UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

APPLICANTS' REPLY BRIEF

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APPLICANTS' REPLY BRIEF

Preliminary Statement

Applicants undertook in their opening Brief ("App. Br.") to this Appeal Board to catalogue the considerable testimony and documentary evidence which the Licensing Board ignored or conveniently reshaped in straining to reach its conclusion that the CAPCO companies have behaved in a manner inconsistent with the antitrust laws. Not surprisingly, the Opposing Briefs filed by the Staff ("S. Br."), DOJ ("D. Br.") and Cleveland ("City Br.") provide no response to Applicants' discussion of the complete record. Rather, our adversaries remain content to rely upon the Licensing Board's selective treatment of the evidence below, even to the point of parrotting in haec verba a number of the findings contained in the Initial Decision.[1/] Applicants

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1/ We have prepared as an Appendix to this Reply Brief a series of charts which show by page reference where each of the

(Continued next page)

have already demonstrated why such a jaundiced approach to antitrust review under Section 105c of the Atomic Energy Act will not withstand scrutiny as a matter of law or fact.

Summary of Argument

The Atomic Safety and Licensing Appeal Board now has before it the three intitial decisions that have been rendered by antitrust licensing boards under Section 105c following a full evidentiary hearing.[2/] We cannot help but note that the cases are remarkably similar in many respects while the results reached by the three licensing boards are strikingly dissimilar. In only a few instances can the discrepancies be traced to the factual record. More often, the conflicting results are attributable to fundamental differences in legal approach.

All the applicants involved in these appeals were met at the outset with virtually the same laundry-list of charges, namely: acquiring adjacent municipal electric systems, entering into territorial or customer allocation agreements, refusals to

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1/ (Cont'd)
parties discussed the findings of fact ("F/F") set forth in the Initial Decision. The similarity in the Licensing Board's language and record citations, on the one hand, and the language and record citations used by our adversaries, on the other hand, is striking. In those few instances where the opposing parties have ventured beyond the four corners of the Initial Decision to make a supporting argument, we have so indicated in the Appendix by footnote reference and marginal comment.

2/ In addition to the present proceeding, initial antitrust decisions have issued in Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-75-39, 2 N.R.C. 29 (1975); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2), Docket Nos. 50-348A and 50-364A (Phase I on Liability issued on April 8, 1977; Phase II on Relief issued on June 24, 1977).

engage in bulk power transactions, refusals to provide general wheeling services, denials of nuclear access, and depriving smaller electric systems of the benefits of coordinated operation and development. The Licensing Board in the instant Davis-Besse/Perry proceeding alone considered these allegations in a theoretical setting fraught with open competition, not in the real world of the electric utility industry. Moreover it automatically attached antitrust significance to the fact that, here, a joint application was made for the subject licenses, even though there is, in reality, no legitimate reason to distinguish the operations of the CAPCO pool from those of the Michigan Power pool (of which Consumers Power Company is a member) or the Southern Company pool (of which Alabama Power Company is a member). Certainly, nothing in the joint application aspects of the present case justifies the Licensing Board in this proceeding reaching basic conclusions which cannot be squared with Consumers and Alabama Power on the question of "nexus" and on the role of municipal "competition" in the electric utility industry.

In the final analysis, the decision below stands alone as a blanket antitrust indictment of all large utilities (whether they be investor-owned or agencies of federal, state or local governments) which have heretofore, are now, or soon intend to be, engaged in coordinated arrangements with one another to achieve scale economies and improved reliability. Congress never intended its delegation of antitrust review authority to the NRC -- for the limited purpose of scrutinizing the antitrust implications of licensing specified nuclear facilities -- to be used, as it was

below, as a device to restructure the electric utility industry through the imposition of sweeping remedies which are limited neither to "activities under" the particular nuclear licenses being examined nor to those electric entities electing to participate said units. Nor do we think the Commission views its responsibilities under Section 105c in such a heavy-handed manner.[3/]

The Licensing Board in the instant proceeding, however, made it perfectly clear from the outset of the hearing that its antitrust review would recognize no jurisdictional bounds.[4/] Nor did it see any need to be any more circumspect in its treatment of this industry under the antitrust laws than the courts have been in their antitrust enforcement of non-regulated industries, where open competition has long been the hallmark.[5/] Thus, the Licensing Board started with the presumption that the CAPCO companies are, by virtue of their size alone, monopolists with an ability to fix prices and exclude competition;[6/] that anything

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3/ See Louisiana Power & Light Co. (Waterford Steam Generating Station, Unit 3), CLI-73-7, 6 A.E.C. 48 (1973) ("Waterford I") and CLI-73-25, 6 A.E.C. 619 (1973) ("Waterford II"); and see Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), Docket Nos. 50-498A and 50-499A, Memorandum and Order of June 15, 1977.

4/ See Licensing Board's "Ruling of Board with Respect to Applicants' Proposal for Expediting the Antitrust Hearing Process," dated June 30, 1975. See also Sixth Prehearing Conference Order of October 2, 1975; "Order and Memorandum Ruling on Applicants' Objections to the Sixth Prehearing Conference Order", dated November 19, 1975.

5/ See Licensing Board's Memorandum and Order of February 3, 1977, at p. 8 ("L.B. Stay Order").

6/ See Initial Decision at 18, 23-25 & 107 ("I.D."); compare App. Br. at 83-86.

they do which "maintains" their dominance in generation or transmission -- even if it is only the integration into their electrical system of one or more nuclear facilities -- is necessarily inconsistent with the antitrust laws under United States v Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945);[7] and that the combination of two or more of these dominant utilities, even for very legitimate and laudable purposes, constitutes a per se violation under Section 1 of the Sherman Act unless all neighboring entities are included in the joint venture.[8] Being of such a mind going into the hearing, it is not at all surprising that the Licensing Board ultimately found antitrust inconsistencies under Section 105c.

The Staff, DOJ and Cleveland subscribe wholeheartedly to the scope and breadth of the antitrust review undertaken below; they have therefore confidently disdained from responding to Applicants' arguments which go to the core of the Licensing Board's analysis. This failure even to address the points made in Applicants' opening Brief may well leave the Appeal Board with an impression that the Applicants and the opposition parties are in many respects "as two ships passing in the night". If that be so, the fault lies solely with our adversaries. It was their affirmative obligation to meet Applicants' arguments directly, and, to the

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7/ See I.D. at 18, 24-25; compare App. Br. at 27 n.32, 98-102.

8/ See "Memorandum and Order of the Board With Respect to Applicants' Request For Certain Procedural Rulings", dated February 9, 1976, at pp. 11-12. See also Tr. 1506-07.

extent they could do so, to offer some meaningful answer to them. The Staff, DOJ and Cleveland for the most part chose to ignore this responsibility; and even where contrary arguments have been made, they depend on a philosophy regarding the application of the antitrust laws to this industry and the responsibility of the NRC under Section 105c which is at variance with what Congress and the courts envisioned.

Applicants have already set forth their disagreement with such an approach in their opening Brief and there is no need to restate our position here. Four essential points deserve special emphasis, however, in view of certain remarks in the opposition Briefs which are made as a result of our adversaries' misguided philosophy.

First, Applicants continue to believe strongly that Congress did not intend for this Commission to supplant the district courts in the area of antitrust review of electric utilities. It delegated to the NRC limited responsibility to consider whether certain earmarked "activities" -- i.e., only those associated with a nuclear unit or units for which a Commission license is being sought -- would "create or maintain" a situation inconsistent with the antitrust laws. If, and only if, the Commission can legitimately find that such activities will have the effect of perpetuating or independently creating the proscribed antitrust situation is a conditioning of the subject license under Section 105c(6) of the statute appropriate. Moreover, the statute as framed makes it clear, both in terms of

the scope of antitrust review it allows and in terms of the type of relief it contemplates (i.e., license conditions), that the remedy, just as the finding of liability, is to be tied directly to the licensed activities. Congress instructed the Commission in Section 105c to satisfy itself only that those licensed activities neither create nor maintain an "inconsistent situation" -- in a word, to neutralize the impact that the addition of the new facility will have in the marketplace. Once this is accomplished, whatever other unrelated antitrust concerns may purportedly need attention (if any) is peculiarly within the province of the district courts, and certainly not the responsibility of this Commission.

Second, in applying the antitrust laws in this industry, Congress obviously was not unmindful of the institutional constraints that prevail at the federal, state and local levels. That regulatory framework exists precisely because the economic and technological realities confronting all electric utilities discourage open competition among the various entities. To speak in terms of "preserving competition" or "protecting competitors" thus has surrealistic overtones in this market setting, especially in jurisdictions like Pennsylvania with its state-decreed exclusive franchises. In point of fact, there is, of necessity, little opportunity for competition both at the retail and the wholesale levels in and around the CCCT, and the potential for introducing a competitive element into this area through the vehicle of distribution-only municipal systems is virtually non-existent.

It is on this basis that serious consideration must be given to whether an indiscriminate application of the antitrust laws, such as adopted by the Licensing Board below, is either desirable or warranted in the electric utility industry. Competition for its own sake was long ago ruled out as an objective which is in the public interest in this industrial environment. Activities which may be viewed as anticompetititve in an unregulated context could well be the very behavior which should be encouraged (not condemned) in circumstances where there exists no meaningful competition. It clearly does not serve any legitimate purpose to introduce artificial "competitors" into a market structure that predicts their early demise and portends a higher cost of service to the ultimate consumer of electric energy until that eventuality occurs. Nor can it seriously be maintained that either Congress or the courts intended antitrust application to remain insensitive to such considerations.

Third, unlike the shoe industry or the aluminum ingot industry, scale economies and technological considerations in the electric utility industry place a premium on large, vertically-integrated electric systems which are better equipped to provide the public with reliable service in the most efficient manner and at the lowest cost. The emergence of a relatively few dominant utilities in this market setting is, therefore, a natural phenomenon; it is the norm, not the exception. To equate bigness (measured by large market shares) with "badness" in these circumstances is thus to turn antitrust analysis on its head.

This is not to suggest that the large electric utilities are immune from antitrust scrutiny. However, to fault their activities on the basis of some inconsistency with Section 2 of the Sherman Act, it is not enough simply to point to acquisitions of small failing systems in their service areas, for example. Rather, it must be shown that these dominant entities purposefully set out to undermine or abuse the regulatory framework which has been constructed to police their behavior, as in Otter Tail Power Co. v United States, 410 U.S. 366 (1973), or that they used their lawful monopoly position in the regulated arena to gain an otherwise not-readily-attainable competitive advantage in another market not subject to the same degree of regulation, as in Cantor v Detroit Edison Co., 428 U.S. 579 (1976). No such behavior can be ascribed to Applicants in the instant proceeding.

Fourth, it makes no sense in the electric utility industry, in light of the existing economic and regulatory barriers to competition, to fault out of hand as per se unlawful under Section 1 of the Sherman Act contracts or combinations between and among electric utilities which provide for coordinated operation or development. There certainly is no legitimate reason in the present context to presume that such pooling or interchange arrangements pose an anticompetitive "restraint of trade" in the traditional antitrust sense. Nor does past experience suggest that they are necessarily of a pernicious character worthy of indiscriminate condemnation. Compare Continental T.V. Inc. v GTE Sylvania, Inc., 45 U.S.L.W. 4828 (U.S. June 23, 1977).

Thus, the proper approach is to scrutinize each such arrangement on its own terms in order to determine whether its purpose and effect has a reasonable business justification which satisfactorily explains its existence and operation.

This "rule of reason" analysis is particularly appropriate in evaluating the pooling arrangement among the several CAPCO companies in the instant proceeding. The Licensing Board and our adversaries erroneously declare the CAPCO contracts to be per se unlawful as indicia of a "group boycott" with exclusionary overtones. With this convenient label they gingerly sidestep Applicants' basic arguments underscoring the reasonableness of the arrangement. The fact of the matter is that the CAPCO pool, as conceived in the 1967 Memorandum of Understanding (S-184), provides for precisely the sort of coordination that the Federal Power Commission ("FPC") was then urging upon all electric entities in order to take advantage of scale economies and to improve system reliability. In this regard, it stands on no different footing than the Southern Company pool, of which Alabama Power Company is a part, or the Michigan Power pool, of which Consumers Power Company is a member. In each instance, the coming together of a few similarly-sized neighboring utilities to coordinate their large-scale generation and transmission on a one-system planning and development basis was not only economically sound but also directly in step with the public interest pronouncements being made at the time by the federal government, either through the Public Utility Holding Company Act or the Federal Power Act.

To be sure, the CAPCO pool did not include municipal electric systems or rural electric cooperatives among its founding members. But neither did the Southern Company or Michigan pools. Yet, the Licensing Board below alone concluded that this element of non-inclusion made the entire CAPCO arrangement per se exclusionary. If such reflexive pronouncements were entitled to any weight, they would soon bring power pooling in the electric utility industry to an abrupt end. No joint venture arrangement can be expected to embrace all conceivable participants, but that surely provides a poor excuse to condemn any of them out of hand as a group boycott.

Rather, the proper inquiry for antitrust purposes should focus upon the underlying reasons for selecting certain pooling partners and not others. Insofar as the CAPCO pool is concerned, the explanation, as we have heretofore shown (App. Br. at 14-25), negatives all suggestions of improper conduct or intent. No municipality or cooperative even asked to be included in the pool at the time of its formation. In 1967, the five original participants were all members of a large reliability council, consisting of some seventeen utilities. DL spoke to most of the companies about the possibility of entering into a pooling arrangement; only CEI, TECO, OE and PP indicated an interest. The record below shows that DL was intent upon reaching agreement with these utilities on the pool concept prior to its deadline for ordering a new large-scale generating unit. Time constraints thus did not permit the shopping around for additional participants.

Nor were municipal systems or electric cooperatives likely candidates in any event. The latter had just entered into a 35-year arrangement with Ohio Power Company and other Ohio utilities which provided the cooperatives their own source of bulk power. As for the former, none of the municipalities had sufficient size and system capability either to contribute in any meaningful sense to pool operations or to realistically assume their proportionate share of pool responsibilities (App. Br. at 15-19). In these circumstances, to attach to the CAPCO pool the convenient label of group boycott, because its original contracting parties did not include smaller neighboring entities, demonstrates how unwarranted the Licensing Board's (and our adversaries') per se condemnation of these Applicants really is.

The record, when examined in its entirety, confirms the infirmity of the antitrust findings below, both as to Applicants' pool-related activities and as to their individual conduct. While there may be instances where the Appeal Board does not feel inclined to undertake de novo review of a licensing board's decision, such a course is certainly not precluded in appropriate circumstances. See Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 N.R.C. 397 (1976). This Appeal Board will never be presented with a better example of the need for such a comprehensive reexamination of the evidence below than is presently before it (see App. Br. at 137-39).[9/] The frailty of

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9/ While DOJ argues that the Licensing Board's findings rest in part on its view of the credibility of certain of Applicants' witnesses (D. Br. at 3 n.6), it is particularly noteworthy that demeanor has nowhere been relied upon in this connection. Rather, the Licensing Board's conclusions concerning Royce Moran's testimony

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the Licensing Board's selective treatment of the record is fully documented in our opening Brief. The Staff, DOJ and Cleveland have chosen to respond by relying almost exclusively on the identical materials referenced in the Initial Decision (see Appendix A, infra). This is no response at all, and only by reviewing the record below for itself can the Appeal Board fully appreciate the unfairness to these Applicants of such a piecemeal approach to the facts.

Argument

A. THE LICENSING BOARD'S FINDINGS OF STRUCTURAL AND PARTICULARIZED NEXUS ARE INCONSISTENT WITH THE ANTITRUST REVIEW FUNCTIONS DELEGATED BY CONGRESS TO THIS COMMISSION

While Applicants have already addressed the nexus issue in their opening Brief (see App. Br. at 125-37), there is reason

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9/ (Cont'd)
(I.D. at 169, 176) and John Arthur's testimony (Tr. 8375) rest on what are perceived to be inconsistent statements. This Appeal Board is certainly in a position to examine for itself those alleged inconsistencies to determine the accuracy of the testimony given by these witnesses (and see App. Br. at 204). Moreover, the vast majority of the evidence below was documentary, not testimonial, and even much of the testimony cited in support of the findings by the Licensing Board was contained in portions of deposition transcripts introduced at the hearing. On this record there is thus no real impediment to de novo review by the Appeal Board.

Nor do we see any reason why the Appeal Board should feel constrained to take a contrary view from the Licensing Board on the credibility of certain of the opposing witnesses, notably Messrs. Hinchee, Hillwig, Lewis and Lyren, based on blatant inconsistencies in their testimony and on the contradictory documentary evidence which the Licensing Board chose to ignore (see App. Br. at nn.190, 193, 197, 200, 204 & 207 (Hinchee); at 196 n.227 (Hillwig); at 204-06, 210 n.243, 231 n.260 (Lewis); and at 215-16, 238 n.267, 239 n.268 (Lyren)). In this regard, we are admittedly disappointed to find DOJ stating categorically to this Appeal Board that Mr. Lewis' affidavit of January 19, 1973 (S-127) "was not prepared for litigation" (D. Br. at 142 n.177), when it knows full well that the Lewis affidavit was in fact prepared at the explicit request of the then lead counsel for DOJ, Mr. Charno, in connection with the Department's antitrust investigation of these very Applicants under Section 105c (see correspondence attached hereto as Appendix B).

to revisit that discussion in view of the several responses of our adversaries. Throughout the evidentiary hearing, Applicants repeatedly attempted (albeit without success) to focus the "liability" inquiry only on those alleged antitrust inconsistencies which our adversaries claimed would be created or maintained by activities under the subject licenses. Instead, the Licensing Board chose to examine all the "inconsistent situations" alleged by the Staff, DOJ and Cleveland, without regard to whether or not they assertedly had any meaningful nexus to the nuclear facilities (see n.4, supra).

Accordingly, the opposition parties were permitted to introduce virtually every scrap of evidence they wished to put before the Licensing Board to define situations inconsistent with the antitrust laws. They now insist that the Board below, having found numerous antitrust inconsistencies, has the responsibility to redress all those condemned situations in any manner it sees fit, again unencumbered by the nexus limitation described in Waterford.[10/] The necessary tie to the nuclear facilities is found, so they argue, in the structural truism, emphasized by the Licensing Board, that nuclear generation from the Davis-Besse and Perry units will, through the planned construction of high-voltage transmission

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10/ See S. Br. at 195-200 ("The choice of remedy available to an independent regulatory commission includes the authority to preclude the revival of practices that have been considered." Id. at 195); D. Br. at 182-89 ("In order to remedy the continuing effects of Applicants' anticompetitive conduct, license conditions must be fashioned which will not only eliminate Applicants' present anticompetitive behavior, but which will 'pry open to competition a market which has been closed by defendants' illegal restraints'." Id. at 184); City Br. at 175-89 ("These conditions must obviate or rectify the situation inconsistent with the antitrust laws." Id. at 180).

from the plants to specified load centers, be commingled into Applicants' respective systems "on an extraordinary scale" (I.D. at 219-20).[11/]

We cannot help but note the "Catch 22" overtones of this argument. Nexus is irrelevant, we are told, for purposes of defining the suspect "situation" under Section 105c. However, once the situation is defined, the contention is that the Licensing Board, in fashioning relief, should not be restricted to ensuring only that the "licensed activities" neither maintain the described situation nor create a new one. Rather, because the nuclear generation is commingled into a named applicant's electric system by means of high-voltage transmission lines, the remedial powers of the Board are said to be pervasive. As is readily apparent, the logic of this reasoning effectively reads the nexus requirement out of the statute altogether, since such "commingling" will always be the case, and probably henceforth only "on an extraordinary scale." The "structural" argument must therefore fail. It is contrary to the congressional mandate in 105c(5) and (6), in conflict with the Commission's Waterford decisions and at odds with this Appeal Board's Wolf Creek ruling.

11/ In Waterford II, the Commission observed (6 A.E.C. at 621):

> We take this occasion to comment upon one aspect of the Board's decision. The Board found that "[p]ower from Waterford will be comingled (sic) with the power from other LP&L generating facilities" * * *. That is a truism applicable to all cases; power is not isolated. Such a finding should not be utilized to support the view that an application to construct one nuclear plant somehow authorizes an inquiry into all alleged anticompetitive practices in the electric utility industry. [Emphasis added.]

The fact remains that "[t]he requirement in Section 105 of the Atomic Energy Act for prelicensing antitrust review reflects a basic Congressional concern over access to power produced by nuclear facilities." Waterford I, supra, 6 A.E.C. at 48-49. The aim of the 1970 amendments was to insure that the nuclear activities licensed by this Commission would neither create nor maintain a situation inconsistent with the antitrust laws. Waterford II, supra, 6 A.E.C. at 620. The language of the statute could not be any more precise. This agency has been delegated limited antitrust responsibility to satisfy itself that access to the questioned units be afforded to non-Applicant entities, if at all,[12/] only on such terms as are necessary to remove those "* * * anticompetitive situations intertwined with or exacerbated by the award of a license * * *." Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1) ALAB-279, 1 N.R.C. 559, 569 (1975) (emphasis added).[13/] As to any other "anticompetitive practices -- however

12/ See, e.g., Consumers Power Company, supra, 2 N.R.C. at 78-80, 114.

13/ We continue to believe that a proper application of the nexus requirement would have the salutory effect of foreshortening the needlessly lengthy hearings associated with the full-blown antitrust inquiries that have heretofore been conducted by the Commission's licensing boards. As we understand the import of the Waterford decisions, any antitrust review conducted by this Commission should start with, not end with, a scrutiny of the applicant's nuclear access policy. If it is found that the applicant's policy offers meaningful access to nuclear power, such that any alleged inconsistent situation could no longer be "intertwined with or exacerbated by" the construction and operation of a nuclear plant, there simply is no need to go forward with a detailed review of the alleged situation. Just such an inquiry was undertaken by the licensing board and this Appeal Board in the Wolf Creek antitrust proceeding. Applicants' numerous proposals to proceed in such a manner in this proceeding were, unfortunately, rebuffed by the Licensing Board below (see App. Br. at 8-9).

serious", it is not the proper business of the Commission to fashion a remedy for such behavior (Waterford II, supra, 6 A.E.C. at 621); if redress is warranted, it can and should be obtained from the federal district courts.

It is from this perspective that the expert testimony of Dr. Pace -- which stands unrefuted on this record -- is particularly relevant to the present proceeding. Dr. Pace accepts for purposes of his discussion that nuclear generation is "an essential economic resource" which bestows significant cost advantages on its owners (A-190(Pace) 8(16-18)). He therefore concludes (id. at 8-9(23-26 & 1-3)):

> In my view as an economist, when an economic resource creates the potential for conferring a significant competitive advantage on its owner and an advantage which cannot be obtained otherwise by rivals, in order to eliminate that special advantage, what we should seek to do is neutralize the impact of that facility in the market-place -- nothing more and nothing less. [Emphasis added.]14/

14/ Only the Staff comments upon Dr. Pace's testimony. In Appendix A to its Brief, the Staff argues that Dr. Pace's economic analysis is faulty in part because it "clearly neglects competitive disadvantages which might result from practices of Applicants other than exclusion of the system from access to nuclear units" (S. Br. at A-2). The Staff unfortunately fails to understand the referenced testimony. Dr. Pace took the competitive situation in the CCCT (whatever it might prove to be) as he found it, just as the licensing board did in Alabama Power Company, supra, Phase II slip op. at 29. He then assumed the introduction into the marketplace of a new factor (nuclear licenses) which would furnish a competitive edge to its owners. His testimony addressed the central question of how to neutralize that factor so it would have no impact at all on whatever competitive advantages or disadvantages were already present in the marketplace. In this way, contrary to the Staff's unexplained assertions otherwise, the nuclear licenses could neither be said to "maintain" the pre-existing situation, nor "create" a new, anticompetitive situation (see A-190(Pace) 5-26). The Appendix discussion in Staff's Brief provides no rebuttal

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This is, we submit, precisely the task Congress assigned to this Commission under Section 105c of the Atomic Energy Act -- i.e., to neutralize the impact of nuclear development so that activities under the licenses to be issued will neither create nor maintain a competitive advantage for the developers (see also n.13, supra). The Department of Justice certainly viewed this as the purpose of antitrust review during the legislative hearings on the proposed amendments. Thus, the address by Roland W. Donnem, then Director of Policy Planning, Antitrust Division, Department of Justice, emphasized that "the small and municipally-owned companies must be afforded the same opportunity to receive low-cost power for the same uses as the larger participating systems".[15/] In explanation he stated: "Only in this way are the competitive opportunities equalized and decisive competitive advantages avoided."[16/] The same point was made by Walter B. Comegys,

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14/ (Cont'd)
to Dr. Pace. Indeed, to the extent it recognizes that neutralizing the impact of nuclear generation will not alter "a significant competitive advantage [which the electric utility adding the nuclear plant may have had] over other systems in its area before the addition of the nuclear plants" (S. Br. at A-2), the Staff underscores the central point of Dr. Pace's testimony. That pre-existing "competitive advantage" has no nexus to "activities under the nuclear licenses" once such activities have been neutralized by affording to other requesting entities access on the terms discussed in Dr. Pace's testimony.

15/ Reprinted in Hearings on Prelicensing Antitrust Review of Nuclear Powerplants Before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess., Pt. 1, at 10 (1970) ("Hearings").

16/ Id. See also Alabama Power Company, supra, Phase II, where the licensing board similarly viewed its antitrust responsibility under Section 105c to insure that the licensing of a nuclear facility "leaves the competitive situation in effect undisturbed * * * with the Farley plant neither adding to nor subtracting from AEC's [the cooperative's] ability to compete" (slip op. at 37-38).

then Acting Assistant Attorney General of the Antitrust Division, in his testimony before the Joint Committee in support of the 1970 amendments. He noted: "We do think that adequate access implies the same opportunity to receive low-cost power for the same uses as those who have the unique low-cost facility" (Hearings, Pt. 1, p. 128).[17/]

This concern with "adequate access" to nuclear power is undeniably what prompted Congress to enact Section 105c. See Waterford I, supra, 6 A.E.C. at 48-49; Waterford II, supra, 6 A.E.C. at 620. The "access" question -- whether it should be afforded and, if so, on what terms and conditions -- is what the Commission properly considered to be controlling the Section 105c nexus inquiry. As stated in Waterford II, "[i]t is the status and role of these facilities which lie at the heart of antitrust proceedings under the Atomic Energy Act" (6 A.E.C. at 620).[18/] Nor do we read this Appeal Board's decision in Wolf Creek as suggesting any different understanding. The task of the licensing boards in carrying out their antitrust responsibility, it was there confirmed (1 N.R.C. at 573), is to determine whether

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17/ See also Comegys' testimony before the Senate Subcommittee on Antitrust and Monopoly in support of the amendments to 105c. Hearings Before the Subcommittee on Antitrust and Monopoly Pursuant to Senate Res. 334, Pt. 1, at 142 ("The principal problem area we foresee is that of access to a plant's output by outside utilities, public and private.").

18/ See also the licensing board's decision in Waterford following the Commission's nexus rulings, wherein it was stated: "The purpose of conditions is to prevent activities under the license from unduly hindering competition. Access in the form of unit power is adequate to accomplish that purpose since it places on a competitive basis Applicant and entities having access to Applicant's facilities." Louisiana Power & Light Company (Waterford Steam Generating Station, Unit 3), LBP-74-78, 8 A.E.C. 718, 731 (1974).

"an offer of 'access' to a nuclear facility * * * is bona fide or * * * but a mask for a situation inconsistent with the anti-trust laws". This is, of course, a task peculiarly within the competence of the Nuclear Regulatory Commission, not some other federal or state regulatory agency; it therefore makes eminently good sense for Congress to have assigned such an inquiry to the NRC (see App. Br. at 72-74 & nn.82, 84).

Applicants' offer of access in the present proceeding (contained in A-44) affords to any non-Applicant CCCT entity an opportunity, upon timely request, to participate on an ownership or unit power basis in the designated nuclear facilities in reasonable amounts and on terms and conditions which provide for the sharing of reserves and for adequate transmission services to accommodate the delivery of the nuclear power and the furnishing or wheeling-in of backup support when the nuclear units are down (see App. Br. at 129 n.151). Moreover, this offer of direct access is available to each of the Applicants' wholesale municipal customers even though they are already assured of indirect access to the nuclear facilities through their bulk power purchases (see A-190(Pace) 8-9(23-26 & 1-9), 11(9-12), 14(7-9); Pace 11731 (6-10); and see App. Br. at 126-28).[19/]

19/ Both Cleveland (City Br. at 169-70) and DOJ (D. Br. at 181 n.234) argue that purchased wholesale power on a full or partial requirements basis does not afford the wholesale customer full access to the nuclear facilities because there is no assurance that the wholesale rate will reflect a "perfect cost pass-through". This argument ignores entirely the fact that Applicants have also offered to their wholesale customers access to the nuclear facilities on a unit power or an ownership basis (A-44). Thus, the speculative comments in this area are of little import in the present circumstances.

