to discuss rates for a parallel operation with

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*Applicants state, (App. ff 36.90), that the Norwalk system was a failing system. Applicants' citation to the record for this proposed finding, App. 221, p. 9 and App. 240, simply does not support that claim. In fact, App. 240 suggests that generating problems may be temporary and remediable without "any severe problems" and, while sufficient for immediate and limited future needs, the generation would not be adequate for long range purposes.

Norwalk and discouraged the investment of capital for paralleling equipment, DJ 428, but instead redirected the negotiations to Norwalk purchasing total power requirements from Ohio Edison, DJ 431.

In December 1971 when Norwalk officials met with representatives of Ohio Edison to discuss Norwalk's power supply problems, Norwalk's representative pursued several alternatives to the sale of its system, DJ 434. Norwalk's attorney inquired about the operating locations and titles of Ohio Edison's power pools. He was given the names of CAPCO and ECAR but told that Ohio Edison representatives were not familiar with the pertinent rules and regulations.* Norwalk inquired again if it could retain its distribution system but was again refused. Norwalk was again frustrated in its inquiries to enter into a partial requirements power contract and, when Norwalk asked about the policy for wheeling power, perhaps from Buckeye Power, it was advised that Ohio Edison representatives, (although high ranking) were unable to provide wheeling information. Norwalk's

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*Applicants' refusals to reveal basic CAPCO information and policies to interested potential members is unreasonable and inconsistent with the defense urged by Applicants of the "legitimate business justification," for refusing membership.

representative inquired about the situation with respect to Orrville, Ohio (Orrville was able to interconnect with another utility) and was denied information. He was again denied any opportunity to discuss a parallel operation with Ohio Edison. In an apparent effort to determine whether purchases from the adjoining Ohio Power Company would be feasible, Norwalk inquired whether there were territorial allocation agreements between Ohio Edison and Ohio Power, recognizing that such matters were not generally discussed. Efforts to purchase power from Buckeye from the Cardinal plant through Ohio Edison's transmission were frustrated. Norwalk's representative stressed the importance of being assured that no better alternative to sale of the entire system was available but, repeatedly, sale of the system with full requirement contracts was the only course held out to Norwalk. Id.

There was indeed a territorial agreement between Ohio Edison and Ohio Power. Ohio Power could not have been a supplier to whom Norwalk could turn, even if Ohio Edison had not had a policy of refusing to wheel outside power. Norwalk's hope of purchasing power from Buckeye was doomed from the start because of restrictive conditions by Ohio Edison. There was never the slightest possibility that Norwalk could have participated in the CAPCO pool.

Norwalk then sold its system to Ohio Edison. The Board finds that the Norwalk, Ohio electric system had several reasonable opportunities to survive including purchases of supplemental power, access to the benefits of pooling including the benefits of nuclear power; purchases from Buckeye Power or Ohio Power; and, in each instance, none of those options were available to it because of a situation inconsistent with the antitrust laws. The ultimate acquisition itself exacerbated that situation.*

103. In 1965 Ohio Edison acquired the system of Lowellville, in 1971 it acquired the system of Hiram and later it acquired the system of East Palestine, Ohio. The record does not demonstrate the circumstances surrounding the acquisitions of these municipal systems, DJ 587, p. 66. They indicate only that Ohio Edison had acquired three potential direct horizontal competitors, eliminated any possibility of supplier competition for their loads, and that the pattern of consolidation by acquisition in its service area continues.

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*Even if the demise of the Norwalk system had been inevitable because of the natural economic forces described by Dr. Gerber, App. 189, this does not save it from the reach of the antitrust laws. Whatever its natural economic fate might have been, Norwalk was entitled to it without being hurried along by the anticompetitive practices of Ohio Edison.

Territorial Allocation Agreements With Outside Utilities

104. In the years following 1965, Ohio Edison entered into, and complied with the terms of territorial allocation agreements with several utilities abutting its service area. Applicants do not admit to these agreements. Ohio Edison's president, Mr. White, suggests that signed maps delineating territorial boundaries were not agreements but efforts by investor-owned utilities to test the feasibility of drafting a territorial integrity law, Tr. 9750. We are not persuaded.

105. Since at least 1965, Ohio Edison and TECO had been parties to a territorial agreement, DJ 513-17; 519; 533-35; 537-40. These territorial agreements took the form of "confidential" but formal territorial maps which were signed by the highest officials of the companies, DJ 516, frequently updated, DJ 517, and used in day-to-day operations of Ohio Edison, DJ 519.

With respect to Mr. White's testimony that these maps may have been no more than study material for legislative purposes, his testimony is inconsistent with the November 1965 letter of Mr. Dreisbach, Ohio Edison's Coordinator of its Division of Distribution Practices, who advised TECO's president, DJ 517:

> We want to thank you, Ken Birch and the other people in your organization for their cooperation in solving this territorial matter and feel that it should make for smoother operations in both of our companies (emphasis supplied).

Moreover, in March 1966, Mr. Dreisbach indicated, DJ 519:

> It was during this discussion that I was able to get the point across that Dayton Power and Light Company, Ohio Power Company and Toledo Edison Company had definitely signed confidential maps which we use in our day-to-day operations.

106. Ohio Edison's territorial agreement with Ohio Power Company (abutting its service area to the south) was in effect at least as early as March 7, 1966, DJ 519. Ohio Edison and Ohio Power officials recognized a functional dividing line which was used to allocate customers, DJ 521, 523-527, 530.

107. Subsequent to the drafting of the territorial maps of 1965, DJ 527, several errors were discovered. Ohio Edison and Ohio Power officials began meeting as early as June 1966 to trade customers in order to resolve some of the questionable areas where competition might arise, DJ 520-30. For example, officials of the two companies met in November 1967 for a general meeting to discuss fringe area problems, DJ 523, where Ohio Edison officials agreed:

> [W]e would take a hard look at territory that we might consider exchanging for the Madisonburg area in lieu of the error made in the construction of this recent line. In connection with the Madisonburg area, we will also have to decide as to our recommendations for correcting this line and as to how we want to correct the line on the signed maps, DJ 523.

108. In connection with the discussion of allocating fringe areas between Ohio Power and Ohio Edison, there were several discussions concerning the possibility of adjusting rates to avoid, directly or indirectly, rate competition between the two utilities, or to facilitate the trading of customers in the program to adjust the territory boundaries, DJ 520, 523, 525, 527 and 530. Rate differences between adjoining utilities create problems exchanging customers. Ohio Power initially sought to deal with this problem by equalizing rates at the fringes, DJ 520, 523 and 525, but was advised by Ohio Edison that similar suggestions made before had been declined by Ohio Edison, DJ 525. Ohio Edison preferred to exchange customers notwithstanding the fact that some customers would be compelled to pay increased rates.* However, in a territorial allocation adjustment meeting in 1969, when Ohio Power again recommended a rate freeze, Ohio Edison's president agreed that his firm would look at all possibilities, DJ 527. The record does not disclose whether Ohio Power and Ohio Edison ever successfully incorporated a price-fixing scheme into their territory allocation program.

109. In January 1966, Ohio Edison officials met with officials of the Columbus and Southern Ohio Electric Company to discuss

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*An additional indication of the helplessness of the customers and the power of the utility.

fringe area mapping but were advised that Columbus and Southern did not want to do any mapping; that they wished to avoid embarrassing their company at a later date. After trying to impress upon Columbus and Southern the advantages of making such a map with a practical example of the avoidance of competition, Columbus and Southern agreed to exchange distribution maps showing their lines, DJ 518. However, at a later meeting in March 1966, Columbus and Southern again declined to agree on territory allocation and Mr. Grueser of that utility stated, DJ 519:

> ...[T]hat they felt any such agreement on territory was illegal and that he had talked to some members of the P.U.C.O. [Public Utilities Commission of Ohio] and they felt the same way....

110. The customer exchange program between Ohio Edison and Ohio Power does not comport with Applicants' argument that the Ohio's Utilities Commission provides an adequate substitute for competition. Aside from the fact that the Public Utilities Commission of Ohio does not require or even favor exclusive service areas, there is evidence of record that the conspiring utilities even avoided submitting to the regulation of the Ohio commission, DJ 513 and 527.

In a 1967 meeting on fringe area problems, Ohio Power did not want to take a chance on getting the matter before the Ohio commission and Ohio Edison regretted that the application

(by a customer for power) had not been previously "ironed out," DJ 523.

In 1969, Ohio Edison and Ohio Power agreed in a meeting to approach the Ohio commission to determine its reaction to a switch of customers. The minutes of the meeting recorded that the companies thought, DJ 527:

> ...that revenue would probably be the basis for any exchange. However, this would not be the basis for any presentation to the Commission. Any presentation to the Commission would be based on the logical aspect of more efficient service areas. Rates were discussed briefly.

111. An agreement to recognize territorial boundaries between CEI and Ohio Edison has been in effect since as early as 1964, DJ 488. In April 1974, Ohio Edison agreed with CEI to regard Boston Road as CEI's area in a territorial allocation agreement, Id. With respect to that agreement, Mr. Davidson, a vice president of CEI, stated that:

> Ten years or more ago the two companies had had difficulty at certain boundaries and it was concluded that the company with the lowest cost should serve; and if this was not agreeable to both parties, it was to be referred to the respective V.P.'s. Mr. Davidson stated his concern for Ohio Edison paralleling their existing facilities.

In connection with Mr. Davidson's statement, Ohio Edison representatives assured him that Ohio Edison had no intention of serving any customers that they were presently

serving or, for that matter, any open lots in the area in question. To this, Applicants state, App. Brief p. 620, that DJ 488, the memorandum of Mr. Davidson's statement, merely refers to an understanding between Ohio Edison and CEI that the utility with the lowest cost would serve. Applicants interpretation of this document, however, overlooks the fact that if the standard of lowest cost was not agreeable to both parties, it was to be referred to the respective vice presidents, Id.

112. Mr. Rudolph, then president of CEI, testified that the failure to compete with Ohio Edison was predicated upon his understanding "...that the company that is closest and can serve with the least cost, they get the business," DJ 558, p. 53, l. 17-18. Mr. Rudloph testified further that his company followed this practice because he had been advised by counsel that that is the law of Ohio, Id.

As noted elsewhere in this decision, it is not Ohio law that adjoining utilities should not compete for new customers. Applicants do not argue to the contrary.* At least one utility, Columbus and Southern, considers agreements not to compete to

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*Section 4905.261 of the Ohio Revised Code, cited by Applicants, provides for limiting competition for existing customers, App. Brief p. 137, et seq.

be illegal. Whatever the basis, the fact that Ohio Edison agreed with CEI not to compete at the fringes for new customers is a per se violation which requires no analysis. It cannot be defended under Parker v. Brown, 317 U.S. 341 (1943). Even though an analysis of intent and effect is not required in a per se violation of this nature, Applicants' justification for this agreement is instructive. They appear, App. Brief p. 621, to feel comfortable with the explanation that the utility with the least cost would serve (by agreement, not by advantage of efficiency) thus demonstrating how far from the real world of antitrust they have strayed. Dividing territories, and business, upon the asserted basis of least cost is a mutually beneficial, self-serving, and profit-maximizing consideration. It fails entirely to differentiate between cost to producer and price to consumer.

Rates are set upon the widely based cost of utilities. As Applicants concede, ff 23.03, "yardstick competition" is not a factor in the regulatory scheme in Ohio. Thus, the hapless customers located on the fringe are allocated between the two utilities depending upon which utility will benefit more. The customers are denied a free choice based upon price and service. If the utility to which they are assigned has higher system costs and higher rates, they have no recourse, particularly since the companies, not the Utilities Commission, made the decisions.

113. The Board does not attach the same relevance and importance as do Applicants to the argument that the territorial agreements affected only retail accounts. Even assuming this to be true, the methodical gathering of retail loads, embracing each new opportunity to serve areas at retail as it arises, effectively precludes the emergence of any competition among investor-owned utilities.

However, the Board has examined each of the exhibits pertaining to the territorial allocation agreements and even Applicants' claim as to the impact upon wholesale business is not supported by the evidence in almost each instance. The territorial allocation was determined on the basis of geography without regard to the functional level of sales. In some instances the territorial allocations were single parcels and would undoubtedly be retail accounts. Then in other instances there were rather substantial areas such as the Madisonburg area, State Route 19 between Galion and Bucyrus, Myers Lake, and Savannah, DJ 523, and the territory southwest of Fairfield, DJ 529, which could ultimately have its impact upon wholesale business.

114. Ohio Edison defends against the territorial allocation charge, in part, by asserting that, if such agreements did exist, Mr. White, the president of the company, ordered that they

cease in 1972 or 1973. In this regard, the Board is troubled by several considerations. One is that in 1972 or 1973, Mr. White arranged for the collection and disposal of documents relating to territorial agreements between Ohio Edison and other utilities, White, Tr. 9747. His explanation for this runs counter to logic, Tr. 9750-52. Mr. White orally ordered division managers to cease adhering to such agreements. Thus we must compare the formally signed territorial agreements and maps with oral instructions to disregard them. At the least, Mr. White's instructions to his division managers lacked emphasis.

Moreover, Mr. White admits that the other utility partners in the territorial agreements were not advised of Ohio Edison's unilateral decision to cease adhering to them, Tr. 9752-53. We are concerned that, in some instances, the practice, once begun, has been continued by the other utilities.

Assuming, however, that Ohio Edison has, in fact, discontinued on its part territorial allocation practices and, assuming further, that Ohio Power and the other partners have somehow learned of Ohio Edison's forebearance, we cannot accept Applicant's arguments that, once the territorial allocation

agreements end, their effects are negated. Applicants recognize the phenomenon in the electric industry of "one time competition;" that once acquired, utilities "serve forever a new customer," App. ff 23.05. It requires no analysis, it is axiomatic, that, with this factor in the industry, territorial and customer allocation agreements cause rigidity in the market. The longer they are in force, the less they are needed. As Ohio Edison expanded its transmission and distribution lines under unlawful protection from competition, it irreversibly carved out for itself strong competitive advantages tending to exclude entry into its market by outsiders. Applicants point to two instances where Ohio Power very recently has agreed to sell on a limited basis in Ohio Edison's service area as evidence that such agreements have had no effect. We disagree. These instances simply establish that the potential for competition always existed but was thwarted because of illegal territorial agreements and other barriers to competition.

The Board finds that there is insufficient evidence that the territorial allocation agreements have terminated. We find that the effects of such agreements continue and contribute to a situation inconsistent with the antitrust laws within Ohio Edison's service area.

115. The Board finds further that Ohio Edison's successful, effective participation in territorial allocation agreements is direct evidence of its power to exclude competition and abuse of its monopoly power. It has been used to consolidate and maintain its monopoly position and this has been done by per se unlawful means.

Refusals to Wheel

116. The wholesale customers of Ohio Edison (WCOE), a group of municipal electric systems having wholesale power contracts with Ohio Edison organized themselves to fight a wholesale rate increase filed with the Federal Power Commission by Ohio Edison in 1972, Lyren, Tr. 1885-88. In August 1972, WCOE's representative wrote to Ohio Edison's president and, among other things, asked if Ohio Edison would be willing to wheel power from generating sources outside of its service area to each of municipal wholesale customers connected to the Ohio Edison system, NRC 30. WCOE received no answer. At a meeting thereafter to discuss this request and other matters, Mr. White, Ohio Edison's president, again refused to answer but, according to Mr. White, Ohio Edison was not refusing to wheel:

> Mr. Mayben said two or three times in two or three different ways, you're refusing to wheel. In each case I said, no, we are not refusing to wheel, we are simply telling you that we have no answer for you to these questions, yes, no or maybe. Tr. 9593, l. 5-9.

And finally, in 1974, Ohio Edison flatly refused to provide any form of wheeling to the wholesale customers, Cheesman, Tr. 12,162, Lyren, Tr. 2021,* and the refusal continues, Firestone, 11,306-08.

117. Buckeye Power, Inc. is a nonprofit corporation owned by 27 rural electric cooperatives in Ohio, App. 284. The Delaware, Firelands, Holmes-Wayne, Lake Erie, Loraine-Medina, Marion and Morrow Cooperatives are located within the Ohio Edison territory and are members of Buckeye Power, NRC 190. On behalf of its member cooperatives, Buckeye contracted for a large block of power from Ohio Power's Cardinal Plant, NRC 188.

118. The Buckeye member cooperatives located in the Ohio Edison service territory had purchased their power requirements from the Ohio Edison Company but wished to substitute Buckeye's Cardinal source, DJ 616. The problem facing the cooperatives was how to transmit the Buckeye Cardinal power to the member cooperatives when the only available transmission was owned and controlled by Ohio Edison.

When the Buckeye program was in the planning stage in September 1965, officials of the rural cooperatives served by

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*This refusal to wheel also applies to transmitting power among wholesalers within Ohio Edison's service area, Cheesman, Tr. 12,167.

Ohio Edison made their fifth request for wheeling services from Ohio Edison. To complete their financing needs, the rural cooperatives had to specify how they would be served. Ohio Edison proposed that, instead of wheeling, a buy/sell arrangement be implemented, DJ 532. By January 1968, the Buckeye Cardinal power was ready for delivery, NRC 188. On January 1, 1968, Buckeye Power entered into a wheeling contract with six investor-owned utilities providing for the transmission of power to the other Ohio rural electric cooperatives, NRC 188. However, Ohio Edison refused to enter into the power delivery agreement for the delivery of power to the seven rural cooperatives located within its service area, Id.

119. It was not until June 20, 1968 that Ohio Edison agreed to a means by which Buckeye Cardinal power could be provided to the seven rural electric cooperatives located in Ohio Edison's service area, NRC 190. This was by a buy/sell agreement, Id, under which Ohio Edison would purchase power (at Ohio Edison's border) for resale to the seven rural electric cooperatives. This was power which otherwise would have been wheeled by Ohio Edison if the Buckeye request had been honored. The fact that Ohio Edison had transmission capacity to wheel the Buckeye power is demonstrated by the fact that the buy/sell agreement accomplishes the same functional result, White, Tr. 9556, DJ 572, p. 119.

Mr. Mansfield, who was then the chief executive of Ohio Edison, explained in a deposition why Ohio Edison preferred a buy/sell agreement over providing wheeling services and why Ohio Edison agreed to any plan by which outside power would be provided to the rural electric cooperatives in its service area:

> Well, in the first place, I don't like wheeling per se. I don't think it is a good concept in our business at all. In the second place, this was a method by which we could avoid wheeling; No. 2, it was also a method by which we could keep our revenues up by including the amounts that we sold to Ohio Power with respect to growth revenue, whereas, had we agreed to wheel, then our growth revenue would have taken a loss of the aggregate sales to the co-ops, in addition to the fact that we would have been wheeling per se. DJ 572, p. 120.

The record establishes that Ohio Edison joined in the Buckeye buy/sell arrangement because it preferred that the co-ops not have their own transmission, DJ 572, p. 118 and 119; see also DJ 479.

120. The record as a whole with respect to the Buckeye program establishes that, even where Ohio Edison reluctantly lowered the barriers to outside power, it did so to avoid the construction of competing transmission within its service area.*

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*Applicants' argument that the Buckeye buy/sell arrangement disproves the existance of a territorial allocation agreement between Ohio Edison and Ohio Power, App. ff 149, p. 119, is unpersuasive in view of the compelling evidence that such an agreement did exist. First, the Buckeye buy/sell arrangement did not introduce Ohio Power as a competitive force in Ohio Edison's service area. The power involved was essentially that of Buckeye Power, Inc., App. ff 36.139, p. 117. Second, both companies were acting to exclude new transmission into the territories they had divided between them. They could be expected to depart from a territorial allocation agreement toward this end, DJ 572, pp. 118-120.

121. As noted above, Ohio Edison's refusal to wheel Buckeye Power foreclosed that possibility when Norwalk was seeking alternatives to the sale of its system. Another effect of the refusal to wheel Buckeye Power may have been to prevent Newton Falls from purchasing wholesale from Buckeye in 1973, Craig Tr. 2927-28, NRC 210, 84.

122. In 1973, Orrville, Ohio requested wheeling services from Ohio Edison and was specifically refused, Lewis Tr. 7958-59, 7980, 8003, 11,341-42 and 11,444, supra.

123. With respect to Orrville and the WCOE requests for wheeling findings, Applicants defend the refusals on the grounds that, without the specifics of size, identity and duration of the proposed load, Ohio Edison would be unable to evaluate and respond to the requests, App. ff 36.103, 36.104.

The request for wheeling services were sufficiently specific as to identity and size to indicate to Ohio Edison that the municipalities were not idly inquiring in a vacuum; and that power was available to import, and, in the case of Orrville, to export, Lewis, Tr. 7980-84, 7997-8003; Cheesman, 12,250, 12,268-69, DJ 628.

