UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

REPLY BRIEF OF THE CITY OF CLEVELAND

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REPLY BRIEF OF THE CITY OF CLEVELAND

Applicants' proposed findings of fact and conclusions of law ignore the record developed before this Board, mistate certain facts and misconstrues the law. 1/ In this reply brief the City will show the fallacies in Applicants' submittal to the exte it has not done so in its initial brief and proposed findings of fact and conclusions of law.

1/ Applicants have also requested leave to file a 698-page supporting brief greatly in excess of the 250 page limit ordered by the Board (Tr. 12,685-86) for Applicants, which, itself, gave the Applicants 50 more pages than the 200 pages allocated to the other parties. No action has yet been taken upon Applicants' motion. Obviously, the 15-page limit on reply briefs (Tr. 12,701) is inadequate to permit the City to fully respond should the motion be granted.

ARGUMENT

I

THE NATURE OF THE ELECTRIC UTILITY INDUSTRY PERMITS SUBSTANTIAL COMPETITION.

Applicants have argued throughout their findings of fact and conclusions of law that by its very nature the electric utility industry permits only de minimis competition and that, in fact, within the CCCT outside of Cleveland there is only de minimis competition. Neither prong of Applicants' argument is correct.

Economic studies have shown that cost benefits do, in fact, accrue when two electric utilities serve in the same municipality. 2/ Wilcox and Shepherd have noted that the bulk supply of electricity is technologically capable of effective competition in most areas. 3/ They state at page 415:

> Many utilities could compete, and would compete, vigorously among themselves for at least their major customers. Each utility would gain by raiding its neighbors main clients and nearly all major urban centers have at least two or three alternative suppliers.

Dr. Leonard Weiss has also concluded that most regions of the country could support extensive competition in the generation of electricity. 4/

2/ Walter J. Primeaux, Jr., A Reexamination of the Monopoly Market Structure for Electrical Utilities, published in Promoting Competition In Regulated Markets, the Brookings Institution 1975.

3/ Public Policies Toward Business. Richard D. Irwin, Inc., Homewood, Illinois, Fifth Edition 1975.

4/ Antitrust In The Electric Power Industry, published in Promoting Competition In Regulated Markets, The Brookings Institution 1975.

Applicants argue at Finding of Fact 22.08 that the Ohio Constitution precludes an all requirements wholesale customer from making resales of purchased power outside of the city limits although they admit elsewhere that that question has never been decided by the Ohio courts. Certainly, the provision of the Ohio Constitution relied upon is not clear and has not, in fact, prevented such sales. The Constitution speaks in terms of sales of surplus product without stating that the municipality must produce the product. It is, of course, possible to purchase more of a product than needed and thus to have "surplus product". Moreover, if the all requirements municipal systems should gain access to alternate bulk power supplies they may, in fact, purchase shares in generating units which would permit them to self-generate "surplus product" for sale beyond the confines of the municipality.

Applicants' argument [5/] that Section 4905.261 of the Ohio Revised Code precludes wholesale competition between investor-owned utilities and REA distribution cooperatives for wholesale customers simply ignores the fact that the wholesale segment of the electric utility business is not subject to regulation by the states. Indeed, Applicants admit that the states cannot regulate wholesale sales of electricity. (Proposed Brief p. 671a).

The argument that the rates, terms, and conditions of all forms of electric service provided by Applicants are regulated and that Applicants cannot engage in rate competition and do not consider competition in designing rates [6/] is contrary to the record developed through Applicants' own

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5/ Proposed Finding of Fact 22.08(c).

6/ Proposed Finding of Fact 22.10.

witnesses. For example, Mr. Bingham testified that CEI does, in fact, consider electric competition in designing rates (Tr. 10,330). Ohio utilities can negotiate -- without regulatory supervision -- rates for street lighting (Bingham Tr. 10,303). Ohio Edison is unregulated with respect to its charges to developers for underground wiring (White Tr. 9811). The Ohio Public Utilities Commission places no restrictions on the amount spent by a public utility on various promotional practices (Rudolph deposition DJ 558 p. 20). 7/ CEI provides services for customers in competitive areas not provided to customers in non-competitive areas (Rudolph deposition DJ 558 pp. 16-17).