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Dr. Pace was the only witness to testify on the economic or market impact of Applicants' access offer -- the opposing parties' witnesses, including their economists who testified about A-44, concerned themselves solely with the alleged engineering deficiencies of the offer (see n.20, infra). Based on his careful examination of A-44, Dr. Pace concluded that it not only neutralized the impact of the subject facilities in the marketplace (see A-190(Pace) 9(4-9), 24(11-25), 26(5-6)), but, indeed, went even further than necessary to remove "the potential for conferring a significant competitive advantage on [the] owner[s]" (A-190(Pace) 8(24-25)). Thus, he testified (id. at 17(3-9)):

> Given the subsidies provided to [municipal and cooperative] utilities, providing proportionate access to nuclear units via ownership entitlements

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19/ (Cont'd)

There is, in any event, no basis on this record to assume that any of Applicants' wholesale rates fail to reflect accurately the utility's cost to serve; nor could this Appeal Board begin to assess such an allegation without having before it a "cost of service" study. None of our adversaries has undertaken to make such a study, let alone introduce one into evidence. In fact, all that the Staff, DOJ and Cleveland did below is compare certain of the Applicants' (OE and PP) published wholesale rates and published retail rates in a shallow effort to establish a "price squeeze" situation (but see pp. 90-92, infra; and see App. Br. at 250-56). Such a rate comparison obviously is of no assistance to the opposition parties' separate argument here, however, which is focused on the various cost factors that go into the rate calculation, rather than on the published rate itself.

It is, of course, a recognized fact that the wholesale rates of an electric utility are required to fall within a "zone of reasonableness" (FPC v Conway Corp., 426 U.S. 271 (1976)). However, if a wholesale customer believes that its supplier's rate does not accurately reflect the cost of service, it can, as Dr. Pace points out (A-190(Pace) 11(3-4)), "petition the Federal Power Commission for a corresponding reduction in wholesale rates" based on the supplier's reduced generating costs by the addition of large-scale nuclear facilities. Thus, the spectre of "unfair wholesale rates", which counsel for Cleveland and DOJ seek to raise without record support as a speculative afterthought is simply an unrealistic prospect in the real world.

> would represent a form of overkill. The impact of the nuclear unit on the competitive situation would be more than neutralized -- small municipal and cooperative systems would gain a new and very significant competitive advantage over the Applicants.

Nowhere in the record below is this testimony contradicted.[20/] We are, therefore, at a loss to understand the conclusion reached by

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20/ Instead, the Staff (S. Br. at 24-30), DOJ (D. Br. at 181-82) and Cleveland (City Br. at 171-72) argue that the specific terms of access offered by Applicants in A-44 are inadequate in several particulars. Thus, they fault the offer because, they argue, the language used in A-44 would not preclude an Applicant from negotiating a "right of first refusal" clause with a requesting entity as to any "excess" nuclear power which that entity might have available for resale. To a very limited extent, the argument is correct. By its explicit terms, A-44 does permit an Applicant to negotiate such a clause with a purchasing entity insofar as an ability to exercise a "right of first refusal" with respect to the resale of excess nuclear power "may be necessary to protect the reliability of [the Applicant's] system" (A-44, para. 2(b)). As we have already explained (App. Br. at 150-51), for this very reason CEI included just such a provision in the draft participation agreement (D-192 § 1.3) it forwarded to Cleveland in February 1974 (see also D-188). Not only is such a clause unobjectionable under the antitrust laws; it is in fact most reasonable in view of the planning commitments for the subject units (see App. Br. at 150-51). Certainly, this degree of latitude contemplated by the language of A-44 suggests no infirmity in the offer of access.

Similarly, there is no basis for faulting the reserve sharing provision in A-44. While our adversaries insist that the reserve formula is unduly burdensome, this general assertion is shown to be entirely inaccurate when the formula is actually applied (see App. Br. at 130-32). Nor should it be forgotten that the "largest single block of nuclear capacity" measurement only becomes applicable if the parties cannot themselves, through negotiations, "jointly establish criteria for determining such minimum reserves of each party" (A-44, para. 3(a)).

Finally, our adversaries fault A-44 for failing to provide for the "wheeling out" of excess nuclear power. It is admittedly unclear to Applicants precisely what counsel for the Staff, DOJ and Cleveland have in mind by the term "wheeling out". To the extent that the concept contemplates the delivery of a purchasing entity's "excess" nuclear capacity or energy from the plant to another interconnection point inside, or on the edge of, the selling Applicant's service area, A-44 clearly requires each Applicant to "wheel out" the power (see A-44, paras. 2(a)(i), 2(b)). Obviously, once the nuclear power is delivered to the edge of said Applicant's service area, it is the responsibility

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the Licensing Board that "activities under the [subject] nuclear licenses", as conditioned by A-44 (see App. Br. at 129 n.151, 299-300), will create or maintain any antitrust inconsistency (and see n.14, supra). Plainly, the non-Applicant CCCT entities have been afforded at least "the same opportunity to receive low-cost [nuclear] power for the same uses as those who have the unique low-cost facility" (Comegys, Hearings, Pt. 1, p. 128).

To be sure, Applicants' offer of access is not designed to provide a cure for every "situation" which the Licensing Board found (albeit erroneously) to exist -- and intentionally so (see p. 15, supra). We do not agree that this agency has the authority to impose the sort of sweeping conditions ordered below (see App. Br. at 294-97), which not only disregard the statutory directive to tie relief to the licensed activities, but also have the

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20/ (Cont'd)
of the recipient entity to arrange for the transmission of that power to its system; surely, the selling Applicant cannot be compelled to extend its lines to complete the transaction. See Alabama Power Co., supra, Phase II slip op. at 43 ("The purpose of the transmission requirement is to allow [the participating entity] the effective use of its participation entitlement, not to transform Applicant into a common carrier of electric power by requiring it to wheel 'anytime, anyplace, anywhere' * * *"). We would only add that the entire discussion of "wheeling out" in this proceeding has been advanced by counsel, and on a very theoretical plane. No evidence has been presented that suggests "wheeling out" is even relevant, let alone essential, to meaningful access. See A-190(Pace) 21(4-9), 24(25); Mayben 7601(4-8); and see App. Br. at 133. One thing that is clear on this record is that if requesting entities are afforded "proportionate access" to the nuclear facilities, as Dr. Pace discussed (without contradiction) in his expert testimony (A-190(Pace) 9, 11-13, 14-18, 20; compare Alabama Power Co., supra, Phase II slip op. at 37-38, 48; and see App. Br. at 129-30 n.152), no CCCT participant would be facing the theoretical prospect of having to dispose of "excess" nuclear capacity -- especially if that participant satisfies its baseload requirements out of several of the subject units, which are due to come on line at different times.

undesired effect of restructuring Applicants into common carriers of electricity in the face of repeated refusals by Congress to do so (see App. Br. 133-34 & n.156). The Commission itself stated clearly in Waterford II, supra, 6 A.E.C. at 621, that it is not a part of the NRC's antitrust responsibility to fashion "proposed forms of relief" to redress inconsistent situations that may exist but have no meaningful link to the units in question. Instead, the statutory scheme devised by Congress plainly suggests that the proper course is to report such matters to the Attorney General for whatever action he deems appropriate (see Sections 105a and b). The "structural nexus" analysis set forth by the Board below provides no justifiable excuse to deviate from the Waterford approach (see App. Br. at 125-34); nor can it be realistically avoided by the Licensing Board's unpersuasive discussion of "particularized nexus" (see App. Br. at 134-37).[21/] To the extent that the Initial Decision and our adversaries argue otherwise, they are simply in error.

B. THE LICENSING BOARD'S ASSUMPTION THAT COMPETITION EXISTS BETWEEN APPLICANTS AND NON-APPLICANT CCCT ENTITIES IN SOME RELEVANT MARKET DOES NOT COMPORT WITH INDUSTRY REALITY

The Licensing Board carefully avoided a question that should have been central to its antitrust inquiry by presuming as

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21/ None of our adversaries chose to respond to Applicants' discussion of the erroneous legal analysis of the Licensing Board in connection with its findings on particularized nexus; nor did any of them address the factual errors made below in this area. Moreover, in view of the fact that no Applicant has ever refused nuclear access to any entity, but to the contrary has offered to all requesting CCCT entities the opportunity to participate (see App. Br. at 134-37), the Staff is less than forthright in suggesting that A-44 represents a "voluntary discontinuance" of some contrary policy regarding the nuclear facilities (see S. Br. at 28-29).

irrebuttable that the non-Applicant CCCT entities were either actual or potential competitors of Applicants (see App. Br. at 40). Thus, the Board had no difficulty concluding (albeit erroneously) that there existed in the CCCT "competition", which arguably had been or could be lessened through the activities of Applicants. We have set forth in our opening Brief the extensive record materials (largely ignored below) which show that the economic factors peculiar to the electric utility industry eliminate any prospect of free and open competition between electric entities in the existing market structure, both at the retail and at the wholesale levels (see App. Br. at 45-50).

Rather than respond directly to this analysis, the Staff argues that Applicants have turned reality "upside down" by "hiding behind the veil of pervasive regulation" (S. Br. at 48),[22/]

22/ What the Staff conveniently ignores is that Applicants' position is based primarily on the realization that it is the economic factors in this industry which prevent free and open competition at both the retail and wholesale levels (see App. Br. at 45-50). The existence of regulation but confirms the need for institutional constraints because of (not in spite of) the very real barriers to competition that are imbedded in the economic characteristics of the industry. Thus, regulation is, as we perceive it, not a mantle to hide behind, but a hallmark signalling the special economic factors peculiar to this industry which deserve careful consideration as an integral part of the antitrust analysis.

It is for this reason that reference to cases like United States v Philadelphia National Bank, 374 U.S. 321 (1963) (see D. Br. at 32), as reflecting the notion that increased competition in a regulated industry is to be encouraged, is inapposite in the present context. For, there exists a fundamental distinction between the banking industry and the electric utility industry, namely, that intense competition is not only possible but does in fact exist among banking entities. In Philadelphia National Bank, the Court explicitly found that "[c]ompetition among banks exists at every level * * * and it is keen" (374 U.S. at 368 & n.45). As

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while both DOJ and Cleveland glibly maintain that competition is economically possible in the CCCT (see D. Br. at 31-42; City Br. at 14, 28-38), without ever specifying who the competitors are or in what ways they "compete" with Applicants.[23/] Thus, arguments advanced by our adversaries accept the Licensing Board's additional premise that the antitrust laws should be applied in this industry in precisely the same manner as they normally would be applied in any unregulated industry. We have heretofore explained the fundamental flaw in such an approach (see App. Br. at 26-45, 85-88, 97-102), and nothing said in the opposing Briefs gives us reason to alter that earlier explanation.[24/] Only a few additional comments are required.

22/ (Cont'd)
we have already demonstrated (see App. Br. at 56-71), the record in this proceeding emphatically testifies that no comparable situation exists, or potentially can exist, in the CCCT. The fact that DOJ has chosen to rely on cases such as Philadelphia National Bank not only punctuates its clear misunderstanding of Applicants' basic position, but highlights its failure to appreciate that in the banking industry the basic justification for regulation is not because the economic characteristics result in natural monopoly but because there is a felt need to protect the customer from unsound banking practices (see 374 U.S. at 327-30). Since the competitive issues are not central to banking regulation, it is not at all surprising that the Court should measure challenged bank mergers from a traditional antitrust perspective.

23/ Typical is DOJ's statement that competition plays an important role in regulated industries and can be of great value in helping to achieve the goals of regulatory schemes (see D. Br. at 33). Support for the proposition comes from Dr. Wein, whose testimony is that "competition where economically possible will be of great value in achieving the goals for which regulatory agencies were established by Congress" (D-587(Wein) 20(1-3) (emphasis added)). Dr. Wein, however, made no attempt in his testimony to specify where competition was "economically possible" in the CCCT, any more than did Hughes or Kampmeier. Nor does any other evidence introduced below provide support for attaching significance here to such abstract theorizing; indeed, it all points in exactly the opposite direction (see App. Br. at 45-50).

24/ Each of the opposing parties maintains that the Licensing Board committed no error in refusing to evaluate the public interest

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First, it is, we think, noteworthy (although not entirely surprising) that not a single party denies the existence of the six economic characteristics which describe the electric utility industry (see App. Br. at 45). Cleveland simply lists the existing characteristics (City Br. at 14) and then turns to a lengthy discussion of coordination and scale economies (City Br. at 14-27), without attempting to respond to Applicants' analysis of how those characteristics create significant economic barriers to competition in this industry. DOJ does not even go that far, choosing instead to ignore Applicants' economic arguments altogether.

The Staff, on the other hand, while conceding that the six economic characteristics do apply to the retail distribution

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24/ (Cont'd)
as part of its antitrust review (compare S. Br. at 193; D. Br. at 45-50; City Br. at 7-13 with App. Br. 29-35). Rather the Staff, DOJ and Cleveland argue that because the NRC has no responsibility to administer an economic regulatory scheme in the electric power industry, evaluation of the public interest is beyond the authority of this Commission. Such reasoning totally ignores the very detailed analysis of the public interest undertaken by the Supreme Court in United States v National Association of Securities Dealers, Inc., 422 U.S. 694 (1975), and Gordon v New York Stock Exchange, 422 U.S. 659 (1975) (see also cases cited at App. Br. 34-35 n.38). The relevant test is not whether the particular forum enforcing the antitrust laws also administers an economic regulatory scheme but whether the conduct being challenged is subject not only to antitrust restraints but also to regulatory restraints. In the latter circumstances, the antitrust forum must reconcile the antitrust and regulatory principles by evaluation of the public interest. In this regard United States v Radio Corporation of America, 358 U.S. 334 (1959), supports Applicants' position. There the Court found no need to engage in such an evaluation because the conduct being challenged was not subject to economic regulation. The clear import of the holding is that, if the challenged conduct were subject to such regulation, an antitrust court would have been obligated to make a public interest assessment reconciling the antitrust policies with the regulatory policies (see 358 U.S. at 347-52). Such a situation is clearly presented in this case.

of electric energy (S. Br. at 49, 50),[25] argues that they are not to be found at the "bulk power level" (i.e., generation and transmission), and that Applicants have failed to deal with the differing organization implications present at the bulk power level (S. Br. at 50-51). The short answer to this argument is to refer to our opening Brief, where the differences in industry functions at the distribution level, on the one hand, and the generation and transmission level, on the other hand, are carefully described (see App. Br. at 48-50).[26] While there recognizing

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25/ Despite this concession, the Staff relies on alleged misconduct by Applicants at the retail level, such as alleged territorial agreements between investor-owned utilities and municipal systems. This position is particularly perplexing since the Staff continues to insist that "[t]he issues in this case focus on the bulk power field" (S. Br. at 40), and that, therefore, Dr. Hughes "eschewed an analysis of retail competition" (S. Br. at 73) because opportunities for competition are not as great at that level. Nowhere has the Staff made an effort to coordinate its analysis of the competitive market structure with its theory of the conduct which deserves condemnation under the antitrust laws.

26/ The Staff seems to suggest that Applicants' description of the bulk power services market is tarnished by Alfred Kahn's opinion that such a market generally does not exhibit "an inherent tendency to decreasing unit costs over the entire extent of the market" (S. Br. at 45). We would point out in response that Mr. Kahn's general view is not shared by the Staff's economic expert, at least not in the context of the situation presented in this proceeding. Thus, Dr. Hughes testified that an area the size of the CCCT is small enough so that a single firm might not exhaust all the generation and transmission scale economies (compare Hughes 3903-04(8-25 & 1-2) with Hughes 3731(19-22)). Indeed, one of the basic tenets of the opposing parties is that the individual CAPCO companies were not themselves large enough to take full advantage of the available scale economies without the formation of the CAPCO pool. Accordingly, whatever the theoretic merit of Mr. Kahn's view in a market significantly larger than the CCCT, it is clearly of no value in this proceeding. Thus, it is not surprising that in the instant setting Dr. Hughes did not advocate rivalry among generating entities, and the Staff's reference to his prepared testimony (see S. Br. at 45 n.94) is certainly not to the contrary.

that those differences imply that a single entity need not necessarily own all the generation and transmission in a designated area, Applicants correctly note that the technology of generation and transmission, which gave rise to what Dr. Hughes called "natural market power", precludes active competition between generating and transmitting entities.[27/]

Second, with respect to Applicants' arguments as to the impact of regulation on the existing market structure (see App. Br. at 50-56), the responses of our adversaries serve to confirm Applicants' position, not to undermine it. Thus, as to regulation at the wholesale level, the only retort of the opposing parties is that Ohio and Pennsylvania are without authority to impose barriers to wholesale competition (see S. Br. at 47; D. Br. at 36-38). The basis for this argument is that the Supreme Court in Public Utilities Commission v Attleboro Steam & Electric Co., 27? U.S. 83 (1927),

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27/ Both DOJ and Cleveland assert that vertical integration is not a prerequisite to obtaining the benefits of scale economies (see D. Br. at 34 n.32; City Br. at 50-51). However, they erroneously equate the benefits of coordinated operation, which are more akin to the benefits achieved from horizontal integration, with the economies of vertical integration. DOJ's reference to Hughes' testimony (see Hughes 3899-901) fully confirms the unique planning efficiencies resulting from vertical integration (see also A-189 (Gerber) 10(3-7); Wein 6840(1-14), 6843-44(23-25 & 1-3)). Nor do Dr. Wein's seven proposed alternatives to vertical and horizontal integration (which in reality amount to variants of but two different organizational schemes (see D-587(Wein) 53-55)), lead to a contrary conclusion. Dr. Wein's careful incorporation of the requirement that the retail distribution system either own, or have a long-term contract with, the generation and transmission company is explicit recognition that the economic characteristics of the industry do impose restraints on organizational freedom (see A-189(Gerber) 23(12-18)). Moreover, inclusion of such requirements also makes it apparent that, even under Dr. Wein's proposed organizational schemes, there would be no greater opportunity for competition in the electric utility industry than exists at present.

purportedly placed interstate wholesale transactions of electric utilities entirely beyond the reach of the states. Such an expansive reading of Attleboro is not supported by the decision. The Supreme Court there did not deal with, let alone remove, the states' authority to regulate wholesale "competition" in this industry. The Court simply held that regulation at the state level would not be enforceable to the extent that it placed a direct burden on interstate commerce (273 U.S. at 80-90). Our adversaries make the leap from that judicial pronouncement to "total preemption" by arguing that FPC regulation is all-pervasive as to every aspect of the wholesale transaction.[28/]

We do not quarrel with the general proposition that the FPC exercises pervasive regulatory controls over the rate-setting functions of electric utilities (see App. Br. at 54 & n.59), and also has broad investigatory powers in connection with its recognized authority to order interconnections (see App. Br. at 78-79). This does not, however, preclude the states from acting in those areas where the regulatory arm of the Federal Power Act does not reach. As stated in Dunk v Pennsylvania Public Utility Commission,

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28/ We cannot help but observe the inherent contradiction in the opposing parties' argument in this connection -- i.e., that there exists a pervasive scheme of federal regulation which preempts state legislation (compare Northern States Power Co. v Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972)) -- with the position they are advancing elsewhere on this appeal to the effect that there is no pervasive regulation of electric utilities by the FPC (see, e.g., S. Br. at 45-46; D. Br. at 78-79; City Br. at 40-42).

210 Pa. Super. 183, 232 A.2d 231, 235 (1967), aff'd, 435 Pa. 41, 252 A.2d 589 (1969), cert. denied, 396 U.S. 839 (1969):

> The real reason for the passage of the [Federal Power] Act was to fill the gap of unregulated wholesale sales of electric energy in interstate commerce. Its purpose was to regulate areas not closed to state control and to supplement, not supersede the regulatory powers of the states. Public Utility Commission of Rhode Island v Attleboro Steam & Electric Co., 273 U.S. 83 * * * (1927). "It is clearly the purpose of the entire act to regulate only those matters which pertain to the interstate exchange of wholesale power." Northern Pennsylvania Power Co. v Pennsylvania P.U.C., 132 Pa. Super. 178, 200 A. 866 (1938). [Emphasis added.]29/

Federal regulation of the electric utility industry plainly does not deal with the power of states to establish limits to wholesale "competition" by deciding which entities may legally provide electric services within the state and under what terms and conditions that service is to be provided. For example, it seems clear to Applicants that a state could validly exercise its police power to preclude municipal entities from engaging in the sale of electricity, thereby removing such entities from both the wholesale and retail markets. DOJ candidly admits that there exist no congressional prohibitions to such state action (see D. Br. at 36). That being the case, it is difficult to understand how the failure of Congress

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29/ Dunk is directly on point with respect to Applicants' argument that by means of the Pa PUC's authority over eminent domain, the Pa PUC exercises de facto jurisdiction over the certification of wholesale territories (see App. Br. at 53 & n.58). The court there held that the FPC had not preempted the Pa PUC's authority over transmission rights-of-way. See 435 Pa. 41, 252 A.2d 589 (1969); see also In re Petitions of Public Service Electric & Gas Co., 100 N.J. Super. 1, 241 A.2d 15, 23-25 (1968). These cases clearly expose the weakness in Staff's and DOJ's simplistic analysis of the preemption doctrine.

to legislate can be deemed by our adversaries to preempt the ability of a state to legislate.[30/] In passing on this issue, courts have traditionally employed various tests to ascertain if federal regulation is indeed preemptive. Thus, they have refrained from declaring the state's police powers to be superseded unless they could find a "clear and manifest purpose of Congress" to do so (see Rice v Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947)). A similar attitude has prevailed if the state regulatory barriers can be enforced "without impairing federal superintendence of the field" (see Florida Lime & Avocado Growers, Inc. v Paul, 373 U.S. 132, 142-43 (1963)). Nor will preemption be implied if the activities reached by the state cannot also be said to be "intimately blended and intertwined with responsibilities of the national government" (see Hines v Davidowitz, 312 U.S. 52, 66 (1941)). Measured by any of these standards, it is readily apparent that the state regulation of wholesale "competition" that is involved in this proceeding -- which is designed to discourage the wasteful duplication of electric facilities -- is not precluded by the Federal Power Act or by the scheme of federal regulation underlying that statute.[31/] The effort by our adversaries to avoid the

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30/ See Huron Portland Cement Co. v City of Detroit, 362 U.S. 440, 445-46 (1960) (no preemption since no overlap in scope of federal ship inspection laws, whose aim is to insure seagoing safety, and municipal pollution ordinance, whose aim is to protect health and enhance cleanliness of local community). Compare Northern States Power Co. v Minnesota, supra (Atomic Energy Act preempted state regulation of radioactive releases from nuclear power plants).

31/ See n.29, supra, discussing the Pennsylvania regulatory scheme. In Ohio, the state constitution imposes a restriction on

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import of this Ohio and Pennsylvania legislation by invoking the doctrine of preemption must therefore fail.

Equally unpersuasive are the arguments made by DOJ and Cleveland dismissing as insignificant the statutory restraints imposed by Ohio and Pennsylvania at the retail level.[32/] For

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31/ (Cont'd)
power sales by municipal systems outside the corporate limits of the municipality (see App. Br. at 51 & n.53). No federal statute or regulation prohibits the state from exercising its authority in this manner. The same can be said for the 90-day disconnect provision in Section 4905.261, Ohio Revised Code (see App. Br. at 52 & n.55). That statutory restriction precludes all forms of wholesale for resale competition in Ohio between investor-owned utilities and rural electric cooperatives. The manner in which this is accomplished, by creating a cause of action for one utility to sue another utility pursuant to the state's general police power, is clearly outside the scope of federal regulation in this area. This was readily apparent to DOJ when Mr. Turner issued to Ohio Power Company, OE, TECO, and others, the Department's business review clearance for the Buckeye Project (see A-248). As part of that clearance, the Ohio utilities represented to DOJ that the 90-day disconnect law applied to wholesale transactions as well as to retail transactions. While accepting that statement of the law, DOJ indicated that, if state law should be further interpreted so as not to cover the wholesale transactions contemplated by the Buckeye Project, then the matter would be reconsidered. To Applicants' knowledge -- and DOJ has not indicated that it has any contrary information -- the state law of Ohio has not yet been so interpreted. However, DOJ now argues on the basis of case-law decided well prior to Mr. Turner's clearance letter, and clearly within the knowledge of the Department at that time, that Ohio has no authority to raise such barriers to wholesale competition. A clear measure of the invalidity of the argument now being advanced is the failure of DOJ to raise such an objection in 1967, or, indeed, any time thereafter until it was made as an afterthought in this proceeding.

32/ We note, however, DOJ's agreement with Applicants that statutes in both Ohio and Pennsylvania "prevent actual and potential competition between investor-owned utilities, on the one hand, and other investor-owned or cooperative utilities, on the other hand, for individual retail customers" (D. Br. at 40). That being the case, DOJ's contention that alleged agreements allocating retail service areas between some of the Applicants substantially lessen competition is difficult to understand.

example, DOJ asserts that, because municipal utilities are excluded from Pennsylvania's new certification plan (see D. Br. 40-41), there are no legal barriers to actual or potential competition between private and municipal utilities for new or existing retail customers in Pennsylvania (see D. Br. at 41-42). The fundamental error in this argument is that it totally ignores the impact of 66 P.S. § 1122(g), which requires every municipal system in Pennsylvania to obtain a certificate of public convenience prior to serving customers beyond its corporate limits (see App. Br. at 53 & n.57). The showing necessary for certification -- i.e., that the utility already certificated to serve in the surrounding areas (e.g., Duquesne Light) is incapable of continuing to provide adequate electric service to its customers and thus should be supplanted by the borough system -- eliminates any prospect of electric systems "competing" at retail in any given area in Pennsylvania. This was fully recognized by the witnesses below, who agreed that there exists no real potential for any form of retail competition in the state (see Wein 6928(8-12); Hughes 3673(3-5); White 9504(9-11), 9062(5-14); compare 66 P.S. § 1122(g) with 53 P.S. § 47471).

The Ohio legislature has also imposed a restriction upon the electric service that can be provided by municipalities of that state beyond their corporate limits -- i.e., a constitutional limit on outside sales from a municipality's "surplus" power of no more than 50 percent of its city load (Ohio Const., Art. XVIII, Sec. 6; see App. Br. at 51 & n.53). Cleveland seeks to minimize this constitutional restraint by reference to Dr. Wein's suggestion

that Ohio municipals could conceivably increase their share of the retail market from 3.8 percent to 5.7 percent if they took full advantage of the "50 percent" clause (City Br. at 28) -- a hypothesis that is totally unrealistic. In any event, Cleveland fails to point out that Dr. Wein, after making this observation, still is of the view that "[t]he competition between self-generating munis [sic] for retail sales by the private utilities is thus very small, and the legal barriers mentioned would keep it small, since no municipality extends its boundaries primarily to capture sales of electricity" (D-587(Wein) 118(13-17); emphasis added).[33/] This general conclusion has equal application with respect to the prospects for increased retail competition between private and public utilities inside the city limits of Ohio municipalities.[34/] Cleveland argues to the contrary -- notwithstanding the legislative franchise power afforded to municipalities

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33/ Dr. Wein also was of the same view with respect to the potential for competition between the distribution-only municipal systems and the private utilities (see D-587(Wein) 122(20)). Moreover, for distribution-only systems, Ohio raises a further barrier to competition because such systems necessarily have no "surplus product" for distribution outside the city limits (see App. Br. at 51 n.53). DOJ and Cleveland each claim that whether a wholesale customer has any surplus product for distribution outside its corporate limits has not yet been decided by the Ohio courts (see D. Br. at 41 n.40; City Br. at 29). That is unquestionably true. It does not, however, in any way undermine the validity of Applicants' position. Significantly, the opposing parties introduced no evidence nor advanced any argument indicating that the clear meaning of the Ohio Constitution is not as stated by Applicants (compare White 9525-26, 9680-83; Guy 3056-57(17-25 & 1-4)).