124. In viewing the record with respect to Ohio Edison's refusals to wheel, the Board finds that the refusals were

threshold in nature, so negative and final in tenor as to discourage further efforts by municipalities to develop the engineering details which now are asserted by Ohio Edison to be needed in considering such a request, White 9707-08. There is no record that Ohio Edison ever advised the municipalities concerning their lack of specificity, nor that detailed requests would be considered. Such advice definitely was not provided in the WCOE negotiations, White, Tr. 9606-07. The record as a whole established that Ohio Edison's refusal to wheel was a product of company policy, and perhaps even a matter of principle, DJ 572, p. 120, see also findings with respect to wheeling Buckeye Power, supra. Additional specificity would have been fruitless.

125. Added to Ohio Edison's territorial agreements, and standing alone, the refusals to wheel effectively insulate Ohio Edison from competition from outside sources of power. They denied the entitites within its service area the advantages of coordination in development and operations, and significantly contribute to a situation inconsistent with the antitrust laws.

Activities Within Ohio Edison's Service Area - WCOE Negotiations

126. WCOE, comprising the 21 municipal wholesale customers of Ohio Edison, was formed to oppose the wholesale rate increase

filed by Ohio Edison with the Federal Power Commission. As a part of the settlement of that case, Ohio Edison and WCOE agreed to study a new form of power supply arrangement for the municipalities, Lyren Tr. 1883-86.

127. The electrical engineering firm of R. W. Beck and Associates was engaged to make the study which was completed in July 1975, NRC 44, Cheesman Tr. 12149. The Beck "power supply study" was conducted under the supervision of Mr. Cheesman who testified at the hearing that this firm was not free to study all of the possible alternatives which otherwise might have been available to WCOE; that these restrictions were imposed upon Beck through a series of meetings by Ohio Edison, Cheesman, Tr. 12151. Therefore, the study contains recommendations which are not necessarily the best for WCOE but only those which met the initial test of acceptability by Ohio Edison. Eliminated from the study at the instance of Ohio Edison were the following possibilities which would affect the power supply for WCOE:

1. Ohio Edison would not consider any third party wheeling including wheeling among municipalities; wheeling from municipalities to other sources outside the Ohio Edison service area; and, as discussed above, wheeling from outside the Ohio

Edison service area to the municipalities located within, Cheesman, Tr. 12,152, 12,167; Lyren, Tr. 2022. Third party wheeling was not excluded from the settlement approved by the Federal Power Commission. In fact, WCOE settled in the belief wheeling should have been included in the subsequent negotiations, Mayben, Tr. 12,530; Cheesman, Tr. 12,191.

2. WCOE would not have access to existing generation. With respect to future generation, only those units selected by Ohio Edison would be available, Cheesman, Tr. 12,152, 12,167.

3. Even with regard to new units, Ohio Edison initially limited the availability to 10% of WCOE's estimated peak load annually, Cheesman, Tr. 12,170-71. This would have required more than 30 years for WCOE to achieve self-sufficiency in generation, Cheesman, Tr. 12,170.

4. The 10% of peak load limitation was abandoned and a new restriction substituted in June 1975, NRC 44, Appendix letter dated June 17, 1975 from Firestone. The new proposal required that WCOE participate

to the extent of 50 megawatts each in 11 CAPCO units.* Although WCOE would pay for all constructing, owning and maintenance costs, only Ohio Edison had the right to determine the scheduling of capacity and energy from the WCOE portions.**

Moreover, the proposal provides that:

> The WCOE entitlement to energy from its ownership portions of CAPCO units is based on the ratio determined by the energy delivered to WCOE customers and the energy delivered to Ohio Edison customers (including WCOE), Id.

Under this plan, if Ohio Edison decided to schedule less than full capacity, the output of the capacity owned by WCOE would be proportionally reduced. To make up the deficiency in power, WCOE would be compelled to convert back to being wholesale customers of Ohio Edison for the energy deficit, Mayben, Tr. 12,570.

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*Including the nuclear units involved in this proceeding.

**This is one of several situations where Ohio Edison has made unacceptable proposals to its customers which would require the customer to pay for facilities which facilities would be controlled by Ohio Edison. See Findings 149-150, infra.

Rather than reducing the cost of energy to WCOE, the proposal could encumber WCOE with ownership and capacity that it was unable to use, Mayben, 12,573.

5. Ohio Edison also would impose restrictions on the resale of WCOE's power from the units it owned (including nuclear). Excess base load capacity would have to be resold to Ohio Edison and would not be available for export by WCOE to an outside source, Cheesman, Tr. 12,155; Lyren, Tr. 2014. This restraint on alienation is even greater than that condemned by the Supreme Court in Arnold Schwinn, supra, p. 22, because, in this instance, WCOE would be the owner of the generating capacity and not a purchaser for resale as in Schwinn. Of course this restriction upon the resale of excess capacity is redundant, because without the opportunity to wheel power among municipalities or to outside sources, excess capacity could not be resold to anyone except Ohio Edison.

6. WCOE would have reserve responsibilities based upon the reliability formula known as "P/N." As we note hereafter, the Board finds that this

formula was adopted by CAPCO companies predicated upon their own belief of how Applicants could best work out their reserve problems among themselves. But it is inherently unworkable for small utilities, see Findings 212-213 infra. In this instance, the unworkability is demonstrated by the fact that WCOE would be required to carry 280% reserves under the P/N formula, Cheesman, Tr. 12,158.

7. A final requirement imposed by Ohio Edison would provide that the WCOE power not supplied from WCOE generation would be supplied exclusively from the Ohio Edison System, NRC 44, Appendix Firestone letter February 28, 1975, p. 2. Here again in view of the refusal to wheel from outside sources together with territorial allocation agreements the exclusive supply proposal by Ohio Edison arises from a surfeit of caution. WCOE has no other power available to it.

128. Beck Associates did not consider any alternatives that had been excluded by Ohio Edison, White, Tr. 9782, since this was a preliminary understanding to the scope of the study, NRC 44, Appendix I. Accordingly, Beck Associates

narrowed their efforts to seven alternative methods of power supply, including the status quo, and concluded that a plan for the prepayment of power purchases, considering all the factors, is the best plan available to WCOE, NRC 44, p. VII, 1-2.

129. At an August 1975, meeting, WCOE and Ohio Edison agreed in principle to the "prepayment of power purchases" plan, App. 15, but subsequently WCOE reconsidered the suitability of this approach where the matter rested at the close of the record, Id.

130. In approving the 1972 rate hike, the Federal Power Commission understood that the parties agreed to undertake a joint study and effort to realign their long term power supply relationships including studies of the feasibility of joint ownership or other contractual agreements relating to generating capacity, App. 9 (Order approving rate settlement). However, the Applicant, Ohio Edison, has not yet been required to release its hold upon the WCOE members as full requirement wholesale customers and it enjoys this rate hike meanwhile.

131. With respect to the WCOE negotiations, the Board finds that Ohio Edison has failed to act reasonably and in a manner

consistent with the antitrust laws. As a result, Ohio Edison has denied to the members of WCOE the benefits of coordinated operation and development, has hindered competition with these systems, has denied WCOE members the benefits of competition among Ohio Edison and electric utilities outside the Ohio Edison service area, and has denied WCOE reasonable and practical access to nuclear generation. In the process, Ohio Edison has acted affirmatively and deliberately to preserve its monopoly position in bulk power service in its service area.

Restraints Upon Wholesale Customers

132. In each of the power supply contracts with rural cooperatives in effect during the relevant period until superseded by the Buckeye Power buy/sell agreements, DJ 17-23, Ohio Edison placed the following restrictive clause in substantially identical form, DJ 17:

> 3. Cooperative agrees that all of the electric energy purchases hereunder is for resale direct to consumers and that the energy will not be sold by cooperative for resale.

Two years later when the power supply contracts with the seven cooperatives were replaced under the provisions of the

June 1968 Buckeye power agreement (NRC 190) there was a prohibition against reselling the Buckeye Power handled by Ohio Edison, Id.

133. By these restrictions, Ohio Edison has eliminated wholesale competition between it and the rural electric cooperatives within its service area.

In addition, at least until 1967, Ohio Edison had a territorial agreement with Holmes-Wayne Cooperative which eliminated retail competition between those two utilities, DJ 522.

134. Prior to 1965, Ohio Edison restricted its municipal wholesale customers in reselling power to industrial customers except in relatively small amounts controlled by Ohio Edison, DJ 24-43. These restrictions reserved to Ohio Edison the right to serve new industrial accounts whose peaks ranged from 50 to 150 kva depending upon the particular municipality involved, Id. Ohio Edison thereby eliminated competition between it and its municipal wholesale customers for these desirable industrial accounts. These contracts also reserved to Ohio Edison the right to continue to serve any account within the municipality already served by the company thus eliminating retail competition to that extent, e.g., DJ 26 and 27.

135. These contracts are relevant to our proceeding because they enabled Ohio Edison to acquire industrial loads which it held beginning in 1965 when new contracts were issued to the wholesale customers, DJ 44-62. The new contracts provided that Ohio Edison, unless waived by written consent, shall continue to serve accounts it was then serving (thus freezing its previously acquired industrial loads). Ohio Edison retained exclusive right to serve any premises within the corporate limits that could be reached by its secondary distribution lines and any business outside of the municipality not then being served by the municipality or which could not be reached by the municipalities' secondary distribution facilities, DJ 44-62.

136. The effect of these restrictions was to maintain Ohio Edison's position with the municipalities and to eliminate competition for virtually all new industrial loads located outside the boundaries of the municipality although, under Ohio law, municipalities were entitled to compete for such business. Comparable restraints were imposed upon the Company, Id., see also DJ 63-65.

137. On occasion Ohio Edison denied permission to the municipalities to extend their primary distribution system. For example: with respect to Wadsworth, Lyren,

Tr. 2246-47, 1926; and with respect to Niles, DJ 406-09. These denials, of course, foreclosed competition for the retail accounts involved.

Sometimes the Ohio Edison Company granted permission to municipalities to extend their primary system but, when this was done, it lead to a curious practice known as "banking" Lyren Tr. 1926. Banking is a system of credits and debits where the condition of consent is that the municipality trade to Ohio Edison a like customer at a future date, e.g., NRC 63-64. The banking conditions were enforced, Lyren,Tr. 1940. Sometimes the banking exchanges would involve an entire development, e.g., NRC 39-40, but most often single customers, Lyren, Tr. 1940. When there was an accumulation of customers in the bank, the parties would meet and make adjustments to equalize the credits, Lyren, Id. There was no provision for consulting the customers involved. They were traded back and forth for the convenience of the utilities without regard to whether their rates would increase or decrease without consideration of any competitive factor.

There is probative evidence that this banking practice was followed with respect to the municipalities of Wadsworth, supra, see also NRC 65-66; DJ 59-60; DJ 63; DJ 466, Hudson, DJ 474; DJ 475; and Cuyahoga Falls, DJ 481-2.

142. In this and in other cases of restrictive agreements, Applicants contend that there must first be some evidence of enforcement of the restrictive provisions before the Board can find that they were, in fact, restrictive in effect, e.g., App. ff 36.168. We have throughout rejected this argument. Not only is the argument sometimes factually inaccurate as in the case of Elwood City, but it fails as a matter of logic. First, a void of evidence does not prove that there was no enforcement. Second, it assumes without foundation that parties do not comply with the terms of their contracts.

Long Term Contracts

143. The evidence does not support the findings proposed by the opposition parties that the ten-year terms of Ohio Edison's municipal wholesale contracts are unreasonably long, DJ fi 8.11; NRC ff 1.253; C ff 13.06. This does not abrogate, however, the Board's observations that the length of these contracts must be considered in light of other restrictive provisions.

Capacity Limitations

144. In 1974, Ohio Edison attempted to impose upon Newton Falls a municipal wholesale contract (NRC 73) with the following provisions:

138. The banking practice discouraged the City of Wadsworth from seeking new customers because the problem of exchanging these new customers for old customers eliminated the incentive to compete. This tended to restrict the growth of the municipal systems, Lyren, Tr. 2264; Tr. 2267.

139. Ohio Edison eliminated the customer and territorial allocation provisions of its municipal power supply contracts unilaterally when it filed a 1972 request for a rate increase with the Federal Power Commission, App. 10; App. 11. Applicants maintain that the deletion of the anticompetitive provisions of the contract was as a result of Ohio Edison's growing sensitivity to the application of the antitrust laws to the electric utility industry, App. ff 36.41, p. 92. This may have been one of the factors entering into Ohio Edison's decision to eliminate restrictive provisions, but another consideration by Ohio Edison's general counsel was a concern that the provisions restricting municipalities were located in the rate schedules controlling the contracts, thus subject to change in a proceeding before the Federal Power Commission. The restraints upon the company were located in the main body of the contract which would remain unchanged, DJ 613. This

was apparently an error in planning by Ohio Edison whose idea was to have the terms that bind municipalities live on beyond the ten-year period of the contract, while Ohio Edison would be freed from its restrictions at the conclusion of that term, DJ 613. Thus, there were very practical business considerations for Ohio Edison to drop the customer and territorial allocation restrictions from its filing with the Federal Power Commission.

In any event, regardless of the motivation for dropping restrictive provisions, the damage had been done. Areas served by Ohio Edison were permanently preempted by the extension of their primary systems under the anti-competitive terms of these ten-year contracts.

140. From 1965 until about June 1976, Pennsylvania Power's municipal wholesale contracts contained restrictions on the resale of the power, DJ 67-76. The restrictions contained in Grove City's contract, DJ 76, are typical:

> Except with the written consent of the company, service furnished hereunder shall not be resold for use at any premises now or hereafter being furnished electric service directly by the company. Except with a written consent of the municipality or upon the order of a public authority having jurisdiction, the company will provide no direct service for use at any premises now or hereafter being furnished electric service directly by the municipality.*

A practical application of this restriction can be seen in Grove City's situation. Although it has the capacity, and would otherwise have the right to serve an industrial customer in its distribution area, it would be unable to serve that customer because of Penn Power's preexisting service, Allen Tr. 4765-66.

141. In Elwood City, Penn Power serves all of the industrial customers, Urian,Tr. 4967. Although Elwood City would like to negotiate for industrial business, the restrictive contract (DJ 75, para. 4) prohibits Elwood City from serving the industrial customers presently served by Penn Power, Tr. 4970-71. Elwood City has the capacity to serve industrial customers, Tr. 4972. Penn Power officials advised Elwood City that consent to serve industries within Elwood City would not be granted, Luxenberg, Tr. 6400, Urian Tr. 4986.**

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*Beginning in May and June of 1976, Penn Power has proposed new contract forms eliminating the restrictive provisions, App. 243-App.247.

**The restrictive provisions of Elwood City's contract were relaxed somewhat with respect to certain specifically named commercial and residential customers, DJ 71.

1. No more than 6250 kva would be provided without written consent of Ohio Edison, Id.
2. The municipality must buy all of its power from Ohio Edison, NRC 86-104, (current FTC Rate Schedule).

The contract was for 10 years.* Newton Falls' City Manager testified that 6250 kva would be barely adequate, or would result in a slight shortfall under the 10-year projected need of 6330 kva, NRC 44; Craig, Tr. 2876. Since the capacity limitation would barely provide for Newton Falls' normal load growth, it would be a certain bar to the addition of new industrial loads, or an extension of the City's system, Craig, Tr. 2926a. Any new business lost by Newton Falls would go, of course, to Ohio Edison. Considering the full requirements provision of the proposal, which was redundantly backed by Ohio Edison's refusal to wheel** and the continuing effect of its territorial agreements with other investor-owned utilities, the contract would eliminate competition between Ohio Edison

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*Staff urges a finding that this period was unreasonably long considering the repressive effect of the proposal. Nowhere does the Staff, nor the Applicant for that matter, analyze the fact that the contract executed provides for cancellation at the end of five years with two years notice prior to cancellation.

**A very real restriction. Newton Falls was unable to buy Buckeye Power partly because Ohio Edison refused to wheel it, NRC 84.

and Newton Falls as effectively as did the recently abandoned customer allocation clauses.

145. Ohio Edison defends against this charge by stating that the restrictions were no more than reasonable safeguards against unplanned demands upon generating and delivery capacity. The Board considers this asserted justification in light of three factors:

1. The proposed limitation of about six megawatts constitutes only about 15/100 of 1% of the combined Ohio Edison/Pennsylvania Power generating capacity of 4266 megawatts, NRC 207, p. 26.
2. Mr. Firestone's testimony that the 6,250 kva limitation was due to the limited capacity of Newton Falls transformer is not persuasive, Firestone Tr. 1'201. This appears to be an after-the-fact justification. We were unable to find any reference to this problem in the negotiations leading to the final contract. Nor do we understand why sufficient transformer capacity could not be a condition of sale if it was not already an obvious implicit condition.
3. The limitation does not account for the ultimate need of Ohio Edison to serve any loads from which Newton Falls would be foreclosed.

146. The Board finds that the initial power supply proposals by Ohio Edison to Newton Falls were attempts to restrict competition between them. They manifest Ohio Edison's intent and attempts to preserve its monopoly in its service area.

147. Following FPC mediation and the commencement of hearings in this proceeding, Ohio Edison proposed terms accepted by Newton Falls which provide for additional capacity when required by the city if there is sufficient notice, Craig, Tr. 2917, App. 34. (December 1975 contract).

Refusals to Deal

148. For the purpose of maintaining and extending its monopoly position, Ohio Edison has refused to sell bulk power. Sometimes these refusals have been in the form of a sham offer to interconnect upon conditions which municipal systems found to be burdensome or impossible. In other cases Ohio Edison has refused to make power available in higher voltages thus preventing municipalities from competing for industrial loads or denying them the economies of taking at higher voltages and breaking load for resale. Also as noted supra, Ohio Edison initially refused to provide sufficient power to Newton Falls to enable it to extend its service.

Although none of the proposed transactions analyzed in this regard would have been unprofitable for Ohio Edison, the advantages of the refusals are obvious. Ohio Edison having secured its service area against competition from without is the only available supplier for business denied to the municipalities by the refusals.

149. In July 1973, to ease its dependency upon its own oil and gas fired generators, Newton Falls began negotiations for purchasing power from Ohio Edison, Craig, Tr. 2846-47. Studies by Ohio Edison demonstrated that a 69 kv interconnection would be required, Craig, Tr. 2915-16. Ohio Edison proposed that Newton Falls pay the cost of an interconnecting line in advance but that Ohio Edison would own and operate the interconnection and serve other customers on the line. Ohio Edison would later refund the cost to Newton Falls, NRC 77. This was a departure from usual industry practice (NRC 77) but, according to Applicants, was necessary because of a "financial crunch," App. ff 36.45.

Because the cost of the line was estimated to be very substantial and for other reasons, it would have been necessary for Newton Falls to issue bonds to finance the project, NRC 79.

Provisions of the Ohio constitution prohibit municipalities from raising money to loan to a private corporation by issuing bonds, NRC 74, and limits the purpose of mortgage revenue bonds to constructing or extending the municipality's own facility, NRC 77. This was the advice of the law firm of Squire, Sanders and Dempsey, NRC 74 and 77, and the correctness of this counselling is not contested by Applicants.* As a result, Newton Falls was unable to raise the necessary funds for the interconnection. The effect of this constitutional prohibition upon Newton Falls was made known to Ohio Edison in connection with the Federal Power Commission efforts to resolve the impasse, NRC 79. But Ohio Edison insisted upon these terms, NRC 79, Craig,Tr. 2856-57 and 2876. It was not until the eve of this hearing in November 1975 that Ohio Edison agreed to a plan permitting Newton Falls to own the line for which it must pay, Id. and NRC 83.

150. Proposals of this same nature were made by Ohio Edison to the municipality of Niles, NRC 216-17 ,Orrville Lewis, Tr. 7960, and Norwalk, NRC 82. Niles accepted

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*As it happens, Squire, Sanders and Dempsey represents CEI in this proceeding. As we learned in the attorney disqualification phase, favorable advice of this firm is desirable to a municipality seeking to issue bonds due to the firms' long-standing preeminence in the field, NRCI 76/3, 236 at 239, 254.

these terms, App. 268. Orrville found the terms to be impossible to accept, Lewis, Tr. 7960, 7980. The City of Norwalk, unable to borrow money, financed a temporary interconnection with "on hand monies", NRC 82, then sold its system to Ohio Edison.

151. Applicants defend against the allegation that the financing and ownership conditions constituted a refusal to deal with the argument that the plan places the burden of the cost upon those who would most benefit, App. ff 36.50, 36.52.* This misses the thrust of the charge. It is not the allocation of costs to the municipalities which is the essence of the charge. It was the coupling of financing responsibilities with the requirement that Ohio Edison own the facility and receive prepayment for the construction, which made the proposal functionally useless to Newton Falls and Orrville and of dubious and temporary benefit to Norwalk. The arrangement with

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*During the negotiations with Newton Falls, Ohio Edison justified its position by asserting that these conditions were applied to all municipalities uniformly as a requirement of the Federal Power Commission, Craig Tr. 2913-15, NRC 81. Aside from the point that the assertion of an FPC requirement does not comport with the facts, NRC 79, the argument that regulatory agencies restrained the utilities from free dealing with municipalities is incompatible with the major theme of Applicants' defense that the regulatory scheme is an effective substitute for the antitrust laws.

Niles, was consumated after June 28, 1976 (App. 268) near the end of this hearing and its impact upon that municipality does not appear in the record.

