April 21, 1975

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' ARGUMENT IN SUPPORT OF ITS PROPOSAL FOR EXPEDITING THE ANTITRUST HEARING PROCESS

1. The City of Cleveland ("City"), by memorandum dated March 21, 1975, and the Department of Justice ("Department") and Nuclear Regulatory Commission Staff ("NRC Staff"), by separate memoranda dated April 7, 1975, have taken exception to Applicants' proposal for an early hearing on the nexus issue to be resolved in the present proceeding. Essentially, opposition to the procedure recommended by Applicants is based on the arguments that Applicants' suggestion is without clear precedent, that it deprives the claimants of an opportunity to introduce evidence on the anticompetitive "situation" which has been said to exist, and that it is really a subterfuge to obtain a premature hearing on the question of appropriate

remedies. None of these contentions, however, provides a legitimate basis for deferring any longer the necessary resolution of the nexus issue.

2. In formulating this proposal for expediting the present antitrust hearing, Applicants are fully cognizant of the fact that the approach they have suggested is a novel one. Even so, the Commissior's pronouncements in other similar-type proceedings provide ample support for dealing here with the nexus issue in the manner articulated. It was stated in Waterford,[1/] for example, that * * * "if it becomes apparent at any point that no meaningful nexus can be shown, all or part of the proceeding should be summarily disposed of" (RAI-73-9 at p. 621; emphasis added). This statement clearly anticipates a procedure whereby the nexus issue can be isolated and heard prior to a full-blown evidentiary hearing on the allegations of anticompetitive conduct.

3. Indeed, such a procedure is contemplated by the NRC's statutory grant of authority to conduct antitrust review in connection with pending applications for nuclear facilities. Under Section 105c of the Atomic Energy Act, the scope of the Commission's jurisdiction in this area is confined to an

---

1/ See In the Matter of Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), Docket No. 50-328A, Memorandum and Order of September 28, 1973, CLI-73-25, RAI-73-9-619 (referred to herein as "Waterford").

examination into whether "activities under" the particular nuclear licenses being sought "would create or maintain a situation inconsistent with the antitrust laws * * *" (42 U.S.C. 2135c (5)). As the legislative history makes clear:

> * * * antitrust review would consider the contractual arrangements and other factors governing how the proposed plant would be owned and its output used. * * * No broader scope of review is contemplated. * * * We do not consider such a licensing proceeding as an appropriate forum for wideranging scrutiny of general industry affairs essentially unconnected with the plant under review. [Emphasis added.][2/]

4. It is, therefore, perfectly appropriate, and, indeed, procedurally desirable, for the Licensing Board, in discharging its antitrust review responsibility, to ascertain at an early stage in the hearing process whether the matters in controversy come within the jurisdictional parameters of its legislative grant. In this regard, the fundamental issue is whether there exists a "meaningful nexus" between the alleged anticompetitive situation, on the one hand, and the activities under the designated nuclear license, on the other hand. Waterford, February 23, 1973, RAI-73-2, at p. 49. If this question deserves a negative response, the various

---

2/ Hearings on Prelicensing Antitrust Review of Nuclear Power Plants Before the Joint Committee on Atomic Energy ("Hearings"), 91st Cong., 1st Sess., Pt. 2, at p. 366 (1969-1970). See also Hearings, Pt. 1, at pp. 97, 144, 145 and 238; Pt. 2 at 365-366, 532 and 625.

allegations of misconduct set forth in the Department's advice letter and in the petitions to intervene are not entitled to scrutiny in this forum. See Section 2.714(b) of the Commission's Restructured Rules of Practice. That is not to say that the complaining parties cannot fully air their grievances in a federal court. It is simply to affirm a general principle applicable to this as well as other government agencies having limited antitrust jurisdiction, which is that the administrative hearing on allegations of anticompetitive behavior is dependent in each case upon first satisfying "the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application [pending before the particular agency]." City of LaFayette, Louisiana v Securities Exchange Commission, 454 F.2d 941, 953 (D.C. Cir. 1971), affirmed, Gulf States Utilities Co. v Federal Power Commission, 411 U.S. 747 (1973); and see Northern California Power Agency v Federal Power Commission, D.C. Cir. No. 73-1765, decided March 6, 1975.