34/ As we have already pointed out, the "competitive" situation in the City of Cleveland is very unusual; it exists nowhere else in the CCCT, and, indeed, has but one or two counterparts in the entire country (see App. Br. at 61 n.69). Nor does the Cleveland story provide encouragement for altering this pattern (see n.38, infra).

in the state (Ohio R.C. §§ 4933.03, 4933.13 and 4933.16) -- in light of Cleveland Electric Illuminating Co. v City of Painesville, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968). That case, however, had nothing to do with the question of providing electric service to ultimate consumers located within the city limits, but rather was concerned solely with "whether a municipality may refuse to consent to the installation of high voltage electric transmission lines which will pass through but not serve such municipality * * *" (239 N.E.2d at 76-77; emphasis added). Cleveland's attempt to read the decision as toppling one of the regulatory barriers to retail competition in Ohio (see City Br. at 29-30) is simply incorrect.

Third, despite the clear showing below that there has long been no active, ongoing competition between Applicants and the non-Applicant CCCT entities for wholesale or retail sales of electric power (see App. Br. at 56-71) -- for the very legitimate reasons we have heretofore discussed (see App. Br. at 45-56) -- it is strenuously argued that the potential for such competition does exist and that what is needed to transform that "potential" into actual competition are the broad license conditions mandated below. The difficulty we have with this thesis is that to state it does not make it so, and our adversaries have failed to develop any analytical framework to support their position.

The Supreme Court has defined a potential competitor as an enterprise "so positioned on the edge of the market that it exerts beneficial influence on competitive conditions in that market." See United States v Falstaff Brewing Corp., 410 U.S.

526, 532-33 (1973). In determining whether an enterprise is "so positioned", the Court has tended to discount the subjective motivations of the enterprise, i.e., whether the company was desirous of entering the market. Rather, the inquiry has focused on objective facts relating to the capabilities of the company and the economic conditions present in the appropriate market. Id.; see also FTC v Procter & Gamble Co., 386 U.S. 578 (1967); United States v Penn-Olin Chemical Co., 378 U.S. 158 (1964). While it obviously is not possible to catalogue all the factors pertinent to such a determination, the district court in United States v Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973), has successfully condensed the relevant considerations down to six basic points. In summary fashion they are (id. at 1239):

(a) whether the potential competitor is in the relevant line of commerce;

(b) whether the potential competitor had previously indicated its interest in entering the market;

(c) whether the objective economic facts indicated that the potential competitor was capable of entering the market;

(d) whether the objective economic facts provided sufficient incentives for the potential competitor to enter the market;

(e) whether the potential competitor was viewed by other sellers in the market as a potential entrant; and

(f) whether objective economic facts relating to the structure and degree of concentration in the market and the barriers to entry made new entry likely.

See also United States v Falstaff Brewing Corp., 383 F. Supp. 1020, 1023-24 (D.R.I. 1974) (decision on remand).

A meaningful evaluation of these factors cannot take place in a vacuum. Rather, as a first step, the relevant market or markets into which any "potential competitor" may realistically be viewed as a possible entrant must be identified (see App. Br. at 88 & n.103).[35/] While the Licensing Board selected as one of the relevant markets for purposes of this antitrust inquiry the market of retail electric power sales, no sound reason was given to support this conclusion (see App. Br. at 89). The Staff seems in agreement with Applicants on this point (see S. Br. at 40, 49-50, 73), while DOJ has chosen to ignore entirely the question of relevancy at the retail level (see D. Br. at 73).

Only Cleveland argues that the Licensing Board's retail market is relevant because "it is the dominant market for electricity" (City Br. at 44). We are not told, however, why this observation should be accorded special significance in the present context, where antitrust review is focused so directly on the bulk power field (see S. Br. at 40; see also pp. 40-45, infra). Nor does Cleveland's argument respond to Applicants' central point in assessing the relevancy of retail sales to this proceeding, which is that the only conceivable retail concerns involved here are those of retail distributors as purchasers in the wholesale market, not as sellers in the retail market. Compare App. Br. at 89 & n.105 with Alabama Power Co., supra, Phase I slip op. at 161-63.

35/ A market may be defined from the following characteristics: (a) there must be at least one buyer and one seller, (b) there must exist a distinguishable product (or service) for which there are no close substitutes, and (c) there must exist the ability (or the right) for the parties to strike a bargain with one another for this product (Alabama Power Co., supra, Phase I slip op. at 146).

In any event, neither the Licensing Board nor our adversaries have shown that retail competition is a viable concept in the electric utility industry, especially in the CCCT, or that, on an application of the Falstaff and Phillips Petroleum criteria, there exists any "potential" for its becoming so. The "open" and "closed" retail market analysis set forth in our opening Brief (see App. Br. at 90-93), and recently acknowledged by the Farley antitrust licensing board (Alabama Power Co., supra, Phase I slip op. at 159-61), accurately describes the existing situation. While Cleveland points to scattered instances where a private utility serves a few customers at retail within the corporate limits of a municipality, those isolated relationships are long-standing.[36/] Rather than reflecting the existence of ongoing retail competition,[37/] they pointedly illustrate the rigidified nature of the one-time retail service that is a unique characteristic of the electric utility industry (see App. Br. at 60-62).[38/]

36/ Cleveland's references are to OE customers within the boundaries of Newton Falls and Wadsworth (City Br. at 29), and PP customers inside Ellwood City and Grove City (id. at 31). In addition, Cleveland asserts that Pittsburgh has its own street lighting system (id.); however, this reference is misleading. Mr. Gilfillan's referenced testimony indicates, quite correctly, that the City of Pittsburgh services the street lighting fixtures. However, Pittsburgh owns no generation and all loads within the city, including residential, commercial, industrial and street lighting, are served by DL.

37/ Cleveland also argues that rate competition does exist (see City Br. at 32-33; see also D. Br. at 33 n.30). However, support for that proposition comes only from testimony relating to the ongoing competition between CEI and Cleveland, which Applicants acknowledge (see n.38, infra), and from testimony relating to competition between electric and gas energy sources, which is clearly of no relevance to this proceeding (see Bingham 10270, 10330).

38/ DOJ can point to but one instance of a retail customer switching suppliers (D. Br. at 40). Cleveland's response is to

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Moreover, the record below amply demonstrates that the objective economic facts relating to the structure and degree of concentration in the designated retail markets (see App. Br. at 45-50), when considered together with the legal barriers to entry that prevail in Ohio and Pennsylvania (see App. Br. at 50-56), offer no discernible prospects of new entrants coming into these markets to compete with the established private or public utilities (see App. Br. at 56-65). Nor can it be said that sufficient incentives for new entry at the retail level exist in view of the economic and legal constraints imposed on this industry. Accordingly, the observation made by the Farley antitrust licensing board is as applicable here: "Competition between retail distribution systems" is, at best, "of only infra-marginal proportions", and thus must fall "outside the scope of antitrust remedy" in terms of fashioning appropriate license conditions for the instant bulk power nuclear facilities. See Alabama Power Co., supra, Phase I slip op. at 161.

There is, we submit, no more reason to conclude that competition, either actual or potential, exists at the wholesale level in any relevant market in this proceeding. Applicants have

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38/ (Cont'd)
point to the competition between itself and CEI (see City Br. at 29). However, Applicants candidly acknowledge the existence of this unusual situation (see App. Br. at 61 n.69). It does not, as Cleveland seems to imply, establish the likelihood of signifiant retail competition in any other part of the CCCT. Moreover, the undesirable consequences of the retail competition present in Cleveland (see App. Br. at 48 n.50) only serve to underscore the validity of Applicants' economic analysis of the adverse impacts of retail competition in this industry (see App. Br. at 62-63 n.70).

heretofore taken exception to the two wholesale markets defined by the Licensing Board due to the lack of "some cogent rationale for grouping the * * * disparate products and services into a single product market" (see App. Br at 93). Since the filing of our opening Brief, we have had a chance to review the market analysis set forth by the licensing board conducting antitrust review of the Farley licenses. That board, too, rejected the proffered bulk power supply and regional power exchange markets, and on much the same grounds as urged by Applicants here. We can do no better than repeat the incisive conclusions stated in Farley (Alabama Power Co., supra, Phase I slip op. at 155-56):

> The confusion we find embedded in a market definition of "power exchange services" is that such a market clearly would include a variety of factors that in no way could be considered close substitutes for one another. A bulk power producer who could benefit from reserve sharing would not find emergency energy a close substitute. A bulk power producer in need of maintenance energy would not find staggered construction a palatable alternative. What is common to all of the elements in this alleged "market" is that they are all important inputs into efficient and reliable production of bulk power generation. But the elements are not usually close substitutes for one another, and hence, not in the same market.
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> By way of example, leather and stitching thread are both inputs into the production of shoes. But they are not substitutes for each other in the production of leather footwear and consequently are not part of the same market. That two firms have a common customer does not place the two sellers in the same market. [Footnotes omitted.]

The Staff and Cleveland offer no response to Applicants' legal argument that the Licensing Board improperly grouped together non-substitutable products into a single market. DOJ's

answer is largely confined to repeating the Licensing Board's citation to Philadelphia National Bank, supra (see D. Br. at 71 n.64), just as though it had never seen the legitimate objections raised by Applicants to the use of that case in this context (see App. Br. at 94 n.111). DOJ also asserts that other electric entities view the services offered by CAPCO as a "bundle". That claim is factually inaccurate (see App. Br. at 12-13, 23-25, 97-98 n.116). The only source cited by DOJ in support of the contention, besides the misguided impressions of the Licensing Board, is a CEI-prepared report comparing the different rates which various power pools charge among pool participants for certain services (D-588). On such proof, one could presumably make the patently absurd argument from the introduction of a company's price list that all goods and services produced by that company are in the same market. Compare United States v Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958) (various types of hot and cold rolled steel sheets, bars, plates and pipes each in different product markets). No better logic supports DOJ's strained reading of the CEI report as somehow suggesting that the Applicant companies buy or sell electric power with non-CAPCO companies on other than an individual basis or in a manner which would imply that the constituent bulk power services are interchangeable or could legitimately be viewed as a "bundle". Nor is there any other evidence in this record which even remotely hints at such a notion.

It is, of course, precisely for this reason that Applicants have argued here (see App. Br. at 95-96), as they did below,

that a realistic definition of the wholesale market in the instant proceeding should describe bulk power transactions in terms of two submarkets: one for short-term operating transactions and the other for long-term development transactions (see A-190(Pace) 31(10-21)). As to the short-term transactions, such as the sale of emergency power, maintenance power, economy power, and the like, it is undeniably the case that the non-Applicant CCCT entities, almost all of whom (including Cleveland) are full or partial requirements customers of one or another of the Applicants,[39/] are not now a competitive factor in this submarket, and have no real potential for becoming so in the future (see App. Br. at 96-97). Similarly, with respect to the submarket for long-term transactions, Dr. Pace testified that, aside from sales or purchases of dependable firm capacity (i.e., bulk power for resale), all such services (e.g., joint or staggered construction of facilities) are of a type not suitable to any sort of meaningful "competitive" participation by the smaller CCCT entities (see A-190(Pace) 34(4-20)); see also App. Br. at 95-96; pp. 69-76, infra).

This leaves, of course, long-term firm power sales, which, interestingly, the licensing board in Farley found to be the only appropriate market in the context of that proceeding (Alabama Power

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39/ Only Painesville and Orrville generate the majority of their power requirements and neither entity has any surplus power available for sale in the short-term transactions submarket (see App. Br. at 68-69 & n.79 (Orrville); Pandy 3180(4-15) (Painesville)). Both Oberlin and Cleveland generate a small portion of their own needs but must rely on OE and CEI, respectively, to supply their entire load. Obviously, those systems are in no position to provide power to other systems. All the remaining CCCT municipal systems are full requirements customers.

Co., supra, Phase I slip op. at 163-64). As part of its analysis, the Farley licensing board examined in detail the form which competition, either actual or potential, would take in that market. What was said there deserves special mention here (id. at 164):

> Competition in such a market would take the form of sellers trying to render superior service to their current utility customers (in order to retain them) and seeking the business of other utility customers who may be currently served by rival sellers of wholesale power. Competition, if only potential, also may take the form of distribution systems, solely or jointly, considering integration backwards into the development of their own generation capacity.

The Farley antitrust board found, and we believe correctly, that the municipal wholesale customers of Alabama Power provided no such actual or prospective competition in the relevant wholesale market (see Alabama Power Co., supra, Phase I slip op. at 157-63, 326-27; Phase II slip op. at 3-4). The same conclusion is equally compelling with respect to the CCCT municipalities involved in this proceeding. Only a few municipal systems have their own generation, and, even then, it is in inconsequential amounts (see n.39, supra). None has any firm plans to build new or additional generating facilities.[40/] Nor has a single municipal

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40/ In fact, to the contrary, all recent actions taken are in the direction of ceasing any generation. Cleveland has increased its firm power contract demand from 70 mw to 90 mw while ceasing all coal-fired generation. Newton Falls plans to leave the generation business altogether. While WCOE considered building 500 mw of its own capacity, its consultants recommended instead a prepayment form of continued wholesale purchase (S-44). And even Mr. Lyren testified that the City of Wadsworth would not be interested in establishing self-generation, but would prefer to purchase power from another supplier (Lyren 2044(3-14)). Moreover, notwithstanding the fact that Applicants have been engaged in the

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system in the area shown or expressed a desire to enter the wholesale for resale market.[41/] Moreover, even if such aspirations did exist, there has been no showing that such entities have the financial and technical capability to carry out such plans or that the previously discussed economic and legal barriers to entry make such a prospect likely (compare pp. 29-32, supra, with D-587(Wein) 136(5-7) (the CCCT self-generating municipal systems are so small (other than Cleveland) and financially weak (as is Cleveland) that potential wholesale competition from them can be disregarded)). It need only be added that municipal access to Applicants' nuclear facilities introduces no new cost efficiencies and, therefore, provides no basis for potential wholesale competition between Applicant and non-Applicant systems (see App. Br. 66-67). Surely, such a reallocation of Applicants' capital assets is not the type of "backwards integration" alluded to by the Farley licensing board since it does not involve development by the distribution systems of their own generating capacity.

40/ (Cont'd)
planning and construction of a number of nuclear facilities for more than ten years now, and have had an open policy, publicly announced for at least the last three years, of affording requesting entities access to the units on an ownership or unit power basis (A-44), only two municipal systems in the CCCT have so much as expressed an interest in participating, and none has yet indicated a willingness to make a commitment (see App. Br. at 136 n.159).

41/ In fact, both the negotiating posture of WCOE and the eventual R. W. Beck recommendation (S-44) made to OE on behalf of the municipal systems located in OE's service area belies any interest on their part in entering the wholesale for resale market (see App. Br. at 217-23). Cleveland, which has proposed to sell its municipal system to CEI (I.D. at 57 n.*) certainly has no such interest. Nor do we know of a single piece of evidence suggesting that any other CCCT municipality is of a different mind.

The Staff, DOJ and Cleveland had more than ample opportunity to lay an evidentiary foundation to support their bald assertion that the CCCT municipalities could be viewed as potential competitors under the Falstaff and Phillips Petroleum criteria. In point of fact, they were unable to substantiate their claim in any particular.[42/] Statements of opposing counsel outside the record as to what they might deem to be the "potential" for such competition cannot now serve as a substitute for the hard evidence that was promised, but never forthcoming.

42/ The assertion that rural electric cooperatives in the CCCT might conceivably be viewed as potential competitors is also lacking in evidentiary support. There is, of course, no electric cooperative in the CCCT comparable to the Alabama Electric Cooperative involved in the Farley proceeding, which currently has a capacity of 137,000 kilowatts with two 210 megawatt coal-fired units under construction, and some 995 miles of transmission and sub-transmission lines (see Alabama Power Co., supra, Phase I slip op. at 31-32). In contrast, all the CCCT cooperatives are under 35-year contracts with Buckeye Power, Inc., from whom they take their full power requirements (see A-248; A-234; A-287). As pointed out by the Farley board, requirements contracts of such duration "only limit further the potential for competition at wholesale" (Alabama Power Co., supra, Phase I slip op. at 174).

It was also argued below that Buckeye can be viewed as a potential source of wholesale power outside the CCCT to be "tapped" by the CCCT municipalities. However, the record shows that this, too, is empty rhetoric which finds little record support. In reality, as we have already pointed out, there is little incentive on the part of the CCCT municipalities to purchase Buckeye power. As DOJ correctly notes (D. Br. at 42 n.41), power purportedly is available from Buckeye at a lower base rate than can be offered by Applicants (see D-543). But, the 100 percent demand ratchet included in the applicable tariff makes it an unattractive alternative to the CCCT municipalities as a bulk power source (see App. Br. at 69-70 n.80), as indicated in D-543 by Napoleon's express concerns "about operations under the seasonal aspects of that [the Buckeye] rate".

C. THE LICENSING BOARD'S CONCLUSION THAT APPLICANTS POSSESS MONOPOLY POWER MISCONCEIVES THEIR ABILITY TO CONTROL PRICES OR EXCLUDE COMPETITION IN THIS INDUSTRY

The aforesaid natural and institutional constraints on competition in this industry, and particularly in the CCCT, obviously bear directly on the antitrust evaluation of whatever conduct is claimed to have anticompetitive overtones. Not only must attention be paid to the very legitimate public interest considerations encouraging the non-competitive framework that exists (see n.24, supra); but also recognition must be given to the basic industry characteristics which are, of necessity, integral to any analysis of market behavior (see App. Br. at 45-56). The Licensing Board saw no need to approach its review responsibilities under Section 105c with a sensitivity for the barriers to competition which we have heretofore described, notwithstanding that those barriers, too, help to define the "situation" that Congress directed the Commission to examine. We have discussed at length the difficulties we have with such an undiscerning application of antitrust policies and principles, particularly as they relate to an assessment of an Applicant's alleged monopoly power (see App. Br. at 77-83, 85-88). Once again, our adversaries offer no meaningful response.

Instead, the Staff, DOJ and Cleveland are content to point to each Applicant's "dominance in generation and transmission" in its particular service area (readily admitted below) as reason to infer the existence of monopoly power (see S. Br. at 51-60;

D. Br. at 61-63; City Br. at 47-53). From this shaky premise (see App. Br. at 85-88), it is then argued, in essence, that all conduct which does not affirmatively diminish Applicants' dominance is inconsistent with the antitrust laws under ALCOA,[43/] no matter how neutral the transaction and legitimate the motivation (see S. Br. at 175-81; D. Br. at 63-65; City Br. at 55-56, 59).

Such a simplistic approach, which is by no means compelled by ALCOA (see App. Br. at 97-102), would, if sustained, effectively condemn every sizable utility in the electric utility industry as a "monopolist" operating in a manner inconsistent with the antitrust laws. Section 2 of the Sherman Act never intended such a result (see pp. 57-61, infra; see also App. Br. at 29-35). Its purpose is to promote meaningful competition only where to do so is in the public interest (see FCC v RCA Communications, Inc., 346 U.S. 86, 92 (1953)) -- not to introduce artificial competitive factors into a marketplace where, as here, federal, state and local authorities long ago determined that the public interest required competition to be largely supplanted by regulation, so as to preserve a market structure in which large, integrated utilities could take full advantage of industry technology and scale economies (see App. Br. at 31-34).

This imposition of regulatory restraints is precisely why Applicants have insisted throughout this proceeding that "monopoly power" cannot properly be assigned to them in the present context. Their admitted dominance in generation and transmission within the

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43/ See United States v Aluminum Company of America, supra.

areas they serve simply does not in the circumstances give them an ability -- sometimes thought, in other contexts, to accompany the possession of sizable market shares (see App. Br. at 27-28 n.33) -- to control prices or exclude competition in any relevant market (see App. Br. at 88-89).

The principal response of our adversaries is a general reference to Otter Tail Power Co. v United States, 410 U.S. 366 (1973), aff'g, 331 F. Supp. 54 (D. Minn. 1971), as though that decision conclusively disposes of any such argument and affirmatively establishes that Applicants (or any large utility) possess monopoly power (S. Br. at 181-82; D. Br. at 62; City Br. at 52). We have already noted what we perceive to be fundamental differences between this case and Otter Tail, differences which render Mr. Justice Douglas' majority opinion there of little precedential value here (see App. Br. at 26-27 n.31). Certainly, a finding on stipulated facts that Otter Tail Power Company had "monopoly power" in particular retail service markets in South Dakota and Minnesota provides a poor excuse for leaping to the conclusion on the present record that these Applicants must also be deemed to have "monopoly power" in distinctly different product markets in Ohio and Pennsylvania (see App. Br. at 88-97).

The market analysis depends, of course, on the facts of each case. Some members of the Court in Otter Tail may well have been content to rely on market predominance to infer (albeit questionably) "monopoly power" at the retail level. There, however, unlike Ohio and Pennsylvania, neither Minnesota nor South Dakota

regulated retail prices at that time (see App. Br. at 26-27 n.31), thereby lending some credence to the inference. Such deductive reasoning from market predominance alone does not follow so ineluctably, however, here, where the power to control retail prices has been affirmatively removed from electric utilities and turned over to the Ohio and Pennsylvania regulators (see App. Br. at 54-55).

Nor does the Otter Tail conclusion as to the retail market under scrutiny in that case realistically offer much analytical help in the instant proceeding, where the relevant antitrust inquiry is properly concerned only with wholesale activities (see p. 38, supra). At the wholesale level, the record below makes it clear that Applicants have no ability to control prices (see App. Br. at 54).[44/] Moreover, the economic and legal barriers to entry into

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44/ DOJ and Cleveland argue that electric utilities do have an ability to "set" prices so long as those prices fall within a "zone of reasonableness", and that this latitude undermines our argument as to the impact in this industry of pervasive price regulation (D. Br. at 63; City Br. at 40). The contention is unsound; it apparently rests on a misconception of the rate-making function in the electric utility industry. The so-called "zone of reasonableness" does not have reference to a "zone" in which utilities can manipulate their rates up or down on a frequent basis in order to meet or beat price competition or to extract monopoly profits. To the contrary, the "zone" is for the sole benefit and use of the regulatory agency to insure a proper exercise of its rate review function. Depending on the particular circumstances confronting a utility, the various cost components in a particular rate calculation may be computed in somewhat different ways. Whichever method is used, however, must produce a rate which accurately reflects the cost to serve (see App. Br. at 55 n.62). That rate is then recommended to the applicable regulatory authorities for scrutiny and approval. The agency proceeds to measure the submitted rate under a "reasonableness" standard to verify that it does, in fact, reflect the cost to serve. Thus, the "zone of reasonableness" is a standard by which the regulatory bodies test the utility's recommended rate

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the wholesale for resale market in the CCCT effectively preclude actual or potential competition between Applicants and non-Applicant CCCT entities at the bulk power level (see pp. 40-45, supra; and see App. Br. at 65-71, 93-97). Accordingly, Applicants also have no ability to exclude wholesale competitors.[45/] In light of these proven realities, it is simply inaccurate to conclude, either on the basis of the Otter Tail decision or otherwise, that any of these Applicants, although admittedly dominant in generation and transmission

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44/ (Cont'd)
computations; it is not a "loophole" through which utilities can manipulate their rates without answering to the regulators. Indeed, in light of FPC v Conway Corp., supra, the existence of a "zone of reasonableness" in the rate-making process suggests more, not less, stringent regulatory control in this area.

45/ The Staff, DOJ and Cleveland respond by listing in abstract terms that Applicants have the power to exclude competition by refusing to sell at wholesale, refusing to interconnect, refusing to wheel power, refusing to engage in coordinated activities, and refusing access to nuclear power. Nowhere do they tell us, however, where they find in and around the CCCT the "competition" that would allegedly be excluded by such activities. Certainly, there is no record support for pointing to any of the municipal electric systems, all of whom are already interconnected with one or another of the Applicants (with the single exception of Orrville, which has an interconnection with Ohio Power), and, but for Painesville (see n.39, supra), are taking full or partial requirements power over those interconnections under FPC filed rates (see pp. 43-45, supra). Nor do any CCCT rural electric cooperatives suggest a competititve element which could potentially be excluded (see p. 46 n.42, supra). Moreover, our adversaries have presented no evidence to indicate that any public or private electric entities immediately outside the CCCT offer a realistic prospect for "competition" that might be excluded by such refusals (see App. Br. at 67-71).

Moreover, it is less than forthright for the opposition parties to argue that Applicants have an ability to do such things as refuse to sell at wholesale, refuse to interconnect or refuse to engage in coordinated activities, since the FPC undeniably controls any and all conduct of this sort by electric entities (see App. Br. at 78-82). Indeed, to the extent any doubts in this

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in the areas it serves, has "monopoly power" in the sense that the courts have traditionally used that concept. See United States v E.I. duPont deNemours & Co., 351 U.S. 377, 389 (1956).[46/]

This does not, of course, insulate Applicants entirely from antitrust scrutiny, despite the efforts of the Licensing Board (I.D. at 149 n.*, 191 n.*, 227 n.*, 229-37) and certain of our adversaries (S. Br. at 192; City Br. at 50-53) to recast Applicants' argument in such pervasive terms. There still remains the potential to offend Section 1 of the Sherman Act as a participant in a contract, combination or conspiracy which unreasonably restrains trade.[47/] Moreover, in at least two other respects, the Supreme

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45/ (Cont'd)
regard once existed, they were certainly laid to rest by Otter Tail as well as by decisions of the FPC itself. See New England Power Pool Agreement, FPC Docket No. E-7690 (Nov. 24, 1975) (A-270); Mid-Continent Area Power Pool Agreement, FPC Docket No. E-7734, Opinion 806 (June 15, 1977); Gainesville Utilities Dep't. v Florida Power Corp., 40 F.P.C. 1227 (1968); and see New England Power Co. v FPC, 349 F.2d 258 (1st Cir. 1965). In addition, the FPC has undertaken, in appropriate circumstances, investigations involving charges of monopolization in the electric utility industry. See, e.g., Pacific Gas & Electric Co., 51 F.P.C. 1030 (1974). Nor are utilities free from regulatory constraints with respect to the matter of nuclear access in view of the pre-licensing scrutiny of that question by the NRC under Section 105c. See Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 N.R.C. _____, slip op. at 28 (June 12, 1977). As for the ability of electric utilities to refuse to wheel power, we know of no rational basis for concluding that such conduct alone could have the effect of excluding competition. Indeed, even in Otter Tail, the majority of the Supreme Court considered such conduct "exclusionary" only in the context of accompanying refusals also to interconnect with the requesting entities and to sell them wholesale power -- a situation certainly not found in the CCCT.

46/ See also the discussion in App. Br. at 84-88, 97-102.

47/ We have already set forth in considerable detail our reasons for faulting the findings of the Licensing Board in this area (see

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Court has signalled clearly that electric utilities will not escape antitrust sanctions.

First, where a large utility undertakes to increase its "strategic dominance" (410 U.S. at 377) by intentionally abusing the regulatory process, Otter Tail teaches that such conduct is indeed subject to condemnation under the antitrust laws. Thus, while the existence of a comprehensive regulatory scheme at the federal, state and local levels may preclude a finding of "monopoly power" (see App. Br. at 77-83, 85-89), a Section 2 offense may yet be found upon a showing that the utility set out, as did Otter Tail Power Company, to undermine and circumvent those regulatory restraints by ignoring them altogether, by delaying compliance with administrative orders for needlessly prolonged periods, and by thwarting the sincere enforcement efforts of others through sham litigation tactics. See Otter Tail Power Co. v United States, supra, 410 U.S. at 377-80.[48/] Such misuse of market dominance -- by disregarding the regulatory

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47/ (Cont'd)
App. Br. at 35-40). To the extent that the Opposition Briefs provide any response at all to our exceptions, we discuss those remarks at pp. 76-99, infra. In all other respects, the Staff, DOJ and Cleveland have relied almost exclusively on the statements contained in the Initial Decision, as reflected in the charts attached hereto as Appendix A.

48/ The courts have traditionally viewed such abuses of the administrative process as deserving of antitrust liability. See, e.g., Keogh v Chicago & N.W. Ry., 260 U.S. 156 (1922) (unlawful conspiracy to fix prices abused rate-making function of ICC); United States v Joint Traffic Ass'n, 171 U.S. 505 (1898) (similar); United States v Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (similar); Pennsylvania Water & Power Co. v FPC, 193 F.2d 230, 236 (D.C. Cir. 1951), aff'd, 343 U.S. 414 (1952).

constraints on market activities that would, if adhered to, ordinarily prevent such conduct -- might well justify a conclusion similar to that reached in Otter Tail that the utility had violated the "attempt to monopolize" clause of the Sherman Act (410 U.S. at 377). Significantly, however, the record in the instant proceeding suggests no such behavior on the part of any of the Applicants; nor did the Licensing Board find to the contrary.