High Voltage Power Supply

152. Ohio Edison and Penn Power are charged with refusing to sell high voltage power for the purpose and with the effect of restraining competition with municipalities, particularly for industrial loads, DJ ff 8.24, 8.25 and C ff 14.01.

Electricity at higher voltages is more efficient to deliver and is therefore cheaper, Tr. 4978. For this reason, the availability of power at higher voltages would better enable municipalities to compete. Moreover, some industrial customers require that their service be at higher voltages, **Urian**, Tr. 4978. In 1972, the **Cities** of Cuyahoga Falls and Niles, Ohio were seriously considering service at 138 kv for the "fairly near future", DJ 421, and requested Ohio Edison to file a rate for such service. None was on file at that time, Id. Niles was at an advanced stage of planning for high voltage facilities, DJ 418. Ohio Edison refused to file a wholesale rate at 138 kv, DJ 419, 421.

153. Ohio Edison justifies its unwillingness to file a rate for service at 138 kv on the basis that it believes that

in doing so it would be violating the FPC Rules, requiring that a rate schedule not be filed more than 90 days before the date on which the expected service is to begin, App. ff 36.76, White, Tr 9735-36. A problem arises with this restriction because the municipality faced with upgrading its voltage will be required to make a substantial investment in order to receive service at that voltage. But it is difficult to determine the financial feasibility of going to higher voltage without knowing the rate, White Tr. 9734.

Applicants do not contend that the Federal Power Commission rules prohibit the utility from advising the municipality in advance what its higher voltage rates will be when filed. They contend that Ohio Edison gave interested cities every indication short of filing as to what the 138 kv rate would be, App. ff 36.78.

It is, therefore, appropriate to evaluate the adequacy of Ohio Edison's indications to Cuyahoga Falls and Niles to determine whether these indications were made in good faith. Applicants state that Ohio Edison was prepared to employ its 5% industrial discount (from 23 kv service) for estimating purposes and that municipalities were so advised, App. 36.79. It is true that Ohio Edison did advise Niles and Cuyahoga Falls of the industrial rate, DJ 419 and DJ 421. In

informal discussions, DJ 417 , Ohio Edison suggested that the 5% discount would apply, but in the formal written answers to the requests by Niles and Cuyahoga Falls, Ohio Edison specifically indicated that the industrial 5% discount may not apply, DJ 419, 421. In view of the fact that Ohio Edison traditionally maintains a difference between its industrial rates and municipal rates (see Price Squeeze, infra.), the Board finds that Ohio Edison did not make sufficient information available to the inquiring municipalities to provide them with dependable bases to proceed with the construction of high voltage facilities.

154. In 1973, Elwood City requested Penn Power to file a rate for 69 kv service, Urian,Tr 4977. Elwood City was interested in competing for the business of some industrial customers and 69 kv service was necessary in order to be competitive, Id. 4978. Penn Power refused to file a rate with the Federal Power Commission and gave no indication whatever to Elwood City what the rate for 69 kv service might be, Urian Tr. 5002, Luxenberg,Tr. 6410. Finally, in April 1975, the Federal Power Commission ordered Penn Power to file a rate increase consistent with FPC regulations, DJ 626. At the FPC hearing, for the first time, the formula upon which the rates would be based was determined by the administrative law judge,

Urian, Tr. 5003 and DJ 626, 627. The effect upon Elwood City of Penn Power's refusal to indicate a rate is even greater than the effect upon the Ohio municipalities because Pennsylvania cities must demonstrate that they can afford an expansion program before they may issue bonds, Tr. 4979. The effect of Penn Power's refusal has been to deny Elwood City the opportunity to compete for industrial customers within its borough, Urian, Tr. 4978, Luxenberg, Tr. 6410. The failure and refusal of Ohio Edison and Penn Power to indicate the basis upon which they would file rates for high voltage power with the FPC constitutes an unlawful refusal to deal which restrains competition between these utilities and municipalities served by it.

The opposition parties have not proved that Penn Power's failure to provide maintenance power to Grove City was an unlawful refusal to deal, DJ ff 8.12.

Price Squeeze

155. Ohio Edison charges municipalities purchasing at wholesale significantly higher rates than comparable sales to industry, Kampmeier, DJ 450, p. 34. The difference between the

municipal and industrial rate in the Penn Power rate structure is even greater, Id. p. 35. This price discrimination is an important factor limiting the abilities of municipalities to compete for industrial loads, Lyren,Tr. 2047, Wein,Tr. 6974, DJ 587, p. 158. The parties discuss the charge of price squeeze in terms somewhat parallel with the elements of §205(b) and 206(a) of the Federal Power Commission Act (16 USC §824) and §2 of the amended Clayton Act, 15 USC §13. The Clayton Act is one of the antitrust statutes named in §105(a) of the Atomic Energy Act. The pertinent provisions of the Federal Power Commission Act proscribe unduly discriminatory preferential, prejudicial or disadvantageous rates. Section 2 of the amended Clayton Act is the basic price discrimination statute.

Applicants defend against the price squeeze charge App. ff 36.59, et seq. in four basic ways:

1. The comparative price analyses involved in this charge is beyond the competence of this Board and should be left to the FPC, App. Brief, p. 571.
2. The retail industrial rate has been found to be reasonable by the state utilities commissions and the wholesale rate has been found to be reasonable by the FPC, therefore both rates are reasonable and may not be challenged by this agency, App. ff 36.59-36.73.

3. By adding the industrial load to its own load, a municipality can profitably compete for industrial customers because it would thereby qualify for a lower rate block, App. ff 36.72.
4. Since the FPC and the State Utilities Commission each use a cost factor in establishing or approving rates we must therefore infer that the difference between the municipal and industrial rates is cost justified, App. ff 36.62, 36.68. Cost justification is a recognized economic justification and is an affirmative defense to a charge of price discrimination.

We address Applicants' first two arguments jointly. While the FPC and the States have the responsibility and competence to establish rates, and we do not, price squeeze is a concept founded in antitrust. We are constituted to discharge the strong antitrust mandate of §105 of the Atomic Energy Act.

Moreover, we consider, as did the Supreme Court in FPC v. Conway Corp., supra, p. 28, that rate making is not an exact science; that two rates each may fall within a zone of reasonableness, yet together they may have anticompetitive

impact and antitrust significance. We do not undertake to make or approve rates; rather we evaluate the anticompetitive effects of the rate differences. City of Mishawaka v. Indiana and Michigan Power Company, supra, p. 28.

In evaluating the price squeeze charges, the Board also observes that the rates, despite the opportunity for review and hearing before the state commissions and the FPC were initiated by Ohio Edison and Penn Power. There is no grant of immunity from the application of the antitrust laws by virtue of State and FPC regulation of the activity under examination. Cantor v. Detroit Edison, _____ U.S. _____ 96 S. Cr. 3110 (1976) and Otter Tail Power Company v. U.S., supra, p. 23.

156. Applicants presented Mr. Wilson andApplicants' Exhibits 167 and 168 to demonstrate that municipalities can profitably compete for industrial loads by adding the industrial customer to its own load thereby taking advantage of a lower rate block for the increased total load, App. ff 36.70. Using the Cities of Wadsworth, Galion and Cuyahoga Falls as examples, Applicants hypothesized the effects of the price of power to those Cities by adding industrial accounts under various conditions, App. 167, App. 168, Wilson, e.g., Tr. 11,060, et seq.

City, C ff 17.01, and Justice, DJ ff 8.26, 8.27, dispute the validity of Mr. Wilson's study by arguing that certain variables are not accurately and uniformly applied and that certain cost factors were omitted. The Board recognizes that the study does contain flaws such as omitting the municipalities' redistribution costs, using off-peak test periods, and failing to analyze the effect of multiple delivery points. But the study does establish that sometimes, under certain circumstances, a municipality could sell power to a retail industrial customer at a price less than that charged by Ohio Edison by adding the industrial customer's load to that of the municipality.

This may not always be true, but even if it were, antitrust analysis must not end there. The municipalities are entitled to operate free from the restraints of discriminatory and prejudicial rates even if the differing rates would permit some level of gross profit to the municipality. As Dr. Wein testified, the price squeeze may still result in an unacceptable rate of return forcing the competitor out of the market, DJ 587, p. 158; see also Kampmeier, Tr. 6021-22.

In a classic price discrimination case, Utah Pie Company v. Continental Baking Company, 386 US 685 (1967) the Supreme Court recognized that injury to competition may be

found even when competitors of the discriminating seller continue to operate at a profit, Id. at 702. The Board finds that the pricing scheme employed by Ohio Edison and Penn Power is a price squeeze even where the only effect is to impose upon the municipalities a limit in the amount of profits they may realize.

However, if the lower price to industrial customers is cost justified, any impediment upon the ability of the municipalities to compete would be attributed to their economic position in the channel of electric power distribution and not to anticompetitive pricing. Cost justification negates a price squeeze, Wein and Kampmeier, supra.

157. Applicants urge that the differing rates are cost justified because the municipalities follow the peaking patterns of the system as a whole while the industrial customers have peaks different than the system peak, App. ff 36.68, Wilson Tr. 11046-65. Mr. Kampmeier, the consulting engineer appearing for the Department of Justice, squarely disputes this contention as being out-of-date, DJ 450, pp. 35, 36. He testified:

> Therefore diversity among the times of peak demands is at least as likely as not to be an added reason for lower rates to distribution systems than to industries, Id., p. 36.

Neither Applicants nor opposing parties present cost studies.* Applicants arrive at the conclusion that the industrial rate is cost justified by a syllogistic route. The retail industrial rate is approved, or set, by the state utility commission based, in part, upon cost of service. The municipal rate is approved or set by the FPC in part because of cost of service. The states have approved a lower rate for industrial customers than the rate the FPC has approved for municipal customers. Ergo, the difference is cost justified.

Applicants reasoning is faulty. They concede "Ohio Edison does not even look to its wholesale rate in designing its retail rates," App. ff 36.63. Therefore, it is apparent that Ohio Edison does not know if there is a justified cost difference between the two rates. If the respective "zones of reasonableness" encompassing the respective rates are broad, there would be no bases to infer any differences in the costs of service from the rates approved. Indeed, if the zones of reasonableness are very broad, the cost may be higher to serve at the lower rate. The basic defect in Applicants' logic is that they are failing to analyze rate differences. They admit

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*The burden rests upon Applicants to establish a cost justification defense. See Utah Pie, supra., 386 US 685, 694 where the court recognized a statutory burden. We have a practical consideration for assigning the burden to Applicants. Only they have the data by which cost justification may be proved or disproved.

that they have not done so, App. ff 36.63. Within the concept of a price squeeze, it is not the high rate nor the low rate but the difference between the rates which injure competition. There has been in this case a totally inadequate showing that the differences are cost justified.

TOLEDO EDISON COMPANY

158. The present system configuration of TECO was achieved through the merger and acquisition of 190 different systems into the present corporate organization. DJ 587, p. 70. By 1973, all municipal systems in its service area purchased their full bulk power requirements from TECO with the exception of Bryan and Napoleon which were partial requirements customers of Toledo Edison and the Village of Tontagony which purchase from Bowling Green (itself a full requirements customer of TECO). DJ 587, pp. 71-72. In 1975, both Bryan and Napoleon ceased self-generation of electric power and no self-generating municipals remain in the TECO service area. DJ 576, p. 128; Dorsey,Tr. 5251.

159. Although the absorption of many smaller systems into the TECO corporate structure in part may be attributable to operating inefficiencies and financial constraints, see App. ff 35.03, the demise of these small independent systems also is a product of a considered and deliberate acquisition policy of TECO. Municipals were recognized as competitors vulnerable to acquisition despite the fact that many of them were profitable even though their rates were lower than those of TECO.

(a) Mr. Schwalbert, TECO's Vice President in Charge of Districts from 1972-74, detailed the acquisition policy. In a July 1974 memorandum, DJ 541, to a newly appointed eastern district manager of the Company, Mr. Schwalbert states:

> I have attached a list of long term objectives I put together and some ways to implement them.
>
> . . . . .
>
> Acquisition of municipals is an objective high on our list.

Continuing, under an outline entitled "Long Term Objectives":

> Convert our wholesale towns to retail by purchasing their electrical systems.

This goal description is followed under Part II.B by specific directives related to its attainment.

(b) Although TFCO has argued that its municipal competitors are weak and inefficient and that opportunities for competition are limited, the Schwalbert memorandum, DJ 541, indicates otherwise. He urges company personnel to:

> . . . try to counteract the factors which prevent conversion to Toledo Edison retail service. These are:
>
> a. Their rates are satisfactory - all lower than ours.
>
> f. They feel that they have an asset that will continue to grow in value.

g. They operate in the black and transfer money to other non-electric operations (by court action)

(c) TECO was aware that denial of bulk power services could be a means of forcing the conversion of self-generating or distributing municipal systems to TECO customer status. For example, Mr. Schwalbert specifically commented that on the occasion of a major storm inflicting damage on a municipal system, an intolerable situation would be presented if the municipality found it difficult to get sufficient help (i.e., lacked an interconnection or opportunity to obtain emergency power). Further, with respect to access to nuclear facilities, Schwalbert took note that the technology of the electric power business is changing rapidly. Also, in contradiction to the company's argument that competitive factors were de minimis, Schwalbert considered arguments relating to whether industry would rather be served by a municipal system or by an investor-owned company. Finally, the Schwalbert memorandum destroys Applicants' argument that acquisition of municipal systems by TECO occurred as a result of unsponsored deliberations by elected officials of the acquired municipalities. TECO promoted the sale of these systems through continuing

contacts, both direct and indirect, with elected officials.*

160. Mr. Moran, TECO Vice President for Corporate Planning and a member of the board of directors, testified with respect to the last five or ten years that:

> We were interested in acquiring municipalities during that period of time.

DJ 583, p. 55. Of similar effect is the testimony of Mr. Schwalbert, DJ 577, pp. 7-8; Kozac, TECO Vice President for Operations Analysis, DJ 579, pp. 24-25; Cloer, TECO Southern District Manager, DJ 582, pp. 34-35; DJ 161.**

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* Compare App. ff 35.03 which asks us to hold that:

> "with respect to both of these acquisitions [Waterville and Liberty Center], the Toledo Edison Company submitted a proposal only after it had been approached by the municipality and formally requested to do so and, moreover, an election was held in which these acquisitions were directly approved by a majority of the municipal voters"

with Schwalbert's statement that:

> "We arrange for counsel to officially ask us to look into the possibility of sale. a) if we don't do it this way it looks as if we are pushing too hard . . . . b) when Counsel asks for this study proposal, then we send our people openly into the town to study the system." DJ 541 (Emphasis added.)

** This 1974 TECO memorandum refers to continuation of the Company's "practice of purchasing municipal systems" and indicates that the Company "should concentrate on those systems that have generating capabilities."

161. Since 1965, TECO has acquired two self-generating systems, Clyde and Waterville, Wein DJ 587, p. 71; NRC 158, p. TE-37; DJ 137, pp. 4-5, and the distribution system of Libertyville, Wein 587, p. 71; DJ 137; DJ 139; DJ 139(a).

Anticompetitive Practices

(A) Awareness of Competition.

162. TECO regarded municipal systems within its service area as competitors. A June 1974 document entitled "Municipalities' Competitive Positions" begins its discussion entitled "Summary" with the statement:

> It is conceded that municipalities can be a competitor as well as customer of Toledo Edison. DJ 166, p. 2.

TECO's contracts to supply wholesale power to municipalities within its service area contained customer allocations and restrictions which not only were anticompetitive agreements in restraint of trade, see Finding 166, infra, but were intended to prevent customer transfers from TECO to the municipalities. Moran DJ 583, pp. 82-83. Moreover, Mr. Moran admitted during deposition the presence of competition both for new loads and existing customers. Moran, DJ 583, p. 23.

163. There is a relationship between solicitation of large loads and the availability of low cost bulk power

services. TECO officers were aware of this relationship. For example, Mr. Moran testified:

> Q: Well in suggesting that you didn't actively solicit customers within the service areas of the other Ohio utilities, you didn't have in mind that they had low cost and reliable bulk power supply from an integrated system?
>
> A: Yes, we did consider them.
>
> Q: Was that one of the factors that you consider?
>
> A: It always is.

Moran, DJ 583, p. 30.

Territorial Allocations

164. Toledo Edison has been a party to territorial allocation agreements with neighboring utilities including Ohio Edison, a member company of the CAPCO group. Such agreements constitute per se violations of the antitrust law. Such agreements have not been submitted to or approved by any regulatory agency nor does the Ohio regulatory plan for electric utilities provide for the elimination of competition by inter-company territorial allocations.

(A) Since at least 1965, TECO and Ohio Edison have been parties to a territorial agreement. DJ 513-17; DJ 519; DJ 533-35; DJ 537-40. These territorial agreements

took the form of "confidential" territorial maps which were signed by the highest officers of the company, DJ 516, frequently updated, DJ 517, and used in the day-to-day operations of Ohio Edison, DJ 519. See Finding 104, supra.

(B) TECO and Ohio Power Company have had a territorial agreement since at least the early 1960s. DJ 536; Tr. 8123.

(C) There is evidence that TECO also had entered into or observed a territorial allocation agreement with its Michigan neighbor, Consumers Power Company. These two systems operate in territories adjacent to one another along the Ohio/Michigan border. Another distribution system, the Southeastern Michigan Electric Cooperative (Southeastern), also provides electric service in southeast Michigan and in the TECO service area in northwest Ohio. Commencing at least as early as 1966, Southeastern approached TECO with a request that it provide power to service the Ohio portion of its load. In September 1966, Mr. Schwalbert of TECO advised a field engineer of the REA that TECO did not want to provide service to Southeastern because TECO did not want to cross the state line. When officials of the REA indicated that TECO would not be expected to serve in Michigan since the Cooperative would provide the necessary transmission and substation facilities to accept load in Ohio,

Mr. Schwalbert stated:

> . . . indicated that his company did not want to invade the Consumer Power Company territory regardless who provided the facilities.
>
> After some discussion, Mr. Schwalbert admitted neither FPC or Buckeye . . . would interfere with service to the cooperative's Michigan load. He indicated that the only reason his company did not want to provide service in Michigan was because of the agreement between his company and the Consumer Power Company. DJ 108, September 12-14, 1966 Report.

TECO has denied the existence of any such agreement and has relied upon the testimony of Mr. Moran to support its contention that the refusal to supply service to Southeastern was predicated solely upon business reasons. Although there is a conflict in the evidence, we find the report of REA official Badner, made contemporaneously with the events, DJ 108, to be inherently more credible evidence. First, Mr. Badner is a neutral party, an official of a government agency whose field report was made in the routine course of his duties. Second, there is no indication of record that Mr. Moran necessarily would have been informed as to the terms of any agreement, particularly an informal agreement negotiated by the top officers of his company concerning a topic which at least in the case of the territorial maps in Ohio they had treated as

"confidential." Finally, Mr. Moran's testimony has been unreliable in certain other instances, thus, reducing our willingness to accept it as probative evidence as to the non-existence of a territorial agreement with Consumers.

165. It should be noted that the legitimate business considerations which TECO claims served as the basis for its refusal to offer service themselves are suspect First, TECO claims to have wanted to avoid the possibility of FPC jurisdiction which would attach to transactions of an interstate nature. We note that the decision in FPC v. Southern California Edison, 376 U.S. 205 (1964), should have caused TECO to consider whether it could in fact avoid such jurisdiction in view of the substantial number of wholesale contracts to which it was party during 1966. Second, its reference to a desire not to operate in a fashion impermissible under the Buckeye agreement is unpersuasive since those agreements were not signed by TECO until 1968. Third, we note that in 1971, TECO refused to provide electric service to the Michigan portion of Southeastern's distribution system and that although in response to a 1974 request by Southeastern, TECO agreed to negotiate a power supply agreement, no such agreement has been signed as of this time.*

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* Counsel for TECO indicates a willingness to sell power to Southeastern and states that a "commitment" to establish a delivery point has been made. Tr. 11,919.

On balance, we find that TECO and Consumers were parties to a territorial agreement or understanding in 1966, the terms of which were observed by TECO.* The existence of a territorial agreement between Consumers and TECO, however, is established by evidence of lesser weight than the uncontroverted evidence of the Ohio Edison and Ohio Power agreements. Accordingly, we should state that in the sum of our deliberations, our finding that TECO and Consumers Power engaged in an illegal territorial allocation is not material to our overall findings. We regard the TECO/Consumers agreement as additional support for our finding of widespread territorial allocations by TECO, but if the allegations relating to Consumers had not been accepted, it would not alter our basic conclusion.

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* TECO also has argued that this Board is collaterally estopped from making a finding contrary to that of the Atomic Safety and Licensing Board appointed to consider antitrust allegations in Midland. We earlier have explained our conclusion that we are not collaterally estopped from inquiring into this matter due to a diversity of parties, issues, and the receipt of evidence relating to TECO's proclivity to enter into such agreements as established by the Ohio Edison and Ohio Power territorial maps. Moreover, collateral estoppel cannot be binding where the public interest in assessing whether an unconditioned license should be granted in these proceedings would be disaccommodated through closing our eyes to the facts.