5. In order for the Board to examine fully whether that nexus requirement has been met in the present proceeding, Applicants have agreed -- for purposes of resolving the jurisdictional question only -- to assume arguendo the existence of an anticompetitive situation in the relevant geographic and product markets which is equivalent to the "situation" that

would have been established at an evidentiary hearing if the opposing parties had been able to prove the affirmative of each of the first ten matters-in-controversy specified in the Board's Prehearing Conference Order No. 2. This approach is similar to the one adopted in Waterford, supra, where the Board was able to avoid an extended evidentiary hearing on the allegations of anticompetitive behavior, and could move directly to the remedy phase of the hearing, because the Waterford applicant agreed to assume arguendo both the existence of a situation inconsistent with the antitrust laws and a nexus between that situation and activities under the nuclear facility in question.

6. The Department (p. 5) and the NRC Staff (pp. 3-4) argue that the procedure followed in Waterford is so rigid that it provides no support for Applicants' proposal in the present proceeding. Such a reading of the Commission's Waterford discussion on this point is myopic. The assumption arguendo proposal adopted in that proceeding was explicitly described as but one "example" of an appropriate procedure to "substantially reduce the time and scope of the hearing" (RAI-73-9, at p. 622). And in that context, the Commission there declared that parties to an antitrust proceeding "should be alert to any initiatives which could efficiently advance the proceeding to a proper and satisfactory conclusion" (ibid; emphasis added).

7. Applicants' present proposal responds to that directive. The "initiative" here differs from the one utilized in Waterford only in that the assumptions arguendo of these Applicants are limited to the anticompetitive situation, leaving in dispute the jurisdictional question of nexus. But conceptually this distinction is of no import. The effort here, unlike Waterford, is not to jump directly to the remedy phase of the hearing. To the contrary, Applicants' argument is that the Board is without jurisdiction to consider remedies at all in this proceeding. The assumptions arguendo are directed to isolating that jurisdictional issue, and that jurisdictional issue alone. It is the precise procedure which was suggested by this Board's earlier order of July 25, 1974 (p. 6).

8. Admittedly, by adopting this procedure, the Board will deny the City, the Department and the NRC Staff an opportunity to present evidentiary material in support of their claims of anticompetitive conduct. This, however, is no cause for objection: Applicants' assumptions arguendo accept as proved for present purposes the very issues which the complaining parties urged upon the Board. In essence, Applicants have stated that they are willing to assume arguendo the best case that the opposing parties could have proved with regard to the existence of a "situation inconsistent

with the antitrust laws." And, if, as the Department argues (p. 6), it can indeed be said that "Applicants' assumptions arguendo, standing alone, are insufficient to establish a situation inconsistent with the antitrust laws," then there is all the more reason to eliminate now the empty exercise of lengthy fact presentations which concededly are going to fall short of establishing an anticompetitive situation.

9. It is equally important to keep in mind that, under Applicants' proposal, the claimants are deprived of an opportunity to make their detailed factual presentation only if the Board determines that it lacks jurisdiction to scrutinize the allegations made. And, of course, that is as it should be! To suggest, as do the Department (p. 7) and the NRC Staff (pp. 4-5), that a meaningful consideration of the jurisdictional question can only follow a full evidentiary hearing on the alleged anticompetitive "situation", flies in the face of the Commission's own mandate -- i.e., that the matter of nexus can properly be considered "at any point" in the antitrust review process. See Waterford, supra, RAI 73-9, at p. 621. Moreover, such a suggestion undermines the basic nexus concept, since it would have the Board undertake a lengthy inquiry into the very matters which might well fall outside the limited scope of its antitrust jurisdiction. The most judicious way to proceed, therefore, is to examine nexus first.

10. If the Board should decide that nexus does exist, Applicants' submission contemplates a full-blown contested hearing on the assertions of anticompetitive conduct. There is no legitimate cause for concern in this regard that Applicants will withdraw their assumptions arguendo in the event of an adverse ruling on the nexus question. It is generally accepted practice both in administrative and judicial proceedings that a litigant who accepts the pleadings against him as true for purposes of attacking jurisdiction can, if he loses, contest those same pleadings when the case is heard on the merits. Applicants' proposal simply follows this procedure.