Second, in its recent decision in Cantor v Detroit Edison Co., supra, the Supreme Court, while unable to muster a majority position, indicated that an electric utility will not be permitted to use its dominance in the retail distribution of electricity, which is "pervasively regulated" (428 U.S. at 581, 584), to gain a competitive advantage over other suppliers in an entirely separate product market (i.e., the distribution of electric light bulbs), which is "unregulated" (id.). In such circumstances, whatever public interest considerations argue against antitrust condemnation of certain activities of a dominant utility in connection with its regulated conduct (see App. Br. at 31-34), antitrust

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49/ Cleveland's argument regarding certain of CEI's conduct in connection with the FPC-ordered interconnection tends to suggest (albeit indirectly) that CEI employed dilatory tactics in order to avoid complying with the administrative directives (see City Br. at 108-18). Such insinuations are belied by the factual record, as we have already indicated (see App. Br. at 154-71). In point of fact, the delays in implementing the FPC orders to interconnect are due to Cleveland's conduct, not CEI's (see App. Br. at 163-69). And, as the federal district court has already found, it is Cleveland, not CEI, which in a very real sense can be faulted for abusing the administrative and judicial process. See Exhibit A to Applicants' opening Brief.

enforcement of its behavior in an unregulated sector of the economy will not be tempered (428 U.S. at 595-96, 598). We have no fundamental disagreement with this legal principle, but it undeniably has no application whatsoever to the present proceeding.[50/]

Far from presenting either an Otter Tail or Cantor situation, what is involved here is simply a laundry-list of challenges to the individual and collective action taken by these Applicants in connection with the daily operations of their vertically-integrated electric power systems. As already developed in our opening Brief, the facts of record do not support the charges made (see App. Br. at 12-25, 139-282; and see Appendix A, infra). Moreover, to the extent that the findings below and our adversaries' arguments here depend on reasoning which suggests that the conduct in question represents an exercise of "monopoly power" which has the effect of substantially lessening competition in the distribution of electricity in the CCCT (either at retail or wholesale), they are infirm. The record in this proceeding shows in no uncertain terms that none of these Applicants has the ability, despite its dominant position in the marketplace, to control prices or exclude competition. It also demonstrates that there are, as a practical matter, no actual or potential competitors in the CCCT likely to enter the relevant wholesale market. In the face of this hard evidence, the theoretical assumptions to the contrary made by the Licensing Board,

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50/ There has been no allegation in this proceeding, let alone the introduction of any evidence, suggesting that any of these Applicants has used its dominance in the regulated sector of the electric power market as a wedge to enter or gain a competitive advantage in some other non-regulated market.

and readily accepted by the Staff, DOJ and Cleveland, are to no avail.

D. THE LICENSING BOARD'S CONCLUSION THAT APPLICANTS HINDERED OR PREVENTED NON-APPLICANT CCCT ENTITIES FROM ACHIEVING THE BENEFITS OF COORDINATED OPERATION AND DEVELOPMENT RESTS ON IMPROPER LEGAL CRITERIA

The Licensing Board identified as a central issue in the present antitrust review whether Applicants had exercised an ability to hinder or prevent access to the benefits of coordinated operation and development in a manner inconsistent with the antitrust laws (see Prehearing Conference Order No. 2, Broad Issues A and B). Its modus operandi for answering this question was to view Applicants' alleged conduct under one of three legal standards -- all of which have no application in the context of the present hearing and provide an erroneous legal framework for assessing the challenged behavior. Thus, in some instances, the Licensing Board based its antitrust findings on the rationale that transactions neutral on their face are to be condemned without any specific showing of anticompetitive motivation if those transactions have an "exclusionary effect on the market" (see I.D. at 24-25). Elsewhere, the Board was content to fault collective action of Applicants as being per se unlawful, thereby avoiding entirely the legitimate explanation or business justification sustaining the reasonableness of the challenged practice (see I.D. at 20-21). Finally, in a few instances, the Licensing Board measured alleged misconduct in terms of "[t]he fashion in which Applicants deal with one another in comparison to

their treatment of other electric entities in the CCCT area" (see I.D. at 12, 21-22). While each of the opposing parties endorses the use of these three legal criteria, their Briefs offer no better justification for relying on them in the context of this proceeding than did the Initial Decision. Nor has an effort been made to respond to Applicants' fundamental disagreement with the Licensing Board's approach in this regard. We see the need, therefore, to make but a few supplementary observations in reply.

With respect to the extraordinarily strict standard announced in ALCOA, supra, each of the opposition parties invokes the often-quoted holding of Judged Learned Hand as dispositive of many of the antitrust considerations here (see S. Br. at 175-82; D. Br. at 63-65; City Br. at 55-59). Yet, nowhere does the Staff, DOJ or Cleveland so much as acknowledge, let alone respond to, Applicants' argument that the underlying theory of ALCOA is simply inapposite in a setting like the electric utility industry, where economic and regulatory factors (see pp. 24-36, supra,) universally produce large, fully-integrated, natural monopolies (see App. Br. 98-100). Instead, Cleveland seeks to cast doubt on the distinguishing characteristics of this industry by listing a number of so-called "exclusionary" practices which Applicants purportedly engaged in deliberately, and not as an inevitable consequence of "natural monopoly forces or superior business acumen" (see City Br. at 56-57). A reading of the list is enough to expose the unsoundness of Cleveland's argument. The "acquisition and merger of many small entities which once existed in the CCCT" (id. at 56), is, indeed, an inevitable consequence of

industry scale economies and technological development (see App. Br. at 45-50, 100-02). No less inevitable in this market setting is that "Applicants should anticipate increases in the demand for power and install new generating capacity to meet that demand" (id.). In fact, such foresight and planning is insisted upon not only by the regulatory agencies but also by Applicants' customers, both retail and wholesale.

In this regard, it bears repeating that Applicants, unlike any municipal or rural electric cooperative, have a public utility responsibility to serve all customers in the respective geographic areas in which they hold themselves out to the public to provide electric service (see App. Br. at 12; Ohio R.C. §§ 4905.04 & 4905.22; 66 P.S. §§ 1171, 1182 & 1183). By necessity, Applicants must carefully plan their systems to meet this obligation. And in carrying out those plans, Applicants, like all private utilities, are particularly careful to impose cost controls so as to avoid seeking substantial rate increases from regulatory authorities (cf. Gerber 11485-86(16-25 & 1-2)). The most obvious cost control is Applicants' program to install additional generating and transmission facilities at the most opportune time -- that is, to plan to meet all new loads with the minimum acceptable level of generating and transmission capacity consistent with financing conditions. That is not, however, the end of the matter. Applicants also attempt to take steps to ensure that once an investment has been made in the needed capital facilities, those facilities are utilized to their maximum capability. Thus, there arises both a need for, and a desirability of, ancillary

arrangements aimed at avoiding a wasteful duplication of capital-intensive facilities. Significantly, such action is not normally contemplated by an aluminum or shoe manufacturer, for example, who is in a position to make its own demand-supply decisions. And, it is precisely because of this basic distinction between the essential management freedom available to an aluminum ingot manufacturer in a more typical, unregulated industry, but unavailable to an investor-owned utility in this industry, that the ALCOA reasoning fails to provide meaningful guidance in ascertaining the true nature of the "situation" that Congress directed this Commission to scrutinize for antitrust inconsistencies under Section 105c.

Cleveland's remaining litany of "objectionable" practices does nothing to undermine this conclusion. Reference is made to certain conduct by named Applicants which Cleveland views as territorial allocation arrangements, including the 90-day disconnect provision in the Buckeye agreements (City Br. at 57). Far from being worthy of condemnation under a misapplication of ALCOA, however, the actions taken in this regard were not only dictated by the economic and technological characteristcs of this industry (see App. Br. at 60-65), but even had the support of state policy and law (see App. Br. at 51-53), and in the case of the 90-day disconnect provision, the advance antitrust clearance of the Department of Justice (see App. Br. at 207-08). Nor is there any logic to faulting Applicants' decisions with respect to CAPCO "membership", either at the time of formation or thereafter (City Br. at 57), in light of industry characteristics that dictate which systems are, and which

systems are not, feasible members of a power pool (See App. Br. at 102-05). As to the rest of Cleveland's charges concerning "refusals" to interconnect or to wheel power (City Br. at 57), we agree that the negative attitude which Cleveland would like to ascribe to some of the Applicants is "not inevitable"; and, indeed, the record below confirms that the Applicants themselves adopted in each such instance an entirely different posture.[51/]

The central point which none of the opposing parties cares to address still remains: the electric utility industry is, by its very nature, monopolistically oriented. In view of this recognized characteristic, actions taken by the dominant utilities in the market place which may theoretically have an "exclusionary effect" are often a product of the very regulatory framework designed to preserve the existing market structure, and are not undertaken to exploit the market as an unregulated monopolist might. What may superficially appear to be "anticompetitive" is, in reality, of no competitive consequence whatsoever because industry economies and established legal restraints leave little, if any, room for meaningful competition to take place (see App. Br. at 56-71). To introduce into this market setting the Licensing Board's reasoning under

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51/ The claim that Duquesne and TECO refused to sell power at wholesale to municipal systems they wished to acquire is dealt with in App. Br. at 268-74 and 186-89, respectively. CEI's so-called refusal to interconnect in parallel with Cleveland without price fixing, to wheel power, and to sell maintenance power to Cleveland are discussed in App. Br. at 157-58, 171-76 and 161 n.190. OE's alleged "refusals" to wheel for WCOE and for Buckeye are treated in App. Br. at 229-30 and 230, 232-34. Duquesne's response to the charge of a refusal to interconnect with Pitcairn is set forth in App. Br. at 268-71. Finally, the claim that Applicants refused to grant municipal systems in the CCCT nuclear access is answered in App. Br. at 136 & n.159.

ALCOA -- without regard to the fact that Judge Learned Hand's discussion in that case focused on the behavior of a monopolist which had emerged (perhaps even legitimately) as the controlling force in a competitive market structure where, unlike here, open competition among a number of firms was the desired result -- is automatically to indict the electric utility industry as a whole, and condemn all private utilities therein under the antitrust laws irrespective of the reasonableness of their actions. The "public interest" (which was admittedly ignored below) has, most certainly, been poorly served if that is to be the consequence of Section 105c review.

Much the same reasoning reinforces our objection to the Licensing Board's formalistic application of per se rules here to measure collective conduct of Applicants. Each of the opposing parties argues that per se treatment is appropriate in this context (S. Br. at 183-88; D. Br. at 54-59; City Br. at 63-64, 98-102), but, again, without offering good grounds for disagreeing with our position.

It is unquestionably the case, as noted in our opening Brief (see App. Br. at 36-40), that in this industry there cannot be found "considerable experience" demonstrating that the conduct being challenged has a "pernicious effect on competition" or "lack[s] * * * any redeeming virtue." See Continental T.V., Inc. v GTE Sylvania, Inc., supra, 45 U.S.L.W. at 4831-32. In its most recent decision in this area, the Supreme Court in Continental T.V. emphasized that "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive" (45 U.S.L.W. at 4831; emphasis added). Noting that this test raised "demanding standards"

(id.), the Court insisted that any "departure from the rule of reason standard must be based upon demonstrable economic effect rather than -- as in Schwinn -- upon formalistic line drawing" (45 U.S.L.W. at 4834; emphasis added). The Licensing Board's per se treatment of the alleged group boycott and territorial agreements that it so readily condemned below runs directly contrary to this instruction and cannot prevail.

With specific reference to the findings of the Licensing Board of a "group boycott", Applicants have insisted throughout this proceeding that indiscriminate use of the per se doctrine in this area is inconsistent with prior case law, since some preliminary showing of exclusionary intent as a principal motivation for taking the collective action is required before courts will attach the per se label (see App. Br. at 107 n.126). Neither the Staff (S. Br. at 188) nor DOJ (D. Br. at 56-57) appears to be in disagreement with this understanding of the law, while Cleveland does take exception (City Br. at 99-102).[52/] However, all three of our adversaries

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52/ Staff and DOJ do argue in identical footnotes (see S. Br. at 187 n.245; D. Br. at 56 n.49) that Applicants' erroneously rely on Silver v New York Stock Exchange, 373 U.S. 341 (1963), as support for the theory that the courts have routinely eschewed the per se approach when there exists government regulatory policies in conflict with antitrust policies (see App. Br. at 36, 38-40). However, it is the Staff and DOJ who misread Silver. Because the Court there found that the Securities and Exchange Commission did not have jurisdiction to review particular instances of enforcement of exchange rules (373 U.S. at 357-58), it concluded that there was no exemption from the antitrust laws (id. at 358-60). Recognizing that the absence of Commission review and the resulting lack of guidance created enforcement problems for the Exchange (id. at 360), the Court further concluded that "under the aegis of the rule of reason, traditional

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maintain that the Licensing Board found a sufficient anticompetitive motivation in this case to invoke the per se rationale (S. Br. at 188; D. Br. at 56-57; City Br. at 98-99). The record simply does not support such a conclusion.

In this connection, an analysis of those "group boycott" cases where a hybrid per se approach has been taken (see, e.g., Klor's, Inc. v Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originator's Guild of America, Inc. v FTC, 312 U.S. 457 (1941)), reveals that the element of "exclusionary intent" has been clearly evidenced from the coercive nature of the refusal to deal itself. Thus, where a group is organized as a private or extra-judicial tribunal to police the market activities of both member and non-member companies, as, for example, a boycott of discount operations as part of a scheme to stifle price competition (compare Klor's and FOGA), there is little difficulty in establishing the necessary intent. Here, by comparison, the Licensing Board made no findings that the

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52/ (Cont'd)
antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act" (id.). Therefore, the final question decided by the Court was whether the act of self-regulation involved in Silver was justifiable (id. at 361). Finding that fair procedures were not afforded to the complaining broker-dealers (id. at 361-67), the Court held the self-regulation to be unreasonable "because the collective refusal to continue the private wires occurred in totally unjustifiable circumstances" (id. at 361). For Staff and DOJ to assert that in Silver the reasonableness of the boycott involved was not determined is a gross distortion of the Supreme Court's holding.

Cleveland's review of the cases leads it to the conclusion that Applicants' statement of the law is incorrect (see City Br. at 99-102). However, the excerpted portions of the decisions cited by Cleveland only confirm the validity of our original position, and we are at a loss to understand on what basis Cleveland draws a different conclusion.

refusals of CAPCO participation to Pitcairn and Cleveland had any coercive intent (see App. Br. at 106-11), but instead rendered some vague findings of anticompetitive motivation on the basis of a clear misreading of deposition testimony and documents.[53/] Thus, not even the threshold finding required by Klor's and its progeny was warranted here. Moreover, in light of the obvious lack of judicial and administrative experience in assessing pooling arrangements, such as CAPCO, further inquiry into the underlying reasons for entering into contractual agreements of this nature should have shaped the antitrust review on this matter. However, the evidence supporting the reasonableness of the pooling actions undertaken by the CAPCO companies was conveniently overlooked below; it is, to say the least, overwhelming (see App. Br. at 108-11, 144-45),[54/] and

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53/ Both DOJ and Cleveland place primary reliance on an excerpt from the deposition testimony of Mr. Lindseth (see D. Br. at 158-59; City Br. at 72-73). We have already responded to that testimony (see App. Br. at 18 n.23), as well as to the other evidence allegedly supporting a finding of exclusionary intent (see App. Br. at 15-22; Brief on Behalf of Applicants in Opposition to Exceptions Filed by the City of Cleveland at 16-17 & n.14). We find particularly disturbing Cleveland's statement that "Mr. Lindseth testified that the reason cooperatives and municipal systems were not invited to join was because CAPCO was to be an organization limited to investor-owned utilities" (City Br. at 73). This reformulation of what was actually stated includes two self-serving assumptions which do not even lurk between the lines: first, that Mr. Lindseth was speaking about cooperative and municipal systems, and, second, that Mr. Lindseth gave as a reason for not extending an invitation to cooperative systems the fact that they were not investor-owned utilities. In point of fact, Mr. Lindseth's testimony plainly relates only to cooperative systems; moreover, nowhere does he use the term "investor-owned utilities." His reference, instead, is to "utility companies," which, as we understand the testimony, connotes nothing more than Mr. Lindseth's accurate observation that the cooperative systems in Ohio did not at that time have any independent generating resources and therefore could not meaningfully participate in CAPCO.

54/ We note in passing what should be self-evident: that neither as to Cleveland nor Pitcairn was there an absolute refusal to deal,

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serves to underscore in dramatic fashion the error of resorting in this context to an unthinking per se analysis.

Similarly, per se condemnation of territorial agreements allegedly entered into by CEI, TECO, OE and PP is entirely inappropriate here, notwithstanding the insistence of our adversaries to the contrary (see S. Br. at 184-86; D. Br. at 57-59; City Br. at 63). To the extent that such agreements existed -- and some clearly did not (see App. Br. at 182-83, 190-92, 236 n.263) -- they are irrelevant to the present antitrust inquiry, both because they concerned only retail sales (and thus had no relationship to the relevant market under scrutiny) and because all such agreements have admittedly terminated (and thus do not form a part of the current situation in any of Applicants' service areas). See pp. 13-24, 38, supra, and see App. Br. at 192-94, 234-35. Moreover, as we have already described in our opening Brief, there are sound justifications in this industry for territorial agreements of the sort challenged here (see App. Br. at 60-65, 189-99, 234-43, 256-57).

54/ (Cont'd)
as, for example, was the case in Otter Tail. While the opposing parties recognize that Cleveland's requests for CAPCO participation and nuclear access may have been inconsistent, they each argue that the requests could have been read in the alternative (see S. Br. at 173-74; D. Br. at 169; City Br. at 83-84). We agree; CEI did, in fact, read them in the alternative and therefore made a bona fide counterproposal of nuclear access that it had every reason to believe gave Cleveland exactly what the municipality was really seeking. In such circumstances there simply has been no refusal to deal.

With respect to Pitcairn, the evidence shows that, while DL thought Pitcairn's participation in CAPCO would be impractical, it was the borough itself that did not pursue further its request to join CAPCO (see App. Br. at 275 & n.296). In addition, DL's negative reaction to pool participation did not leave Pitcairn without an alternative source of bulk power since DL had always offered to sell Pitcairn emergency power and reached final agreement to sell the municipality wholesale power in 1970 (see S-126).

The Staff, DOJ and Cleveland do not seriously contest Applicants' basic position on this latter point. Rather, the opposition parties claim that lower court cases[55/] establish the propriety of applying per se rules to territorial agreements among electric utilities. Ignored are those decisions refusing to find such agreements unlawful.[56/] While we do not believe that this split in judicial precedent, in and of itself, establishes the lawfulness of such agreements, we do think it provides more than sufficient support for reviewing such agreements under the "rule of reason" standard, especially in light of the Supreme Court's most recent admonition against "formalistic line drawing" in Continental T.V., supra, 45 U.S.L.W. at 4831 n.13, 4834.

In undertaking such an evaluation, the correct mode of analysis is that followed by the court in United States v Pan American World Airways, Inc., 193 F. Supp. 18 (S.D.N.Y. 1961), aff'd on other grounds, 371 U.S. 296 (1963). There the Department of Justice challenged as anticompetitive a territorial division between Pan American

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55/ Both the Staff and DOJ assert that the Supreme Court held territorial agreements among electric utilities to be per se unlawful in Otter Tail. That is inaccurate. In Otter Tail, the defendant attempted to justify its absolute refusals to deal by reference to contracts with the Bureau of Reclamation that allegedly precluded the electric utility from wheeling the requested power. The Supreme Court merely held that the contracts could not be used by way of defense (see 410 U.S. at 378-79). There was no conclusion in the Court's opinion that those agreements constituted an independent violation of the Sherman Act. The Court did not have to decide that issue given its disposition of the rest of the case; therefore, it still remains an open issue.

56/ See, e.g., Intermountain Rural Electric Association v Colorado Central Power Co., 135 Colo. 42, 307 P.2d 1101 (1957); Weld v Gas & Electric Light Commissioners, 197 Mass. 556, 84 N.E. 101 (1908); City Gas Co. v Peoples Gas Systems, Inc., 182 So. 2d 429 (Fla. 1965) (gas); Peoples Gas System, Inc. v City Gas Co., 167 So. 2d 577 (Fla. App. 1964) (gas).

Airlines and W. R. Grace and Company, whereby their jointly-owned subsidiary, Panagra, was to have the exclusive right to traffic along the West Coast of South America south of the Canal Zone, while Pan American was to be free from competition elsewhere in South America and between the Canal Zone and the United States. The district court explicitly rejected the Department's suggestion that it take a per se approach (see 193 F. Supp. at 22); it upheld this market-division arrangement as reasonable in the circumstances. In a part of its opinion which was not challenged on appeal, the court stated:

> Consideration of defendants' agreement or understanding with respect to the respective spheres of operations for the two airlines, when viewed in the light of the conditions under which they undertook, as foreigners, to establish an American system of international aviation in South America, the policy of this government and its stake in fostering their efforts, and the dedication of public monies involved, as well as the relation of the parties one to the other and the nature of the industry itself, compels the conclusion on our part that it involved no violation of the antitrust laws. [193 F. Supp. at 33-34.]

Likewise, the underlying market conditions, government policies, relationship of the parties involved, and nature of the industry itself, should be an integral part of the antitrust assessment of the territorial arrangements challenged in this proceeding to the extent they are at all relevant to the present inquiry (see p. 65, supra). The Licensing Board's failure to proceed in such a manner is reversible error.

Nor is it an adequate retort to assert, as does the opposition (S. Br. at 138 n.204, 183; D. Br. at 50 n.46, 55 n.48; City Br. at 102), that the Licensing Board, notwithstanding its abrupt dismissal of Applicants' arguments by application of the per se doctrine,

took the further step of finding Applicants' activities also unreasonable. An examination of those occasions in the Initial Decision where lip-service was given to the "rule of reason" standard demonstrates that only rarely did the Licensing Board provide any analysis of the reasonableness or unreasonableness of the challenged conduct. In its own defense, the Board below has stated: "Repeating 'unreasonable' after the description of each unjustified anticompetitive action would add little to the opinion except extra pages" (L.B. Stay Order at 12). That response serves only to magnify what we perceive to be the basic failing of the Board's review effort in this proceeding. Evaluation of the reasonableness of Applicants' conduct is not limited to attaching one or another label. Rather, it requires application of a particular mode of analysis -- as, for example, that set forth by Mr. Justice Brandeis in Chicago Board of Trade v United States, 246 U.S. 231 (1918) -- to the facts of record. Acceptable administrative practice requires that both Applicants and this Appeal Board be apprised of exactly what standard of reasonableness was used below and how that standard was applied to the facts (see App. Br. at 138-39). Failure to include such essential findings renders the ultimate conclusion suspect since no reviewer of the proceeding can determine if the proper legal standard was applied in the proper manner.

On this score, the Licensing Board is particularly vulnerable, since, from what Applicants have been able to garner from the loose language of the Initial Decision, an improper standard of "reasonableness" was employed below in those instances where a per se response was not given. Thus, the Board seems to have used as a

"rule of reason" measurement that "[t]he existence of a situation inconsistent with the antitrust 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" (I.D. at 12; see also App. Br. at 102-05). None of the opposing parties adopted this test of reasonableness, nor did they try to defend the conclusions reached by the Licensing Board on the basis of this misguided standard -- and with good reason. For, resort to such a simplistic comparative analysis in the electric utility industry fails to take account of the controlling consideration that must be an element of all coordinated power transactions if they are to remain viable, namely, that there be a sufficient degree of mutuality to ensure a net benefit to all parties to the transaction (see App. Br. at 102-04).

Recognition of this mutuality concept as an integral aspect of coordinated operations between and among electric utilities is well developed in the record (id.). The Staff's economic expert alluded to its importance in testifying that one of the ways in which market power could be exercised in this industry would be in the "refusal to engage in economically efficient transactions" (see S-207 (Hughes) 8(7-10)).[57/] The efficiency of a transaction necessarily

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57/ This testimony apparently formed the basis of the Licensing Board's conclusion that OE and PP possessed and used "the power to refuse to engage in transactions which would otherwise be economically beneficial * * *" (I.D. at 107-08). Applicants willingly accept that test as the appropriate standard. Our objection arises because nothing said thereafter by the Licensing Board with respect to OE and PP, or for that matter with respect to any other Applicant, indicates a refusal to engage in "economically beneficial" transactions. The net benefit theory discussed in our opening Brief is entirely consistent with the Licensing Board's own standard, by providing a method of analysis to determine whether any proposed transaction is, in fact, "economically beneficial."

refers to both the costs and benefits received by each party to the arrangement. Obviously, where the costs to one party exceed the benefits received by that party, the transaction is not "efficient" and one would not expect to see it consummated.[58/] In this regard the "net benefit theory" provides an accepted method in the electric utility industry by which to determine whether the costs each party must bear exceed the benefits to be derived from the transaction, and thus assess its viability. See Consumers Power Co., supra, 2 N.R.C. at 34-35 & 64-66.

Each of the opposing parties takes exception to Applicants' discussion of the net benefit theory, although not always for the same reasons (see S. Br. at 40-43, 66-70; D. Br. at 14-31, 152-58; City Br. at 65-70). Thus, DOJ asserts that Applicants' analysis in this area erroneously focuses only on the benefits to be received as a result of entering into a coordinated arrangement, while the proper focus should be, instead, on the burdens to be incurred (D. Br. at 153-54). We will not take the time of the Appeal Board to reiterate our position here. It can readily be seen from a review of our opening Brief (see App. Br. at 102-04, 108-09, 110-11), as well as from a reading of the testimony of Messrs. Slemmer (see A-121) and Firestone (see A-122), that Applicants' understanding of "net

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58/ Moreover, if an objective economic and engineering analysis of the proposed transaction shows that one party will not receive a net benefit, there is no logical basis to infer that a refusal to engage in the transaction is motivated by an exclusionary motive or intent. It is clear beyond peradventure that in the absence of any such sinister motive or intent an individual company is free to exercise its own independent discretion as to the parties with whom it will deal. See United States v Colgate & Co., 250 U.S. 300, 307 (1919). It is also a well-recognized principle of antitrust law that a group of companies may collectively refuse to deal with another party, if such a refusal is reasonable and so long as there is no showing of exclusionary intent (see pp. 62-64, supra).

benefit" requires, just as the term itself suggests, an assessment of both the burdens and the benefits likely to result from any transaction (see also Slemmer 8966-67(5-24 & 1-6)). DOJ's contrary argument that burdens alone are the relevant measurement finds no support in logic, the record below, or a fair reading of the decision by the FPC in Gainesville (40 F.P.C. 1227 (1968)).[59/] Obviously, without any knowledge or appraisal of the gains or benefits each party is likely to receive from the transaction, it is not possible to assess adequately the complications or burdens resulting from the transaction. In addition, since the success of coordination depends on the willingness of each participant to make maximum use of the coordinated facilities and operations, unless each participant anticipates significant benefits for itself, it will have no incentive to maximize the extent of its coordination (see, e.g., A-121(Slemmer) 8-9(23-26 & 1-20); Slemmer 8968-69(15-25 & 1-25), 8977(15-20), 8978-81). To ignore these considerations, as DOJ would have it,

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59/ DOJ cites Gainesville as precluding any consideration of benefits to be derived (see D. Br. at 153-54). However, the reproduced portion of the decision relied upon does not, when read in context with the immediately succeeding sentences which explain the factual limitations of the holding, support DOJ's argument. Thus, the FPC stated (40 F.P.C. at 1237):

> In the course of negotiation of voluntary pooling arrangements, benefits received may, on occasion, serve to offset burdens imposed in determining the appropriate charge for particular services rendered or facilities supplied. But where, as here, the cost of providing such services and facilities and the appropriate charges therefor have equitably been determined after a careful analysis and apportionment of the burdens and responsibilities of each party, there is no basis for any further consideration of relative benefits as proposed by the Examiner. [Emphasis added.]

misconceives the very nature and purpose of the contemplated transaction.[60/]

DOJ makes the additional argument that Applicants' net benefit theory impermissibly requires that the benefits accruing to both sides of the transaction be equal (D. Br. at 154-55). This is clearly not the case. Rather, as carefully stated in our opening Brief, "[m]utuality is present if it can reasonably be expected that the benefits one party derives and the responsibilities he undertakes will accrue in similar fashion to all parties in the coordinating transaction" (App. Br. at 103; emphasis added); there is no requirement of absolute equality. That does not mean, however, that the responsibilities and benefits of the various participants can differ greatly. DOJ states to the contrary only because it misreads Mr. Slemmer's testimony as indicating that it makes "no difference from an engineering standpoint if one pool member takes more than it puts into the pool" (D. Br. at 155). Mr. Slemmer was quite definitely of a different viewpoint.[61/]

60/ While DOJ also claims that Applicants "apparently subtract from their benefits the business they will lose to the system with which they coordinate due to that system's increased ability to compete" (D. Br. at 154), this assertion is simply not true. Nowhere in Applicants' opening Brief was such an argument advanced. Moreover, DOJ's claim assumes that Applicant and non-Applicant entities engage in meaningful competition in some relevant market, an assumption that we have previously indicated is erroneous (see pp. 24-26, 36-46, supra).