166. TECO has a substantial number of full requirements wholesale power municipal customers. Its contract to provide services to these customers contains a paragraph entitled "Provision 8" which allocates customers between TECO and the municipal distribution systems.* The terms of Provision 8 constitute a restraint of trade that violates Section 1 of the Sherman Act. Moreover, Provision 8 is unreasonable on its face and no credible evidence has been presented to persuade us that such a clause is necessary for the proper operation of any regulatory scheme of the FPC or the State of Ohio. Indeed, it might be noted that both the FPC and the State of Ohio have accepted substantial numbers of rate and service contracts which do not include territorial allocation provisions.

167. At the instigation of certain TECO municipal customers, Provision 8 has been deleted from many municipal contracts in the past few years.** Hillwig, Tr. 2378-84;

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* Bowling Green (NRC 45, 111), Bradner (NRC 112), Haskins (NRC 118), Liberty Center (NRC 119), Montpelier (NRC 120), Pemberville (NRC 123) and Woodville (NRC 125), Custar (NRC 114), Edgerton (NRC 115), Elmore (NRC 116), Genoa (NRC 117), Oak Harbor (NRC 122), and Pioneer (NRC 124). The fact that these contracts have been accepted by the FPC would seem to negate TECO's argument that the Commission has provided an "adequate remedy" for such restraints.

** The effects of the situation created by this restraint would not be dissipated in a short period of time. Thus, a situation inconsistent with the antitrust laws is maintained even for municipalities no longer prohibited by contract from competition with TECO.

NRC 46-47; Dorsey, Tr. 5279-80; App. 35-36; App. 38-42; App. 259-60; DJ 311; DJ 147. Provision 8 has not been deleted from all of the TECO wholesale firm power contracts with municipalities in its service area since at least one present contract, Genoa, contains such a provision at this time. App. ff 35.39.

168. The provisions of paragraph 8 had an actual rather than theoretical effect in limiting the extent of competition offered by municipalities within the TECO service area. Hillwig,Tr. 2370-72; 2375; 2417; 2422-24.* An example of specific enforcement of the anticompetitive provisions contained in TECO's municipal wholesale contracts is set forth in DJ 551. TECO relied upon and asserted territorial restrictions in its contract with the Village of Edgerton in an attempt to prevent that municipality from extending lines to serve new industry on land outside of the corporate limits.

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* Mr. Hillwig conceded at Tr. 2422-23 that Bowling Green in fact never made a request of TECO to extend its services into TECO territory. He also acknowledged that no substantial opportunity was presented for Bowling Green to "infringe" on TECO's "so-called territory." At the same time, he stated that he was restricted from taking advantage of such opportunities as did exist and he indicated that Bowling Green has sought to expand its customer base within the City limits and is without specific policy direction relating to the acquisition of customers outside of the City limits. Very importantly, he stated that if Bowling Green had had access to alternative sources of bulk power through wheeling, they gladly would have tried to service additional customers. Tr. 2424.

Denial of Bulk Power Services

169. TECO has refused to wheel power for municipalities located within its service area. Both Bowling Green and Napoleon made requests to TECO for wheeling. Such requests either have been denied or have been subject to deferral equivalent to denial.

170. The City of Bowling Green has made several requests for wheeling including a request made at a meeting on June 2, 1972. Hillwig, Tr. 2386-88. At that meeting, TECO officials (Moran and Wendall Johnson) gave a negative response to the wheeling request relating the refusal, at least in part, to a "bad feeling for wheeling power because of an existing contract with the Ohio Power Company for wheeling Buckeye power." Tr. 2388. At another meeting held on August 27, 1975, attended by Mr. Smart, now Vice President and General Counsel of TECO and other company officials and representatives of four municipalities in the TECO service area, another request was made that TECO wheel power to Bowling Green. The response of TECO to the request was negative. Moreover, there was a direct tie made by Mr. Smart between the future financing of nuclear plants in CAPCO and the Company's refusal to wheel. TECO's position appeared to be that wheeling would impose a burden in

connection with future planning of loads and financing of CAPCO nuclear stations (which would include the Davis-Besse and Perry stations) Tr. 2402. Accordingly, there is direct nexus between the refusal to provide bulk power services and the construction and operation of the nuclear units involved in this proceeding.

171. At the time TECO gave a negative response to the 1975 Bowling Green request for wheeling, Bowling Green had an expression of interest from the Ohio Power Company to supply wholesale firm power to the Village of Bowling Green.

The presence of alternative sources of bulk power is pro-competitive and would tend to act as a check on TECO applications for wholesale rate increases. If alternate suppliers were available, TECO would have a concern that its higher rates would cause some of its customers to shift to another utility to obtain a portion of their electric power requirements. Ohio Power, however, had no transmission linking it to Bowling Green and the City of Bowling Green was unable to sustain the financial burden of constructing transmission necessary to reach the Ohio Power system.* If TECO had agreed to wheel power, then Bowling Green would have had access to an alternate power source.

An important factor in TECO's decision not to wheel power for municipalities is the competitive effect that

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* Hillwig, Tr. 2405-07.

decision has upon the requesting entity. Moran, Tr. 10,021-28. In the case of the Bowling Green request for wheeling, a study of the competitive effect of TECO's response was made at the TECO home office. Moran, Tr. 10,029.

172. On several occasions, TECO has refused to wheel power for the City of Napoleon. In July 1971, Mr. Lewis, a consulting engineer for Napoleon, was assigned the task of conducting a bulk power supply survey to determine the most economic means of meeting the City's bulk power requirements. Lewis, Tr. 5605-07. After studying a number of alternatives, Mr. Lewis recommended that Napoleon purchase seasonal power from Buckeye (through TriCounty Cooperatives). Lewis, Tr. 5612-14. The Buckeye power could be delivered to Napoleon either by TECO wheeling the power to the existing TECO-Napoleon interconnection which would be designated a Buckeye delivery point or by having Napoleon build a ten-mile 69kv transmission line to an existing substation owned by TriCounty. Lewis, Tr. 5614; NRC 127. In furtherance of this plan, Mr. Lewis met with TECO representatives and was informed on at least three occasions that TECO would not wheel Buckeye power and would oppose efforts by Napoleon to obtain such power. NRC 127. Mr. Moran testified to a concern that if Napoleon constructed a ten-mile line to the

TriCounty Cooperative, Napoleon might serve customers along the route of that line. Moran, Tr. 10,065-66.*

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* Mr. Moran did not dispute the accuracy of the Lewis affidavit, NRC 127, during his deposition, but attempted to qualify his position during his oral testimony at the hearing. As noted, the Board had some difficulty in accepting all of Mr. Moran's testimony at face value due to certain inconsistencies or attempted qualifications.

Mr. Lewis has been an important witness in these proceedings since he was involved in engineering studies on behalf of many municipalities in the CAPCO area and since he negotiated on their behalf with various of the Applicant companies. Mr. Lewis was recalled for extensive cross-examination on several occasions so that the Board has had an opportunity to form an opinion as to his veracity and his recollection of events important to the resolution of some matters in controversy. We have concluded that Mr. Lewis' testimony is generally reliable and we tend to give credence to his answers in instances where his testimony is not fully supported by the testimony of officials of the Applicant companies.

As to the Napoleon/TECO negotiations, we note that NRC 127 was prepared on January 19, 1973, and not in contemplation of these proceedings. Accordingly, we assign Mr. Lewis' testimony supported by NRC 127 greater weight than that of Mr. Moran in his later attempts to suggest that the Lewis testimony and affidavit are incomplete or inaccurate.

An example of our difficulty with the Moran testimony occurs on Tr. 10,018-19 in which he indicates first that TECO has not changed in its policy with respect to wheeling but then states that his deposition testimony reflecting a change merely means "crystallization". That is followed by reference to App. 17, a summary of a meeting between representatives of Bowling Green and TECO, which summary was prepared by officials of TECO and which Mr. Moran had just testified was a fair representation. When asked if the first sentence of this TECO document which states "Mr. Hillwig then asked whether TECO would be willing to wheel", Mr. Moran denied that he regarded the Hillwig question as a request to wheel.

173. Although TECO was obligated to transmit power on behalf of Buckeye pursuant to the terms of the Buckeye transmission agreements, that agreement contained a provision that before a municipal wholesale customer of an investor-owned utility can obtain Buckeye power, it must disconnect from the investor-owned utility and operate as an isolated power system for 90 days. NRC 188, p. 3; NRC 190, p. 1. This restrictive provision makes it impractical for municipal systems to obtain Buckeye power,* Schwalbert DJ 577, p. 46. TECO has insisted upon strict adherence to this restriction, DJ 581, and TECO denied requests for

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* The Buckeye contract also contained a provision prohibiting Buckeye from furnishing service to any present customers of other electric entities (the Department of Justice contends that this clause should be read as relating only to retail sales since the State of Ohio has no authority to regulate that aspect of wholesale sales which is subject to FPC jurisdiction). This means in effect that a municipal system which obtains part of its power requirements through self-generation supplemented by the purchase of wholesale firm power from another system will never be in a position to obtain Buckeye power because the system is precluded even from requesting interconnection with Buckeye after a 90-day isolation period since it would have inadequate power during that period. Thus, only systems capable of generating 100% of their power needs even have the option of considering Buckeye as an alternative source for firm power requirements. See Eppard, Tr 5453, 5455-57. See also arguments of counsel, Tr. pp. 5469-74. There is no evidence of record that TECO was responsible for the insertion in the Buckeye agreement of the clauses prohibiting service to present customers of other entities. Justice argues, however, that TECO was a knowing beneficiary of what it contends to be an inherently anticompetitive provision.

waiver of this provision by Napoleon so that Napoleon could complete its proposed interconnection with TriCounty. In conformity with the Buckeye agreements, Napoleon was required to disconnect its system from that of TECO and operate in isolation before it could secure power from Buckeye. Dorsey, Tr. 5262, 5282, 5284; NRC 128. TECO indicated that it would not wheel Buckeye power unless Napoleon completed a 90-day period of isolated operation. DJ 145; DJ 148; NRC 128-29; NRC 131. Napoleon agreed to do so, Dorsey, Tr. 5264; DJ 149, though such operation would result in a serious reduction in the municipal system's reliability and leave it totally without reserves during peak loads. Dorsey, Tr. 5264-66. Napoleon informed its customers of the impending isolated operation and received numerous complaints. Dorsey, Tr. 5266-68; DJ 302-07.

The risks of isolated operation were such that Napoleon made a written request that TECO waive the 90-day cutoff requirement, NRC 130; Tr. 5269, but such a waiver was refused. NRC 131; Tr. 5269. TECO took the position that it would emphatically resist any such waiver in Napoleon's case, DJ 150. Napoleon was therefore very concerned about the possible need to reconnect with TECO if an emergency arose on the municipal system during the 90-day cutoff.

Dorsey, Tr. 5270; Moran, Tr. 9861. Napoleon suggested a simple method of disconnecting the systems which would require only 15 minutes to reconnect in case of an emergency, but TECO insisted on a cumbersome method which would require at least four to five hours to reconnect. Dorsey, Tr. 5273; Moran, Tr. 9861, 9947; DJ 309-10.*

174. At this point, Napoleon concluded that the risks of operating in isolation for a period of 90 days compounded by the additional risks imposed by the cumbersome procedure to reconnect with TECO in the event of an emergency required abandonment of its efforts to obtain an alternate source of bulk power. Accordingly, it accepted a new rate schedule offered by TECO which included a reduction in ratchet charges. Dorsey, Tr. 5274-75; 5292-97.

175. TECO added additional obstacles to Napoleon's plan to purchase a portion of its power requirements from Buckeye through TriCounty by a refusal to operate with

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* Mr. Moran's attempt to justify TECO's position by citing "safety" considerations, Moran, Tr. 9861, 9945-55, is belied by his inadequately reasoned rejection of less cumbersome alternative methods of resolivng TECO's purported concern. Tr. 9946, 9948-49, 9954. He finally admitted that TECO could have obtained protection simply by Napoleon's assurance that no city employee would enter the substation -- an alternative never mentioned to Napoleon. Moran, Tr. 9954.

continuous synchronism with Napoleon if its arrangement with Buckeye were consummated. On three occasions between September 1971 and March 1972, TECO representatives made this refusal but gave no technical or engineering reasons in support of these refusals, Lewis, Tr. 5635-39.*

176. TECO has argued that its denials of requests for wheeling should not be considered absolute, but merely as preliminary pending receipt of specific requests. The Board rejects this argument. We believe that the record establishes TECO's refusals would not be understood by the requesting parties as a negotiating tactic but would be understood as denials of the request. Our finding is buttressed by the admission of TECO's General Counsel that it is possible for TECO to agree in principle to wheel subject to negotiation of specific details. Smart, Tr. 10,105; 10,121-22; 10,150. In fact, TECO did not agree in principle to wheel for Bowling Green, subject to negotiation of details, upon the specific request of Bowling Green. We note that since Bowling Green had in mind a particular

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* TECO's representative at these discussions, Mr. Moran, was unclear with respect to what he had stated at these meetings. Moran, Tr. 9849, 9937, 10,091-92. There is a discrepancy between his live testimony, Tr. 10,009-12, and his deposition testimony, DJ 622, pp. 50-51.

supplier - Ohio Power - the request was not made in a theoretical or abstract capacity. Hillwig, Tr. 2386, 2388, 2390, 2394, 2402-04; NRC 49; App. 17; Moran, Tr. 10,015-18; Smart, Tr. 10,100-02, 10,150.

177. TECO's actions in refusing to wheel power for Napoleon, in refusing to waive the 90-day disconnect provision in the Buckeye contract and in refusing to operate in continuous synchronism if Napoleon did conclude an arrangement with Buckeye should be seen in the light of the purpose of the original Buckeye agreement. At least one of the private utilities involved in the negotiation of the Buckeye agreement, Ohio Power, did so for the purpose of forestalling construction of an independent G&T (generation and transmission) system. In a February 1962 memorandum, Ohio Power stated:

> [w]e might forestall the construction of an independent G & T system by offering to cooperate to the extent of allowing the cooperatives to install a generating unit or units in one of our own stations and then delivering the power to the cooperatives over our own facilities, with either Buckeye providng the transmission to load centers which we do not reach or the other utilities in Ohio which now supply cooperatives agreeing also to wheel power. DJ 200, Attachment 12, p. 5.

Mr. Keck, TECO's Vice President of System Planning, testified that TECO entered into the Buckeye contract on an involuntary basis at the persuasion principally of American Electric Power (Ohio Power). He admitted to a knowledge that the co-ops planning to build a state-wide transmission network and that "the effect of entering into the arrangement for Buckeye would obviate the need for co-ops to own and control their own transmission network across the State of Ohio."

178. We find that the action of TECO in refusing to wheel for municipalities within its service area is anti-competitive not only due to the structure of the market and the refusal of TECO to make available other bulk power services, but in addition because TECO had joined in an agreement designed to insure that its municipal competitors would be unable to obtain access to an alternate transmission network. Thus, our conclusion as to the anticompetitive effects and motives of the various TECO refusals is buttressed by the evidence of TECO's understanding of the consequences attendant upon execution of the Buckeye transmission agreement.

179. In 1966, TECO was aware that Waterville was an isolated self-generating municipal system which was having

problems with reliability and voltage variations. Cloer, DJ 582, p. 12. TECO also knew that Waterville was unable to supply all of its industrial customers with power on certain occasions. DJ 615. Waterville informed TECO that it was interested in negotiating for bulk power supply on a long-term basis. DJ 615. Exhibit DJ 504, a report from Cloer to Schwalbert on Cloer's meeting with Mr. Bucher, president of the Waterville BPA, is significant in many respects. First, it indicates that Waterville was seeking some form of interconnection because its system was "in trouble" when its large generator was down. This demonstrates TECO's awareness of the problems imposed by isolated operation. Second, the memorandum sets forth TECO's reluctance to sell wholesale power "since this makes their system more reliable." Thus, there is a direct relationship between the refusal to sell at wholesale and the knowledge that this refusal would place this small competitor in an untenable position. TECO's motive for placing its competitor in this position is further disclosed by Cloer's statement that the reason he wants to make this system unreliable is TECO's desire to purchase the light plant. Third, and extremely significant as we examine the arguments and representations advanced by TECO to justify a series of denials

of requests to obtain bulk power service, is Cloer's statement that TECO did not want to state its actual position as its public position but rather devised a phony or secondary justification for the refusal to furnish wholesale power. Fourth, Cloer notes his awareness that a rejection could be made in such a manner as to avoid a complete "no" answer. Nonetheless, it is clear that TECO had no intent of furnishing such service. In other words, it was dissembling with officials of the municipality. This is significant in view of TECO's protestations with respect to wheeling that it never gave a final negative answer but occasionally was willing to entertain the concept. Our confidence in TECO's articulated reasons for denial of bulk power services is not enhanced by careful reading of DJ 504. Finally, 504 again undercuts TECO's argument that its acquisition program came about not through its own initiative but through requests by village officials for TECO to acquire their facilities. As DJ 504 illustrates, such requests, in fact, often were the product of deliberately staged charades which masked the role of TECO as a moving party.

180. In June 1967, TECO again responded to a request by Waterville's consulting engineers that TECO sell either full or partial requirements firm wholesale power, DJ 505. TECO refused, DJ 506.

Denial of Joint Ownership in
Large Scale Generating Facilities

181. In 1971-72, the City of Napoleon engaged a consulting engineer, Mr. Lewis, to conduct a study of future bulk power supply alternatives. Mr. Lewis met with TECO representatives Moran and Cloer (also present was Napoleon's City Manager, Mr. Wagner) to inquire as to whether TECO would consider joint ownership of large scale generating facilities by Napoleon and other municipal electric systems in the State of Ohio. Mr. Moran:

> . . . responded by saying that Toledo Edison considers its municipal electric wholesale customers as nothing more than industrial customers purchasing power under a retail rate schedule and it intends to adopt rates for the municipal systems in the future that will be on the same level as its retail rates to industrial customers; therefore, there would be no feasible arrangement whereby Toledo Edison could enter into such a joint ownership-type arrangement. NRC 127, p. 7.

At another meeting on March 6, 1972, Mr. Lewis renewed the request for joint ownership of large scale generating facilities by Napoleon and other municipal systems to Mr. Moran and Mr. Cloer. Mr. Cloer stated that this was "impossible." Id. Large scale electric generating facilities would include nuclear stations and it is reasonable to conclude that TECO's

denial of access to large scale generating facilities to Napoleon and other municipalities effectively precluded these entities from obtaining access to the Davis-Besse and Perry stations. With respect to any asserted proposed change of attitude by TECO, we observe first that there is no evidence of record suggesting that any new policy of Applicants has been communicated to municipalities in the TECO service area; furthermore, the 1971-72 refusals would have had a discouraging effect upon any planning necessary for these municipalities to utilize the output of the Davis-Besse or Perry stations.

182. Since commencement of these proceedings, TECO has agreed to consider joint construction with Napoleon, Bryan and Buckeye to a refuse burning generating unit. Moran, Tr. 9858-59. However, TECO's witness was unaware of any notification by TECO to its CAPCO partners of its proposal to engage in coordinated development of a generating facility with non-CAPCO entities. Moran, Tr. 10,666-67. TECO is aware that such an arrangement would be inconsistent with CAPCO understandings. See Sullivan, DJ 578, p. 117.*

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* The president of one CAPCO member, Duquesne, has testified that approval by a member company's CAPCO partners would be required before the member company would be free to engage in coordinated development with non-CAPCO entities. Schaffer, Tr. 8557.

CAPCO ANTITRUST VIOLATIONS

a. Denial of Membership

183. At the time of formation of CAPCO in 1967, each of the member companies had participated in actions intended or having the foreseeable effect of reducing the reliability and the economic viability of competing electric generating and distribution entities within their respective service areas. As has been noted in findings 7, 8, 111, 141, infra, Applicants provided bulk power services to each other even as they avoided competition in the retail and wholesale power transaction market. This avoidance was not passive since several Applicants were parties to affirmative agreements or understandings not to compete with one another. Moreover, each Applicant took actions intended or with the foreseeable effect of eliminating competition with non-Applicants in retail power transactions.* These restraints took the form of agreements in restraint of trade with municipal generating and distribution systems including territorial or customer allocations, attempts to fix prices for retail power transactions, and refusals to provide bulk power services where the refusals had the known effect of reducing the reliability and the

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* As noted, we are aware of the Pennsylvania Applicants' arguments that Pennsylvania law does not permit direct retail competition between electric entities in that state. Nonetheless, Pennsylvania Applicants in their own internal documents have conceded the awareness of competition offered by the mere presence of other generating and distribution entities within their service areas, and Duquesne engaged in conscious campaigns or actions designed to eliminate such entities. See Duquesne ff. 76, 79, infra. Further, the possibility that such electric entities could obtain access to economies of scale which would be reflected in their retail rate schedules must have had some restraining influence on the Pennsylvania Applicants notwithstanding their protestations to the contrary.

economic competitive potential of these rival systems. Thus, each Applicant has entered into agreements and understandings the effect of which is to create and maintain a situation inconsistent with the antitrust laws within its own service territories. These actions or policies have continued over a period of years and their cumulative effect has been to reduce the level of competition within the CCCT or to prevent such competition from being as vigorous as it otherwise might have been.