Despite Applicants' assertions to the contrary, there is more than de minimis competition in the CCCT and the potential for much more upon the removal of the restrictive practices engaged in by Applicants. Once again Applicants seek to buttress their argument by ignoring or completely mistating the record. For example, Applicants make the astonishing assertion that there is no competition between CEI and Painsville. 8/ In fact, CEI and Painsville do compete for residential, commercial and industrial loads. (Pandy Tr. 3117-18, 3152-53).

Nor is it true that Pennsylvania law precludes or is intended to preclude competition. Applicants cite Metropolitan Edison Co. v. Public Service Commission, 191 A 678 (1937) for the proposition that the Pennsylvania state

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7/ The Ohio Commission has no authority to prohibit public utilities from engaging in promotional activities. Ohio Public Interest Action Group, Inc. v. Ohio Public Utilities Commission (1975), 331 NE 2d 730.

8/ Proposed Finding of Fact 34.14.

policy is one of regulated monopoly. 9/ In Metropolitan Edison the Public Service Commission announced that the policy of the state was to be "regulated competition" and not "regulated monopoly". Moreover, the court agreed that in certain instances competition between privately owned systems and municipal systems is desireable.

In Columbo v. Public Utilities Commission, the court observed that the purpose of Pennsylvania public service laws is to serve the public, not to establish monopolies. 10/

The Pennsylvania Commission has stated that in some instances duplication of facilities might be in the public interest. Re Bell Telephone Co., 29 PUR (NS) 233 (1939).

A Pennsylvania utility cannot by agreement between itself and a customer, limit or relieve itself of the obligation to serve the public. Lake Greely Camp v. Lackawaxen & H. Teleph. Co., 95 PUR (NS) 12.

It is not true that in Pennsylvania a municipality has absolute monopoly power to exclude competition and control prices within its municipal boundaries. 11/ For example, an industry can purchase power outside of a City and import it into the City for its own use. Schuylkill Haven v. Pennsylvania Power & Light Co., 3 PUR (NS) 127 (1934). An electric utility may deliver electric energy at a point in its charter territory, for use outside the

9/ Applicants' Conclusions of Law 37.02.

10/ 48 A 2d 59 (1946).

11/ Applicants' Conclusions of Law 37.01(e).

charter territory where transmission from point of delivery to point of use is carried out over patron's privately owned line. Northwestern Mining & Exchange Co. v. West Penn Power Co. (1945) 61 PUR (NS) 186.

A Pennsylvania hydroelectric company has been permitted to compete with other investor-owned electric systems. Pennsylvania Power & Light Co. v. Public Service Commission, 171 Atl. 412 (1934).

A municipality may be permitted to construct and operate an electric system in competition with an existing electric utility serving under a non-exclusive franchise. Re Meyerstown, 12 PUR (NS) 39 (1936).

Similarly, the assertion that municipalities can charge such rates as they desire is overstated. The rates charged by a municipal electric system within its boundaries may very well be influenced by Public Service Commission regulation of rates charged by the municipality outside the city boundaries. The Commission, for example, can require a municipal system to charge uniform rates within and without a municipality to avoid rate discrimination. Sieninski v. Ambridge, 27 PUR (NS) 305.

Applicants' argument [12] that restrictions in Pennsylvania law on the condemnation powers of public utilities precludes even potential competition for wholesale customers is equally fallacious. First, it must assume complete refusals to wheel as well as the complete absence of transmission lines of competitors and also the complete absence of transmission routes not requiring condemnation. Moreover, Applicants' argument utterly ignores the potential competition inherent in the possibility that municipalities might be-

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12/ Proposed Finding of Fact 22.09.

come self-generating. See Otter Tail Power Co. v. United States. 13/

Clearly, Applicants' argument that only "fringe area" competition is possible is not in keeping with either the law or the facts. Neither can "fringe area" competition be so easily dismissed with unsupported -- but oft repeated -- assertions that it is de minimis. It must be remembered that it is in the "fringe areas" that municipal growth is most likely to occur. It is in the fringe areas that new subdivisions are built and industrial parks are located.

II

CEI HAS USED ITS MONOPOLY POWER

Applicants' argument that CEI has no monopoly power, and, assuming it had monopoly power, has not used it once again ignores the record.