61/ Mr. Slemmer unequivocally testified that it does make a very practical difference if some members take more than they put into the pool, since the other pool participants will stop working on pool-related problems and "[i]n the end, the pool will fold up" (Slemmer 8988-89(21-25 & 1)). Following several questions by the Chairman, Mr. Slemmer agreed that if one member took more than it

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A similar misunderstanding of Mr. Slemmer's testimony underlies DOJ's objection to Applicants' reference to the need for coordinating parties to be able to provide like services (D. Br. at 155-56). Both the Staff (see S. Br. at 66-70) and Cleveland also dispute this point (see City Br. at 66). The contrary position advanced by our adversaries is that, in a coordination transaction, money is acceptable as an adequate substitute for like services (see e.g., D. Br. at 155, 160 n.202). Curiously, Mr Slemmer's testimony is used to support such a proposition. What Mr. Slemmer actually stated, without contradiction, is that, if a pool participant were continually to purchase services from the pool, some other kind of arrangement would be more beneficial to the parties (Slemmer 8989 (8-10)); that while receipt of money is, of course, a benefit, if only money is transferred some arrangement other than pooling is more desirable since the pool arrangement is too complicated for that situation (Slemmer 9021(3-9)); and that if an entity brought only money to the pool, pool participation would not be appropriate (Slemmer 9165(2-15)). This testimony hardly suggests the conclusion which the Staff, DOJ and Cleveland would like to reach.[62]

61/ (Cont'd)
put in there would be no "equipment reason" why the pool could not operate (Slemmer 8989(11-14)); he was still of the opinion, however, that there would remain significant "system operating" problems associated with such a situation (Slemmer 8989(18-25)).

62/ It is true that in any pool relationship the final equalization among the participants is by money, and Mr. Slemmer clearly recognized this (see Slemmer 9043(13-23)). However, that is no basis for concluding that all services can always be purchased. The very word "pooling" connotes the bringing together of various resources for the common benefit of the group. In CAPCO, for example, service

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The Staff compounds its misreadings of Mr. Slemmer's testimony by continually misciting it for the proposition that non-generating and non-transmitting systems can meaningfully participate in pooling arrangements.[63] This subject was raised during a line of questioning by Staff counsel. Mr. Slemmer was asked if a non-generating electric system could be a contributing member of a power pool (Tr. 9036-37(25 & 1-2)). He responded very directly: "I would not say they could not. It would be a very special case" (Slemmer 9037(3-4)). And in response to whether a utility with generation but no transmission could be a contributing member of a power pool, Mr. Slemmer answered: "It is conceivable, yes" (Slemmer 9038(8-11); see also Slemmer 9038(21-24)). Finally, when asked if a system with no generation and no transmission could offer benefits to a pool, Mr. Slemmer testified. "I hate to say anything

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62/ (Cont'd)
schedule A (Replacement Capacity and Replacement Energy) is the pricing tariff pursuant to which Applicants undertake maintenance power and emergency power transactions. That schedule provides no demand charge for Replacement Capacity. Rather, compensation for capacity and energy actually received is effectuated through a return-in-like-kind arrangement under the so-called "banking principle" (S-202, service sch. A, §§ 2.1-2.2 & 3.1-3.2). The impact of the banking principle is to allow each CAPCO company to replace the power borrowed from another system at its (the borrower's) own system costs. Consequently, from an economic standpoint, the situation gives every appearance of the borrowing company supplying its own reserves (Schaffer 8562(12-18)). This remains so notwithstanding provisions for a monetary payback should borrowed capacity and energy not be returned in-like-kind within a given period (S-202, service sch. A, appendix I). In practice, the CAPCO companies have not sought monetary repayment but have been willing to wait until the need arose to take payment in-like-kind (Schaffer 8585(12-15)).

63/ It is interesting to note that the Staff's mischaracterization of Mr. Slemmer's testimony appears not once, but is repeated throughout the entire Staff Brief (see S. Br. at 68-69, 161, 174; see also D. Br. at 160 n.202).

is impossible. You have got it limited to where it is hard to see where there would be any benefit" (Slemmer 9039(14-19)). These are the statements which serve as the bases for the Staff's misleading assertion. If anything, they highlight the incompatibility of distribution-only systems in the pooling context.[64/]

In the final analysis, nothing is contained in the Opposition Briefs which undermines in any way the evidence below confirming the importance of the mutuality concept to coordinated transactions in the electric utility industry (see App. Br. at 102-04). The Licensing Board's refusal to assess the collective and individual actions of the Applicants in terms of a "net benefit" analysis which ensures mutuality makes a mockery of its lip-service to a "rule of reason" standard. Clearly, the approach urged by Applicants does not deprive small electric systems which are capable of assuming their proportionate share of the responsibilities from participating in such arrangements (see App. Br. at 104). Nor does it deprive those systems incapable of doing so of the benefits of coordination (see App. Br. at 104-05). Yet, of equal importance, it does not permit blanket condemnation of the legitimate action of large electric systems in rote fashion for failure to operate in this

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64/ Several times the opposition parties argue that, even if requests by non-Applicant entities for full participation in CAPCO were unreasonable, Applicants had an obligation to seek out alternative forms of participation (see, e.g., D. Br. at 168 n.219). We know of no antitrust principle that requires such action on the part of Applicants. Had alternative forms of participation been proposed, Applicants would have studied those proposals. But to say that Applicants had an affirmative obligation to undertake what necessarily is, and should be, the responsibility of the non-Applicant systems, is to fault unfairly Applicants for inaction on the part of the non-Applicant entities.

particular industry in the same manner as firms are required under the antitrust laws to operate in other sectors of the economy where competition is deemed essential to the public interest. The failure of the Licensing Board and our adversaries to appreciate this fundamental point explains in large part the substantial error committed below.

E. THE LICENSING BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW DIRECTED AGAINST THE INDIVIDUAL APPLICANT COMPANIES ARE ERRONEOUS

The Licensing Board's errors in antitrust legal analysis are responsible, at least in part, for the infirmities in its treatment of the factual record below. A good deal of evidence explaining Applicants' conduct, and the underlying reasons therefor, was either ignored or considered irrelevant to the inquiry because of the Board's misapplication of the law. In addition, testimony and documents flatly contradicting certain fact findings, and raising serious question as to the accuracy of others, were not discussed, or indeed even disclosed, in the Initial Decision. As a result, Applicants undertook in their opening Brief to identify, and show the relevancy of, the extensive record materials not addressd below.

This effort has not been seriously challenged by our adversaries in their Opposing Briefs. For the most part, whatever responses they have made depend almost entirely on the same arguments that are set forth in the Initial Decision (see n.1, supra; and see Appendix A, infra). Nowhere do the opposing parties dispute that the Licensing Board relied, at best, on but half the record; nor do they provide any grounds for questioning the accuracy

of our reading of the other half. This leaves to the Appeal Board, of course, the task of reviewing the full record below to determine whether the evidence will, when examined in its entirety and under proper legal standards, support the findings and conclusions below. We think not, for the many reasons already stated.

At this stage each Applicant is basically content to rely on its individual fact analysis in the opening Brief, since the utilities' separate statements deal effectively with virtually every argument made by the opposition parties (see Appendix A, infra). The additional observations offered below are simply to ensure that the more egregious mischaracterizations of evidence by our adversaries do not go unnoticed.

Cleveland Electric Illuminating

The discussions in the Opposing Briefs relating to CEI's conduct (see S. Br. at 78-104, 173-74; D. Br. at 93-107, 116-75; City Br. at 91-95, 103-41) add little to the Initial Decision and are largely unresponsive to the arguments made separately by CEI in the opening Brief (see App. Br. at 139-83). Only four points, involving critical evidence totally ignored by the Licensing Board and unconvincingly brushed aside or carefully neglected by the opposing parties, warrant additional attention in reply.

First, Cleveland's complete lack of good faith in making less than bona fide requests for access to nuclear generation and for participation in CAPCO was never addressed by the Licensing Board. Yet, Cleveland's Director of Public Utilities openly admitted to the Utilities and Finance Committees of City Council that it was not the intention of Cleveland to acquire a participation

interest in nuclear generation or to become a participant in CAPCO. The Director's unambiguous statements to this effect are recorded on tape and are fully corroborated by the live testimony and the filed affidavit of the Chairman of the Public Utilities Committee (see App. Br. at 141-45).

CEI's position as to the significance of this evidence is set forth in Applicants' opening Brief (id.). The Staff's response is much the same as that of the Licensing Board, namely, to ignore the matter (see S. Br. at 173-74). DOJ, on the other hand, argues that Cleveland was, in fact, sincerely interested in taking unit power from the nuclear units (see D. Br. at 171 n.223, 174 n.230). And Cleveland, while attempting more strenuously than DOJ to bolster its credibility on the subject (see City Br. at 91-95), in the final analysis makes essentially the same point.[65/] Nowhere, however, is rebuttal made to the fact that Cleveland never had an interest in CAPCO participation or in ownership participation in the nuclear units, even though that is what Cleveland requested from CEI.

65/ Cleveland chooses to color its response by arguing that its lack of bona fide surfaced for the first time late in the proceedings (City Br. at 91). That is untrue; it was argued in CEI's prehearing brief (see "Prehearing Fact Brief of the Cleveland Electric Illuminating Company" at 8, dated December 1, 1976) and in an early discovery motion (see "Application for Subpoenas", dated March 27, 1974). In addition, Cleveland asserts without any support that Aplicants' transcription of the recording was "incomplete and inaccurate" (City Br. at 91), that Mr. Gaul's affidavit was "erroneous and misleading" (id.), and that Applicants' version of the tape recording was incomplete (id. at 93). The first two charges are baseless; the last is inaccurate. CEI offered into evidence as much of the tape recording as it possessed. Cleveland's version admittedly had a few more immaterial words at the end, but that is only because, until the end of the hearing when Cleveland's tape was produced, Cleveland incorrectly insisted that it did not possess a copy of the tape recording. Finally, Cleveland makes some ad hominem attacks on the character of Mr. Gaul (City Br. at 91-92). Despite these unwarranted aspersions, the tape recording fully confirms Mr. Gaul's recollection of the City Council hearings.

Moreover, even as to the claim that what the City truly desired was unit power, there is strong reason to question Cleveland's sincerity. In his taped remarks before the City Council, Director Kudukis acknowledged that Cleveland only desired to "tap some power"; he testified below that this quoted comment was meant to have reference to a purchase of unit power (see Kudukis 12741(9-19), 12742(2-11)). Even accepting that explanation at face value (which we find difficult), Director Kudukis' understanding of the term "unit power" indicates that what Cleveland really desired was a firm power schedule (see Kudukis 12742-44). While DOJ attempted at the hearing to educate Director Kudukis on this matter, he ultimately admitted that he personally had not gotten sufficiently involved in the negotiations to distinguish between unit power and firm power or to know the costing details of either transaction (Kudukis 12753(16-25), 12755(10-17)). Such costing details are, of course, the very heart of the matter. If Cleveland's requests were truly in good faith, it is unthinkable to CEI that the Director of Utilities would not be sufficiently knowledgeable to distinguish between unit power and firm power, unless, of course, the only real objective was to gain some bargaining leverage over CEI in an attempt "to tap some power".

Second, the Licensing Board ignored completely the abundant evidence showing that Cleveland had for some time lacked the financial capability to purchase an interest in nuclear generation or to participate in the CAPCO pool. Thus, no weight whatsoever was given below to the long-standing failure of Cleveland to pay CEI for energy CEI supplied to Cleveland. In view of the City's flagrant breach of contractual commitments and open defiance of orders issued by courts and federal agencies (see App. Br. at Exh. A, slip op. at 5-7), it is not

at all surprising that CEI showed some reluctance at times to enter into new arrangements with Cleveland, requiring an even larger expenditure of municipal funds, without first receiving some assurance of payment (both of past debts and prospective commitments) (see App. Br. at 165-66 n.196).

The only response by any party in this regard is DOJ's statement (D. Br. at 169 n.221) that the argument is "interesting" in view of CEI's assertion that Cleveland was capable of spending sums of money to construct its own transmission lines. DOJ has obviously missed the thrust of Mr. Caruso's testimony in this area. The point made by this expert witness was that it would be feasible for Cleveland to build transmission lines today to interconnection points on the edge of CEI's service area at a substantial cost savings to the City (see A-162(Caruso) 21(3-11)). Moreover, Mr. Caruso made the additional observation that, if the lines studied had been constructed in the past, at a time well before Cleveland began experiencing financial problems, the construction costs would have been even lower than computed at the time of the hearing (see A-162(Caruso) 17-18(19-25 & 1), 22(3-7)). The undisputed fact that Cleveland is now heavily indebted to CEI does not suggest any infirmity in Mr. Caruso's conclusions in this regard. Indeed, to the extent DOJ is suggesting that the City's "insolvency" provides an adequate reason for not expecting Cleveland to take such action at the present time, the same reasoning is an even more compelling justification for CEI's reluctance to do further business with the City until its outstanding debts are paid (see App. Br. at 165-66 n.196). This is especially true with respect to the matter of nuclear access, where the costs to Cleveland of participating in nuclear

generation is well above the $12-$16 million that would be needed to build the lines studied by Mr. Caruso; participation in CAPCO would probably cost even more.

Third, since 1971, the relationships between CEI and Cleveland have been under the direct supervision of the FPC. CEI's actions since that time have not been unilateral; they were undertaken pursuant to, and in compliance with, specific orders of the FPC. These orders were issued after extensive adversary hearings, with the full participation of Cleveland and the FPC staff. Not only did the Licensing Board ignore these proceedings, but each of the opposition parties also continues to close its eyes to the impact of this regulatory supervision. For example, DOJ incorrectly asserts that the FPC orders did not prevent synchronous operation of the 69 kv tie (D. Br. at 102 n.98), notwithstanding the FPC's precise directive to the contrary (see App. Br. at 166-67 n.197). In addition, Cleveland continues to argue, on the basis of questionable testimony by Mr. Hinchee, that CEI frustrated Cleveland's construction of the interconnection (City Br. at 116), when reports submitted by FPC personnel supervising the construction found no delay on the part of CEI (see A-100 and A-101).

It is CEI's position, as stated in Applicants' opening Brief (see App. Br. at 139-40), that the Licensing Board is in error in refusing to recognize the orders of sister agencies which impact directly on controverted matters that are deemed part of the antitrust review here. Those administrative directives are no less forceful than the rulings emanating from this agency, and no good reason has yet been offered why they should not be accorded full respect in the present context (see App. Br. at 72-76). Moreover, where parties

have joined issue elsewhere on precisely the same matters that are being argued here, and a sister agency has finally resolved the dispute, the principle of collateral estoppel should bar relitigation of the controversy (see App. Br. at 75).

Fourth, the Staff, DOJ and Cleveland continue to ignore, just as the Licensing Board did below, that there now exists an interconnection between CEI and Cleveland (S-204; A-271) over which Cleveland receives emergency, short-term, limited-term and firm power. Also unacknowledged is the interconnection between CEI and Painesville (S-203) over which Painesville receives emergency, short-term and limited-term power, as well as economy interchange and coordination of scheduled maintenance. These services, when considered together with CEI's general (A-44) and specific (D-192) offers of nuclear access, remove entirely the possibility that activities under the licenses issued for the Davis-Besse and Perry nuclear facilities will create or maintain any "situation" with respect to CEI that could be considered inconsistent with the antitrust laws. The interconnection contracts between CEI and the municipalities in its service area are undeniably at least as much a part of the current "situation" as the alleged conduct of past years on which the Licensing Board rests its erroneous conclusions. No good reason has yet been offered for putting this evidence aside, as was done below. Our adversaries' silence serves only to perpetuate the error, not eliminate it.

Toledo Edison

In almost all instances the Opposing Briefs provide no response to the legitimate objections raised as to the specific

findings of fact and conclusions of law rendered by the Licensing Board against TECO (see App. Br. at 184-212). The Staff is content simply to summarize the Licensing Board's findings (see S. Br. at 104-10), while both DOJ (see D. Br. at 129-51) and Cleveland (see City Br. at 141-47) attempt to obfuscate the paucity of any wrongdoing by TECO behind a screen of well-worn allegations for which no evidentiary support was ever forthcoming.[66/]

In undertaking the comprehensive review called for here, this Appeal Board should not lose sight of the relatively limited nature of the case against TECO. It consists of three elements. First, there is the claim -- similar in form to that rejected by the antitrust review boards in Consumers and Farley and directly contrary to the economic evidence in this proceeding -- that the acquisition by TECO of two small electric systems is inconsistent with the antitrust laws. That argument was fully treated in Applicants' opening Brief (see App. Br. at 185-89). Second, TECO is charged with antitrust indiscretions because of alleged territorial agreements it had with other investor-owned utilities and with its municipal wholesale customers. Again, as to that part of the claim relating to Consumers Power Company, it was specifically rejected by the Consumers board (see App. Br. at 191 & n.222). In any event, we have already shown that such arrangements, if they existed and had any relevancy here (see p. 65, supra), were in the given circumstances entirely reasonable and imposed no significant restraints on competition (see App. Br. at 192-94, 195-99). Third, and finally, TECO is accused of having unreasonably refused to deal

66/ See Appendix A, infra; to the very limited extent that any new record references have been cited by the opposition parties in connection with their discussions of TECO's individual conduct, those references are treated in the marginal notes of the Appendix.

with the cities of Napoleon, Waterville and Bowling Green. This latter element of the TECO case consists of alleged refusals to wheel when there was no power available for wheeling (as in the case of Bowling Green); of alleged refusals to wheel when TECO agreed to provide the requested transmission so long as it was done in conformity with valid, preexisting agreements (as in the case of Napoleon); and of an alleged refusal to sell wholesale power when it is clear that TECO's reluctance to respond affirmatively to a last-minute request had no impact on the already predetermined fate of a mismanaged and poorly operated failing system (as in the case of Waterville). These matters, too, are fully covered in Applicants' opening Brief (see App. Br. at 200-03, 203-09, 186-89, respectively).

In view of our adversaries' inattention to the points TECO has already made, there is no cause to repeat our arguments here. One final observation in reply will suffice, and that relates to the Napoleon matter. The only evidence to support an alleged refusal by TECO to deal with Napoleon is an affidavit executed by William Lewis (see S-127), which DOJ solicited in connection with the instant antitrust inquiry (see Appendix B, infra). That affidavit sets forth Mr. Lewis' stated recollection of three meetings with TECO representatives that took place between ten and sixteen months earlier. Mr. Moran, a TECO representative at those meetings, testified on deposition and before the Licensing Board as to his understanding of what occurred at those meetings. There clearly is a difference of opinion between Mr. Lewis' testimony and Mr. Moran's testimony. The Licensing Board chose to rely on Mr. Lewis' version because it mistakenly believed, on the basis of Mr. Lewis' erroneous representation,

that the affidavit was not prepared for use in litigation (I.D. at 176 n.*). In addition, the Licensing Board perceived certain inconsistencies in Mr. Moran's testimony (id.).

DOJ attempts to magnify the alleged differences in statements by Mr. Moran in a series of footnotes (see D. Br. at nn.177-79, 183, 192) which purportedly describe in detail the inconsistencies relating to Napoleon. A fair reading of the testimony itself will expose the shallowness of this theme.[67/] Moreover, what is readily apparent from a reading of the record as to this matter is that the objective facts of TECO's course of dealing with Napoleon subsequent to the three meetings with Lewis -- and after he had been fired as Napoleon's consultant (D-147) -- fully supports Mr. Moran's recollection of the discussions at the three meetings, not the account set forth by Mr. Lewis. Thus, notwithstanding the Lewis affidavit, TECO did agree to transmit power from Buckeye to Napoleon (see App. Br. at 205), did agree to operate its system in synchronism with Napoleon's system should Napoleon take power from Buckeye (see App. Br. at 205-06), and did agree to consider joint development of large-scale generating facilities (see App. Br. at 210).[68/] To rest a finding

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67/ Thus, when DOJ claims that Mr. Moran did not remember what was discussed, the referenced testimony shows that he was disputing Mr. Lewis' claim that a particular matter was discussed. It was not a lack of memory he was testifying to, but a substantive statement as to matters not brought up at the meetings. And where DOJ asserts that Mr. Moran repeatedly confused the meetings referred to by Mr. Lewis, the testimony it cites indicates only that he was not sure at which of two meetings a particular topic was discussed, though he clearly remembered that it was only discussed at one meeting and not at both meetings. Finally, as to DOJ's claim that Mr. Moran's hearing testimony was inconsistent with his deposition testimony, the Appeal Board can check for itself the consistency of the two (see App. Br. at 204).

68/ DOJ questions the bona fide of TECO's offer to jointly develop new generation with Napoleon and others because DOJ speculates that (Continued next page)

of antitrust inconsistency on an affidavit solicited by DOJ for the present litigation which sets forth a scenario disputed in a number of particulars and contrary to actual fact, as confirmed by TECO's subsequent course of conduct, is wholly impermissible and cannot withstand appeal.

Ohio Edison and Penn Power

From the history of this proceeding (see App. Br. at 1-12, 212-214), it is apparent that the case against Applicants other than CEI was largely the product of afterthought and represented the ongoing development of the standard DOJ and Staff antitrust case against investor-owned utilities, as reflected in what is now essentially the same "laundry list" of charges made against each company to come before the Commission (see p. 2, supra). With regard to OE and PP, three of these charges have been advocated by the opposition parties with increasing vehemence as the proceeding has progressed. Although receiving little, or no, attention in the September 5 Filings, the claims of denial of nuclear access, price squeeze, and refusal to wheel power now form the central core

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68/ (Cont'd)
if TECO were to take part in such a venture it would first have to obtain CAPCO approval, which it has not yet done (see D. Br. at 151 n.196). The testimony, however, indicates that if it were determined that a transaction with a third party would adversely affect the other CAPCO companies, Executive Committee approval is necessary (see Schaffer 8557(5-6); Williams 10449(11-15)). Thus, for example, an agreement to construct and operate generation with a non-CAPCO company might require such approval if the Applicant were to receive credit in CAPCO for such a capacity addition (Schaffer 8557(2-6, 19-22)). However, Mr. Williams of CEI testified that CEI had, in fact, unilaterally acquired 200 mw of capacity from Union Carbide without informing the other CAPCO companies; only after the purchase was the transaction discussed with the other CAPCO companies and it was decided that CEI would receive credit for that generation when CAPCO next needed additional capacity (Williams 10473-75; see also Williams 10449-53). There is no reason why TECO could not proceed in a similar fashion.

of the case against OE and PP.[69] The findings below with regard to each of these matters are forthrightly addressed in Applicants' opening Brief (see App. Br. at 214-23, 228-34, 250-56). Yet, even now, each of the opposition parties continues to expand its case and seeks to present new arguments and evidence beyond the scope of the Board's findings.

With regard to the matter of nuclear access, the opposition parties now assert that the negotiations between OE and the Wholesale Consumers of Ohio Edison ("WCOE") clearly dealt with nuclear access and were thus certain to be the subject of this proceeding. This position stands in stark contrast to the representations made in the September 5 Filings, where only the requests for nuclear access by Cleveland and Pitcairn were alleged to be relevant; no charge was there made that OE had denied nuclear access to any entity in its area and no mention was made of the WCOE organization.[70] Accordingly, prior to the commencement of the evidentiary hearing, OE had no reason to believe that this proceeding would inquire into such matters as the company's negotiations with WCOE on the assumption that these customers were the competitors of OE in any meaningful

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69/ As to the other allegations against OE and PP, the treatment in the Opposing Briefs is not materially different from the treatment by the Licensing Board. Appendix A, infra, shows where to find the various discussions of the Board's findings and includes comments, where necessary, on the few additional record citations appearing in those discussions.

70/ This history is particularly revealing in view of the fact that Staff now chooses to quote CAPCO counsel regarding the Applicants' willingness to proceed on the basis of the September 5 Filings (see S. Br. at 38). No specific charge concerning a WCOE request for access was there made by the opposition parties, nor was good cause demonstrated for an amendment to the September 5 Filings to assert such a charge. Nonetheless, the evidence concerning WCOE and the "WCOE negotiations" was relied upon heavily by the Licensing Board in arriving at its erroneous findings concerning OE.

sense.[71/] Yet, asserting that WCOE members are meaningful competitors of OE and are not required to ask specifically for nuclear access, DOJ now professes to "find absurd" OE's treatment of the WCOE negotiations (see D. Br. at 118).

It is we who find incredible the failure of DOJ and the Staff to differentiate between the negotiations of WCOE and its power supplier for a new bulk power supply relationship -- in which WCOE

71/ In this regard, we note the finding of the Farley licensing board that, while Alabama Electric Cooperative (which had sizable generation and transmission facilities) was a legitimate competitor of Alabama Power Company and therefore had a claim to nuclear access, neither MEUA (a group of wholesale customer municipalities closely analogous to WCOE) nor its members were competitors and thus MEUA was entitled to no such remedy. The Farley Board thus concluded that:

> To go beyond this might be considered an unwarranted attempt to restructure the electric power industry at the retail distribution level, rather than fulfilling the statutory mandate of antitrust review under Section 105c. [See Alabama Power Co., supra, Phase I slip op. at 326-27.]

The Licensing Board in the instant proceeding did not merely undertake to restructure the industry by finding meaningful competition where none existed, but proceeded as though such restructuring had long since taken place. It therefore improperly viewed the evidence as if such a restructured, highly competitive, electric utility industry had long existed in Ohio and Pennsylvania.

Such is plainly not the case. While the Staff seeks to suggest otherwise by an appendix reference to a statement made this year to the "Dingell Committee" by Mr. John Shenefield, Acting Assistant Attorney General, Antitrust Division, Department of Justice (see S. Br. at Appendix C), that reproduced statement does not argue with Applicants' basic position that no real competition exists in this industry and has not for some time. Indeed, the most recent Shenefield statement provides an interesting comparison with the statement commenting on similar proposed legislation which was made to the same Committee a year earlier while Mr. Shenefield was still a partner in the law firm of Hunton & Williams. For the convenience of the Appeal Board, we have reproduced in Appendix C hereto the earlier statement, which appears in Hearings on H.R. 12461 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 94 Cong., 2d Sess., Pt. 2, at 1948-54 (1976). See also Shenefield, Antitrust Policy Within the Electric Utility Industry, 16 Antitrust Bull. 681 (1971).

never expressed any preference for or special interest in nuclear power (see App. Br. at 217-18; Cheesman 12214) (during which, in short, the source of power was immaterial) -- and these proceedings before the Nuclear Regulatory Commission, in which nuclear power is the very reason for the existence of a licensing procedure and antitrust review. The September, 1974 letter from WCOE's attorney, C. Emerson Duncan (D-222),[72/] admits that nuclear access was never explictly requested or even discussed in the WCOE negotiations, and that WCOE had never specifically requested access to the nuclear units which are the subject of these proceedings. Moreover, an earlier letter from Mr. Duncan (A-227) reveals that WCOE was confident that successful completion of its negotiations pursuant to the FPC settlement agreement would "obviate" any antitrust claims it might have against OE.

The WCOE negotiations resulted in the parties' agreement in principle to the prepayment of power purchases proposal made by WCOE's own consultants (see App. Br. at 220-23). As we earlier pointed out (id. at 223), this proposed prepurchase plan afforded "the WCOE members access to all of OE's generation, existing and future, fossil and nuclear, at a cost lower than that which other OE customers enjoy (see S-44, at viii-1-2)". This statement is not refuted by the opposition parties. Nor do they contest that WCOE, not OE, suddenly began to reconsider the suitability of their consultant's recommended approach after OE had agreed to it in principle (see F/F 129).