184. Finding 182 describes the atmosphere and situation prevailing at the time of CAPCO formation in 1967* Although a primary purpose for the formation of CAPCO was to secure certain lawful advantages to Applicants themselves, Fleger, Tr. 8617-20, a collateral and well understood result of the formation of CAPCO was to deny to competitive entities in the CCCT access to coordinated operation and development. During the CAPCO formation meetings, specific consideration was given to the inclusion of municipal systems in the CAPCO group. After considerable discussion among the prospective CAPCO members, they collectively decided that only investor-owned utilities should be permitted to join CAPCO and that municipals or cooperatively-owned systems should be

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* The acts and practices described above continued well beyond the 1967 inception date and many are in effect today.

excluded. Lindseth*, DJ 568, p. 26-29.** The record contains numerous references to formation meetings of CAPCO in which the possibility of municipal participation was considered and rejected. C 50; C 51; C 52. At one point, Applicants went so far as to consider the effect of including a municipal system specifically modeled after Cleveland in the allocation of CAPCO generating capacity. Interestingly, the resulting installed reserve of each Applicant company would decline with the inclusion of Cleveland in the CAPCO pool by using the CAPCO allocation formula while the installed reserve of Cleveland would have risen markedly. The author of the study recognized that the proposed approach was at variance with what the FPC might consider equitable. DJ 278. Finally, we note that Applicants expressed considerable concern that their presentation to the FPC be as limited as possible in order to avoid the risk of municipal intervention in the FPC review. DJ 279; DJ 280. The record reflects a continuing determination on behalf of Applicants that

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* Mr. Lindseth was Chairman of the Board of CEI from 1960 until his retirement in 1967, and he served as a director of CEI until 1974.

** Another CAPCO company executive, Mr. Fleger, Chief Executive Officer and President of the Duquesne Light Company from 1958 to 1967, testified that he never gave consideration to the inclusion of other parties to the pool. He indicated that this was due, in part, to Duquesne's desire to complete the CAPCO arrangement before it was required to make the decision with respect to the installation of its next large scale generating unit. Thus, Mr. Fleger decided it would not be worthwhile even to give thought to permitting any other party to share in the benefits of CAPCO. Fleger, Tr. 8617-20.

CAPCO be structured so as to avoid to the maximum extent possible FPC supervision and the possibility that the FPC might consider membership requests from municipal systems in deciding whether to approve any of the CAPCO agreements submitted for its review. * C 52, p. 2.

185. Having reached the consensus opinion that public power bodies not be included in CAPCO, Applicants then devised arguments to be advanced to the FPC staff as to why such membership was undesirable. The first reason cited was that:

> . . . The most appropriate means for the public power bodies to participate in the economic and other benefits of the Pool would be through the sale of capacity and energy by Parties of the Pool to these public power bodies under FPC approved rates. C 52.

This rationale was a sham since in the same time frame Duquesne was refusing to sell power at wholesale to Pitcairn and had indicated an intent not to make such sales in the future. NRC 13 dated January 23, 1968. CEI had refused to interconnect with the Cities of Cleveland and Painesville except upon an illegal price fixing condition. See C 99; C 111; C 128; C 132, Tr. 2569, 3152-53.

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* In fact, at least some Applicants were concerned about FPC efforts in 1967 "to give capacity value to small units in municipal systems when pool arrangements are being considered." C 54, p. 1. The evidence shows that Ohio Edison was interested in rigging the CAPCO arrangements so that Pennsylvania Power would receive favorable treatment with respect to pool allocations of initial capacity while municipal systems seeking membership would not receive the same benefit. C 54.

TECO also refused to sell wholesale power to a municipal system which it hoped to acquire. DJ 504; DJ 506.

186. Mr. Greenslade, counsel for CEI, submitted to his counterparts at TECO, Duquesne, and Ohio Edison a memorandum dealing with the ability of the regulatory agencies to cope with new concepts in interconnection through the formation of power pools. He notes, in C 55, p. 2, that:

> Whether by accident or design, one of the effects of the tenancy in common concept [the proposed CAPCO method of ownership of generating facilities] has been, to date at least, removal of regulatory supervision.
>
> . . . . . .
>
> Similarly, the FPC is denied regulatory control except over minor facets of the arrangement . . .*

Mr. Greenslade concludes that:

> I have seen no current efforts by the various agencies to assume additional jurisdiction over power pools and tenancy in common arrangements by utilization of the entities approach.

However, he expresses his concern that regulatory bodies may become more active in an effort to fill what CEI's counsel describes as a "substantial regulatory gap." Id, p. 3. Finally Mr. Greenslade notes increasing attempts by municipalities to become pool members and to participate in

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* An interesting argument from the very Applicants who argue that the NRC essentially is ousted from jurisdiction in these proceedings because of the pervasive regulation of the FPC over all aspects of Applicants' operation.

ownership of joint units* as a factor stimulating FPC interests. He concludes, however:

> The FPC is seemingly sympathetic with these efforts, but its legal powers in the area are limited.

187. At the same time as Applicants were combining to exclude their municipal competitors in the CCCT from CAPCO membership, they were discussing the possibility of including additional utility members outside of their service areas as CAPCO members. Williams, Tr. 10,354. This is further confirmation of Applicants' policy of isolating competitors within the CCCT and denying them the benefits of coordination which Applicants received and made available to outside systems.

188. We find that Applicants, from the very inception of CAPCO, were aware of and held mutual discussions concerning the possibility of applications for membership by other entities in the CCCT. It was the consensus opinion of Applicants reached as a result of these discussions that municipals not be included in the CAPCO structure and that allocation formulas making it difficult for municipalities to join be accepted notwithstanding adjustments in the formula made to favor each other with respect to initial

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* Once again, we observe early identification of the nexus between joint ownership in nuclear units (CAPCO had already decided to go nuclear) and the desirability or necessity of participating in a pool as a vital adjunct of this ownership.

capacity allocations. C.50.* Applicants also deliberately sought to minimize FPC supervision over the CAPCO arrangement because of their concern that the FPC might deem it appropriate to make provision for municipal membership. All of these factors considered individually and collectively cause us to find that Applicants consciously denied and intended to deny the benefits of CAPCO membership to competitors in the CCCT.

189. We find that there is a relationship between the collective denial or lack of provision for membership in CAPCO and the individual intent and practices of the Applicants in creating and maintaining a non-competitive situation within their individual services areas. Although we do not hold that the primary motivation for the instigation of the CAPCO arrangement was to affect adversely Applicants' competitors, we do hold that this inevitable result was recognized by Applicants as a result of the arrangement and that they took no effort to alleviate the consequences of the agreement.

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* C.50 consists of Ohio Edison's Mr. Firestone's notes of an August 20, 1967 meeting of CAPCO principals. C.49 consists of notes of the same meeting prepared by Duquesne's Mr. Munsch. These two sets of notes confirm the joint notion of the understanding reached and destroy Applicants' argument that each set of notes be received as evidence only against the individual Applicant in whose file it was found. We hold that at least from August 20, 1967 forward Applicants were a party to a joint plan or combination, one facet of which was to exclude CAPCO participation by municipals.

We further hold that the CAPCO agreement was an agreement in restraint of trade in that it extended services and benefits to parties to agreements not to compete which it denied to their would-be competitors. We hold that these denials were not accidental or unintended but were the result of consideration of the consequences of these actions. Given the stipulated dominance of Applicants' of generation and transmission within their service areas and their collective dominance within the CCCT, the denial of membership opportunities was an act of monopolization and also constituted a group boycott. Thus, we hold that there were violations of both Section 1 and Section 2 of the Sherman Act resulting from the form of CAPCO agreement which Applicants adopted knowingly.*

190. After the inception of the CAPCO agreement, Applicants continued their maintenance of an anticompetitive situation by refusals to approve membership requests in CAPCO from competing entities. These refusals were the result of collective action and this collective action was contemplated from the very outset of the CAPCO agreements.

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* It should be obvious that we do not hold that the formation of an area wide power pool founded on fair and nondiscriminatory principles either creates or maintains an anticompetitive situation. Our concern is not that CAPCO was formed, it is how it was formed and managed that gives rise to antitrust consequences.

191. On December 5, 1967, Mr. McCabe, the Solicitor of Pitcairn, wrote to each of the Applicants with a request to discuss membership affiliation of Pitcairn in CAPCO. McCabe, Tr. 1555, 1557-58; NRC 1-5.* A CAPCO drafting committee met on December 11, 1967 and discussed Pitcairn's request. DJ 130; DJ 131. TECO, CEI and Duquesne each prepared draft responses to the Pitcairn request during December, and these requests were circulated to and found in the files of the various CAPCO member companies. DJ 237;** DJ 202; DJ 204; DJ 205. A copy of one of Duquesne's draft responses was located in TECO's files, NRC 53; NRC 54, with a cover memorandum*** from Mr. Henry, counsel for TECO, who attended the December 11 meeting, DJ 130, to TECO's president in which he stated:

> This [the Duquesne draft letter] goes into detail contrary to consensus at the last meeting. It is to be discussed at Thursday s meeting . . .
> NRC 53.

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* Although McCabe did not send any of the CAPCO companies copies of his letters to the other CAPCO members, the Applicants circulated the McCabe letters among themselves. McCabe, Tr. 1723; NRC 3, Tr. 5223; DJ 224, Tr. 5111.

** An Ohio Edison and Pennsylvania Power acknowledgement of the inquiry was mailed to Pitcairn, NRC 8, McCabe, Tr. 1571, and copies were found in the files of CEI (Stipulation Tr. 5223) and Duquesne, DJ 225, Tr. 5144.

*** Applicants have indicated that NRC 53 and NRC 54 are the same document. Tr. 2579; Tr. 2580.

The reference to a consensus reinforces our holding that the CAPCO companies acted collectively and jointly in discussing and agreeing upon a common stand in refusing the Pitcairn membership request.

192. On December 18, 1967, CEI sent a letter to Pitcairn refusing its request for CAPCO membership. NRC 10; McCabe, Tr. 1573-75.* On December 19, TECO sent a refusal letter to Duquesne. NRC 7; McCabe, Tr. 1566-67. A comparison of the CEI and TECO responses indicates that they are essentially identical.** On January 2, 1968, Duquesne refused Pitcairn's request, DJ 167, p. 9, in a letter that was shorter than the initial Duquesne draft and was similar in content to the TECO and CEI responses. NRC 6.***

193. On January 9, Ohio Edison and Pennsylvania Power also refused Pitcairn's request for pool membership, NRC 9.*** Although

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* CEI forwarded copies of its letter to other Applicants, DJ 218, although the letter to Pitcairn did not show any copies. NRC 10.

** TECO also sent blind copies of its refusal letter to other Applicants, DJ 124. Moreover, TECO's Vice President for System Planning, Mr. Keck, testified on deposition that TECO conducted no study in response to the Pitcairn request but that a study was conducted by Duquesne. This contradicts Duquesne's scenario of companies acting unilaterally and without reliance on the actions of each other. Keck, DJ 576, p. 225.

*** Copies of Duquesne's response were distributed to other Applicants on January 3, 1968. DJ 207; DJ 209.

Mr. White testified that when Ohio Edison made its response to the Pitcairn request, Ohio Edison was not aware of the response of the other Applicants, White, Tr. 9817, and the record shows that CEI, DJ 218, and TECO, DJ 124, supplied the president of each Applicant company with copies of their responses prior to the date of the Ohio Edison response.

194. Despite the refusals of CEI and TECO to its request for CAPCO membership, Pitcairn again wrote to CEI and TECO on January 2, 1968, DJ 110; DJ 125, to request further consideration of its request for pool membership. A similar request was sent to Ohio Edison and Duquesne on January 11, 1968. App. 52; NRC 11.* On January 17, 1968, the CAPCO drafting committee scheduled a meeting to discuss Pitcairn's request for additional consideration. DJ 288; White, Tr. 9509-10. On January 22, 1968, Duquesne wrote to Pitcairn stating that it was not aware of any reason to modify its earlier refusal but that if Mr. McCabe wished to discuss the matter further, he should contact one of Duquesne's attorneys, NRC 12. A notation on Duquesne's file copy (but not on the copy sent to Mr. McCabe) stated:

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* Ohio Edison also sent blind copies to other Applicants. DJ 115; NRC 9.

**Although no copies were sent to the other Applicants by Mr. McCabe, McCabe, Tr. 1723, his letter to CEI was located in the files of TECO, Tr. 4652-53, and Duquesne, DJ 211, Tr. 5111, and was dictated by a Duquesne employee to Mr. Greenslade, counsel for CEI. DJ 220. In addition, Pitcairn's letter to TECO was mailed to Duquesne by TECO's President Mr. Davis. DJ 233.

This reply represents the consensus of the attorneys for the CAPCO companies.*

Once again, we conclude that notwithstanding the fact that individual Applicants responded directly to the Pitcairn request (albeit in similar terms), the responses were a result of mutual discussions and a joint decision to deny CAPCO membership to Pitcairn.

195. Shortly after receipt of the Duquesne response, Pitcairn informed Duquesne that it wished to meet and discuss its desire for CAPCO membership. DJ 213; DJ 214. Simultaneously, Pitcairn wrote to each Applicant requesting a copy of the CAPCO agreement. DJ 127; DJ 215; DJ 222; DJ 229.** Each of the Applicants in very similar language declined to supply a copy of the agreement. DJ 112; DJ 128; DJ 217; DJ 230. The refusal to supply copies of the CAPCO agreements or memorandums of understanding was unreasonable and undercuts Applicants' argument that the decision to exclude Pitcairn was a result of a mature exchange of information between Applicants and Pitcairn relating to the feasibility of Pitcairn participation. See App. ff 33.33-36. Plainly, Pitcairn was disadvantaged in any discussions with Applicants in demonstrating how, if at all, it could make a contribution to CAPCO ***

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* Copies bearing this notation were sent to other Applicants. DJ 211.

** The CEI, DJ 222, and Ohio Edison, DJ 229, letters were found in the files of Duquesne, Tr. 5111.

*** Assuming, arguendo, that this is the relevant criteria. The "mutual benefit" theory espoused by Applicants conveniently overlooks any obligations imposed by virtue of their stipulated dominance.

since it was not supplied with the most basic information relating to the structure and operation of CAPCO. Moreover, we can discern no need for secrecy as to the terms of the CAPCO agreements and memorandum and even Applicants have not advanced such an argument. It seems obvious that the refusal to provide copies of the agreement was a deliberate attempt to frustrate negotiations. If Applicants were sincere in their contention that they were motivated solely by business reasons in denying the Pitcairn membership application, they should at least have been willing to create a record which would allow for discussion on the merits.

196. On February 21, 1968, Mr. McCabe met with representatives of Duquesne and again made an oral request for membership in CAPCO and again asked for a copy of the CAPCO agreement. Both requests were refused.* McCabe, Tr. 1630-36; NRC 17. McCabe wrote to Duquesne memorializing the reasons Duquesne had given for the most recent refusal of Pitcairn membership in CAPCO, McCabe, Tr. 1633; DJ 121.** Duquesne prepared a draft response, DJ 122***,

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* We make no finding as to whether Pitcairn's request for membership in CAPCO necessarily should have been approved at the time the request first was made. Although provision for small system membership is not incompatible with the formation and operation of an area wide pool, e.g., New England Power Pool, the desirability in the context of the CAPCO pool was not established. Our concern is that the refusal was unreasonable and anticompetitive in the fashion in which it was effected. The refusal also is consistent with the prior decision of the CAPCO companies not to make provision for the participation of rival systems within the CAPCO pool irrespective of the size of these rivals.

** A copy of DJ 121 was found in the files of TECO. Tr. 4652-53.

*** The draft response also was found in the TECO files, Tr. 4652-53.

and then sent a revised reply to Duquesne, App. 5. McCabe then concluded that Duquesne's adamant stance made it useless for Pitcairn to continue its quest for CAPCO membership, McCabe, Tr. 1725.

197. A second request for municipal membership in CAPCO occurred in April of 1973 when Cleveland's Municipal Electric Light Plant (MELP) sent a letter to CEI requesting admission to and participation in the CAPCO power pool. In its request letter, Cleveland noted that it was then the ninth largest electric power utility in the State of Ohio, DJ 97. Cleveland's letter of April 4, 1973 also requested an opportunity to participate in joint development of power generation and transmission facilities in the northeast Ohio area. CEI's President, Karl Rudolph, responded to the City's request by letter of April 17, 1973 by noting first that ownership of the Perry nuclear plant raised essentially the same question as membership in CAPCO. Thus, it is clear that a direct nexus between access to Perry and membership in CAPCO was perceived by the President of one of the Applicant companies. Mr. Rudolph suggested that Cleveland representatives meet with Lee C. Howley, CEI's general counsel, and that "[i]f it appears that further discussion would be appropriate, we will pursue the subject with representatives from all of the CAPCO companies." DJ 97. Also on April 17, Mr. Rudolph forwarded copies of his response to Cleveland and to the Chief Executive Officer of the other CAPCO members

together with his request that the subject be discussed at an April 27 meeting of CAPCO executives. DJ 97. It is plain that Mr. Rudolph regarded the request for municipal membership as a matter of joint interest for resolution among the CAPCO partners. The subject of CAPCO membership was made a part of the agenda of the April 27 meeting. DJ 98, p. 9; White, Tr. 9512.

198. On August 3, 1973, MELP again wrote to each of the Applicants, this time with a comprehensive proposal for membership in CAPCO and participation in nuclear units. DJ 100.* At an August 8 meeting of CEI's top management, "[I]t was decided that the company should refuse to agree to Cleveland becoming a member of CAPCO." DJ 291, p. 3. Since each CAPCO member company had veto rights over the decision of the group, this essentially eliminated any prospect that Cleveland would be admitted to CAPCO. By letter of August 17, 1973, CEI communicated its intent to exclude the City from CAPCO membership to the other Applicant companies. This decision was not made known to Cleveland, however, and on September 10, 1973, the City, once again wrote to CEI and other CAPCO companies with a request for nuclear participation. App. 61. CEI and Cleveland representatives met on October 25 to discuss the City's request for membership in CAPCO and for participation

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* Although DJ 100 contained separate (though not inconsistent) suggestions relating to Perry participation and to CAPCO membership, we concentrate here only on that part of the request relating to CAPCO membership.

in CAPCO generating units. At that meeting, CEI refused to give Cleveland a definite response to its request notwithstanding its prior decision to deny CAPCO membership to Cleveland.* A special meeting of the CAPCO executive committee was convened on December 7, 1973 to discuss Cleveland's dual request for membership in CAPCO and participation in CAPCO nuclear units. At the December 7, 1973 meeting, it was decided jointly that CEI would not be permitted membership in CAPCO. Deposition of Karl Rudolph, DJ 558, p. 245.

199. Following discussion of the Cleveland request for membership, Applicants agreed at their December 7 meeting to communicate their responses to Cleveland prior to the next MELP-CEI meeting. DJ 104. Each of the Applicants then communicated to CEI its rejection of the Cleveland request. White, Tr. 9515; C. 61; DJ 581, p. 18; C. 63; Stipulation, Tr. 7433. Duquesne informed CEI of its decision, and in addition mailed a direct copy of its response to MELP. DJ 105; DJ 187.

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* In fact, CEI also consulted its CAPCO partners prior to responding to Cleveland's August 3 request for CAPCO membership although CEI was aware that under CAPCO rules requiring unanimous consent, CEI alone could have vetoed Cleveland's request. Williams, Tr. 10,436-37. Moreover, Cleveland was informed by CEI that " ... we have talked with the other members of the CAPCO group, all of whom feel that these discussions can best be initiated by the Illuminating Company and the City of Cleveland." App. 25. Applicants have disputed whether the requirement that Cleveland deal exclusively with CEI as representative of the CAPCO group created an agency relationship. Although we find that such a relationship was created in this and other instances, this finding is not crucial to our holding that the rejection of Cleveland's application for membership was the result of joint action among Applicants. Nor does the fact that each Applicant individually may have wished to reject Cleveland for its own reasons overcome a finding that Applicants combined to resist the entry of any municipal, including Cleveland, to CAPCO.

200. On December 13, 1973, CEI officials (general counsel Howley) met with Cleveland officials and informed them of the jointly formulated negative response to the membership request. Rudolph, DJ 558, p. 245. CEI's Mr. Howley, both orally and in writing, denied Cleveland's request on behalf of the CAPCO companies.* DJ 188; DJ 291, p. 18-22; Hart, Tr. 4795.**

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* The December 13 notes in DJ 291 state expressly that the turndown letter of Duquesne reflected the reasons of the CAPCO companies. We reject Applicants' assertion that no joint action was involved in this boycott and refusal to deal.

** Mr. Arthur, Chairman of the Board of Duquesne, testified that he was influenced in his decision to turn down Cleveland's request by the fact that MELP's generation, transmission and distribution were dissimilar to those of CAPCO companies. In fact, the systems of the CAPCO companies were not compatible in all respects. More importantly, Mr. Arthur conceded during his cross examination that he lacked relevant information and was unable to support his contentions of system dissimilarity. Arthur, Tr. 8378-85.