It is argued that CEI's offers of access to generation and transmission lines have removed any advantage CEI might have. 14/ For this untenable position, Applicants cite the testimony of Mr. Mayben at transcript pages 7782, 7792 and 7797. Nothing stated by Mr. Mayben at the pages cited in any way supports the argument made. All that Mr. Mayben said was that CEI had offered access to generation in the amounts requested by the City. Nothing is said with regard to the terms and conditions of the offer. It appears that the Board cannot take Applicants' record citations at face value.

13/ 410 US 366.

14/ Proposed Finding of Fact 34.23.

Although Applicants' suggestion that the City was not in good faith in seeking access to nuclear units and CAPCO membership was fully answered in the City's initial filing, one further mistatement of the record must be laid to rest. Applicants have stated [15] that the City never responded to Mr. Hauser's letter of April 10, 1974 inquiring as to the City's true intentions. Applicants' own exhibit no. 64 states in a portion not quoted by Applicants that at a meeting on March 28, 1974, after reference by Mr. Hauser to Director Kudukis' testimony before City Council Mr. Goldberg:

> . . . responded that you [Mr. Goldberg] were the spokesman for MELP and that MELP's official position was that its preference was to obtain ownership interests in these units but that if there was a legal impediment to ownership, your alternative position was that MELP still desired Unit Power Participation in these facilities.

Applicants' futile effort to argue that the City had never shown an interest in an interconnection prior to 1969 was again fully answered in the City's initial filing. However, once again, it is necessary to set the record straight. Applicants claim that exhibit DJ621 "suddenly surfaced for the first time at the very end of these proceedings." [16] Exhibit DJ 621 was described and discussed very specifically at page 27 of the City's Prehearing Brief filed November 26, 1975. It is simply not true the document "suddenly surfaced" for the first time at the very end of these proceedings.

It is incredible that Applicants would now assert that CEI's constant study and repeated offers to acquire the City's electric system were merely

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15/ Proposed Brief pp. 448-49.

16/ Proposed Brief p. 427.

in response to stimuli for such acquisition from sources outside the company. When evidence to the contrary was offered, Applicants asserted that they were making no such contention. Moreover, CEI's public relations department proposed a publicity campaign to prepare public acceptance of acquisition of MELP by CEI. (DJ 603; See also C-102, C-121, C-142 rejected; DJ 383-390 rejected).

Applicants' argument that the criteria employed by CEI in determining whether load transfer service should be provided [17] would not have prevented the City from maintaining its equipment confuses maintenance with emergency repair. CEI says the test was "whether MELP could carry its load without load transfer service." Clearly, the test contemplates that the City use all operable equipment. Only when a forced outage occurs forcing equipment out of service would the City be able to meet the CEI test.

While it is true that the City requested that the load transfer facilities be maintained after the 138 kv interconnection was effected,[18] it was not for a continuation of power purchases over those facilities. Rather, the purpose was pointed out in the very exhibit cited by Applicants (A-153) at page 3:

> . . . the load transfer points have reliability benefits which would be of value in the event of an outage on the interim 138 kv interconnection. Indeed, your company has expressed concern about reliance solely on one 138 kv interconnection and has suggested consideration of the installation by the City of a second 138 kv interconnection.

17/ Proposed Brief p. 435.

18/ Proposed Brief p. 447.

Clearly, the City sought to have the load transfer points maintained only for back-up for the temporary 138 kv interconnection.

At pages 414 - 415 of their proposed brief Applicants play statistical games to contend that more than 55% of the 9,050 customers -- residential and small commercial -- lost by the City between 1968 and 1974 were lost for reasons other than transferring to CEI. In fact, as Applicants' 132 p. 4 shows, transfers to CEI amount to 5,229 customers. It is only by subtracting all new customers acquired by the City from the figure for those lost to CEI that Applicants were able to develop their figure. In fact, the 5,229 residential and small commercial customers lost to CEI were offset by only 720 customer transfers from CEI to the City. Applicants' figures totally ignore the City's loss of large commercial and industrial customers to CEI.