72/ DOJ lists the author of D-222 as counsel for OE (D. Br. at 118); apparently this is a typographical error.

To turn the WCOE negotiations around in an effort to make them into a denial by OE of nuclear access is an egregious distortion of the record below. What the evidence shows is that, in its good faith negotiations with WCOE as a group of customer entities, OE agreed to a new bulk power supply relationship with WCOE which would be mutually beneficial[73/] and which would provide to its wholesale customers, inter alia, the benefits that nuclear power would bring to the OE system.[74/] Such action certainly does not deserve antitrust condemnation.

Nor is there any basis for faulting OE or PP under an alleged "price squeeze" theory (see App. Br. at 250-56). In attempting to buttress and expand upon the Licensing Board's findings in this area, the opposition parties have erred in assuming that OE and PP do not contest the Board's rapid shift of the burden of proof to the Applicants. To the contrary, we contend that the Licensing Board's failure to require more from the opposition parties than a mere facial comparison of wholesale and retail rates in order to establish the existence of a price squeeze necessarily precludes this Appeal Board from affirming the finding of price squeeze below.[75/]

73/ There can be no doubt that mutual benefit was the agreed upon basis of these negotiations (see Cheesman 12199(1-5); Mayben 12517 (8-12); A-7; and see App. Br. 217-18).

74/ Notwithstanding this history of good faith dealing by OE in this and all other negotiations examined in this hearing, the Licensing Board, without any citation, blithely concluded that OE refused "to engage in transactions which would otherwise be economically beneficial * * *" (P/F 99). There is absolutely no evidence in this record to suggest that any proposal has been rejected by OE which, if accepted, would have reaped economic benefits to the company. With specific regard to the WCOE negotiations, the only formal proposal ever made by WCOE to OE was accepted by the company.

75/ Although not binding upon this Appeal Board, Section 2.17 of the FPC's Rules and Regulations issued on March 21, 1977, is

(Continued next page)

The error in this regard is magnified because of the manner in which the Board treated Mr. Wilson's testimony in this case. While OE and PP believe that this evidence supports a finding of cost justification as to any differential in wholesale and retail rates (see App. Br. at 253 & n.282), the primary thrust of Mr. Wilson's testimony and supporting exhibits was to educate the panel below on rate matters and to demonstrate the many complicated factors (such as the ability of the municipalities to make a profit under the prevailing rate structure and the absence of any anticompetitive intent on the part of OE or PP) that require consideration before any judgment can be made on the price squeeze issue. Regrettably, the Licensing Board chose to disregard the clear and uncontradicted evidence put before it demonstrating that a mere comparison of rates cannot alone support a finding of price squeeze. It thereby failed to heed the truism recognized by the Farley board that "[t]o ascertain whether a price squeeze has occurred is not any easy exercise in arithmetic and accounting" (Alabama Power Company, supra, Phase I slip op. at 276).

Cognizant of the difficulties involved with consideration of the price squeeze issue in a licensing proceeding, the Farley licensing board set for itself a more appropriate task than did the Licensing Board below. Thus, it was stated in Farley (id. at 278):

> The usual role of a price squeeze allegation in a nuclear licensing proceeding is to cast light on the purpose and intent of an applicant as to its competitive behavior. To this end, we

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75/ (Cont'd)
certainly instructive guidance in considering the question of price squeeze in a Section 105c(5) proceeding. For the convenience of this Board, we have reproduced that Section in Appendix D hereto. The new rule specifies what the minimum elements of a prima facie price squeeze case would be; the opposition parties have fallen woefully short of meeting that standard.

> have fully examined and evaluated the alleged price squeeze to determine what evidence it presents of the intent and purpose of Applicant in its competitive relationship with other parties.

In finding no anticompetitive intent, the Farley board looked both to (a) the fact that there was no indication the applicant was serving its retail customers at less than either long run average or long run incremental costs and (b) the fact that the retail rate allowed by the Alabama Public Utility Commission was even less than Applicant had requestd (id. at 276-77). See also Boston Edison Co., FPC Docket E-7738 & E-7784, Opinion No. 809, slip op. at 25 (July 6, 1977). Likewise, the record in this proceeding establishes that OE sought higher retail rates from its state commission than were ultimately allowed (see App. Br. at 225 n.283); nor can it be said that the retail loads of these companies are being served at less than long run average or long run incremental costs (see A-163; A-164; A-165). Furthermore, as was the case ir Farley (Phase I slip op. at 278), there has been absolutely no evidence presented here suggesting that any industrial load was lost by a wholesale customer due to its inability effectively to "compete" on the basis of price.

Accordingly, no legitimate ground exists for the Licensing Board's finding, based solely on a superficial comparison of OE's and PP's wholesale and retail rates, that the companies engaged in a price squeeze; nor is there even room to infer from the evidence in this area any anticompetitive intent or purpose on the part of OE and PP. Our adversaries' arguments to the contrary are ill-conceived and entitled to no weight.

The final area in which the opposition parties focus their main attack on OE concerns the matter of wheeling. We have,

of course, already addressed this subject in Applicants' opening Brief (see App. Br. at 228-34), and there is little said by our adversaries in reply to warrant further discussion here. We would simply note that, while the Staff suggests no WCOE representatives were ever advised that OE would be willing to consider specific wheeling transactions, its record citation (White 9706-07) does not support the assertion. Moreover, both Mr. White (White 9631(4-7), 9701-02(10-25 & 1-2)) and Mr. Wilson (Wilson 11086-87(10-25 & 1-4)) testified very directly about a conversation between John White of OE and Charles Stout of WCOE during which Mr. White communicated OE's willingness to consider specific requests for wheeling outside the context of the FPC settlement discussions.[76/] No such requests have ever been forthcoming. Certainly, they are not to be found in the vague references to PASNY and Buckeye Power as possible sources from which energy could be wheeled into the CCCT (see App. Br. at 173, 230-31).

In the final analysis, a review of this record by the Appeal Board will confirm that OE has taken a negative stand in connection with the subject of wheeling in but one instance, to wit: a refusal on the part of OE to express its willingness to wheel under any and all circumstances, and thus render itself a common carrier of electricity.[77/] Such a position does not warrant condemnation under any antitrust standard.

76/ The substance of this discussion as testified to by Messrs. White and Wilson was never disputed. Interestingly, Mr. Stout, who was originally scheduled as a witness for the Staff and was available to the Staff for rebuttal, was never called to the stand. Cf. Interstate Circuit, Inc. v United States, 306 U.S. 208, 221, 225 (1939); see generally Wigmore, Evidence § 285 (3d ed. 1940); McCormick, Evidence § 272 (2d ed. 1972).

77/ It is, we think, instructive that the Farley licensing board did not consider it appropriate to transform electric utilities into

(Continued next page)

Duquesne Light

The arguments advanced against Duquesne by the opposing parties leave unanswered the nagging question raised by the Initial Decision: "For what reason should conditions be attached to Duquesne's license?" As we have previously urged, the Licensing Board's findings concerning Duquesne were devoted to outdated and irrelevant trivia. Even the Licensing Board acknowledged that the purported refusals by Duquesne to sell wholesale power, when viewed in light of its present behavior, provide no basis for inferring future inconsistent action by the company or for imposing license conditions on it (L.B. Clarification Order slip op. at 5-8). Moreover, viewed from Duquesne's perspective, the relief formulated below is entirely arbitrary. The Licensing Board imposed no conditions proscribing conduct which our adversaries, or the Board itself, viewed as central to the case against Duquesne (see App. Br. at 260-62, 268-69), while it ordered the attachment of conditions relating to conduct Duquesne was never even alleged to have engaged in.

77/ (Cont'd)
common carriers of electricity under the guise of antitrust review. Indeed, it specifically tailored its relief to insure that the transmission requirement not be misconstrued to produce such an undesired result. What was stated at the remedy stage of that proceeding bears repeating:

> The purpose of this transmission requirement is to allow AEC the effective use of its participation entitlement, not to transform Applicant into a common carrier of electric power by requiring it to wheel 'anytime, anyplace, anywhere.' Transmission or wheeling license conditions should have a reasonable relationship to AEC's effective use of Farley plant power; and should avoid the possibilities for mandatory or premature additions to Applicant's system in order to accommodate requests for transmission services as well as the inherent reliability problems associated with universal and on-demand services. [Alabama Power Company, supra, Phase II slip op. at 43 (citations omitted).]

Rather than try to defend the Initial Decision in light of these fundamental weaknesses, the opposing parties have been content to repeat, with revealing similarity, their assertions that Duquesne, many years ago, refused to sell wholesale power and refused to permit municipal utilities to join in the CAPCO contractual arrangements.[78/] No effort has been made, however, to address the current situation in Duquesne's service area, and, focusing particularly on the company's conduct for the past ten years, to show in what respect, if any, it can be said that there lurks an antitrust inconsistency which needs remedying by this agency. Obviously, our adversaries and the Licensing Board, eschewed such an approach because it would have produced no excuse for license conditions. The error is manifest.

It is compounded, moreover, by the continued insistence upon imputing to Duquesne's service area forms of competition that do not and cannot exist (S. Br. at 43-44; D. Br. at 34-43; City Br. at 30-38). DOJ, for example, constructs a grandiose theory of wholesale competition (D. Br. at 34-38), even though there is not a single shred of evidence in the record that suggests any competing wholesale supplier is now, or ever has been, in Duquesne's service area. As applied to Duquesne, DOJ's discussion is nothing more than irrelevant speculation (see also pp. 36-37, 40-46, supra). The theory of retail competition advanced by DOJ (D. Br. at 38-42) is similarly hollow and unpersuasive, particularly since it depends

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78/ The extent to which these discussion track the findings of the Licensing Board, and even at times each others' language, can be readily discerned from the comparative references set forth in Appendix A, infra. In the few instances where one or another of the opposing parties has made passing reference to additional record materials, the matter is commented upon in the footnotes in Appendix A.

upon a complete misinterpretation of the legal barriers under Pennsylvania law that preclude such competition.[79] And, while DOJ hypothesizes that there can be free and open "franchise" competition (D. Br. at 38-40), such "competition" simply does not and cannot exist in Pennsylvania.[80]

Nor is the opposition parties' treatment of the facts any more accurate than their discussion of competition within Pennsylvania. Thus DOJ's description of the Pennsylvania Economy League's report on the Borough of Aspinwall (D. Br. at 111) is inexcusably misleading. Its assertion that the report demonstrates that the Aspinwall system was in "good condition financially and physically" in 1967 (D.Br. at 111) is factually wrong. The most direct response to DOJ's arguments is to urge the Appeal Board to read the PEL report for itself (see A-120). It will find that Aspinwall's equipment was old, substandard, and subject to maintenance costs which

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79/ It is implied that Pennsylvania municipal utilities may freely compete for loads outside the municipal limits, as if the requirements of 66 P.S. § 1122(g) that they obtain Pa PUC approval before serving outside such municipal limits were a mere formality (D. Br. at 41-42). In point of fact, the Pa PUC has made it exceedingly clear that it will not, under most circumstances, permit a utility to supplant the service provided by another utility because such competition is inimical to the public interest. Koppers Company v North Penn. Gas Company, 42 Pa. P.U.C. Rep. 730 (1966); Manufacturer's Heat & Light Company v Peoples Natural Gas Company, 39 Pa. P.U.C. Rep. 440 (1962) (attached to App. Br. as Exhibit C); see also pp. 33-34, supra.

80/ In order for a municipality to acquire the electric facilities of an investor-owned public utility serving within the municipal limits, it must first obtain the approval of the Pa PUC (66 P.S. § 1122(c)) upon a showing that the utility to be ousted has provided inadequate or unsatisfactory service or acted in an otherwise objectionable manner. Such approval would rarely, if ever, be given, for the policy of Pennsylvania is that "unnecessary and useless competition should be prevented." Painter v Pa PUC, 194 Pa. Super. 548, 551, 169 A.2d 113, 115 (1961). See also Koppers Company, supra; Manufacturer's Heat & Light, supra.

had risen 130 percent between 1955 and 1964. Moreover, the expectation was that those costs would continue to rise at the same rapid rate. The report anticipated that Aspinwall's electric system would be operating at a deficit in the very near future (see A-120, pp. i, ii, 3-5, 22, 29, 31, 32, exh. x). As reflected therein, the borough had used all of the revenue it obtained from system operations to subsidize its General Fund, leaving the electric system with no financial capability to undertake the "substantial capital investments" needed within the next few years (A-120, pp. i, ii, 22, 31, 32). It is, thus, not at all surprising that the PEL recommended as one advisable course of conduct the sale of the system. Nor is there any basis on this record to question the objectivity of that judgment by an independent, outside source (see App. Br. at 272-73 n.294).

As for Duquesne's dealings with Pitcairn, they, too, are not to be faulted for the reasons set forth in Applicants' opening Brief (see App. Br. at 268-71, 274-77). The Staff, DOJ and Cleveland continue to contend that Duquesne unreasonably refused to "interconnect" with Pitcairn -- that is, unreasonably refused to enter into an interchange agreement (S. Br. at 159-61; D. Br. at 115-16; City Br. at 166-67). However, it cannot fairly be disputed that Pitcairn was incapable of providing any benefit to Duquesne under an interchange agreement (see Dempler 8673-83).[81/] Although the opposing

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81/ The Staff asserts that Pitcairn could have provided a benefit to Duquesne by offering certain schools and buildings in the area around Pitcairn with an alternate emergency source of power (S. Br. at 160). What benefit this would be to Duquesne is difficult to perceive. At most, Pitcairn might conceivably have provided owners of certain buildings a backup source of power for their emergency lighting systems, which those owners (not Duquesne) were required to maintain independently (see McCabe 1836, 4209-11). Obviously, such alternate service by Pitcairn would be of no benefit, or even

(Continued next page)

parties try to attack by innuendo Mr. Dempler's credibility (S. Br. at 161; D. Br. at 116 n.123), they make no attempt to refute the underlying facts concerning Pitcairn to which he testified or to controvert the significance of those facts. Indeed, they could not. Even Mr. McCabe, the Borough's Solicitor, seemed to acknowledge that a true interconnection involving a reciprocal power flow between Duquesne and Pitcairn was improbable (McCabe 1832-34.[82/] It is, therefore, difficult to understand on what basis Duquesne could conceivably be faulted for not entering into some sort of interchange arrangement with Pitcairn (see pp. 69-76, supra).

Last, and truly least in importance, are the reiterated contentions that Duquesne supposedly refused to operate in parallel with Pitcairn. In view of Mr. Stark's undisputed testimony that Duquesne did in fact offer to operate in parallel with Pitcairn (Stark 8948-49), the issue would seem to have been mooted at least 6-1/2 years ago. While reference is made to early meetings in which

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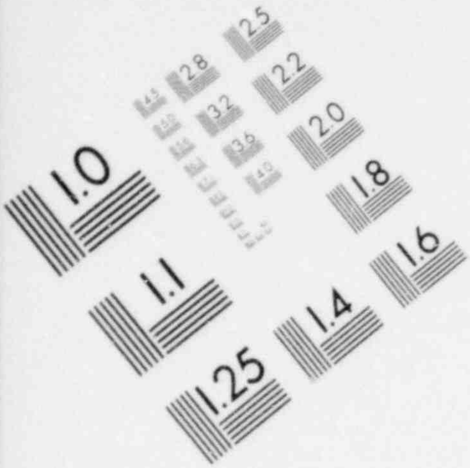
81/ (Cont'd)
concern, to Duquesne. As for the Staff's apparent assertion (S. Br. at 160, citing McCabe 1834) that Pitcairn's generation could be of use to Duquesne in an emergency, either as "dead-start" capacity or as a source of power in the Monroeville area, see the unchallanged and uncontroverted testimony of Mr. Dempler to the contrary (Dempler 8678-83).

82/ Curiously, Staff contends that Pitcairn could have adjusted for the lack of mutuality in an "interchange" agreement between it and Duquesne by paying Duquesne for emergency service with dollars rather than by offering Duquesne payment-in-kind (S. Br. at 161). However, such an arrangement would transform the "interchange" agreement into a simple wholesale power contract for emergency service, which is precisely what Duquesne offered Pitcairn under Rate M (see App. Br. at 269-71). Staff is unconsciously acknowledging the reality of the situation -- that "interchange" was a synonym for cheaper power, and that the real controversy was over price. See also pp. 73-76, supra, for why mere monetary exchange is not a sufficient substitute for like-service in a true coordination transaction.

Duquesne allegedly "refused" to enter into parallel operations (McCabe 1658) -- although, more accurately, the company only insisted as a precondition to such an arrangement that protective equipment be installed for Pitcairn's benefit (McCabe 4176-77) -- no one, including the Licensing Board has questioned the accuracy or validity of Mr. Stark's testimony as to the later offer by Duquesne regarding this matter (Stark 8948-49; see S. Br. at 166-67; D. Br. at 114).[83/] Nor is it a matter of dispute that Pitcairn, not Duquesne, was the one which ultimately decided against parallel operation (see A-48). For our adversaries to highlight this "situation" as reflective of conduct by the company inconsistent with the antitrust laws is but a measure of how weak the entire case against Duquesne really is.[84/]

83/ Staff and DOJ suggest that Duquesne unreasonably (S. Br. at 166; Dr. Br. at 114) conditioned its offer to operate in parallel. However, there was no competent "live" testimony to that effect, only a hearsay statement by the Borough Solicitor, obviously unsusceptible to cross-examination, that the Borough's consulting engineer thought Duquesne's protection equipment requirements overly elaborate (see McCabe 4176-77).

84/ One other red-herring that deserves disposition is the exaggerated interpretation by Staff and DOJ of advice given to Duquesne by its defense counsel in the course of antitrust litigation (D-254). To pervert this into "evidence" of Duquesne's abuse of the litigation process for anticompetitive purposes is not only unwarranted but wholly unsubstantiated by anything in this record (see S. Br. at 155; D. Br. at 113 n.116).



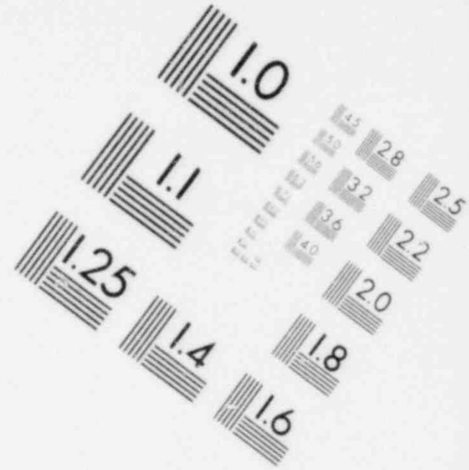


IMAGE EVALUATION
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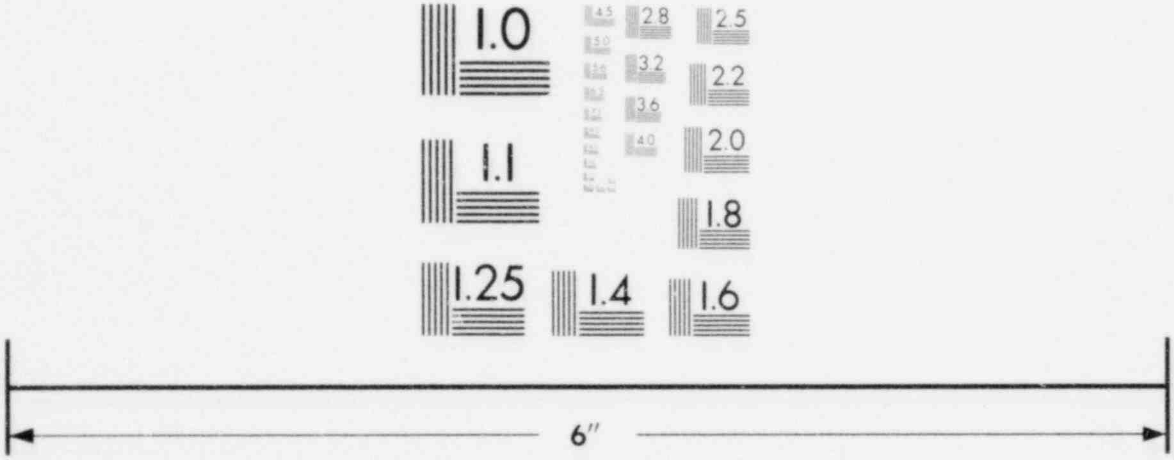
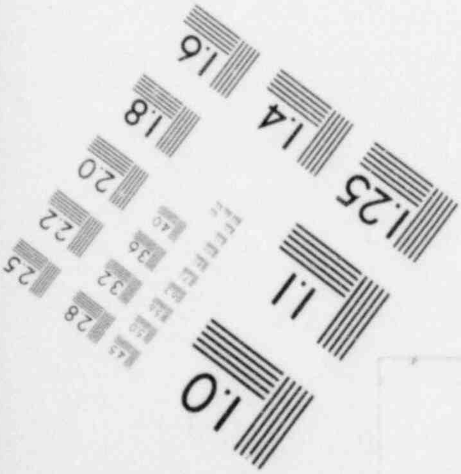
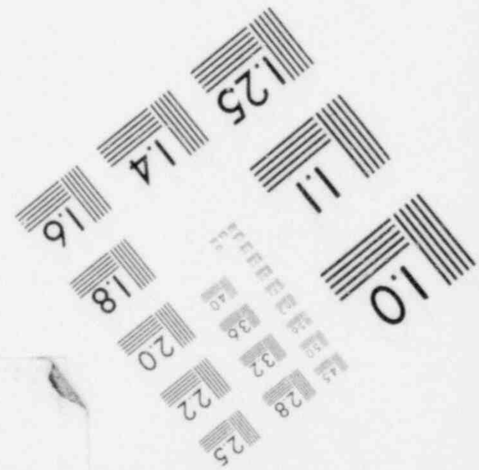
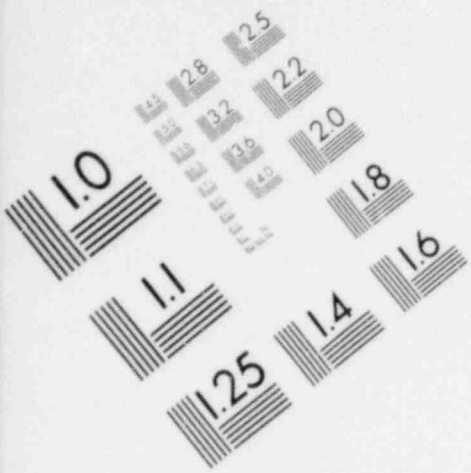


MICROCOPY RESOLUTION TEST CHART







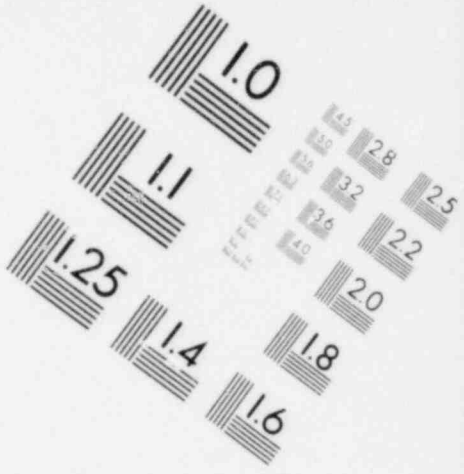


IMAGE EVALUATION
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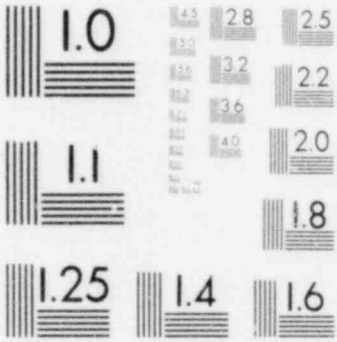

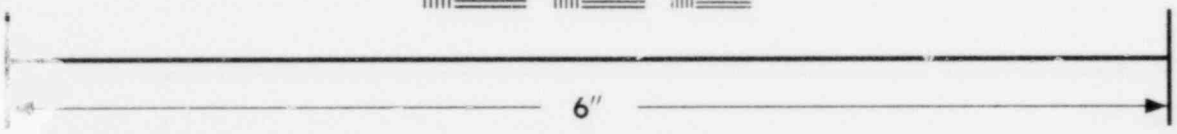

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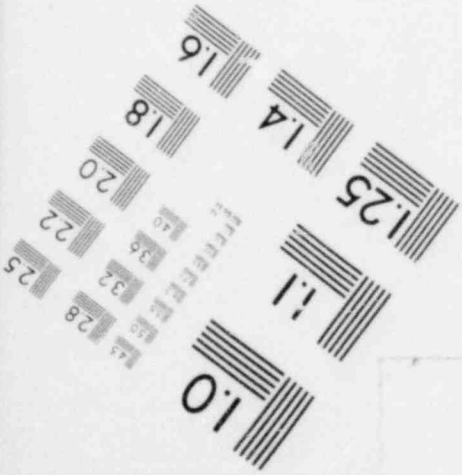

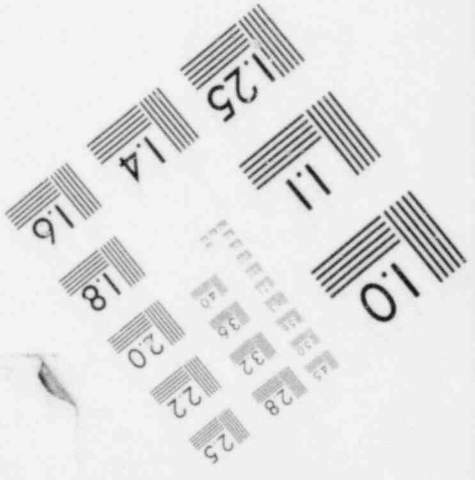

Conclusion

For all the foregoing reasons, as well as for the reasons set forth in Applicants' opening Brief, the Initial Decision rendered by the Licensing Board below should be reversed in all respects.

Respectfully submitted,

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Dated: August 4, 1977

APPENDIX A

The following charts set forth the pages in the parties' respective Appeal Briefs where the numbered Findings in the Initial Decision (s wn in column 1 of each chart) are discussed. If no footnote signal appears beside a page reference shown in columns 2, 3 or 4 of each chart, the argument there advanced by an opposition party relies upon the statements and record citations contained in the referenced finding of the Licensing Board -- to which Applicants have already responded at the pages in their Appeal Brief set forth in column 5 of each chart. In those few instances where additional evidence (not noted by the Licensing Board) is referred to by one or another of the opposition parties, the added citations are discussed in the margin unless additional comment is totally unnecessary.

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
26	78	94	103	--
27	--	94-95[a]	103-04[a]	100-02
28	82[a]	107[a]	140-41[a]	100-02
29	95	--	--	--
30	95	93	104	61 n.69
31	--	93-94	104-05	61 n.69
32	--	94[b]	104[b]	--
33	--	94	105	--
34	96	95-96	126-27	171-72, 174-75
35	97	95-96, 98	105-06	171-72, 174-75
36	96, 102	96	106	157-58
37	97	--	107	157-58
38	--	96-97	--	157-58
39	96-97	97	107-08	157, 158-59

a/ All parties claim that it was a CEI goal to acquire the municipal systems of Cleveland and Painesville. While we believe the evidence is at best ambiguous, even assuming arguendo that CEI had such a goal, there is nothing unlawful or sinister in that given the nature of the retail market. Compare Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 515 (6th Cir. 1972) ("In a natural monopoly situation any successful competitor gets the market. Thus, it cannot be 'unreasonable per se, to foreclose competitors from any substantial market' [citation omitted], where such foreclosure is the natural result of success in a natural monopoly situation"); see also App. Br. at 100-02.

b/ DOJ and Cleveland allege that CEI's "promotional allowances" are a form of cutthroat competition. The referenced testimony shows, however, that CEI standardized service to new customers in conformity with its tariff (Bingham 10323-25; D-558(Rudolph) 13(14-15)) in order to "meet competition" from Cleveland (D-558(Rudolph) 16-17(25 & 1); Bingham 10325(1-6)), or because Cleveland "was going to provide certain things" (D-566(Wyman) 61(18-21)). Such conduct is not inconsistent with the antitrust laws. Cf. Robinson-Patman Act § 2(b), 15 U.S.C. § 13(b) (meeting competition defense).