11. The issue then is squarely posed: will the activities under the requested Davis-Besse and Perry licenses create or maintain the anticompetitive situation which Applicants have assumed arguendo to exist. Those activities include, by virtue of Applicants' proposed license conditions,3/ affording to requesting entities access to nuclear power from these facilities, together with sufficient transmission and back-up services to make access meaningful, and an opportunity to wheel-in equivalent amounts of power from alternate sources when the nuclear plants are down for emergency or maintenance reasons.

3/ See Exhibit A to Applicants' Proposal For Expediting The Antitrust Hearing Process, dated March 14, 1975.

12. The Department (p. 4) and the NRC Staff (p. 8) strenuously object to the fact that Applicants have "unilaterally" agreed that their present nuclear licenses shall be so conditioned. It is, however, not at all uncommon, in connection with the separate NRC environmental and safety hearings, for example, for an applicant itself to condition its license application in some fashion. The underlying purpose for taking such a step here is not the remedial one suggested by the other parties; instead, the proposed conditions are intended to provide meaningful definition to the phrase "activities under the license." By the terms thereof, Applicants are now unequivocally committed to providing requesting entities the opportunity for access to these nuclear units, together with back-up services.4/

13. The fact that the Department (p. 6) and the NRC Staff (pp. 7-8) may find these license conditions "unacceptable" is, in the present context, of little consequence. The proposed conditions continue to describe activities under these nuclear licenses, with or without the approval of the other parties. Whether or not the conditions might also be

---

4/ The Department seems to suggest that the Applicants' offer of access is somehow defective because it contemplates that access will be granted upon "mutually agreed-upon" terms (p. 9). This formulation, however, is similar to language used in conditions imposed upon nuclear licenses for other plants -- conditions which the Department has itself proposed as being acceptable. Indeed, Applicants are aware of no license conditions which take the alternative approach of providing that access shall be upon terms dictated solely by either the Applicant or the requesting entity.

sufficient to "remedy" some anticompetitive situation (if the existence of one is ever proved), is, of course, a different sort of inquiry. In that separate context, the acceptance by the Department and the NRC Staff of Applicants' proposed license conditions may well have relevance. But, that is not now a matter before this Board -- the question of adequate remedies is off in the future (if at all). The issue here is not whether the "activities under the nuclear license" will remedy an anticompetitive situation; rather, it is whether those licensed activities will create or maintain a situation inconsistent with the antitrust laws. If the answer to the latter question is negative, the former inquiry regarding remedies is eliminated altogether for this Board.

14. While the Department (p. 4) and the NRC Staff (p. 7) insist that the jurisdictional inquiry must proceed on the basis that the license to be issued will be without conditions, this assertion is groundless. Indeed, in its initial Waterford decision (RAI-73-2, at p. 49), the Commission examined the nexus question at the pleading stage of the proceeding with specific reference to the conditions then proposed for the nuclear license. And, more recently in In the Matter of Kansas Gas & Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit 1),

Docket No. 50-482A, the entire nexus discussion was in terms of a nuclear license which contained conditions, not in terms of one subject to "unconditioned issuance" (Department Ans., p. 4).

15. Similarly here, in order to obtain a meaningful hearing on nexus, the license conditions must be taken into account by the Board as the true measure of the "activities under the nuclear license."[5/] It is within this framework that Applicants are now advancing their jurisdictional argument. The position, simply stated, is that the

---

5/ The Department makes the surprising statement "that license conditions cannot be framed at all until the detailed nature, scope and anticompetitive effect of a situation inconsistent have been determined" (p. 8). Yet, time and again we have seen the Department negotiate, frame and accept very specific license conditions well before tne Department, or anyone else, has had an opportunity to focus on the "detailed nature, scope and anticompetitive effect of a situation inconsistent." These conditions have then served as the principal predicate for a recommendation in the Department's advice letter against having an antitrust hearing in connection with an application for a nuclear license.

Moreover, it should again be pointed out that the license conditions proposed by Applicants in this proceeding are not designed to be remedial in nature. Contrary to what the City, the Department and the NRC Staff are arguing, these license conditions have not been framed in response to, or as a cure for, some particular anticompetitive "situation". It is, of course, Applicants' firm belief -- notwithstanding the assumptions arguendo -- that no such "situation" actually exists. What Applicants' proposed license conditions do is, as stated above, help to define the "activities under the license" to be issued for Davis-Besse 1 and for Perry 1 and 2. Clearly, license conditions serving this purpose can be framed at any time, without regard to the nature and scope of some alleged anticompetitive "situation". Whether or not additional license conditions might also be warranted later on for remedial purposes is a consideration which this Board can properly address only if it is first determined that the licensed activities under the existing conditions will create or maintain a situation inconsistent with the antitrust laws -- that is, only if a "meaningful nexus" is first found to exist.