Applicants' argument that the City could have constructed its own transmission lines ignores the testimony of Applicants' own witness Caruso. See City Initial Submittal pp. 67-70. City would further note that in any court action concerning an attempt by the City to construct transmission lines, the court would consider both the necessity for the service and the affect of the service on the welfare of the general public. The Cleveland Electric Illuminating Company v. Scapell, 41 O. Misc. 107, aff'd Ct. App. No. 33428.

In addition, when the City sought the required certificate of the Ohio Power Siting Commission, the Commission could not grant the certificate unless it determined that:[19/]

19/ O.R.C. §4906.10(A)(4).

> . . . such facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems; and that such facilities will serve the interests of electric system economy and reliability.

Given the developing CAPCO transmission grid, it is unlikely that any of the lines Mr. Caruso studied would be certificated by the Ohio Power Siting Commission.

Applicants attempt to rely on Applicants' Exhibit 159 for the proposition that load transfers were operated reasonably and that the delays occasioned thereby were infrequent and of short duration [20/] does not suffice to rebut the testimony to the contrary. Applicants' 159 does not cover the entire period of operation of the 11 kv service (Hauser Tr. 10,832). Some of the 11 kv outages omitted from Applicants' 159 lasted 15 - 20 minutes (Hauser Tr. 10,834-35). Nor can one ascertain from Applicants' 159 which of the outages shown were caused by the load transfers (Hauser Tr. 10,837). Only 11 kv outages are reflected (Hauser Tr. 10,839), although load transfers were also made at lower voltages (Hauser Tr. 10,843). Load transfer sometimes occurred at lower voltages only because facilities did not exist for transfer at 11 kv (Hauser Tr. 10,858).

An argument predicated on an incomplete and inaccurate document purposely prepared in such a manner as to omit important data is a flimsy argument indeed.

20/ Proposed Finding of Fact 34.34.

III

THERE IS NO BASIS FOR ARGUING THAT THE ANTITRUST LAWS ARE NOT FULLY APPLICABLE TO ELECTRIC UTILITIES OR THAT APPLICANTS HAVE NOT VIOLATED THOSE LAWS.

Applicants have argued [21] that the Commission should not apply per se rules to the electric utility industry. Fatal to Applicants' argument is the Supreme Court's decision in Otter Tail Power Co. v. United States, 410 US 366 (1973). In Otter Tail the Court expressly affirmed the District Court's ruling that restructive provisions in Otter Tail's contracts with the Bureau of Reclamation were territorial allocation schemes which were per se violations of the Sherman Act. Applicants' reference to the musings of Justice Blackmun in Cantor v. Detroit Edison, 96 S. Ct. at 3126, is misplaced. No issue of the applicability of per se rules was before the Court in Cantor. Moreover, Justice Blackmun was not addressing the issue of whether a tying arrangement, for example, would be a per se violation in the context of the electric utility industry. Rather, his comments were that a rule of reason should be applied in the first instance in determining whether an immunity existed under Parker v. Brown. [22]

Applicants have also argued that to show conspiracy through conscious parrallelism, it must be shown that Applicants' adopted policy not in their own self-interest. While the City believes the record provides ample evidence of conspiracy without reliance on conscious parrallelism, it would point out that

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21/ Proposed Brief pp. 59-66.

22/ 371 US 341 (1943).

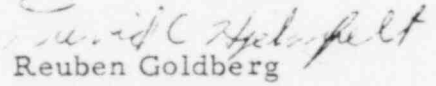
Applicants did, in fact, adopt the P/N method, the application of which was not in their own self-interest. Indeed, the original CAPCO allocations among Applicants were made arbitrarily to avoid the adverse impact of the P/N method (See City's main brief pp. 91-92).

CONCLUSION

The weakness of Applicants' case was made apparent in the closing weeks of the hearing when Applicants surface one defense after another only to have it crumble under the weight of the facts. Now, in their initial filing, Applicants have largely ignored the facts to argue policy and economic theory.

The record fully supports the City's proposed findings of fact and conclusions of law and the City submits that they should be adopted by the Board.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing "Reply Brief of The City of Cleveland" has been made on the following parties listed on the attachment hereto this 22nd day of September, 1976, by depositing copies thereof in the United States mail, first class postage prepaid, or by hand delivery.

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