CLEVELAND ELECTRIC ILLUMINATING

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
40	96-97	--	108	158-59
41	102	97-98	112-13	154-59
*42	97[c/]	98-99[c/]	108-10[c/]	159-60
43	97-98	99-100	110	159-63
44	98	100	110-11	163-68
45	99, 101	100	111	163-69
46	--	100-01[d/]	111-12	166-68
47	99-100	101-02	114-15	159-62
48	--	103-04	115	162 n.190
49	101	--	115	162 n.190
50	101	101	114	161-62 n.190
51	101-02	102-03	116	166-67 n.197
52	102	102	116	168 n.200
53	--	102-03	116-17	168 n.200
54	99, 101-02	103	117	161 n.190

c/ All parties rely on the testimony of Mr. Titus at Tr. 7505-06 to establish that CEI's offer of load transfer service was unresponsive to Cleveland's alleged desire for a synchronous interconnection. The cross-examination of Mr. Titus indicates that he had no personal knowledge of the negotiations (see Titus 7506-07), and as a result his testimony on what CEI offered was struck by the Board (see Tr. 7507-08).

d/ DOJ responds to CEI's argument of non-payment by noting that CEI held a "purchase order" from Cleveland for $62,000 without attempting to negotiate it. The cross-examination of Mr. Hart demonstrates the difficulty CEI would have had in "negotiating" such an instrument (see Hart 5354-63). Moreover, given Cleveland's already mounting financial delinquencies, it is hardly unreasonable for CEI to insist on payment by check.

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
55	--	--	117-20[e/]	110, 167-69
56	--	104	--	169-71
57	96	104	126-27	171-72
58	103-04	104-05	120-22	173-76
59	104	106	121-25	172-73
60	104	106-07 n.105	127-32	171-72, 174-75
61	--	173-75	132-37	145-48, 150-54
62	--	--	133-37	150-54
63	--	--	136-37	148, 171-73
64	78-79	--	137-38	--
65	78	--	--	60-65
66	79, 89[f/]	--	138[f/]	--
67	80-81	--	139-40	178
68	81	--	140	177
69	81-82	--	139	177-78
70	--	--	139-40	178-79

e/ Cleveland's discussion of its attempt to sell certain bonds raises issues already disposed of by this Appeal Board in its order on Cleveland's disqualification motion (see ALAB-378) or rejected by the Licensing Board as beyond the scope of Cleveland's September 5 Filing (see Tr. 7474-80). Cleveland's claim that it is at a loss to understand why the Licensing Board barred such testimony (City Br. at 119 n.17) is belied by the above-referenced transcript pages.

f/ The claim that Painesville has surplus power, or markets to dispose of such power, is contrary to Mr. Pandy's testimony that "the only capacity [Painesville has] that can be counted on continually is the new [25 mw] unit. If you assume it out of service, [we] have zero firm capacity" (Pandy 3180(13-15)).

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
71	82-87[g/]	--	140	179-80
72	82	--	--	177-78
73	87-89[h/]	--	139-40	180
74	89-95	--	138-39	180-82

g/ The Staff's assertion that the Painesville interconnection contains anticompetitive provisions is based on the same erroneous testimony of Mr. Mozer who also claimed that the CEI-Cleveland interconnection contained similar anticompetitive provisions. For a response to these allegations, see App. Br. at 170, 179-80.

h/ The Staff charges that the "Short-Term Service" schedule in the CEI-Painesville interconnection agreement is unreasonable and anticompetitive, essentially because the Staff views the rate contained therein as too high. Yet, the evidence shows that Painesville was satisfied with the agreement (see A-195(Milburn) 6-7), that Painesville's short-term rate was identical to the short-term rate ordered by the FPC in the CEI-Cleveland agreement (compare S-204, service schedule A, § 3.3), and that the rate is lower than Ohio Power's rate for similar service, which the Staff proffered as a model interconnection agreement (compare S-141a, service schedule C, § 3).

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
75	150-51	107-08	--	--
76	156, 165	107-08	163	260, 100-02, 266 n.291, 271-73
77	150, 152-53	108-09, 113	165-66	260-61, 268-71
78	165	109	--	260-61, 268-71
79	--	--	--	263-68
80	152-54, 158, 165	109 n.109, 113	165-66	268-71
81	155	109-10	163	271-74
82	155	109-10, 113	163	--
83	153-54	--	165-66	268-74
84	156-58	114-15	163	100-02, 268-74
85	159-61 i/	109 n.109, 115-16	166-67	102-05, 268-71, 276 n.297
86	158	--	166	72-83, 268-71
87	156-57	114-15	167	274 n.295
88	--	113	167	--
89	154-55	--	167	--
90	--	--	--	260-61, 268-69

i/ Staff asserts that Pitcairn could have offered certain benefits to Duquesne under an interchange agreement. This is simply untrue. While it is hypothesized that Pitcairn could provide certain buildings in Monroeville with an alternate source of power or could offer Duquesne beneficial service in an emergency, the uncontradicted testimony of Mr. Dempler is directly to the contrary (Dempler 8678-83).

DUQUESNE LIGHT

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
91	165-67 j/	114 j/	--	260-61, 268-69
92	162-64	116	--	280-82
93	164	116-17	--	280-82
94	--	--	--	124-37, 280-82
95	156	--	167	102-05, 260-61 & n.287, 268-71, 274 n.295, 276 n.297
96	150-67, 171-74	107-17, 164-66, 171-75	71-86 163-67	72-102, 102-13, 125-34, 268-83
97	150-67, 171-74	107-17, 164-66, 171-75	71-86, 163-67	72-102, 106-09, 268-77, 280-82
98	152-55, 159-62, 162-64, 165-67	113-17, 164-66, 171-75	71-86, 163-67	72-102, 102-09, 128-34, 268-77, 280-82
--	--	111-112, & n.115 k/	163-65 k/	272-74 k/

j/ Staff and DOJ assert that Duquesne refused to operate in parallel. This argument is flatly contradicted by the testimony of Mr. Stark which has not been refuted. This contention is discussed more fully in App. Reply Br. at pp. 98-99 , supra.

k/ DOJ and Cleveland misread A-120 as indicating that the Aspinwall electric system was financially and physically sound. Not only does A-120 itself undermine such an assertion, as discussed in App. Reply Br. at pp. 96-97, supra, but it is also belied by other evidence of record confirming the financial and physical deterioration of the Aspinwall electric system (see App. Br. at 272-74).

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
99	111-12	117-18	3-6, 47-48	84-87
100	112, 114	6, 118-19	15	223-25
101	112	119	15	225-26
102	113-14	119	15, 53	225-28, 230
103	114	118-19	56	223-25
104	130, 137-39[1/]	123[1/]	56-57	190-192, 234-38
105	130, 137-39	105, 123	56-57	192-193, 234-38
106	130, 137-39	122-23	56-57	234-38
107	130, 137-39	122-23	56-57	234-38
108	130, 137-39	122-23	56-57	234-38
109	130, 137-39	122-23	--	234-38
110	130, 137-39	122-23	--	234-38
111	130, 137-39	107, 122-23	56-57	182-83, 236-37
112	130, 137-39	122-23	--	182-83, 237-38
113	130, 131-39	122-23	--	234-38
114	130, 137-39	122-23	--	234-35, 238
115	130, 137-39	123	--	235-38
116	115, 118, 124-26	117, 120	151	228-30
117	126	121	149	232-34
118	126	121	149-50	232-34

1/ It is inaccurate for the opposition parties to state that OE did not contest the existence of territorial agreements with other investor-owned utilities. Such a contention disregards Ohio Edison's reference to the discussion of these agreements by other Applicants in the opening Brief (App. Br. at 236 n.263). Ohio Edison also contends that the existence or non-existence of such agreements is irrelevant in this proceeding (App. Br. at 234-38).

OHIO EDISON AND PENN POWER

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
119	127	121	150[m/]	232-34
120	127	121	150	232-34
121	112-15	--	151	230
122	127-28	120-22	67	231
123	128	120-22	57, 67	228-31
124	128-29	120-22	150	228-32
125	124-30	120-22	56-57, 71-72	228-38
126	115-16, 122-23	117-18	151[n/]	217-19
127	116-21	117-18	151-52	214-20
128	116-21	117-18	151-52	218-23
129	--	--	--	222
130	121	118	151-52	218-19, 223

m/ Cleveland improperly relies upon D-479, which not only was excluded from evidence (Tr. 6239), but which was used by Cleveland in the face of Applicants' protest against a similar use of this exhibit by the Licensing Board (F/F 119, App. Br. at 233).

n/ Cleveland claims to know what induced each side to settle the 1972 rate case before the FPC. It relies upon Mayben, however, who described his testimony on the issue as "probably speculation" (Mayben 12558(20)), and who recognized not only that Ohio Edison's "inducement" had to do with the "real dispute in the matter" (Mayben 12559(7)) but also that WCOE viewed the rate agreement aspect of the settlement as advantageous (Mayben 12560(5-9)).

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
131	115-26[o/]	117-18	56-57	214-16, 223
132	119-20, 130	--	147	241-42
133	130	--	147	241-42
134	131	124	147	234-35, 238-41
135	131	124	147-49	238-41
136	139	124	147-49	238-41
137	132-35	124	147-48	239
138	134-36	124	147	239
139	132-33, 136[p/]	122-24	148-49	240
140	148-49	128	152-53	256-57
141	148	--	153	256-59
142	--	--	--	256-59

o/ Staff's contention (S. Br. at 120 n.195) that Ohio Edison omitted a relevant citation is inaccurate (see App. Br. at 214). Staff also alleges that it was improper for Ohio Edison to schedule power from the small WCOE shares of Ohio Edison operated units. This contention represents such a distorted view of power dispatch, reserve sharing and coordination as nearly to prevent response. Suffice it to say that permitting WCOE the "right" to schedule its own power and export its alleged "excess" in this fashion would so adversely impact on the OE system's reliability and costs as to make the true cost of such a service to WCOE astronomical in relation to the modest benefits WCOE might gain. In addition, it should be remembered that this was but one of several ill-considered ideas which was briefly put forth and then put aside while the parties explored more practical suggestions.

p/ DOJ makes imaginative and inappropriate use of Craig's testimony concerning an "unwritten agreement" (D. Br. at 123 n.137). If read in context, the referenced testimony clearly shows that Craig considered his own unilateral restriction of service to inside the town's boundaries to be reasonable and that any other policy would result in raiding one another's customers. In addition, when specifically queried about why Ohio Edison served new customers outside city limits, his response was "proximity of line", not territorial agreements (Craig 2911(2-14)).

OHIO EDISON AND PENN POWER

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
143	--	--	--	--
144	145-48	126	--	248-50
145	147	126	--	248-50
146	147-48	126	--	248-50
147	146	126	--	250
148	140-47	125-26	59	242-43
149	140-43	124-25	--	243-44
150	144-45	124-25	--	244-45
151	144-45	124-25	--	243-45
152	--	125-26	149	245-47
153	--	125-26	149	245-48
154	--	125	153	257-59
155	--	127-28	154-56, 162	250-56
156	--	127-28	156-58	250-56
157	--	127-28	158-62	250-56

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
158	104	129	141	--
159	104-05	130-31 q/	141 q/	185-89
160	--	129	141	185-89
161	--	130	141	--
162	--	139	--	60-65, 186
163	--	--	--	--
164	106	132-33 r/	146	189-90, 192-94
164(a)	106 s/	133 s/	146	190, 192-93
164(b)	107	133	146	190-91

q/ DOJ and Cleveland make reference to a TECO Office Memorandum (D-554), and to certain notes concerning the sale of the Elmore, Ohio, distribution system (see D-553) in connection with their claim that TECO, not the municipalities in its service area, initiated discussions concerning acquisition of a municipal electric system. However, these documents plainly indicate that TECO was approached, unsolicited, by a group of Elmore businessmen who were interested in initiating the sale of the Elmore distribution system, and that TECO's participation before city council occurred wholly as a result of such citizen-initiated contact.

r/ DOJ has again selected and referred to certain isolated portions of Mr. Moran's testimony (see D. Br. at 132 n.152) in an attempt to challenge his credibility. A full review of the entire record, however, will show that any effort to characterize Mr. Moran's testimony as unreliable is totally unfair and wholly unsupported by the record (see App. Br. at p. 204; App. Reply Br. at 84-85).

s/ The Staff and DOJ refer to certain documents (D-512, attachments 4, 4a, 4b, 8) in support of their allegation that both TECO and Ohio Power Company refused to sell power at wholesale to distribution systems which were being served by the other because of a territorial allocation agreement which had been in effect since the early 1960's. The referenced documents permit no such conclusion, however. They show, instead, that the diseconomies and administrative problems associated with having two or more electric utilities serve the same customers on a rotating basis were the sound business considerations prompting TECO to follow the established industry practice of serving fringe-area customers only if the company's existing facilities are closest to them and can most economically serve them (see App. Br. at 192-94).

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
164(c)	107	134-35	--	191
165	--	135-37 u/	--	191
166	105	138-39	146	194-99
167	105-06	138-40	--	195
168	106	139-40	146	196-99
169	107	--	--	199-200
170	107-08 v/	140-41 v/	147	200-03
171	107, 109	141	147	200-03

t/ DOJ refers to certain contracts between Southeast Michigan Rural Electric Cooperative and both TECO and Consumers Power Company (D-16, pp. 1, 4; D-107, pp. 4, 8) to support an inference that TECO and Consumers have been parties to a territorial allocation arrangement since at least 1966 to the present. No such inference logically follows from the cited portions of said contracts. In the first place, the TECO contract with SEM dated May 8, 1952, was in existence long before the alleged commencement of the asserted territorial agreement, and therefore could not possibly have been written to reflect such agreement. In the second place, there is nothing in the cited portions of the contracts to suggest a reason to doubt TECO's explanation for the provisions, i.e., that prior to its interconnection with Detroit Edison in 1970, TECO had a legitimate desire to remain free from FPC jurisdiction by not crossing state lines (see App. Br. at 191 n.222).

u/ DOJ refers to certain exhibits (D-580(Bosch) 30-33; D-86; D-88, D-90) in support of its allegation that the Power Delivery Agreement, to which TECO is a party, contains a territorial limitation which has prevented SEM from obtaining Buckeye power for the Michigan portion of its load. But, as the disclosure made to DOJ in connection with the business review clearance shows, this "limitation" was included to preserve the intrastate nature of the various utilities involved in the Buckeye Project (see A-284, pp. 16-17).

v/ The Staff and DOJ make reference to certain portions of the transcript (see Tr. 2367-68, 2415, 4887-89, 10048-49, 10072, 11997-98, 12006) to support their allegation that TECO power is wheeled by the Bowling Green system without restriction or charge. As Mr. Moran testified, however, Bowling Green in fact receives compensation for such service on a continuous basis by being treated for monthly billing purposes as but a single customer even though it is taking power at two locations (Moran 9887-90).

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
172	109	141-43	143-44	203-05
173	109	137, 144-46 w/	142-45	206-09
174	109	--	145	207
175	109	144	--	205-06
176	109	140	--	202-03
177	109	146-49	142-43	233
178	109-110	--	143	--
179	110	149-50	142	186-89
180	110	150	142	187-88
181	110	150-51	145	209-11
182	--	151	145-46	210-11

w/ DOJ refers to a certain office memorandum (D-146) to support its contention that TECO felt that the restrictive provisions in the Buckeye Agreement were so strong that they prohibited Buckeye from competing for or securing TECO's customers (D. Br. at 144 n.181). What the memorandum actually confirms, as TECO has argued throughout this proceeding, is that the contractual provisions of the Buckeye Agreement had, as their effect, to restrict sales by Buckeye members to municipalities only insofar as the present Section 4905.261 of the Revised Code of Ohio would restrict such sales (see App. Br. at 208-09).

Additionally, DOJ refers to certain portions of the transcript (see Dorsey 5276-78; Lewis 5620) in support of its allegation that, while TECO would incur no additional expense for facilities or maintenance by wheeling Buckeye power to Napoleon, it demanded additional compensation to maintain the same level of service. The record clearly shows, however, that additional maintenance and cost could result from TECO's use of a dual feed arrangement to wheel Buckeye power to Napoleon (see Dorsey 5276-78). Even assuming, arguendo, that no additional expense for facilities or maintenance would be incurred, these are only two of the elements that go into determining the appropriate charge for wheeling power (see Smart 10099-102). Thus, there would in any event be no basis for attaching a negative implication to an increased charge for wheeling power even if no additional facilities or maintenance costs were involved.

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
183	--	--	71-72	12-14
184	169	152, 150-61	72-75	15-19, 21-22
185	--	--	75-76	18 n.22
186	--	--	75	22 n.26
187	--	--	--	20-21
188	--	--	--	19 n.24
189	--	--	--	12-25
190	--	--	--	106-07, 111-13
191	--	--	79	112 n.128
192	--	--	79	112 n.128
193	--	--	79	112 n.128
194	--	--	80	112 n 128
195	--	--	--	--
196	171-72	164-66	76, 84-86	106, 108-09
197	--	166	77	112-13 n.128, 146
198	--	166-67	77	112-13 n.128, 147-49
199	--	167	77-79	112-13 n.128, 149
200	173-74	168-71	76, 83-84	106, 109-11, 149-54
201	--	--	--	--

(1) L.B. F/F	(2) Staff	(3) DOJ	(4) Cleveland	(5) Applicants
202	174	171[x/]	132[x/]	146
203	174	171-72	133	147-50
204	174	--	133	147-50
205	174	--	133	147-50
206	174	172	--	147-50
207	174	172-73	--	147-50
208	174	173-75	--	150-54
209	174	170 n.222	89-90	147-48 n.174
210	174	--	--	102-05
211	170	--	--	113-15, 118-19
212	170	162	86	116
213	170-71	162-63	86-89	19-20 n.24, 117-18, 120
214	--	--	--	--
215	--	--	--	104-05

x/ Relying on Mr. Hinchee, both DOJ and Cleveland claim that in early 1971 Cleveland made an oral request to participate in Davis-Besse 1, which CEI refused. However, Cleveland's July 6, 1971 petition to intervene made no mention whatsoever of such a request; Cleveland's two other intervention petitions are similarly silent. And, DOJ's July 9, 1971 advice letter on Davis-Besse 1 explicitly refutes the claim now being advanced (see 36 Fed. Reg. 1789) (Cleveland "has made no request to either CEI or Toledo Edison nor formulated the terms of a proposal for such participation"). Moreover, Hinchee testified that his purported oral request was confirmed by a written request from Director Gaskill (Hinchee 2702-03, 2705-06, 2807, 2810). Yet, Cleveland had to admit after a thorough file search that it could find no such written request (A-192; A-193, A-194).

APPENDIX B

Hoco

0062

Files
Corres.
Charno-2
Saunders-2
Baker

SMCharno:obj

TER:JJS
60-415-61

November 29, 1972

AIR MAIL

Philip P. Ardery, Esquire
Brown, Todd & Heyburn
1500 Citizens Plaza
Louisville, Kentucky 40202

Re: Duquesne Light Company
Ohio Edison Company
Pennsylvania Power Company
Cleveland Electric Illuminating Company and
Toledo Edison Company --
Beaver Valley Power Station, Unit No. 2

Dear Mr. Ardery:

This will acknowledge and thank you for your letter of November 17, 1972. Before we can fully consider the matters which you have raised, we will require certain additional information. We would therefore appreciate your supplying the Department with the following materials on or before January 15, 1973:

1. Affidavits executed by either Mr. Dillwin or Mr. Lee concerning their June 2, 1972 discussion with representatives of Toledo Edison Company concerning bulk power supply.

2. Copies of all relevant documentary materials, together with affidavits setting forth in detail the circumstances surrounding the three requests by the City of Napoleon that Toledo Edison wheel electric power from the system of Ohio Power Company to that of the City.

3. Copies of all relevant documentary materials, together with affidavits setting forth in detail the circumstances surrounding the three requests

by the City of Napoleon that Toledo Edison operate its system in continuous synchronism with that of Napoleon.

4. Copies of all documentary materials, together with affidavits setting forth in detail the circumstances surrounding Napoleon's discussions with Toledo Edison concerning joint ownership of large-scale generating facilities.

5. Copies of all correspondence between AMP-O and any of the applicants concerning: (a) participation by AMP-O, or its members, in bulk power generation contemplated by the applicants and (b) wheeling of power by the applicants on behalf of AMP-O, or its members.

6. Copies of all documents, and any other factual materials, concerning practices of any of the applicants with respect to the City of Cleveland which have any bearing on the above-captioned application.

It will be most helpful if the affidavits requested above include: any specific factual background material which can be documented by the affiant; the time, place, and parties present at all discussions referred to in the affidavit; the exact terms and conditions of any claim or proposal (set forth in the same detail with which it was set forth at the meeting); and detailed response of the applicant's representative (to the affiant's best recollection).

Upon receipt of these materials, we will be in a position to make an initial determination as to which of the matters set forth in your November 17 letter should have a bearing upon the advice to be rendered by the Department. If you intend to supplement your letter of November 17, we would appreciate your documenting any supplementary allegations in the manner outlined above so that they may be given immediate consideration.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: Steven M. Charno
Attorney, Department of Justice

[RETYPED COPY OF 11/29/72 LETTER FROM CHARNO TO ARDERY]

Files
Corres.
Charno-2
Saunders-2
Baker

SMCharno:obj

TEK:JJS
60-415-61

November 29, 1972

AIR MAIL

Philip P. Ardery, Esquire
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202

Re: Duquesne Light Company
Ohio Edison Company
Pennsylvania Power Company
Cleveland Illuminating Company and
Toledo Edison Company --
Beaver Valley Power Station, Unit No. 2

Dear Mr. Ardery:

This will acknowledge and thank you for your letter of November 17, 1972. Before we can fully consider the matters which you have raised, we will require certain additional information. We would therefore appreciate your supplying the Department with the following materials on or before January 15, 1973:

1. Affidavits executed by either Mr. Hillwig or Mr. Luce concerning their June 2, 1972 discussion with representatives of Toledo Edison Company concerning bulk power supply.

2. Copies of all relevant documentary materials, together with affidavits setting forth in detail the circumstances surrounding the three requests by the City of Napoleon that Toledo Edison wheel electric power from the system of Ohio Power Company to that of the City.

3. Copies of all relevant documentary materials, together with affidavits setting forth in detail the circumstances surrounding the three requests

by the City of Napoleon that Toledo Edison operate its system in continuous synchronism with that of Napoleon.

4. Copies of all documentary materials, together with affidavits setting forth in detail the circumstances surrounding Napoleon's discussions with Toledo Edison concerning joint ownership of large-scale generating facilities.

5. Copies of all correspondence between AMP-O and any of the applicants concerning: (a) participation by AMP-O, or its members, in bulk power generation contemplated by the applicants and (b) wheeling of power by the applicants on behalf of AMP-O, or its members.

6. Copies of all documents, and any other factual materials, concerning practices of any of the applicants with respect to the City of Cleveland which have any bearing on the above-captioned application.

It will be most helpful if the affidavits requested above include: any specific factual background material which can be documented by the affiant; the time, place, and parties present at all discussions referred to in the affidavit; the exact terms and conditions of any offer or proposal (set forth in the same detail with which it was set forth at the meeting); the detailed response of the applicant's representative (to the affiant's best recollection).

Upon receipt of these materials, we will be in a position to make an initial determination as to which of the matters set forth in your November 17 letter should have a bearing upon the advice to be rendered by the Department. If you intend to supplement your letter of November 17, we would appreciate your documenting any supplementary allegations in the manner outlined above so that they may be given immediate consideration.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: Steven M. Charno
Attorney, Department of Justice

BROWN, TODD & HEYBURN
(MARSHALL, COCHRAN, HEYBURN & WELLS)
(BROWN, ELDRED & BONNIE)
(BROWN, ARDERY, TODD & DUDLEY)
SIXTEENTH FLOOR
CITIZENS PLAZA
LOUISVILLE, KENTUCKY 40202

JOHN MARSHALL, JR.
COUNSEL

(502) 589-5400

January 11, 1973

A-1480
1:r

Steven M. Charno, Esquire
Attorney, Department of Justice
Washington, D. C. 20530

Re: Duquesne Light Company
Ohio Edison Company
Pennsylvania Power Company
Cleveland Illuminating Company and
Toledo Edison Company --
Beaver Valley Power Station, Unit No. 2

Dear Mr. Charno:

In response to your letter of November 29, 1972, I enclose the following:

An Affidavit by Powers Luse with an accompanying letter from Toledo Edison and an Affidavit of Mr. John Engle with an accompanying letter from Toledo Edison, and letters Mr. Engle wrote to Toledo Edison, Cleveland Electric Illuminating Company and Ohio Edison.

I have been unable to obtain release of the information with regard to the City of Napoleon, but I believe I may have that information next week. If so, I shall promptly send it to you.

Yours truly,

Philip P. Ardery

60-413-61

JAN 15 1973

Enclosures
cc: Messrs. John Engle,
Powers Luse
William M. Lewis, Jr.

ENCLOSURE

M Charno

F 0088

ELI H. BROWN, III
BUCKER TODD
HENRY P. HEYBURN
PHILIP P. ARDERY
MARSHALL P. ELDRED
RANDOLPH A. BROWN
SAMUEL R. WELLS
GEORGE E. DUDLEY
EDWARD S. BONNIE
JOSEPH S. HELM
MARK B. DAVIS, JR.
W. C. FISHER, JR.
JOHN T. SCHOURANT
CHARLES S. CASSIS
MARSHALL P. ELDRED, JR.
R. MARTIN ROCKWELL
D. PATTON PELFREY
ELI H. BROWN, IV
KENNETH J. TUGGLE
C. EDWARD GLASSCOCK
WILLIAM C. STONE
IRVIN APELL, III
TIMOTHY W. MARTIN

BROWN, TODD & HEYBURN
(MARSHALL, COCHRAN, HEYBURN & WELLS)
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(BROWN, ARDERY, TODD & DUDLEY)
SIXTEENTH FLOOR
CITIZENS PLAZA
LOUISVILLE, KENTUCKY 40202

JOHN MARSHALL, JR.
COUNSEL

(502) 568-3400

January 22, 1973

A-1480
1:r

Steven M. Charno, Esquire
Attorney, Department of Justice
Washington, D. C. 20530

Re: Beaver Valley Power Station, Unit No. 2

Dear Mr. Charno:

I enclose herewith an affidavit of Mr. William Lewis in the above matter.

Yours truly,

PHILIP P. ARDERY

Enclosure

CC: Messrs. John Engle
Powers Luse
William M. Lewis, Jr.

AFFIDAVIT

of

WILLIAM M. LEWIS, JR.

State of Ohio, Scioto County, ss:

William M. Lewis, Jr., being first duly sworn, deposes and says:

1. Representatives of Toledo Edison Company stated on three occasions that they would not wheel power from the system of the Ohio Power Company to the electric system of the City of Napoleon, Ohio:

a. On September 2, 1971, between the hours of 0900 and 1100, at the offices of Toledo Edison in Toledo, Ohio, specifically in the office of Mr. W. R. Moran, and in the presence of Mr. Moran, Vice President of Administrative Services, Mr. John B. Cloer, Manager of Southern District, and Mr. Harold F. Wagner, Manager, City of Napoleon, affiant, Consulting Electrical Engineer for Napoleon, asked whether or not Toledo Edison would establish a delivery point for Tricounty Rural Electric Cooperative, Inc., which is a member of Buckeye Power, Inc., at the present interconnection point of Toledo Edison's transmission system and the electric system of Napoleon, for the purpose of Tricounty's delivering supplemental power to Napoleon, provided that Napoleon would enter into a contract with Tricounty to purchase supplemental power that is made available from excess capacity on the Buckeye system. Mr. Cloer responded that Toledo Edison would not establish such a delivery point and would further resist every effort by Napoleon

to obtain power from Tricounty and Buckeye. Mr. Moran responded that Toledo Edison would not agree to the establishment of such a delivery point at this time and would have to consider the matter. He further said that Toledo Edison would in effect be wheeling power from Ohio Power to Napoleon and it is not Toledo Edison's policy to wheel power to a municipal customer.

Affiant then asked Mr. Moran if it were not Toledo Edison's policy to provide a delivery point when requested by Tricounty for the purposes of Tricounty's serving its members. Mr. Moran responded that unless there were technical difficulties Toledo Edison would establish such delivery points when requested by Tricounty. Affiant then asked Mr. Moran if this did not constitute wheeling and he responded that it did but that it was because of the Buckeye contract and Toledo Edison wasn't very happy with the arrangement.