"activities under" these nuclear licenses, as conditioned, will neither create an anticompetitive situation nor contribute in any respect to the maintenance of that "situation" which has been identified by the Board's first ten matters-in-controversy -- as to which the assumptions arguendo apply. In sum, the construction and operation of these nuclear units in accordance with the terms specified in Applicants' proposed license conditions bears no relationship whatsoever to the claimed antitrust violations, even assuming arguendo that they are accurate. There thus exists no meaningful nexus on which to predicate jurisdiction for purposes of pursuing in this forum an inquiry into the allegations of anticompetitive behavior.

16. The City, the Department and the NRC Staff respond to this jurisdictional argument by essentially sidestepping the real issue. They assert that the absence of an offer by Applicants in their proposed license conditions to furnish to requesting entities third-party wheeling services provides the necessary nexus to the existing anticompetitive situation (as assumed arguendo). But the wheeling across Applicants' transmission lines of power generated from other sources is not an "activity under the nuclear license." Whether Applicants agree or refuse to wheel has nothing whatsoever to do with the operation of the Davis-Besse and Perry plants. It relates, instead, solely to remote sources of

power not generated by Applicants and to the use of Applicants' existing transmission facilities for purposes of transferring that power to some designated drop-off point. The fact that Applicants might refuse to wheel is perhaps an element of the alleged anticompetitive situation. But there is no meaningful relationship between that refusal and the recognized activities under the nuclear licenses.6/

17. In essence, the claimants' argument with respect to third-party wheeling goes, once again, to the remedy question, not the threshold question of jurisdiction. The contention is that the Board should impose on Applicants a third-party wheeling requirement, not because it is a legitimate "activity under the nuclear license", but because it will purportedly provide a means of remedying the alleged anticompetitive situation. In essence, the City, the Department and the NRC Staff seek to make Applicants' transmission lines common carriers of electric energy. This is, of course, directly contrary to the legislative intent underlying Section 105c of the Atomic Energy Act. The congressional concern with regard to nuclear plants was confined to the question of "access" to nuclear power. As pointed

---

6/ As the Commission observed in Waterford, consideration of denials of access to transmission systems "link[ing] non-nuclear facilities and [which] had been constructed long before application for an [NRC] license" (RAI-73-9, at p. 621), has little relevance to the nuclear plant or to any activities under the nuclear license.

out in Waterford, "the requirement in Section 105 for pre-licensing review reflects a basic congressional concern over access to power produced by nuclear facilities" (RAI-73-9, at p. 620). Indeed, the Department itself eschewed any broader interpretation of the "remedies" contemplated under the Act. As the then Assistant Attorney General, Antitrust Division, stated at the hearings:

> We think that for some time to come the "access" issue will be predominant: In what circumstance and to what extent is the applicant for a Commission license obliged to make available to other electric utilities an opportunity to participate in the economic advantages of scale made possible by the nuclear unit? [Hearings, Pt. 1, at p. 145.]

18. Thus, any discussion with regard to third-party wheeling as an appropriate remedy to impose in proceedings of this sort overreaches the permissible bounds of administrative antitrust authority. It is, moreover, clearly premature for this Board to give any consideration to the remedy question at this stage of the hearing. Even more to the point for present purposes, however, is the fact that references to Applicants' refusals to wheel power do not shed any meaningful light on the jurisdictional question. To resolve the nexus issue, this Board's inquiry is confined solely to whether "activities under the nuclear license would

create or maintain a situation inconsistent with the antitrust laws" (42 U.S.C. §2135c (5)). And, not even the City, the Department and the NRC Staff have gone so far as to suggest that there are any such activities associated with the construction and operation of Davis-Besse Unit 1 and Perry Units 1 and 2 which would relate in any respect to Applicants' refusal to wheel power generated from outside sources.7/

