October 21, 1974

UNITED STATES OF AMERICA
ATOMIC ENERGY 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' REPLY TO THE SEVERAL MEMORANDA FILED BY THE OTHER PARTIES IN OPPOSITION TO APPLICANTS' MOTION FOR SUMMARY DISPOSITION

I. Preliminary Statement

1. A careful reading of the several arguments advanced by the Intervenors, the Department of Justice, and the AEC Regulatory Staff in opposition to Applicants' Motion for Summary Disposition serves only to reinforce Applicants' position that "there is no meaningful nexus between CEI's present refusal to wheel the 30 megawatts referenced in AMP-Ohio's petition, on the one hand, and activities under the license requested in the captioned dockets, on the other" (Motion, para. 3, p. 2). The termination of AMP-Ohio's intervention in the present proceeding is therefore fully warranted.

2. Before responding to particular assertions made in the opposition papers filed on October 9 and 10, 1974, there is one matter that requires special comment at the outset in order that the essential focus of the present inquiry is not lost. The Intervenors, seemingly in an effort to persuade the Licensing Board that there is no real need even to consider the instant motion, declare stridently that the issue of "nexus" underlying Applicants' request for summary disposition was placed before the Licensing Board in several earlier filings which addressed the question whether AMP-Ohio should be permitted to intervene. Because AMP-Ohio's intervention was ultimately allowed, Intervenors strenuously argue that the claim of "no nexus" can no longer be raised as a basis for removing AMP-Ohio from this proceeding.

3. This argument is analytically unsound. In Applicants' earlier papers directed to the intervention question, the "nexus" challenge to AMP-Ohio's participation in the antitrust hearing was based solely on the pleadings, as set forth in AMP-Ohio's petition, and the supplemental material thereto. The sole issue presented to the Licensing Board in that context was whether, as a matter of law, AMP-Ohio alleged a sufficient nexus to permit it to intervene in this proceeding. For purposes of resolving that threshhold question, the allegations in the petition to intervene, as supplemented, were necessarily taken to be true, and, as the

Licensing Board clearly indicated in its Memorandum and Order of March 15, 1973 (p. 10), the inquiry focused only on whether those allegations met the intervention "requirements of Section 2.714, as further clarified by Waterford."[1/] Under the Waterford standard, the petition to intervene "must describe with particularity and specificity the relationship between the activities under the nuclear license and the alleged anticompetitive practices * * *" (Waterford, September 28, 1973, supra, RAI-73-9, at p. 621 n.2). The Licensing Board ultimately determined that AMP-Ohio had made "a sufficient pleading of nexus to permit [its] intervention in the Perry proceeding" (Final Memorandum and Order on Petitions to Intervene and Requests for Hearing, April 15, 1974, p. 5; emphasis added).

4. That determination, however, clearly does not close the door on further consideration of the nexus question insofar as it bears on AMP-Ohio's continued participation in the antitrust hearing. The Licensing Board itself indicated that, although AMP-Ohio was to be admitted as a party on the basis of its pleadings, a harder look would be taken at the alleged "technical, economic and marketing relationships [AMP-Ohio] asserts could lead to [AMP-Ohio] being unable to

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1/ See In The Matter of Lousiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), Docket No. 50-328A, Memorandum and Order of February 23, 1973 (RAI-73-2-48), and of September 28, 1973 (RAI-73-9-619), respectively (hereinafter referred to as "Waterford").

fulfill its commitment to [the City of] Cleveland" prior to commencement of discovery (ibid.). In this regard, it is instructive to focus again on the Atomic Energy Commission's language in Waterford. The Commission there directed that "an intervenor must plead and prove a meaningful nexus between the activities under the nuclear license and the 'situation' alleged to be inconsistent with the antitrust laws" (Waterford, September 28, 1973, supra, RAI-73-9, at p. 621; emphasis added). Moreover, after specifically noting that the nexus issue "is a primary and predominant question which must pervade the proceeding," the Commission further admonished in Waterford that (ibid.):

> * * * 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. This can be done under the provisions of 10 C.F.R. 2.749 or by any other appropriate means. [Emphasis added.]