The supplemental power that Tricounty proposes to sell to Napoleon must flow over the interconnected electric systems in Ohio and by virtue of the Ohio Power-Buckeye Power agreement filed with the Federal Power Commission as Rate Schedule No. 70, the power must flow from Buckeye's generator at the Cardinal station into Ohio Power's transmission system and thence to Toledo Edison's transmission system before it can be delivered to Tricounty at established delivery points.

Affiant then asked the question as to whether Toledo Edison would make any effort to oppose Napoleon's constructing approximately ten miles of 69 kv transmission line to Tricounty's New Liberty substation at

which Toledo Edison now has a delivery point to Tricounty. Mr. Cloer responded that Toledo Edison would take steps to prevent Napoleon from obtaining power from Tricounty and Buckeye. Mr. Moran did not respond to the question.

b. On January 24, 1972, between the hours of 1930 and 2330, at the Council chambers of the City of Napoleon, and in the presence of Mr. Moran, Mr. Cloer, Mr. Wagner, Dr. Thomas F. Moriarty, Jr., Mayor of Napoleon, members of the Napoleon City Council, other representatives of Toledo Edison, various citizens of Napoleon, and representatives of W. M. Lewis & Associates, affiant asked whether or not Toledo Edison would establish a delivery point for Tricounty at the present interconnection point of Toledo Edison's transmission system and the electric system of Napoleon, for the purpose of Tricounty's delivering supplemental power to Napoleon, provided that Napoleon would enter into a contract with Tricounty to purchase supplemental power that is made available from excess capacity on the Buckeye system. Mr. Cloer responded by saying it was illegal for Napoleon to enter into a contract with Tricounty, and Mr. Moran responded by saying that this is something to which the Company would have to give careful consideration.

c. On March 6, 1972, between the hours of 1015 and 1245, at the offices of Toledo Edison in Toledo, Ohio, specifically in the office of Mr. Moran, and in the presence of Mr. Moran and Mr. Cloer, affiant asked whether or not Toledo Edison would establish a delivery point for Tricounty at the present interconnection point of Toledo Edison's trans-

mission system and the electric system of Napoleon, for the purpose of Tricounty's delivering supplemental power to Napoleon, provided that Napoleon would enter into a contract with Tricounty to purchase supplemental power that is made available from excess capacity on the Buckeye system. Mr. Cloer responded by saying that Toledo Edison would not establish a delivery point to enable Tricounty to steal Toledo Edison's customer and that it was illegal for Tricounty to serve the City because of the anti-piracy law in the State of Ohio. Further, Mr. Cloer said, "We are not going to wheel power for you." Mr. Moran responded by saying that it was not Toledo Edison's policy to wheel power to municipal customers and other than that he could not give affiant any further answer.

2. Representatives of Toledo Edison Company stated on three occasions that they would not operate their system in continuous synchronism with the system of the City of Napoleon if Napoleon enters into an agreement with Tricounty Rural Electric Cooperative, Inc.:

a. On September 2, 1971, between the hours of 0900 and 1100, at the offices of Toledo Edison in Toledo, Ohio, specifically in the office of Mr. W. R. Moran, and in the presence of Mr. Moran, Vice President of Administrative Services, Mr. John B. Cloer, Manager of Southern District, and Mr. Harold F. Wagner, Manager, City of Napoleon, affiant, Consulting Electrical Engineer for Napoleon, asked whether or not Toledo Edison would agree to operate its system in parallel and continuous synchronism with Napoleon's generators if Napoleon is receiving power from Tricounty through either a new delivery point

established by Toledo Edison for Tricounty or through the already established delivery point to Tricounty at its New Liberty substation. Mr. Cloer responded with a definite no. Mr. Moran responded by saying that although the Toledo Edison system is now being operated in parallel and continuous synchronism with Napoleon's generators and technically there would be no reason why such operation could not continue, such arrangement as proposed in the question by affiant would present legal problems and a departure from the present managerial policies of Toledo Edison, and therefore he would have to say, "No, Toledo Edison will not allow parallel operation but would give the matter further consideration when and if a request is made by Tricounty."

b. On January 24, 1972, between the hours of 1930 and 2330, at the Council chambers of the City of Napoleon, and in the presence of Mr. Moran, Mr. Cloer, Mr. Wagner, Dr. Thomas B. Moriarty, Jr., Mayor of Napoleon, members of the Napoleon City Council, other representatives of Toledo Edison, various citizens of Napoleon, and representatives of W. M. Lewis & Associates, affiant asked whether or not Toledo Edison would agree to operate its system in parallel and continuous synchronism with Napoleon's generators if Napoleon is receiving power from Tricounty through either a new delivery point established by Toledo Edison for Tricounty or through the already established delivery point to Tricounty at its New Liberty substation. Mr. Cloer responded by saying there is no need to discuss this matter--it is illegal for Tricounty to serve the City. Mr. Moran responded by saying that this is something the Company would have to consider.

c. On March 6, 1972, between the hours of 1015 and 1245, at the offices of Toledo Edison in Toledo, Ohio, specifically in the office of Mr. Moran, and in the presence of Mr. Moran and Mr. Cloer, affiant asked whether or not Toledo Edison would agree to operate its system in parallel and continuous synchronism with Napoleon's generators if Napoleon is receiving power from Tricounty through either a new delivery point established by Toledo Edison for Tricounty or through the already established delivery point to Tricounty at its New Liberty substation. Mr. Cloer responded by saying Toledo Edison will do everything in its power to prevent Napoleon from taking power from Tricounty. Mr. Moran responded by saying, "We will have to wait and see."

5. Representatives of the Toledo Edison Company stated on two occasions that they would not consider joint ownership of large scale generating facilities by Toledo Edison and the City of Napoleon and other municipal electric systems in the State of Ohio:

a. On September 2, 1971, between the hours of 0900 and 1100, at the offices of Toledo Edison in Toledo, Ohio, specifically in the office of Mr. W. R. Moran, and in the presence of Mr. Moran, Vice President of Administrative Services, Mr. John B. Cloer, Manager of Southern District, and Mr. Harold F. Wagner, Manager, City of Napoleon, affiant, Consulting Electrical Engineer for Napoleon, asked whether or not Toledo Edison would consider joint ownership of large scale generating facilities by Toledo Edison and Napoleon and other municipal electric systems in the State of Ohio. Mr. Cloer responded by saying that this is completely

impossible and impractical. 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.

b. On March 6, 1972, between the hours of 1015 and 1245, at the offices of Toledo Edison in Toledo, Ohio, specifically in the office of Mr. Moran, and in the presence of Mr. Moran and Mr. Cloer, affiant asked whether or not Toledo Edison would consider joint ownership of large scale generating facilities by Toledo Edison and Napoleon and other municipal electric systems in the State of Ohio. Mr. Cloer responded by saying, "Impossible." 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. Affiant then asked Mr. Moran if the PV-44 rate schedule that was sent affiant by Mr. Cloer's letter of September 29, 1971 (a copy of which letter is attached hereto and by this reference made a part hereof), and

which is a retail rate schedule, represents the price level that Toledo Edison expects from its municipal wholesale customers.

Further affiant sayeth not.

William M. Lewis, Jr.

Sworn to before me and subscribed in my presence this 19th day of January A. D. 1973.

Dorothy Cochran

Dorothy Cochran, Notary Public, Scioto County, Ohio. My commission expires August 14, 1973.

THE TOLEDO EDISON COMPANY
613 THIRD STREET · DEFIANCE, OHIO 43512 · (419) 782-2015

JOHN B. CLOER
MANAGER - SOUTHERN DISTRICT

September 29, 1971

William M. Lewis
Box 1383
Portsmouth, Ohio 45662

Re: City of Napoleon

Dear Bill,

Thank you for the load duration curves that you sent.

Based on the information that we have, we feel that proposed rate PV-44 is proper for the City of Napoleon if they purchase all their electrical requirements from us. This rate is included in our current rate proceedings with the Commission.

A copy is enclosed. If you have any questions about it, please let me know.

Sincerely,

John B. Cloer

JBC:rr

cc: W. R. Moran

APPENDIX C

Hearings on H.R. 12461 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 94 Cong., 2d Sess., Pt. 2 (1976)

COMPETITION IN THE ELECTRIC UTILITY INDUSTRY

Memorandum on the Antitrust Aspects of H.R. 12461

Submitted by Hunton & Williams

I. INTRODUCTION

The Electric Utility Rate Reform and Regulatory Improvement Act (H.R. 12461), if enacted, would effect sweeping changes in the regulation of electric utilities at the wholesale and retail levels. This Memorandum (1) discusses the ways in which the Act would enlarge the role of competition in the electric utility industry, (2) analyzes the ways in which the Act would affect the status of the industry with respect to the antitrust laws, and (3) recommends amendments to the Act in the light of that discussion and analysis. The suggestion of amendments does not necessarily imply a preference for this legislation, even if modified, over the regulation currently applicable to the industry, including its consideration where appropriate of the desirability of competition.

II. Competition and the Public Interest

A. COMPETITION AND REGULATION IN THE ELECTRIC UTILITY INDUSTRY

One of the bill's major premises, namely, that "increased competition among electric utilities for wholesale and industrial sales can complement existing regulations providing protection for consumers of electric energy", is contained in § 101(10) of the Act. Moreover, § 102(9) states that one purpose of the Act is "to foster increased use of competition as a complement to existing regulation." Specifically, the Act would increase the feasibility of competition in the following ways.

(1) Section 301 would require utilities to make "new, increased or retired capacity in a bulk power facility available to any person engaged in the transmission or sale of electric energy within its planning area . . . . on such basis as the Commission [the Federal Power Commission] establishes to be fair, reasonable and nondiscriminatory." Presumably, this provision is intended to make it possible for smaller electric systems, which could not otherwise afford a large, efficient generating facility, to purchase only a fraction of such a facility and thereby obtain the economies of scale usually directly available only to larger systems.

(2) Section 302 would impose upon the FPC a duty to promote and encourage interconnection and coordination "for the purpose of assuring the goals set forth [in the Federal Power Act] and to assure maximum competitive opportunities for the purchase and sale of electric energy at wholesale at the lowest possible cost." At least one purpose of this provision seems to be to allow a retail system the opportunity to choose among several bulk suppliers, even though only one bulk supplier is interconnected with that retail system.

(3) Section 302(b) would give the Commission authority to order a utility to transmit energy for, provide transmission services or wheeling for, and pool or coordinate with the facilities of one or more other entities engaged in the transmission or sale of energy. In addition to considerations of reliability, this section could also serve to increase competition in bulk power sales.

(4) Section 307 would give the FPC authority to prohibit unfair methods of competition in the electric utility industry.

(5) Section 310 would direct the Commission to undertake a study, to be completed within two years after enactment of the Act, to determine whether increased competition is in the public interest and to ascertain means to foster increased competition in the electric utility industry. Neither § 301 nor any other provision of the bill contains a clue as to why alteration of the regulatory pattern should precede conclusion of the study, rather than the other—and more logical—way around.

(6) Section 311 would provide that nothing contained in Title III relieves any electric utility from the operation of the antitrust laws or restricts any authority the FPC may have to regulate unfair methods of competition.

Thus it is clear that, in addition to multiplying regulation of an industry that is already extensively regulated at the federal, state, and local levels of government, the Act strives to enhance competition in that industry. In doing so, the Act seems to rest on two important assumptions—(1) that competition is necessary in the electric utility industry as a complement to regulation, and (2) that competition in the industry is desirable in the public interest. In view of the vigor of the electric utility industry, which is vital to the economic health of the nation, these assumptions underlying so drastic a change as would be produced by H.R. 12461 should be tested rigorously, preferably before enactment of the legislation.[1]

(1) Is Competition Necessary?

A substantial number of the policy purposes of regulation are either parallel to or identical with those of antitrust. The antitrust laws seek to eliminate monopoly profits by enhancing competition and promoting entry into the market. Because competition has been found to be infeasible in the electric utility industry, however, regulation restrains entry. At the same time, regulators closely supervise utility rates so that electric utilities earn no more than a fair rate of return. The antitrust aim of eliminating monopoly profits is thus also accomplished by regulation.

Antitrust also depends upon competition to promote efficiency. Regulation, in its limitation of allowable expenses and investments to those found prudent, promotes efficiency in service to the customer. Indeed, federal and state licensing and certification proceedings for major investments promote efficient allocation of resources by requiring advance economic justification.

Just as antitrust seeks to eliminate unjustified price discrimination, so too does regulation in mandating reasonable and equitable rates to comparable customers.

Finally, where antitrust relies upon completion to provide dissatisfied consumers with recourse to alternative sources of supply, regulation performs the same function by making available the processes of regulatory agencies for the handling and rectification of consumer complaints.

Thus, it seems anomalous to create both regulation and competition in the electric utility industry. Regulation is meant to perform those functions antitrust normally expects competition to perform. In addition, the antitrust laws were enacted to deal with the replacement of competition with unregulated private control over prices and terms of sale, not to penalize governmentally sanctioned and regulated public utility monopoly. If regulation is for some reason inadequate, the remedy is to improve the quality of regulation, not create an overlapping and conflicting regime of economic rules in this unique industry.

(2) Is Competition Desirable?

Title III seems to assume that competition in the electric utility industry advances the public interest. This assumption prompts two thoughts.

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[1] As mentioned above, § 310 of the Act would authorize a study to determine whether increased competition is in the public interest. Yet the other provisions of the Act are effective upon enactment prior to this basic policy determination.

First, competition—in its proper perspective in this industry—is already considered in the regulatory process as a component of "the public interest." [2] The best judgment as to competition's proper role is made by expert regulators, familiar with the complexity of the industry's technology and economics. Legislation such as H.R. 12461, mandating an inflated and inflexible role for competition in this industry is, therefore, not really appropriate given the current state of the law defining the "public interest" standard.

Moreover, the assumption that competition is desirable ignores the underlying premise of all regulation of electric utilities—that the utility industry posseses technical characteristics leading to monopoly or other ineffective forms of competition. First, electric utilities inevitably must invest huge quantities of capital in long-lived and inflexible facilities directly connected to consumers. Thus, direct competition for the patronage of given consumers would require costly facility duplication and therefore impose on society excessive and unnecessary capital costs of a magnitude that generally has been considered unacceptable. Rather than the lower prices assumed from the competitive process, higher and higher rates would inevitably result.

Second, electric utility operations are characterized by the existence of substantial economies of scale—that is, by declining costs as the scale of operation increases at any point in time. Thus, a single large electric utility occupying a given market area generally can render service at significantly lower cost than could several smaller utilities operating in the same area.

Given these cost characteristics, in the absence of franchises or other regulatory restrictions, one firm would tend naturally to expand by offering lower prices, thus inducing growth in the size and density of the market served and thereby achieving even lower costs. The end result of such an uninhibited process would be a market occupied by only one utility—hence the term "natural monopoly."

Direct competition among electric utilities has long been considered economically wasteful and thus undesirable. Indeed, in most states competition at the distribution level is prohibited by statute or limited by regulatory policy. Because competition would result in costly, inefficient, and unnecessary capital investment, with resulting higher cost to consumers, government has approved geographic monopolies.

For these reasons, serious questions are raised whether enhancement of competition is consistent with the broader public interest purposes of the Act. These, as stated in § 102, include the promotion of more efficient use of scarce capital and energy resources, encouragement of maximum effective use of electric transmission facilities, encouragement of conservation of electric energy by all users, and avoidance of construction of unnecessary electric generating and transmission facilities. In addition, the encouragement of competition may not be consistent with the stated policy goals of the Federal Power Act—including assurance of "an abundant supply of electric energy throughout the United States with the greatest possible economy" and the avoidance of impairment of a utility's ability to render adequate service to its customers.

The Act contains an odd, cart-before-horse provision directing the FPC to undertake a study to determine whether such competition would in fact serve the public interest, but the study would be completed two years after the Act becomes law. As appropriate as study and investigation are in this complex area, they should surely precede legislative action, not follow it. As crucial as electric power is to the nation's needs, unbridled and potentially destructive competition should not be intruded into the electric utility industry until after the Commission has completed its study. Only then will the wisdom, or lack thereof, of increasing competition in the industry be apparent.

A. EMPHASIS ON COMPETITION—THE LEGAL IMPLICATIONS

(1) Unfair methods of competition

Section 307 of the Act would authorize the FPC to determine, on its own initiative or upon complaint, that a public utility is engaging in an unfair method

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[2] *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86 (1953).

of competition or that the utility's contract, agreement, tariff, or schedule on file would result in an unfair method of competition. Upon making such determination, the Commission could issue an order prohibiting the unfair method of competition or reject the particular filing.

Unfortunately, the term "unfair method of competition" is left undefined in the Act. Neither a general fairness standard nor the jurisprudence inherited from interpretations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), would necessarily be synonymous with the broader public interest standard of the Federal Power Act, nor appropriate in this industry. For instance, decisions by the FTC under the Robinson-Patman Act, and therefore even more clearly under the Federal Trade Commission Act, would run counter to marginal cost pricing, the very concept mandated by § 205(a) of H.R. 12461.

The Act should thus be amended to clarify that the Commission should be guided by public interest criteria, not merely antitrust or unfair competition principles, in determining what constitutes appropriate conduct in the industry.

(2) *Application of the Antitrust Laws*

a. Implied Immunity

Section 311 of the Act provides:

> "Nothing contained in this Title or the amendments made thereby shall (1) relieve any person or electric utility from the operation or enforcement of the antitrust laws of the United States, including the Sherman Act . . . Clayton Act . . . and the Federal Trade Commission Act . . . or (2) restrict any authority the Commission may have under the Federal Power Act to regulate unfair methods of competition."

Given the absence of express immunity in H.R. 12461, conflicts between regulation and antitrust would normally be avoided by the application of the doctrine of implied immunity, pursuant to which antitrust in appropriate circumstances gives way to the regulatory scheme. Section 311 bears directly on the resolution of such conflicts between Title III of the Act and the antitrust laws, and may substantially alter existing legal doctrines in this area.

Supreme Court decisions dealing with implied immunity from the antitrust laws unfortunately do not reveal a precise standard for determining when regulated activities should be immune. Nevertheless, at the risk of oversimplification, legislative intent seems to provide the touchstone for determining whether the antitrust laws should apply to regulated conduct.

Courts are fond of saying, "Repeals of the antitrust laws by implication from a regulatory scheme are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[3] It is presumed, however, in the absence of evidence to the contrary, that the legislature intended the antitrust laws to yield to the regulatory scheme in the event of direct conflict.

Probably the best statement of the repugnancy test is found in *Silver* v. *New York Stock Exchange*:[4]

> "The difficult problem here arises from the need to reconcile pursuit of the antitrust aim of elimination restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may have anticompetitive effects. . . ."
>
> • • • • • • •
>
> "[U]nder the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the exchange of sufficient breathing space within which to carry out the mandate of the Securities Act . . . . Although . . . the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws . . ., it is also true that particular instances of exchange self-regulation that fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim."[5]

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[3] *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).
[4] 373 U.S. 341 (1963). See also *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975).
[5] *Id.* at 360–61.

Thus *Silver* holds that activity may be immune from antitrust attack to the minimum extent necessary to make the regulatory scheme work as intended by Congress.[6]

Section 311 is susceptible to two readings. On the one hand, because it might apply only to changes effected by Title III, it would not preclude implied immunity with respect to other provisions of the Federal Power Act, particularly the public interest standard. On the other hand, it arguably would rule out immunity at least with respect to the provisions in Title III. This result would be a clear reversal of the present law on antitrust immunity, and might well lead to contradictory and overlapping economic regimes. Moreover, and even more importantly, § 311 evidences a congressional intent that the antitrust laws should prevail over regulatory considerations in this industry, and this legislative intent might be held controlling even with respect to the rest of the Federal Power Act.

Thus it is possible to argue that § 311, representing a congressional declaration that nothing in Title III may relieve any person or electric utility from the operation or enforcement of the antitrust laws, would require regulatory provisions of Title III and the Federal Power Act to yield to the antitrust laws to the extent of a specific repugnancy between the two. The conflict's potential for absurdity is easily demonstrated.

Suppose that Title III, including § 311, is enacted. A municipal utility applies to the Commission for an order requiring a contiguous electric utility to wheel power from another bulk power supply source. The Commission, after a full evidentiary hearing, refuses to order such wheeling, finding that it would result in an undue burden on the utility, would impair the utility's ability to render adequate service to its customers, and is therefore inappropriate in the public interest under the standards of § 202(b) of the Federal Power Act, as amended by Title III. Not satisfied with this determination, however, the municipal system then files an action in federal court under the antitrust laws, seeking to require the contiguous utility to provide wheeling services. After a full trial, the district court determines that a violation of the antitrust laws has occurred and that wheeling is required to remedy the violation. According to one possible reading of § 311, the finding of the Commission would be utterly irrelevant to the proceeding in district court. The court could order wheeling despite the Commission's determination that such wheeling would be contrary to the public interest as contemplated in the Federal Power Act.

To avoid this kind of result, § 311 should be qualified to provide that the antitrust laws apply to the electric utility industry except to the extent of incompatibility or repugnancy between the language or enforcement of the Federal Power Act, as amended by H.R. 12461, on the one hand, and the antitrust laws on the other.

b. Primary Jurisdiction

By precluding implied antitrust immunity with respect to Title III of the Act, § 311 would also preclude application of the doctrine of primary jurisdiction. That doctrine is also desgned to accommodate conflicts between a regulatory scheme and the antitrust laws. When such conflicts may possibly arise as a result of an antitrust action, a court may require litigants to resort to the regulatory agency for initial consideration.

In *Ricci* v. *Chicago Mercantile Exchange*,[7] the Supreme Court enunciated three premises for requiring prior resort to a regulatory agency. First, it must be essential for the court to determine whether the regulatory statute or any of its provisions is "incompatible with the maintenance of an antitrust action."

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[6] Implied immunity has sometimes been found when the legislative history of the regulatory statute manifests a legislative intent that provisions of the regulatory scheme should supersede the antitrust laws. *See, e.g., Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963). Conversely, when there is nothing in the legislative history of the regulatory act that reveals a purpose to insulate the regulated companies from the antitrust laws, implied immunity has sometimes been rejected. *See, e.g., Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (4–3 vote) (1973).

Also, courts look to the pervasiveness of the regulatory scheme, which is really another index of legislative intent. The notation here seems to be that pervasive regulation of an industry or a particular area implies that Congress intended the regulatory scheme to supersede the antitrust laws. *See, e.g., United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Haddad* v. *Crosby Corp.*, 1973–2 Trade Cas. ¶ 74,841. (D.D.C. 1973).

[7] 409 US. 289 (1963).

Silver v. New York Stock Exchange, 373 U.S. at 358. Second, some facets of the dispute must be within the statutory jurisdiction of the regulatory agency. Third, adjudication of the dispute by the agency must promise to be of material aid in resolving the immunity question.

Assuming that § 311 precludes any finding of immunity, then the first and third premises for the doctrine of primary jurisdiction will be absent with respect to Title III, making it very unlikely that a court would refer a matter to the Commission for preliminary determination. Again, this would be destructive. The FPC should be allowed to bring its expertise to bear in an antitrust action that may disrupt the regulatory scheme. Only the Commission is in a position to determine accurately whether the relief sought in the antitrust case will be consistent with the public interest standard set forth in the Federal Power Act.

Although amendment of § 311 as suggested above would probably allow courts to defer antitrust actions to the Commission, it would seem prudent to ensure this result by expressly providing in Title III that the Commission shall have industry.

c. Rule of Reason

The best solution to the problem of incompatibility of competition and regulation would be to give the Commission primary jurisdiction to decide questions of implied immunity from the antitrust laws, for the Commission, with its expertise derived from many years of regulating electric utilities, is particularly well suited for the task of defining the interface between the antitrust laws and the federal regulatory plan. If, however, the Commission is not to be given primary jurisdiction in this field, Congress should at least consider requiring courts, in their application of the antitrust laws to the electric utility industry, to take into consideration under the rule of reason the peculiar economic characteristics of the industry and the unique regulatory policy embodied in the Federal Power Act.

This would require the courts, if not the Commission, to evaluate antitrust charges in light of the pubic interest standard provided in the Federal Power Act and would preclude application of rigid, conventional per se concepts in the regulated electric utility field. Application of the rule of reason would require that the challenged conduct be weighed in its economic context to determine whether its adverse effect upon competition, if any, is unjustifiably substantial.

Certainly, the rigid per se rule has no place in a highly regulated industry having the peculiar economic characteristics discussed in the earlier portion of this Memorandum. Rather, courts should be required in all cases dealing with electric utilities to consider regulatory goals and the economic context in which the alleged violation occurred. Only in this way can the antitrust laws be applied fairly and consistently with the regulatory policies established in the Federal Power Act.*

III. Summary of Recommendations

(1) Before enacting those provisions of the Act that would increase competition in the electric utility industry, the Commission should be allowed to undertake and complete a study, as provided in § 310, to determine the extent to which competition in the industry is compatible with public interest.

(2) The term "unfair method of competition," as used in § 307 of the Act, should be defined as anticompetitive conduct inconsistent with the public interest standard contained in the Federal Power Act.

(3) Section 311 of the Act, which provides for a disclaimer of antitrust immunity with respect to Title III, should be amended to provide that the antitrust laws apply to the electric utility industry except to the extent of incompatibility or repugnancy between the language of the Federal Power Act or enforcement of the Federal Power Act by the Commission, on the one hand, and the antitrust laws on the other.

(4) The Federal Power Commission should be given primary jurisdiction to decide questions of implied immunity.

(5) If the Federal Power Commission is not to be given primary jurisdiction over antitrust actions against electric utilities, Congress should at least direct the

* For a recent case embodying this approach under the Securities Exchange Act, see *Jacobi v. Bache & Co.*, 520 F. 2d 1231 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 784.

courts, in their application of the antitrust laws in this industry, to avoid per se rules of illegality. Rather, courts should be required under the rule of reason to take into consideration the economic peculiarities of the industry and the regulatory policy of the Federal Power Act.

APPENDIX D

18 C.F.R. § 2.17 (1977)

§ 2.17 Price discrimination and anti-competitive effect (price squeeze issue).

To implement compliance with the Supreme Court decision in *F.P.C. v. Con-Way Corp.*, 426 U.S. 271 (1976), aff'g 510 F. 2d 1264 (D.C. Cir. 1975) and to expedite the consideration of price squeeze issues in wholesale electric rate proceedings, the Commission adopts the following procedures for raising price squeeze issues which are to be followed unless they are demonstrated in an individual case to be inadequate:

(a) Any wholesale customer, state commission or other interested person may file petitions to intervene alleging price discrimination and anticompetitive effects of the wholesale rates. In order to have the issue of price discrimination considered in the rate proceeding, the intervening customer or other interested person must support its allegation by a prima facie case. The elements of the prima facie case shall include at a minimum:

(1) Specification of the filing utility's retail rate schedules with which the intervening wholesale customer is unable to compete due to purchased power costs;

(2) A showing that a competitive situation exists in that the wholesale customer competes in the same market as the filing utility;

(3) A showing that the retail rates are lower than the proposed wholesale rates for comparable service;

(4) The wholesale customer's prospective rate for comparable retail service, i.e. the rate necessary to recover bulk power costs (at the proposed wholesale rate) and distribution costs;

(5) An indication of the reduction in the wholesale rate necessary to eliminate the price squeeze alleged.

(b) Where price squeeze is alleged, the Commission shall, in the order granting intervention, direct the Administrative Law Judge to convene a prehearing conference within 15 days from the date of the order for the purpose of hearing intervenors' request for data required to present their case, including prima facie showing, on price squeeze issues.

(c) Within 30 days from the date of the conference the filing utility shall respond to the data requests authorized by the Administrative Law Judge.

(d) Within 30 days from the filing utility's response, the intervenors shall file their case-in-chief on price squeeze issues, which shall include their prima facie case, unless filed previously.

(e) The burden of proof (i.e. the risk of nonpersuasion) to rebut the allegations of price squeeze and to justify the proposed rates are on the utility proposing the rates under section 205(e) of the Federal Power Act.

(f) In proceedings where price squeeze is an issue, the Secretary shall include the state commission, agency or body which is responsible for regulation of retail rates in the state affected in the service list maintained under 18 CFR 1.17(c).

[Order No. 563, 42 FR 16132, Mar. 25, 1977]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Reply Brief" were served upon each of the persons listed on the attached Service List, by hand delivering copies to those persons in the Washington, D. C. area, and by mailing copies, postage prepaid, to all others, all on this 4th day of August, 1977.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Wm. Bradford Reynolds
Wm. Bradford Reynolds
Counsel for Applicants

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

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