B. Denial of Nuclear Access

201. As indicated in preceding findings dealing with individual Applicant activities, certain Applicants have denied access to nuclear facilities (including Davis-Besse or Perry) to other electric entities in their respective service areas or have conditioned access upon agreement to restraints in alienation of the nuclear power by the purchasing entity. With reference to our preceding findings, it now should be apparent that at the time of these denials Applicants already had been acting in concert to deny vital entities access to bulk power services which would include products of low cost base load electricity from nuclear generating stations. Accordingly, we make two findings. First, we hold that the various denials to nuclear access by individual Applicant companies were inconsistent with the antitrust laws.* Second, we find that the individual denials, whether or not cleared with other Applicants in advance, were made pursuant to common objectives and understandings among Appliants to limit the

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* These denials also were inconsistent with the Congressional policy of assuring access to nuclear facilities to more than a few dominant entities.

availability of bulk power services to non-Applicant entities within the CCCT. We should indicate that in the absence of the second finding above, the other related findings of joint action have an impact on the outcome of these proceedings sufficient to require that no unconditioned licenses be granted. Our first finding, standing alone, also justifies relief.

202. In support of our finding that Applicants had a collective and concerted interest in the denial of access to nuclear facilities to rival entities, we now examine Applicants' response to a request by the City of Cleveland for access to CAPCO units, specifically including the Perry unit.* Exhibit DJ 97, cited earlier with respect to Cleveland's application for CAPCO membership, also contained an April 13, 1973 letter from Cleveland to CEI's Karl Rudolph requesting access to the Perry nuclear plant. By reply of April 17, 1973, Mr. Rudolph informed Cleveland of the joint ownership of CAPCO units by Applicants and stated that if after preliminary meetings with CEI's Mr. Howley, it appeared that

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* We also make this finding independent of prior determination of collective exclusionary acts.

further discussion would be appropriate, CEI would pursue the subject of nuclear access with representatives from all CAPCO companies. Mr. Rudolph then communicated with the president of each of the CAPCO companies to inform them of the Cleveland request.

203. On August 3, 1973, Cleveland renewed its request for access to the Perry plant and included a more comprehensive proposal listing participation in the Davis-Besse and Beaver Valley plants as additional items for discussion. This communication also was sent by Cleveland to the president of each CAPCO company. On August 8, 1973, CEI executives met to discuss Cleveland's request and Mr. Hauser's minutes state that CEI made a determination to deny Cleveland membership in CAPCO and access to Davis-Besse and Beaver Valley Unit 2. DJ 291, p. 3. The Hauser notes further provide:

> On the other hand it was agreed that the lawyers should advise the Justice Department, after it was cleared with the other CAPCO companies, that the City of Cleveland would be allowed to participate in the Company's allocated portion of the Perry units. (Emphasis added).

It is apparent that collective approval of this approach was contemplated and that "clearance" by other CAPCO companies was considered important.*

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* Footnote on next page.

204. On September 10, 1973, Cleveland once again communicated with the president of each CAPCO company with the request that it be permitted to participate in the "planning, construction and power delivery agreements and other coordinated aspects of power generation and transmission" relating to the five additional electric generating facilities which the CAPCO companies publicized an intent to build.

205. On October 25, 1973, management representatives of Cleveland and CEI met to discuss the City's pending requests. Notwithstanding CEI's prior decision that Cleveland would be denied

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* Footnote from preceding page.

Applicants do have an argument that in a wide area power pool it is essential that each participant be apprised of the commitments of the other. On the other hand, we have seen that Applicants deliberately structured the CAPCO arrangement so that they would own shares in nuclear power plants as tenants in common - this in an attempt to avoid to the maximum extent possible federal agency jurisdiction. Finding 186 supra. Therefore, according to the legal structure selected by Applicants for their own purposes, CEI would, in essence, own outright a block of power with which it should have been free to do as it wished. Of course, it was not relieved of the obligation to meet its other CAPCO commitments. However, so long as Cleveland met its CAPCO commitments, it theoretically was no business of the other Applicants what collateral arrangements CEI might make for the disposal of any portion of the nuclear output of the Davis-Besse or Perry plants. Thus, we are inclined to give little weight to any argument that the so-called clearance procedure among other CAPCO companies was nothing more than a courtesy notification. In fact, DJ 291, p. 00014326 (Mr. Hauser's chronological record of events) reflects that "K. H. Rudolph did receive approval of the chief executives of the other CAPCO Companies for the Company to proceed with proposing [sic] participation in the Company's allocated portion of Perry."

access to Beaver Valley and Davis-Besse, no response was made to Cleveland's request for nuclear access.

206. At the special CAPCO executive committee meeting held on December 7, 1973, all Applicant companies jointly considered Cleveland's request for nuclear access. It was agreed that other Applicants would communicate their position to CEI prior to a scheduled meeting between Cleveland and CEI to be held on December 13. The other CAPCO companies did communicate their positions to CEI prior to that meeting. C. 61 (Ohio Edison); DJ 581, p. 18 (TECO); C. 63, Stipulation Tr. 7433 (Duquesne).

207. At the December 13 meeting between Cleveland and CEI representatives, Mr. Howley spoke for CAPCO and communicated the position that CAPCO took with respect to Cleveland's request for access to nuclear units. DJ 558, p. 245.* A response dated December 10, 1973, DJ 187, signed by John Arthur of Duquesne had been sent to Cleveland refusing the City's request for

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* Mr. Rudolph specifically was asked during his testimony if a group position by CAPCO was formulated at that meeting. His unequivocal answer was that the position taken at that meeting was a CAPCO joint position rather than a CEI position.

> Q: Now when you said the position that "we took", did you mean the position C.E.I. took? Or are you speaking of the position CAPCO took?
>
> A: I am talking about the position that CAPCO took at that meeting.

participation in the Perry 1 and 2, Davis-Besse and Beaver Valley 2 nuclear units. That letter reflected the CAPCO joint position. DJ 291, p. 00014340.

208. CEI distributed a letter at the December 13 meeting, DJ 188, in which it agreed to enter into negotiations with the City for participation in the nuclear units from CEI's entitlement in those units on the condition precedent, inter alia, that Cleveland withdraw its petition for antitrust review in any administrative or court proceeding. DJ 188; see also DJ 291, p. 00014340-43. The condition that Cleveland not approach the AEC in connection with pending license applications as a prior condition even of negotiating access to nuclear power was unreasonable and had the effect of maintaining a situation inconsistent with the antitrust laws.*

209. Exhibit 291, a memo from V. F. Greenslade, counsel for CEI, to D. H. Hauser, another counsel for CEI, on the subject of the Perry antitrust review is particularly destructive to certain arguments raised by Applicants. First, Mr. Greenslade recognizes that Cleveland officials may be distrustful of receiving a "fair shake" from the FPC, particularly in view of the recent FPC action

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* We note that the CEI proposal was not that the petitions to intervene before the AEC be withdrawn upon satisfactory conclusion of an agreement giving Cleveland access to nuclear power; rather, it was the position of CEI that the City would have to withdraw any informal or formal petition or request for antitrust review even prior to the commencement of negotiations with CEI. DJ 291, p. 00014342-43.

involving CEI rates for low displacement service. Mr. Greenslade concludes that:

> MELP officials may feel more comfortable with back-up arrangements under which they will be paying the same rates and be subject to the same conditions as other utilities in the CAPCO Group.

Plainly, this undercuts Applicants' argument that extensive NRC review is unwarranted because the FPC is in a position to adjudicate and resolve all of Cleveland's charges and complaints relating to denial of bulk power services.

Second, the Greenslade memo underscores CEI's direct awareness that the denial of bulk power services has the inevitable effect of reducing an entity's competitive viability. Further, the Greenslade memo supports our view of the relevant product market and is at odds with the proposals of Applicants' experts taking exception to this definition. Mr. Greenslade states:

> CAPCO membership by MELP would allow MELP to participate in economy interchange transactions, and allow them to participate in coordinated maintenance scheduling. Presumably there would be more opportunity to participate in the economy interchanges as a member of the CAPCO Group than simply under a two-party contract with CEI. Finally, membership in CAPCO by MELP would provide them with access to transmission to all of the CAPCO Companies, rather than simply transmission from the particular plants where they have an ownership interest or are buying unit power, to the City's load center. Access to this CAPCO transaction would, in turn, better provide access to alternate bulk power sources for the City, such as Niagara, Cardinal, or AEP. It could also, perhaps, better provide access to bulk power from new generation which might be planned by the municipal systems of Ohio, similar to the Cardinal generating facilities which have been constructed by the co-ops.

210. We hold that Applicants' joint and separate denials of access to nuclear units, including Davis-Besse and Perry, either in absolute terms or with unreasonable conditions creates and maintains a situation inconsistent with the antitrust laws. The proposals set forth in App. 44 maintains the situation because it does not provide the same range of bulk power services and regional power exchange transactions as Applicants make available to each other.

C. The P/N Formula

211. The CAPCO pool differs from many other wide area power pools in that member obligations to maintain reserves are calculated on the basis of a P/N allocation of responsibility rather than a more conventional equal percentage of reserves* or largest single unit down standard. Applicants' description of their jointly adopted P/N formula indicates that it utilizes probability analysis by viewing each member system as an isolated system and describing resources by a probability model on a unit by unit basis. The system load is described by another probability model in which 252 daily peak-hour loads are included.** The capacity model is then merged with the system load model to compute the array of daily capacity margins and a probability number associated with every margin is determined. A margin can be positive, zero or negative. The positive margin (P) portion represents ability to provide help and the negative (N) margin represents the potential need for help.

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* Applicants' Mr. Firestone, Vice President of Ohio Edison Company, defined equal percentage of peak load method of reserve sharing as composed of the specification of an installed reserve criterion consisting of some stated percentage value which, when applied to the system's annual peak-hour load, determines the required number of megawatts of installed reserve for that system. App. 122, p. 19.

** 252 days were selected to allow for low peak days such as weekends and holidays.

Prepared testimony of Lynn Firestone, App. 122, p. 21-24. See also App. 124. The objective of the CAPCO companies was to arrive at a negative margin of one day per year on the system.

212. Although the P/N formula was developed by employees of Ohio Edison and CEI in an attempt to apply probability techniques to system operations in order to determine proper reserve responsibilities, the P/N method had the recognized effect of applying extraordinary reserve requirements to small systems, thus penalizing small systems in attempts to join pools using the P/N reserve allocation method. Small systems are victims of a dilemma (assuming that the P/N allocation type pool is an open membership pool) in that they would be required to sacrifice economies of scale in the production of electricity in order to qualify for pool membership without carrying excessive reserves. Firestone,Tr. p. 9324-36; Kampmeier,Tr. p. 5702-08; See generally, NRC ff 1.309-1.324.*

213. There is no question that CAPCO members were aware that the P/N formula had the effect of discriminating against municipal Applicants and indeed recognized that the formula would be desirable as an exclusionary tool. C. 48, p. 7. Moreover, the record is abundantly clear that Applicants did not apply the P/N formula

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* The Board has considered carefully the transcript and documentary references set forth in the Staff's proposed findings relating to the P/N method. Although we do not adopt these findings in totc, we are satisfied that we could do so and that the record is more than sufficient to support the Staff's contention that the CAPCO P/N reserve method of allocating responsibility is exclusionary and serves as a barrier to entry into CAPCO of municipal systems.

to themselves at the time of entrance, but made arbitrary allocations in order to avoid dislocations among member companies for the first few years of CAPCO operation. Schaffer, Tr. p. 8602-03; C. 30; C. 31; C. 44; C. 48; C. 49; Firestone, Tr. p. 9424.

In 1973-74, further changes were made in the CAPCO formula shifting the method of representing units from pro rata to an investment responsibility context. C. 57, p. 5. The change in formula was made with the intent and purpose of raising entrance barriers to other potential CAPCO members.

214. If membership in the CAPCO pool is regarded as necessary to the competitive viability of electric entities in the CCCT, then the knowing erection of entry barriers through the imposition of the P/N formula violates the antitrust laws. This conclusion follows in light of our earlier findings with respect to Applicants' dominance over generation and transmission and the furnishing of bulk power services and bulk sales at wholesale within the CCCT.

It should be understood that we do not condemn the P/N formula as inherently anticompetitive nor do we hold that the principal purpose of its design was to exclude competitors. We are persuaded by Applicants' testimony that the formula represented an attempt to distribute in a rational fashion individual reserve requirements necessary for the operation of a wide area pool. What we condemn is Applicants' deliberate and knowing recognition of

the effect the application of this formula would have on generating entities at the time of entrance into the pool, and their agreement to deviate from the formula for member companies but to impose rigid formula applications on municipalities in the event municipals cracked the CAPCO entrance barrier.

215. Applicants' competitors must have either membership in CAPCO, thus obtaining concomitant bulk power services, or they must have alternate access to such services. As reflected in our findings dealing with individual Applicant activities and those dealing with the joint denial of access to nuclear facilities and/or membership in CAPCO, rival entities were unable to obtain sufficient bulk power services either through CAPCO or through alternate means. In these circumstances, we hold that denial of membership in CAPCO is and was equivalent to denial of access to a "bottle-neck" facility.

NEXUS

216. Section 105(c) requires that a situation inconsistent with the antitrust laws and the policies underlying those laws be created or maintained by activities under the license. The relationship between the proscribed antitrust situation and the license activities has been referred to as nexus. The NRC is not charged with the responsibility of the general enforcement or administration of the antitrust laws. Its particular interest is focused not upon a regulatory mandate to investigate all market activities of Applicants but only to consider the effect of granting a nuclear license on the competitive environment in which Applicants operate.

In its Waterford II, supra, p. 3, decision, the AEC stated that mere comingling of electric power generated by a nuclear station into the overall system output of an Applicant was insufficient, in and of itself, to establish the necessary relationship giving rise to Commission authority to apply antitrust remedies. It is the effect of the licensed activities measured against particular situations which is the predicate for Commission involvement in Section 105(c) license consideration.

Throughout these proceedings, the Board has functioned with the instruction of Waterford clearly in mind. The nexus issue surfaced as early as the second prehearing conference and was specifically included as Item 11 of the Matters in Controversy.

Periodically, Applicants have questioned whether the opposition parties were making a sufficient showing of nexus to enable them to proceed, and the Board has had occasion to reconsider whether the Commission's nexus requirements were being met. In our Memorandum and Order of November 19, 1975, for example, we discuss the relationships encompassed within matter in Controversy 11.

The issues herein as initially perceived related largely to the structure of the electric power industry within the CAPCO market. Dominance of the CAPCO companies and the possibility of abuse of monopoly power exacerbated by the granting of unconditioned licenses which would further strengthen that dominance were among the core issues. As discovery developed, of course, opposition parties sharpened the thrust of their allegations and disclosed in advance of the hearing that they also intended to introduce evidence of agreements in restraint of trade, some of which constituted per se violations of the antitrust laws.

217. Accordingly, we make findings with respect to nexus jointly and alternatively.* The Board finds nexus to exist with respect to

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* Findings in the alternative not only are permissible but are protected by the umbrella of the substantial evidence test. Gainesville Utilities Corp. v. Florida Power Corp., 402 U.S. 515, 526, n. 7 (1971).

structural abuses and secondly with direct reference to restraints imposed on specific outputs of the Davis-Besse and Perry plants. Either ground is sufficient in our judgment to support in full the conservative nexus standards enunciated in the Waterford decisions. Thus, although we make both findings, if we are in error with respect to either, the alternate approach would form a sufficient basis to support our actions with respect to the situational findings we have made.

Structure

218. With respect to the connection between the structure of the industry in the CCCT and the licensing of the Davis-Besse and Perry nuclear units, we can begin with Applicants' own proposed findings of fact. We accept Applicants' proposed finding 33.11 that:

> The CAPCO Pool was formed so that Applicants could coordinate installation of generation and transmission in order to further reliability and take advantage of scale economies.*

We also accept that part of Applicants' proposed finding 33.12 which provides:

> To achieve these goals Applicants engage in a construction program of jointly committed generating units using a one-system planning concept.

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* As indicated previously, we do not find this to be the sole intended result of the formation of CAPCO.

And 33.13:

> The five nuclear facilities being licensed in this proceeding are part of a larger fourteen-facility construction program implementing the CAPCO planning guidelines.

And 33.14:

> Complementing the generation construction program is another joint program, again making use of the one-system concept, to coordinate sufficient transmission facilities to permit carrying out the arrangements described in the [CAPCO] Memorandum of Understanding.

Applicants' own proposed findings set forth a situation far different from the mere comingling of power from a single nuclear station with the other generation resources of a single electric utility. Within the CCCT, the generation of the nuclear units ineluctably will have a substantial effect on the supply and cost of power for each of the five Applicant companies.* Moreover, there is a direct tie between the generating station construction program and the transmission program which Applicants describe as complementing it. As described in CAPCO memoranda, far more is contemplated than the mere extension of a line from the site of the proposed nuclear station to the closest terminal of the Applicant in whose service area of the plant

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* Obviously, the cost factor would apply to Applicants' overall wholesale power rates and thus to their argument that municipalities can obtain all the benefits of CAPCO membership through wholesale contracts with Applicants (overlooking the fact that certain Applicants have resisted making unfettered sales at wholesale to certain municipalities). Thus, nexus would be established between the licensed activities and purchasing entities' competitive posture even were we to accept Applicants' argument since these municipalities would continue to have a vital interest in the cost of the power they were being offered.

is to be located. Applicants are engaged in substantial planning studies and construction programs specifically intended to develop a plan for high voltage transmission at low cost among CAPCO members. There will be comingling, but the comingling will be on an extraordinary scale. The one-system concept utilizing nuclear generation for base load power will have such a pronounced effect on the overall economies of generation and transmission within the CCCT as to make the generation of these nuclear power plants an extremely substantial, if not the dominant, force in power production planning.

The Commission's Waterford I opinion indicates that tructure is a very important element in the determination of nexus. The Commission directs its licensing boards to consider "the relationship of the specific nuclear facilities to the Applicant's total system or power pool, e.g., size, type of ownership, physical interconnections" in the evaluation of the link between the situation and the activities under the license.* We have made findings with respect to each of these Commission enumerated criteria. We have discussed the size of the five large generating stations involved in this license proceeding and the substantial contribution they will make to the resources of the CAPCO pool and in particular to the satisfaction of its base load power requirements. We have

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* 6 AEC 48, 49 (1973).

discussed the joint nature of the ownership not only of these stations but of the transmission facilities associated therewith* and we have discussed the physical interconnection relationships which CAPCO members have with each other and with non-competing utilities as opposed to those they offer or fail to offer to rival entities in the CCCT.

219. Not only do the power supply options which Applicants will obtain by the addition of the Davis-Besse and Perry units to the CAPCO system have an effect on power generation within the CCCT, but there is a relationship between the nuclear generating plants and the transmission systems of Applicants and their ability to limit the power supply options of small electric entities in the CCCT. Mozer, NRC 205, p. 9, 12, 14, 18, 25, 60, 64-69; Mozer, Ex. HMM-3; Mozer, Tr. 3357-58. The construction of the nuclear stations herein at issue has required Applicants to plan additional high voltage transmission to supply this power in areas of need. This necessary transmission expansion would make it increasingly difficult for small utilities to obtain necessary approvals to construct alternate transmission systems since these systems in essence would duplicate portions of an already adequate transmission system owned by Applicants. Mozer, NRC 205, p. 57-58, 60-61, 64-69.

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* We refer, of course, to the one-system concept of CAPCO operation and development planning rather than the particular company in which legal title may vest.

220. In order to utilize nuclear power, as with any other power supply, a provision must be made to carry a certain level of reserves. Mozer, NRC 205, p. 63, 68-69; Hughes, NRC 207, p. 32. The level of reserves that must be carried can be reduced substantially if generating entities can pool reserves with others through arrangements for sharing emergency and maintenance capacity and energy. Mozer, NRC 205, p. 63. These reserve requirements create a need for replacement capacity which must be arranged either within the system or through interconnection with an adjacent system and transmission services to provide this outside power. Denial of bulk power services including emergency and maintenance power and reserve share arrangements can and does act as an impediment to the use of nuclear power by Applicants' competitors, or would-be competitors, and discourages the use of nuclear power from Davis-Besse and Perry for competitive purposes. Thus, the structure created by Applicants within the CCCT combined with their refusal to make available necessary bulk power services creates a direct nexus between acitivites under the license and the situation inconsistent with the antitrust laws. In effect, Applicants have denied the option of effective utilization of nuclear power to their competitors. Mozer, NRC 205, p. 68; Hughes, NRC 207, p. 30; Wein, DJ 587, p. 145-47.*

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* Applicants' proposals for access to Davis-Besse and Perry, while better than nothing, are inadequate since they contain anti-competitive provisions - i.e., restraints on resale or use of the power by rival entities - which have the effect of limiting competition. Thus, Applicants' proposal would have the effect of both creating and maintaining a situation inconsistent with the antitrust laws.