19. For the foregoing reasons, Applicants submit that their motion to proceed directly to a hearing on the nexus question in accordance with their proposal for expediting the hearing process should be granted. The fact that this request is not submitted under Section 2.749 of the Commission's Rules of Practice provides no basis to reject it. As the Commission declared in Waterford, supra, RAI-73-9, at p. 621, the nexus question can be isolated for separate consideration "at any point" in the antitrust hearing process

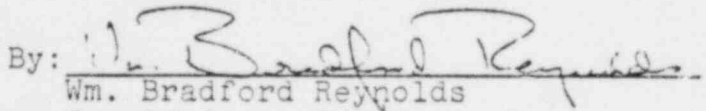
---

7/ The NRC Staff does state that it views the phrase "activities under the license" to embrace, among other things, "the integration of such a facility into an effective bulk power supply system" (p. 7). To the extent that this is the Staff's view, it is clearly in direct conflict with the understanding which Congress had of the phrase "activities under the license." Moreover, it is worth noting that heretofore the NRC Staff has never suggested in connection with the environmental and safety reviews of nuclear plant applications that it views as an activity under the nuclear license "the integration of such a facility into an effective bulk power supply system." Indeed, its participation to date in NRC proceedings involving permit applications to construct and operate nuclear plants suggests just the opposite viewpoint.

either by utilizing the provisions or 10 C.F.R. 2.749 "or by any other appropriate means" (emphasis added). Applicants have followed the latter course. While the Department seems to infer the jurisdictional issue presented here has already been disposed of by the Board's ruling on Applicants' motion for summary judgment against AMP-Ohio, any such inference is incorrect. Consideration of the AMP-Ohio summary judgment motion was held in abeyance pending completion of discovery. Document discovery is now virtually completed and, in light of Applicants' assumptions arguendo, it is believed that the nexus issue is ripe for resolution. Applicants urge that consideration of this important matter not be deferred any longer.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: 

Wm. Bradford Reynolds
Gerald Charnoff

Counsel for Applicants

Dated: April 21, 1975.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Argument In Support Of Its Proposal For Expediting The Antitrust Hearing Process" were served upon those persons listed on the attached Service List, by hand delivering the same to those persons located in the Washington, D. C. area and by mailing the same, postage prepaid, to all others, on this 21st day of April, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

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

Dated: April 21, 1975.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

SERVICE LIST

Douglas V. Rigler, Esq.
Chairman, Atomic Safety and Licensing Board
Foley, Lardner, Hollabaugh and Jacobs
Schanin Building
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

John H. Brebbia, Esq.
Atomic Safety and Licensing Board
Alston, Miller & Gaines
1776 K Street, N.W.
Washington, D. C. 20006

John M. Frysiak, Esq.
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Chase R. Stephens
Docketing & Service Section
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D. C. 20006

Benjamin H. Vogler, Esq.
Office of General Counsel
Regulation
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Robert J. Verdisco, Esq.
Office of General Counsel
Regulation
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Roy P. Lessy, Jr., Esq.
Office of General Counsel
Regulation
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Joseph J. Saunders, Esq.
Steven M. Charno, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

Melvin G. Berger, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
1700 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Frank R. Clokey, Esq.
Special Assistant
Attorney General
Room 219
Towne House Apartments
Harrisburg, Pennsylvania 17105

Mr. Raymond Kudukis
Director of Utilities
City of Cleveland
1201 Lakeside Avenue
Cleveland, Ohio 44114

Herbert R. Whiting, Director
Robert D. Hart, Esq.
Department of Law
1201 Lakeside Avenue
Cleveland, Ohio 44114

John C. Engle, President
AMP-O, Inc.
Municipal Building
20 High Street
Hamilton, Ohio 45012

Donald H. Hauser, Esq.
Corporate Solicitor
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Leslie Henry, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Thomas A. Kayuha, Esq.
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

David Olds, Esq.
Reed, Smith, Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, Pennsylvania 15230

John Lansdale, Esq.
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D. C. 20036

Wallace L. Duncan, Esq.
Jon T. Brown, Esq.
Duncan, Brown & Palmer
1700 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Edward A. Matto, Esq.
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Richard M. Firestone, Esq.
Assistant Attorney General
Antitrust Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43215

Deborah P. Highsmith, Esq.
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Christopher R. Schraff, Esq.
Assistant Attorney General
Environmental Law Section
361 East Broad Street, 3th Floor
Columbus, Ohio 43215