221. In considering whether nexus can be established by the structure of competition in the CCCT, we have found particularly helpful the analysis of the NRC's expert economy witness Dr. Hughes. On page 30 of his testimony, NRC 207, he discusses the economic relationships between Applicants' nuclear units and their possession and use of market power. After concluding that nuclear power offers a superior base load choice*, he then goes on to state:

> Where nuclear generation is the superior base load choice, the cumulative effect on market power of a sequence of nuclear plants will be greater than the impact of any one plant alone, because each successive nuclear addition will confer an incremental advantage.

He concludes that:

> The economic feasibility and benefits of access to bulk power services provided by the nuclear units themselves depend on access to other bulk power services from the Applicants.

The Board is of the opinion that Dr. Hughes supported the contentions set forth in his pretrial testimony during four days of intensive cross examination and that the conclusions he urged should be accepted.

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* He indicates that Applicants' own documents substantiate his conclusion that nuclear generation is a distinctly superior choice for expanding base load capacity over fossil-fueled alternatives. See CEI Annual Report for 1972, p. 11; CAPCO Base Load Generating Capacity Requirements follow Perry No. 2, 1981-84; Planning Committee Report No. 5, June 14, 1973.

Restraints on Specific Outputs

222. Even in the absence of nexus arising through the structure of the electric power industry in the CCCT, there are significant direct relationships involving anticompetitive activities under the license. These involve attempts to place unreasonable restraints on the disposition or use of power to be generated by the licensed facilities.

(A) First, we refer to the testimony of Mr. Lyren of Wadsworth, Ohio, stating that he was informed by officials of Ohio Edison that the sale of nuclear power to Wadsworth and the WCOE group would be conditioned upon agreement not to use that power for resale to present customers of Ohio Edison. Lyren, Tr. 2030-31.

(B) The CEI response to Cleveland's request for access to power from Davis-Besse and Perry was conditioned on rights of first refusal to repurchase any excess power from Cleveland's share of those units for which Cleveland had no immediate need. The effect of this restraint would be to prevent or impede Cleveland from entering into power exchange or economy transactions with other electric power producers. We refer in particular to Cleveland's preliminary discussions and interest in agreeing to exchange bulk power services with the City of Richmond, Indiana. We have seen that Applicants' denial of CAPCO membership to Cleveland prevented

Cleveland from pooling or coordinating its operation or development with CEI, its surrounding utilities, or with other Applicant companies. The right of first refusal on Davis-Besse and Perry power as a price for access to these units would frustrate Cleveland's ability to provide for any alternative to CAPCO membership and would relegate it to a continued role as an isolated entity. Applicants' jointly espoused rationale of the purpose of CAPCO is abundant evidence of and recognition of the competitive burden imposed by isolated operation.

(C) Painesville's Mr. Pandy testified that CEI general counsel Howley equated interconnection with CEI as the equivalent of and a substitute for access to the Perry nuclear plant (a plant to be constructed within the Painesville service area). However, as set forth in finding 74, supra, the interconnection offers with Painesville were conditioned upon anticompetitive terms including territorial and customer allocation.

(D) Pitcairn's Mr. McCabe testified with respect to the factors which influenced Pitcairn to abandon generation and to become a wholesale customer of Duquesne. Prior to reaching the decision, the Pitcairn request for CAPCO membership had been rejected as had its requests for participation in CAPCO nuclear generation. Findings 92-98, supra. Nonetheless, it is clear that access to nuclear power and access to alternate sources of power is of continuing interest to the Borough of Pitcairn. At

Tr. 1659, McCabe testifies:

> While this agreement certainly did satisfy one of our objectives in permitting us to acquire power for resale it does not mean that this is the complete end of any planning for power acquisitions by the Burough of Pitcairn. The Burough of Pitcairn certainly has an obligation to its customers to make very effort to provide them with the cheapest and most reliable electrical service. If it is possible for us to take any action which would enhance reliability and reduce the cost of our service, we certainly will consider that.

Thus, if access to nuclear stations in the CAPCO group is a viable competitive alternative, Pitcairn's long-time solicitor has expressed a direct interest in exploring such possibilities.*

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* There remains, of course, the possibility that other municipalities in the Duquesne service area also may wish to consider re-entry into the electric distribution business based upon the availability of base load power at costs which would be less than that experienced by users within the municipality who currently are purchasing from Duquesne. Indeed, the possibility that some of these municipalities may seek to use this alternative serves as a check upon prices Duquesne may include in its retail schedules. United States v. Penn-Olin Co., 378 U.S. 158, 174 (1964). Actual yardstick competition is not necessary to serve as a price deterrent to Duquesne. Id.

Duquesne argues that it could not respond to the competitive alternatives available to Pitcairn by making rate reductions because it is bound by provisions of Pennsylvania law which prohibit discrimination in tariffs. Pitcairn, however, is the only customer affected by such a tariff so that plainly Duquesne could file amendments to the tariff acting solely in response to competitive pressures from Pitcairn for a different price schedule. No discrimination would be involved.

(E) Exhibit DJ 188 again illustrates Applicants' demands for illegal price fixing agreements as a condition of access to the Davis-Besse and Perry nuclear units.

(F) There is no question that Applicants themselves understood the relationship between unit access to the Perry nuclear plant and denial of membership in CAPCO as a whole. Unit participation was recognized as a less desirable alternative for the City and specific note was taken of the fact that membership and the attendant access to bulk power services could be construed as advantageous to the City "in securing new customers and capturing existing CEI customers." C. 146.*

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* The analysis set forth in this memorandum is pertinent not only to our discussion of nexus, but in showing the defects in Applicants' arguments that FPC regulation is an effective check on all anticompetitive acts of the Applicant companies which were considered in this proceeding. C. 146 supports our determination that bulk power services constitute a relevant product market since the exhibit focuses upon the identical elements of bulk power services which were deemed so important by Staff witness Hughes and by this Board. It also reinforces Dr. Hughes' argument that access to alternative bulk power sources is necessary to prevent the maintenance of anticompetitive situations in the CCCT, and it undercuts Applicants' argument that their proposed offers of access gave Cleveland and other entities all that they could hope to obtain by being members of the CAPCO group.

We should note that C. 146 was a document which Applicants initially declined to produce under claim of attorney-client privilege. Messrs. Greenslade and Hauser are both attorneys in the employment of CEI. Mr. Williams, who is shown as a carbon addressee of the memorandum, is an executive vice president of CEI serving in a nonlegal capacity.

(Footnote continued on next page)

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* (Footnote continued from preceding page)

Applicants were parties to a stipulation that documents claimed to be privileged would be reviewed by a Special Master whose decision on production would be binding upon all parties. Applicants have argued in support of this understanding in opposition to Cleveland's request for interlocutory relief. It has become the law of the case that the decision of the Special Master with respect to privileged documents is binding on all parties.

On June 19, 1975, the Special Master denied the claim of privilege with respect to C. 146 on the basis that it was business related rather than a document generated in connection with providing legal advice to a client, and its production was ordered. Applicants asked for and were granted a rehearing before the Master with respect to this document among others and such hearing was held on June 30, 1975. After consideration of Applicants' arguments, the Master reaffirmed his prior decision to order production of this document on the basis of its business-oriented nature. Tr. of Special Hearing, p. 85-86.

Although we accept the decision of the Special Master for the reasons set forth in our earlier memoranda dealing with Cleveland's application for consideration of claims of privilege by this Board, we should note that despite the fact that the document was written by a lawyer to another lawyer, the document focuses on benefits arising out of CAPCO membership and we therefore would reach the same conclusion as that drawn by the Master. We find nothing in the document of an inherently legal nature. Moreover, we note that Mr. Hauser has assumed a dual role in dealings with Cleveland. He has negotiated with the City not only as one of the attorneys for CEI but he also has been involved in operational matters such as the approval of load transfer service when requested by Cleveland.

APPLICANTS' ARGUMENTS

Although the principal framework of our decision has been to evaluate evidence important to the resolution of the issues in controversy, we now take brief occasion to comment more specifically upon arguments raised by Applicants in their Proposed Findings of Fact and Brief. These arguments, of course, have been addressed throughout this opinion so that it is not necessary for us to conduct an exhaustive analysis of each point raised in Applicants' prolix filings. Many of their arguments are repetitious and to the extent that we have failed to comment on any argument with greater specificity, it is because we deemed it unpersuasive or without sufficient weight to change our view with respect to the resolution of any of the issues in controversy.

Applicants' arguments, stated succinctly, are that competition in the CCCT is precluded not through their actions but through the existence of state and federal regulatory schemes which either act to suppress competition or which prevent abuses from arising in areas where competition may be permitted. Applicants' second argument is that as wholesale suppliers to rival entities within the CCCT, they extend to these entities essentially the same measure of benefits as Applicants derive from their CAPCO membership. Finally, Applicants argue that their actions did not suppress competition because rival entities always had the option of constructing fossil-fueled generating facilities of their own and of constructing a

transmission network duplicative of Applicants. None of these arguments is tenable. Moreover, we find that each one of these arguments is contradicted by materials located in the files of various Applicant companies or in the testimony of expert witnesses sponsored by Applicants.

Turning first to the argument that the federal and state regulatory schemes have created an environment in which competition cannot occur or in which it is regulated to prevent situations inconsistent with the antitrust laws or their underlying policies from arising, we begin by referring to Clevelands Exhibit 121. This 1968 text of a speech by K. H. Rudolph, President of CEI, describes the factors which induced CEI to enter into pooling arrangements with other utilities and in particular the CAPCO pool. Although recognizing that the FPC urged greater coordination to prevent area wide power outages from occurring, Mr. Rudolph made plain his company's resistance to federal regulation and its intent to conduct its pooling operations without government assistance or interference.*

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* C. 121, p. 8:

> So you can see that the industry has long ago taken the steps necessary to provide the reliability of service which is so necessary, and I might add without any prodding on the part of the government. We all understand that the government has a rightful place in regulating industry when industry demonstrates that it is unable to meet its responsibilities without government assistance. There is absolutely no need for government interference in this area, however. For this reason, The Illuminating Company as one company is unalterably opposed to the FPC's proposed electric power reliability act and we feel that its enactment would impede the already significant progress that has been made in this area by the private sector of our industry.

We also have observed TECO's attempts to avoid FPC supervision as an asserted reason for their refusal to sell power to the Southeastern Michigan Electric Coop. Finding 165. Likewise, Duquesne compromised its differences with Pitcairn in an attempt to minimize the effects of FPC regulation and with the awareness that continuation of its controversy could lead to more intense interest by the FPC. This concern on the part of Duquesne is indicative of the fact that FPC regulation still leaves wide gaps in its coverage and wide choices with respect to the remedy of an assertedly anticompetitive situation. CEI, too, conditioned its responses to various requests for coordination and interconnection with Cleveland upon a fear that a failure to work out one type of arrangement might lead to a more intensive scrutiny by the FPC. Finding 186. Ohio Edison commenced its negotiations with the WCOE group under the benevolent good offices of the FPC, but plainly without the direct involvement of that Agency in the negotiation of bulk power service alternatives. Thus, we have a situation in which Applicants display continuing awareness that the FPC may affect, to a degree, their coordination policies, but one in which the sporadic involvement of the FPC and its choices of lesser alternatives than the primary relief sought by Applicants' rival entities suggests less than perfect regulation of competition.*

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* Footnote on next page.

The limitations on FPC regulation of anticompetitive entities have received comment during the recent term of the Supreme Court in Conway v. FPC, 425 U.S. 957, 96 S. Ct. 1999 (1976). There the Court concurred in an analysis by the District of Columbia Court of Appeals that wholesale rates even with costs are fully allocated according to current provisions of the FPC, may fall within a zone of reasonableness. The Court further held that this zone of reasonableness can permit the imposition of a price squeeze between wholesale and resale rates notwithstanding the FPC's proper allocation of its own rules and regulations. This recognition of the imperfect nature of the regulation and the fact that approval of a particular wholesale rate structure does not necessarily eliminate the possibility of anticompetitive effects is significant to our determination to reject Applicants' argument that regulation has acted as a substitute or replacement for competition in the CCCT.

A second interesting aspect of the Conway decision is that the FPC, petitioner in the Supreme Court, was arguing that it lacked

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* Footnote from preceding page.

As Dr. Hughes testified, NRC 207, p. 40:

> In practice, coordination does not rule out a useful role for competition. Power systems can and do choose between different alternatives in putting together the overall power supply package on which they rely. For a large area, there are often many ways of developing an efficient overall bulk power supply plan or pattern of development. The existence of a diversity of approaches and the freedom to shop for options provide a degree of competitive stimulus to search for new and better power supply alternatives.

jurisdiction to consider the allegations of the company's wholesale customers that the proposed wholesale rates which are within the Commission's jurisdiction are discriminatory and non-competitive when considered in relation to the company's retail rates which are not within the jurisdiction of the Commission. Thus, in passing upon rate applications, the FPC, prior to Conway, had considered its statutory role fulfilled by reference only to specified cost bases and without reference to certain downline competitive consequences. Since Conway was not decided until June 7, 1976, it is clear that the pre-1976 wholesale contracts in the CCCT approved by the FPC were reviewed under the FPC's self-perceived limitations on its jurisdiction.

Another holding of the Supreme Court during the current term, Cantor v. Detroit Edison, U.S. , 96 S. Ct. 3110 (1976), also negates Applicants' argument that the presence and observance of a state regulatory scheme precludes the possibility of finding that electric power companies subject to the scheme may violate the antitrust laws.

> [T]he Court has already decided that the state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. Id. at 3118.

In its rationale, the Court noted:

> In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding

> the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.
>
> The case before us also discloses a program which is the product of a decision in which both the respondent and the Commission participated. Respondent could not maintain the lamp exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's. . . . Id. at 3118.

In the instant proceedings, as in Cantor, the Applicants were and are the direct beneficiaries of the regulatory schemes which they claim limits competitive options of other entities in the CCCT. It was Applicants who had the primary interest in the passage of the Ohio Anti-Pirating Act since it insulated their systems of possible loss of customers to more competitive suppliers. Once the scheme was in effect, Applicants then were in a position to utilize provisions to suppress competition as did TECO when it denied the application of Napoleon to obtain a waiver of the 90 day isolation provision in attempting to work out an interconnection and power supply agreement with Buckeye. Similar instances occur in Duquesne's refusal to sell power to Pitcairn except pursuant to Rate "M" and without attempting to explore the possibility of new and fairer tariffs or alternate supply arrangements. Other examples occur with respect to Penn Power's reliance on Pennsylvania rate structures and territorial schemes to deny power supply options to area

municipalities.*

To the extent that Applicants seek to rely on state regulatory schemes which allegedly were enacted to protect the public interest, the federal antitrust laws nevertheless may apply. In this proceeding, we are concerned with the grant of a license by a federal government agency. Congress has directed this Commission specifically to consider the anticompetitive consequences of activities under this license and this directive cannot be subverted by state regulations.**

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* We recognize that Applicants may have been obliged to adhere to the provisions of existing tariffs. Our problem is that these tariffs were used as anticompetitive weapons by the Pennsylvania utilities in refusing to make available bulk service options.

** In Cantor, the Court noted:

> Amici curiae forcefully contend that the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the "public interest" standard widely enforced by regulatory agencies, and that the essential teaching of Parker v. Brown is that the federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies.
>
> There are at least three reasons why this argument is unacceptable. First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs. 96 S. Ct. at 3119.

Another definitive answer to Applicants' first argument is that the existence of state regulation and the terms of the Federal Power Act certainly were well known to Congress at the time it enacted Section 105(c) of the Atomic Energy Act. Had Congress been convinced that federal and state regulation was sufficient to obviate situations inconsistent with the antitrust laws from arising in the electric power industry, there would have been no need to order the Nuclear Regulatory Commission to engage in antitrust review in appropriate circumstances.

Applicants' argument also overlooks the implications and teachings of Otter Tail Power Co., 410 U.S. 366 (1973) in which substantive antitrust violations were examined notwithstanding the presence of state and federal regulatory schemes. It is foolish to suggest that the regulatory Acts upon which Applicants seek to rely either eliminate the possibility of competition or are intended to serve as complete substitutes for competition. Even Applicants would be hard pressed to deny that the statutory scheme of the State of Ohio contemplates competition and that territorial and customer allocations are not a part of that regulatory scheme. In Pennsylvania, the decision in Pennsylvania Metropolitan Edison Co. v. Public Service Commission, 191 A. 678, 682 (1937), indicates that the Public Service Commission "had changed its established policy of non-competition." Disavowing the previous standard of "regulated monopoly" in the electric utility industry in Pennsylvania, the

Commission stated that "In the field of electric power, a policy of regulated competition by municipalities has been adopted." Id at 683. Moreover, the Superior Court of Pennsylvania outlined several factors which would permit or require the Public Service Commission to issue a certificate of public convenience to a municipality enabling it to engage in generation and distribution notwithstanding the fact that another utility previously had supplied electric service to that locality.*

For all of these reasons, we hold Applicants' first argument to be without merit.

With respect to Applicants' second argument, that their current offers of access and to sell power at wholesale to certain entities within the CCCT eliminate the possibility of a situation inconsistent from being maintained, the quick answer is that these offers themselves contain anticompetitive provisions. There is no real need to go further in pointing out the deficiencies of Applicants' current concessions made in the context of licensing proceedings in which numerous antitrust violations have been disclosed. C. 146. There is, however, another cardinal deficiency of Applicants' argument as to which ruling should be made. We have emphasized that Applicants' actions creating the situation incon-

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* Neither have Applicants suggested that the FPC endorses or approves customer or territorial allocations.

sistent with the antitrust laws have been aimed at competitors within the CCCT and within their respective service areas. The position that these competitors should now be left in the hands of Applicants to obtain their bulk power supply is akin to delivering these entities into the hands of their adversaries. Once these rival entities become dependent upon Davis-Besse and Perry power under options that restrict their use of that power or the exchange of that power, their opportunities for offering competition are reduced.*

As to Applicants' third argument, that their competitors throughout the CCCT can build small scale fossil-fueled plants and obtain the same competitive advantages as would be available through CAPCO membership, we note that this argument appears to be a product of counsels' fertile imagination which received precious little credible support from any of Applicants' witnesses or experts. As noted in Dr. Hughes' testimony, Applicants themselves made a determination that nuclear power offered significant cost advantages and that economies of scale achieved through joint ownership of large sized stations offered a financial reward to each member of CAPCO. Hughes, NRC 207, pp. 30-31.

Applicants' contention is so frivolous as not to require elaborate discussion. It is bottomed on the premise that municipalities' costs of construction for small fossil-fueled plants would be lower than the construction costs of Applicants for the same small less efficient fossil-fueled plants because municipalities

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* The policies underlying the antitrust laws require the freedom to choose between alternatives <u>even at the expense of choosing the less desirable alternative</u>.

may obtain a somewhat lesser interest rate on construction borrowings because of the tax free nature of their bond offerings. What Applicants conveniently overlook is that their municipal competitors have the same ability to pay a lesser interest rate on the issuance of tax free bond obligations in connection with financing of large and efficient generating stations including nuclear generating stations.

Finally, we note that this argument is irrelevant. If state and municipal governments have the constitutional or statutory right to issue obligations free of federal income tax, this ability hardly serves as a license for Applicants to engage in boycott activities.

MISCELLANEOUS

Applicants' Motion for Leave to File Brief.

As we reach the end of our findings of fact, one procedural ruling remains outstanding. The Board had discussions with the parties and entertained arguments relating to the schedule for submission and length of post hearing proposed findings of fact and conclusions of law. Tr. 12,682-705. The Board's original preference for a four week period in which to make such filings was modified to extend the period to approximately six weeks based on Applicants' representation that they needed additional time. Applicants were given an upper limit of 250 pages for their post hearing filing.*

It was with full consideration of Applicants' arguments and reservations that the Board imposed this limit.** Applicants

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* Although we refer to this filing as proposed findings of fact and conclusions of law, there was no doubt in any of the parties' minds that it also included such argument as the parties cared to address to the Board. Indeed, Applicants referred to the filing as a "brief." See, e.g., Tr. 12,686, l. 11-13; Tr. 687, l. 7-11. There is no question that Applicants understood the 250 page limitation to apply to any material in the nature of a brief which would be included within proposed findings they might submit.

** The imposition of limits on pages is not unusual in federal court practice. The rules of many federal courts contain explicit page limitations covering the filing of any brief. The Commission's rule, 10 C.F.R. Section 2.754, provides for the filing of proposed findings and conclusions within twenty days after the record is closed or within such reasonable lesser or additional time as may be allowed by the presiding officer. As noted, after extensive consideration, the Board modified the time periods suggested by Section 2.754 to allow all parties additional time. This extension was deemed warranted by the length of the record in these proceedings.

indicated an intent to return to the Board in the event this page limit proved burdensome with "a request for leave of the Board to file a brief that includes extra pages, if indeed it looks like that's going to be necessary." Tr. 12,687-88. The Board agreed to entertain such a request.

Nothing more was heard on this issue until in an August 9, 1976 telephone call (seven days before the filing deadline) initiated by Applicants' counsel for additional time in which to file "initial briefs."* Over the strenuous objection of the opposition parties, Applicants were given an additional two weeks in which to file their post-hearing pleadings. Minutes of Telephone Conference Call of August 9, p. 7-10. At no time during the discussion in this telephone conference was any mention made of an attempt to exceed the previously established 250 page limit. On August 30, 1976, Applicants filed their Joint Proposed Findings of Fact and Conclusions of Law consisting of 211 pages. Simultaneously, they filed a Joint Brief in Support of Proposed Findings of Fact and Conclusions of Law which numbered 698 pages (excluding certain attached exhibits). Nowhere had Applicants put the Board on notice

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* The secretary who kept the minutes of this telephone conference was one of Applicants' counsel. We should note that where procedural matters required resolution by conference call, the Board adopted the practice of requiring counsel for one of the parties to prepare minutes to be placed in the public file following circulation to all parties for correction and approval.

of the intent to file such a Brief or to produce such a voluminous set of post-hearing filings. Applicants' motion for leave to file made reference to the transcript exchange at 12,688-89 in which their counsel indicated the possibility of requesting leave of the Board to file a brief that includes extra pages. That transcript, fairly read, could not possibly support the surprise request to file a "brief" almost three times as long as the 250 pages previously allocated to the Applicant. The post-hearing documents submitted by Applicants (excluding rebuttals to the other parties' proposed findings) numbers almost 1000 pages.

It cannot be contended in good faith that Applicants ever supposed the Board would be receptive to the receipt of so voluminous a pleading file. We note that not only did the parties file pre-hearing briefs, but that discrete legal issues such as nexus and motions for summary disposition also were the subject of extensive briefing during preceding portions of the proceedings. Thus, the Board was hardly without guidelines as to the particulars of the issues before it even assuming, incorrectly, that the Board has been less than attentive during the 13,000 pages of live testimony or that the Board has not reviewed comprehensively the thousands of pages on evidence submitted for its consideration.

Moreover, it is apparent that Applicants' representations during the telephone conference call of August 9 that they needed additional time in order to prepare their initial brief was evasive

in that neither the Board nor any other party had any reason to suspect Applicants' intent to attempt to circumvent the 250 page rule.

Other parties have objected to receipt of Applicants' brief, thus placing the Board in the dilemma of ignoring materials Applicants offer as relevant to our considerations or running the risk of prejudice to the other parties whose post-hearing filings were confined (pursuant to our direction) to a substantially lesser number of pages.

To assist in resolving the dilemma, we took early opportunity to compare a citation to the Brief from one of the Applicants' proposed findings of fact, selected at random, with the material to which were directed in the brief. In doing so, we had before us that statement in Applicants' moving papers that:

> A supporting brief explaining our view of the evidence which was accummulated during this seven-month hearing and analyzing that evidence in light of the applicable legal principle and relevant case law, was deemed imperative in order to apprise this Board fully of the state of the record. (Emphasis added).

We sought to ascertain on this selective check whether the Brief contained supporting arguments or discussion or whether it constituted an attempt to include materials which ordinarily would be found within proposed findings of fact. Our reference point was Applicants ' proposed finding 21.03 which appears on page 5 of Applicants' Joint Proposed Findings of Fact and Conclusions of Law.

Corresponding pages in the Brief appear at 115-118. These pages are factual in nature, replete with references to both documents and transcript of the hearing. Labeling this material as "explaining our view of the evidence which was accummulated during this seven-month hearing, and analyzing that evidence in light of applicable legal principles and relevant case law" severely distorts its nature.

Our initial inclination was to deny the motion to file the Brief, holding that Applicants' conduct in submitting this document was nothing more than a deliberate attempt to evade the prior order of the Board. However, the Board wanted to insure that it had overlooked none of Applicants' arguments in defense of the allegations made against them. We hold that there is good cause to reject the receipt of Applicants' Brief. Nonetheless, we have concluded that because we intend to impose extensive license conditions upon the Applicants, we will accept the Brief and make reference to it notwithstanding our conviction that it is not necessary to do so. Accordingly, Applicants' motion for leave to file dated August 30, 1976 is hereby granted.

Although we grant Applicants' motion, we reiterate our finding that the submission of this Brief was a deliberate attempt to circumvent an order of this Board. We find this particularly disturbing since the Board, throughout these proceedings, has made repeated efforts to understand the complete position of the parties and on numerous occasions has amended its procedural orders to grant

relief upon a claim of hardship or burden by an affected party. Applicants have benefited by the receipt of numerous extensions of time (despite their expressed desire to advance the progress of these hearings to the maximum extent possible) and, as noted, by the Board's indication that it would receive applications to extend the length of proposed findings upon a showing of necessity or good cause. Accordingly, Applicants' counsel are reprimanded for their action in submitting the Brief without prior notice to the Board and other parties.*

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* The imposition of the reprimand is intended as a disciplinary action by the Board. Since we have taken no action to suspend or bar any attorney from further participation in these proceedings, Section 2.713(c) is not applicable to this action of the Board. No other section of the Commission's Rules of Procedure purports to deal directly with discipline short of suspension other than §2.718 which delegates to the presiding officer the duty of conducting a fair and impartial hearing and to take appropriate action to maintain order. Subpart E of §2.718 specifically includes the power necessary to "regulate the course of the hearing and the conduct of the participants." Subpart I includes the power to take any other action consistent with the Act and 5 U.S.C. §§551-558. We read this section as providing ample authority for the issue of reprimands relating to conduct intended to or with the known effect of evading or failing to comply with orders of the presiding officer.

Burden of Proof

Applicants and opposition parties differ in their views on the proper allocation of the burden of proof. Applicants simply place the burden of proof upon the opposition party, App. Brief p. 209-214. We would be inclined to favor Applicants' position as far as it goes, and to the extent that it is limited to evidence resolving the Issues in Controversy. But Applicants inextricably intertwine valid arguments of evidentiary burden with invalid arguments concerning the legal elements of a situation inconsistent with the antitrust laws under §105 of the Atomic Energy Act. Id at 209-210. Moreover, we cannot accept Applicants' simplistic statement that "the burden of proof at each stage in the analytical process rests" with the opposition parties, (Id, p. 210), because this assertion fails to consider shifting burdens when affirmative defenses are relied upon.

City and Staff urge that the burden rests upon Applicants to establish their right to an unconditioned license once the opposition parties have made their prima facie cases. The best support for this position can be found in the Appeal Board opinions in Consumers Power Company (Midland Plant, Units 1 and 2) NRCI 76/2, 101, (Feb. 27, 1976) and NRCI 75/7, 11 (July 30, 1975). There the Appeal Board held that the ". . . burden of proof in any Commission proceeding . . ." on an application to build or operate a nuclear reactor rests upon Applicants.

This is broadly inclusive language, but we recognize that the Appeal Board was concerned with a show cause matter in health and safety considerations. We do not believe the Appeal Board necessarily intended to encompass antitrust proceedings in the Consumers opinions. The entire debate arises from a provision of law which places §105 within a larger regulatory scheme principally concerned with public health and safety. We see no requirement that we depart from traditional and fair allocations of burdens of proof.

We are not helped by 10 CFR 2.732 which provides:

> Unless otherwise directed by the presiding officer, the applicant or the proponent of an order has the burden of proof.

This language may be applied with logic to both sides of the issue, but on balance, the better reasoning is that the disjunctive language of §2.732 was intended to provide for a rational allocation of the burden and does not require that Applicants always carry the ultimate burden.

Therefore, we have been guided in the conduct of this proceeding by the following order of procedure, allocation of the burden of proof, and the burden of proceeding with the evidence.

1) We began with a clean slate, presuming a lawful situation;

2) opposition parties were required to establish a prima facie case, whereupon;

3) the burden of proceeding with the evidence shifted to Applicants, then;

4) we analyzed the whole record to determine whether the opposition parties carried their burden of proof with a preponderance of the reliable, probative and substantial evidence, except;

5) where Applicants attempted to meet a specific charge, (first established prima facie), by relying upon an affirmative defense. In this instance, we allocate the burden of proof to Applicants to establish such a defense upon the whole record.*

Irrespective of the assignment of burden, however, opposition parties have prevailed by an overwhelming preponderance

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* 2(a) Moore's Federal Practice, ¶8.27; 1(a) Moore's Federal Practice, ¶0.314[2]. The question of who has the burden of proof is sometimes more theoretical than practical. For example, once the traditional elements of a monopolization offense are established, the Applicants should be required to carry the burden of proving that they owe this standing to a natural monopoly, or that regulation is a complete substitute for competition and antitrust. United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521. As a practical matter, opposition parties were eager and effective in proving that the industry does not require natural monopoly and that regulation does not serve in lieu of antitrust and competition.

of evidence. Were we to accept Applicants' contention without change or comment, there would be no difference in our ultimate conclusions or provisions for relief.

Other Matters

We have reviewed all of the parties' proposed findings and have considered the record as a whole as we developed our findings and conclusions. To the extent that we have not commented upon any particular proposed finding or argument, it is because that discussion is subsumed into material appearing elsewhere in our opinion or because there would be no material effect upon our conclusions and findings were we to accept the argument.

It is appropriate to note that for the most part, we have chosen to cast our findings and discussion in our own words. This does not mean that we are unable to accept without change substantial numbers of the findings proposed by opposition parties, or considerable material included in Applicants' proposed findings. As has become apparent, we would reject outright or in substantial part more of Applicants' proposed findings than those of other parties. No useful purpose would be served, however, by commenting in greater detail upon those findings since as noted, we have addressed every crucial argument which would have significant impact upon our reasoning.

CONCLUSION

In conclusion, we hold that a situation inconsistent with the antitrust laws and the policies underlying those laws would be both created and maintained by the unconditioned license of the Davis-Besse and Perry nuclear stations. We have examined Applicants' policy statements which they indicate will be followed collectively and individually by the Applicant companies irrespective of whether this Board grants relief in this case and we have concluded that the application of those policies would neither prevent nor eliminate anticompetitive activities under the license.

Opposition parties have prevailed in establishing both Broad Issue in Controversy "A" and Broad Issue "B", that the structure of the relevant markets and Applicants' position or positions therein gives them the ability acting individually, together, or together with others to prevent or hinder (1) other electric entities from achieving access to the benefits of coordinated operation either among themselves, or with Applicants; and (2) other electric entities from achieving access to the benefits of economy of size of large electric generating units by coordinated development, either among themselves or with Applicants.

We conclude further that Applicants' ability has been used, is being used and may be used to create and maintain a situation or situations inconsistent with the antitrust laws or the policies underlying those laws. In the course of our decision, we have answered the questions posed in Matters in Controversy under Broad Issues "A" and "B". In summary, our conclusion is that within the relevant product and geographic markets, Applicants have acted individually and collectively to eliminate one or more other electric entities and to preclude competition. Many of these anticompetitive acts are in the nature of per se violations of the antitrust laws. We have found Applicants to be engaged in activities which violate Section 1 of the Sherman Act, Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Their activities also contravene the policies underlying these statutes. We have found that Applicants' policies with respect to providing access to nuclear facilities to other electric entities in the CCCT are anticompetitive in nature and intent. Indeed, we have determined that Applicants for many years have been aware of the effect of their acts and policies which we deem anticompetitive upon lesser electric generation or distribution systems within the CCCT. Finally,

we have determined that there is a very substantial nexus both in terms of market structure and in terms of availability and use of power to be generated at the Davis-Besse and Perry nuclear stations and the situation inconsistent with the antitrust laws which we have found to exist.

RELIEF

We have concluded that the issuance of licenses for the nuclear units involved in these proceedings without appropriate license conditions will lead to the creation and maintenance of the proscribed situation inconsistent with the antitrust laws. Accordingly, it is our task to design license conditions which will prevent activities under the license from achieving and aiding in this result.

As we observed earlier in the proceedings:

> In determining what constitutes appropriate relief, the Board cannot be bound by the terms of a particular proposal suggested by Applicants or, indeed, any other party or combination of parties. It is the Board's responsibility to determine what constitutes appropriate relief and there is no statutory provision for delegation of that responsibility. Faced with a "situation" which affects "activities" under the license, the Board must be satisfied that any relief proposed by the parties is appropriate.

See Ruling of Board with respect to Applicants' Proposal for Expediting the Antitrust Hearing Process, June 30, 1975, p. 9.

As is evident from our findings, denial of bulk power service options, particularly opportunities for coordinated operation, reserve sharing, wheeling, and

economy energy exchanges is a substantial element in the situation prevailing in the CCCT. The anticompetitive situation is further exacerbated by restraint on utilization of power generated by the nuclear facilities in issue. Our relief, therefore, must focus upon providing access to power from the nuclear units in a manner in which it allows it to be used without restraint and with the availability of necessary bulk power service alternatives. See Hughes, NRC 207, p. 32.

Definitions

Entity shall mean any electric generation and/or distribution system or municipality or cooperative with a statutory right or privilege to engage in either of these functions.

Wheeling shall mean transportation of electricity by a utility over its lines for another utility, including the receipt from and delivery to another system of like amounts but not necessarily the same energy. Federal Power Commission, The 1970 National Power Survey, Part 1, p. I-24-8.

LICENSING CONDITIONS

1. Applicants shall not condition the sale or exchange of electric energy or the grant or sale of bulk power services upon the condition that any other entity
   a. enter into any agreement or understanding restricting the use of or alienation of such energy or services to any customers or territories;
   b. enter into any agreement or understanding requiring the receiving entity to give up any other bulk power service options or alternatives or to deny itself any market opportunities;
   c. withdraw any petition to intervene or forego participation in any proceeding before the Nuclear Regulatory Commission or refrain from instigating or prosecuting any antitrust action in any other forum.

2. Applicants, and each of them, shall offer interconnections upon reasonable terms and conditions at the request of any other electric entity(ies) in the CCCT, such interconnection to be available (with due regard for any necessary and applicable safety procedures)

for operation in a closed-switch synchronous operating mode if requested by the interconnecting entity(ies). Ownership of transmission lines and switching stations associated with such interconnection shall remain in the hands of the party funding the interconnection subject however to any necessary safety procedures relating to disconnection facilities at the point of power delivery. Such limitations on ownership shall be the least necessary to achieve reasonable safety practices and shall not serve to deprive purchasing entities of a means to effect additional bulk service options.

3. Applicants shall engage in wheeling for and at the request of other entities in the CCCT:

   1) of electric energy from delivery points of Applicants to the entity(ies); and,

   2) of power generated by or available to the other entity, as a result of its ownership or entitlements* in generating facilities, to

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* "entitlement" includes but is not limited to power made available to an entity pursuant to an exchange agreement.

delivery points of Applicants designated by the other entity.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of Applicants, the use of which will not jeopardize Applicants' system. In the event Applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effected until reductions of at least 5% have been made in transmission capacity allocations to other Applicants in these proceedings and thereafter shall be made in proportion to reductions imposed upon other Applicants to this proceeding.*

Applicants shall make reasonable provisions for disclosed transmission requirements of other entities in the CCCT in planning future transmission either individually or within the CAPCO grouping. By "disclosed" is meant the giving of reasonable advance notification of future requirements by entities utilizing wheeling services to be made available by Applicants.

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* The objective of this requirement is to prevent the pre-emption of unused capacity on the lines of one Applicant by other Applicants or by entities the transmitting Applicant deems noncompetitive. Competitive entities are to be allowed opportunity to develop bulk power services options even if this results in re-allocation of CAPCO transmission channels. This relief is required in order to avoid prolongation of the effects of Applicants' illegally sustained dominance.

4. a) Applicants shall make available membership in CAPCO to any entity in the CCCT with a system capability of 10 MW or greater;

b) A group of entities with an aggregate system capability of 10 MW or greater may obtain a single membership in CAPCO on a collective basis.*

c) Entities applying for membership in CAPCO pursuant to License Condition 4 shall become members subject to the terms and conditions of the CAPCO Memorandum of Understanding of September 14, 1967, and its implementing agreements; except that new members may elect to participate on an equal percentage of reserve basis rather than a P/N allocation formula for a period of twelve years from

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* e.g., Wholesale Customer of Ohio Edison (WCOE).

date of entrance.* Following the twelfth year of entrance, new members shall be expected to adhere to such allocation methods as are then employed by CAPCO (subject to equal opportunity for waiver or special consideration granted to original CAPCO members which then are in effect).

d) New members joining CAPCO pursuant to this provision of relief shall not be entitled to exercise voting rights until such time as the

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* The selection of the 12-year period reflects our determination that an adjustment period is necessary since the P/N formula has a recognized effect of discriminating against small systems and forcing them to forego economies of scale in generation in order to avoid carrying excessive levels of reserves. We also found that P/N is not entirely irrational as a method of reserve allocation. We have observed that Applicants themselves provided adjustment periods and waivers to integrate certain Applicants into the CAPCO reserve requirement program. The 12-year period should permit new entrants to avoid initial discrimination but to accommodate and adjust to the CAPCO system over some reasonable period of time. Presumably new entrants will be acquiring ownership shares and entitlements during the 12-year period so that adverse consequences of applying the P/N formula will be mitigated.

system capability of the joining member equals or exceeds the system capability of the smallest member of CAPCO which enjoys voting rights.*

5. Applicants shall sell maintenance power to requesting entities in the CCCT upon terms and conditions no less favorable than those Applicants make available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract; or (2) to non-Applicant entities outside the CCCT.

6. Applicants shall sell emergency power to requesting entities in the CCCT upon terms and conditions no less favorable than those Applicants make available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract; or (2) to non-Applicant entities outside the CCCT.

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* Our objective is to prevent impediments to the operation and development of an area-wide power pool through the inability of lesser entities to respond timely or to make necessary planning commitments. While we grant new member entities the opportunity to participate in CAPCO it is not out intent to relieve joining entities of responsibilities and obligations necessary to the successful operation of the pool. For those smaller entities which do not wish to assume the broad range of obligations associated with CAPCO membership we have provided for access to bulk power service options which will further their ability to survive and offer competition in the CCCT.

7. Applicants shall sell economy energy to requesting entities in the CCCT, when available, on terms and conditions no less favorable than those available: (1) to each other either pursuant to the CAPCO agreements or pursuant to bilateral contract: or (2) to non-Applicant entities outside the CCCT.

8. Applicants shall share reserves with any interconnected generation entity in the CCCT upon request. The requesting entity shall have the option of sharing reserves on an equal percentage basis or by use of the CAPCO P/N allocation formula or on any other mutually agreeable basis.

9. a) Applicants shall make available to entities in the CCCT access to the Davis-Besse 1, 2, and 3 and the Perry 1 and 2 nuclear units and any other nuclear units for which Applicants or any of them, shall apply for a construction permit or operating license during the next 25 years. Such access, at the option of the requesting entity, shall be on an ownership share, or unit participation or contractual pre-purchase of

power basis.* Each requesting entity (or collective group of entities) may obtain up to 10% of the capacity of the Davis-Besse and Perry Units and 20% of future units (subject to the 25-year limitation) except that once any entity or entities have contracted for allocations totaling 10% or 20%, respectively, no further participation in any given unit need be offered.

b) Commitments for the Davis-Besse and Perry Units must be made by requesting entities within two years after this decision becomes final and within two years after a license application is filed for future units (subject to the 25-year limitation).

10. These conditions are intended as minimum conditions and do not preclude Applicants from offering additional bulk power services or coordination options to entities within or without the CCCT. However, Applicants shall not deny bulk power services required by these conditions to non-Applicant entities in the CCCT based upon prior commitments arrived in the CAPCO Memorandum of Understanding

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* Requesting entities election as to the type of access may be affected by provisions of state law relating to dual ownership of generation facilities by municipalities and investor-owned utilities. Such laws may change during the period of applicability of these conditions. Accordingly, we allow requesting entities to be guided by relevant legal and financial considerations in fashioning their requests.

or implementing agreements. Preemption of options to heretofore deprived entities shall be regarded as inconsistent with the purpose and intent of these conditions.

The above conditions are to be implemented in a manner consistent with the provisions of the Federal Power Act and all rates, charges or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them.

The Board concludes that the above conditions should attach to licenses for the Davis-Besse 1, 2 and 3 and Perry 1 and 2 nuclear units.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

John M. Frysiak

John M. Frysiak, Member

Ivan W. Smith

Ivan W. Smith, Member

Douglas V. Rigler

Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 6th day of January 1977.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY, ET AL.	)	Docket No.(s) 50-346A
CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	50-440A
	)	50-441A
	)	50-500A
(Davis-Besse Nuclear Power Station, Unit No. 1; Perry Nuclear Power Plant, Units 1&2)	)	50-501A

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
10th day of Jan 1977.

P. C. Gauding
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
TOLEDO EDISON COMPANY, ET AL	)	Docket No.(s) 50-346A
(Davis-Besse Unit 1)	)	
CLEVELAND ELECTRIC ILLUMINATING	)	50-440A
COMPANY, ET AL.	)	50-441A
(Perry Units 1 and 2)	)	
TOLEDO EDISON COMPANY, ET AL.	)	50-500A
(Davis-Besse Units 2 and 3)	)	50-501A

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