5. It is from this perspective that Applicants' filed their present motion for summary disposition pursuant to Section 2.749 of the Commission's Restructured Rules of Practice. The issue raised therein no longer concerns simply the pleading requirements, as articulated in Waterford. 2/ Rather, the Licensing Board is now confronted with the separate question whether there exists any factual basis

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2/ It is to be remembered that the Commission's decisions in Waterford were directed to the threshhold question of intervention; the nexus issue was not considered there in the context of a summary disposition motion. Accordingly, contrary to AMP-Ohio's claim (AMP-Ohio, Response, p. 8), the fact that intervention was allowed in Waterford in no way undermines -- even assuming arguendo a similarity of circumstances -- Applicants' present request for summary relief.

for the allegations (earlier assumed to be true) which AMP-Ohio set forth in its petition to intervene, and the supplements thereto, to sustain its nexus position. In short, the Licensing Board is, for the first time, called upon to determine whether there exists a genuine issue of material fact regarding the blanket assertions in AMP-Ohio's pleadings that installation of Perry Nos. 1 and 2 will (a) eliminate the present capability of the CEI system to accept and transmit 30 MW of PASNY power to the City of Cleveland's Municipal Electric Light and Power ("MELP") plant, (b) disrupt the pattern of power flows on the CEI system (assuming, after installation, a temporary loss of the Perry generating or transmission facilities) so as to create an overload condition on the facilities handling the PASNY deliveries, or (c) cause an unstable situation on the CEI system which would lead to an interruption in the transmission of 30 MW of PASNY power.

6. Contrary to Intervenors' contention, this determination depends on an entirely different analysis than that undertaken by the Licensing Board in disposing, on the basis of the pleadings alone, of the nexus arguments made earlier in connection with AMP-Ohio's intervention. It is therefore disingenuous for AMP-Ohio to suggest that the present motion is undeserving of consideration because Applicants' arguments are here "for the fifth consecutive time in these proceedings" (AMP-Ohio Response, p. 3).

Clearly, the questions now underlying AMP-Ohio's nexus position are new to the Licensing Board. Applicants submit they have satisfactorily demonstrated in their moving papers that the sweeping allegations in AMP-Ohio's pleadings are not supported by the undisputed facts; their motion for summary disposition should therefore be granted.

II. Discussion

7. Most of the arguments made against summary disposition are misdirected. This is clearly the case with respect to AMP-Ohio's rather lengthy discussion of the concept of standing. As pointed out above, Applicants do not seek to resurrect on this motion their earlier challenge, based on the pleadings, to AMP-Ohio's intervention in the present proceeding. AMP-Ohio has been allowed to intervene, and thus the question of its standing is one that has been put behind us.

8. The issues now before the Licensing Board are thus directed, not to the intervenor's "standing" in the sense discussed in Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S.Ct. 827 (1970), and National Coal Association v. Federal Power Commission, 191 F2d 462, 467 (C.A.D.C. 1951) -- the cases on which AMP-Ohio places principal reliance -- but to the jurisdictional content of the intervenor's various contentions. Just as in a judicial context, where a litigant's standing to sue

plainly does not preclude the courts from awarding summary judgment against him for lack of subject matter jurisdiction over the matters he seeks to put in controversy, so, too, in the present context, AMP-Ohio's standing does not act as a bar to summary disposition of its claims if, due to the failure to show a meaningful nexus, AMP-Ohio's contentions fall outside the antitrust jurisdiction of the Licensing Board. As observed by the Atomic Safety and Licensing Appeal Board in a related context in its Memorandum and Order of March 29, 1973 in In the Matter of Northern States Power Company (Prairie Island Nuclear Generating Plant, Unit 1 and 2), Docket Nos. 50-282 and 50-306, ALAB-107, RAI-73-3-188, 191, affirmed BPI and Nodland v. Atomic Energy Commission, No. 73-1689, ___ F. 2d___ (C.A.D.C. 1974):

> It certainly would not further -- but indeed would impede -- the orderly carrying out of the adjudicatory process to accord an individual the status of a party to a proceeding in the absence of any indication that he seeks to raise concrete issues which are appropriate for adjudication in the proceeding. [Emphasis added.]

9. Applicants have heretofore discussed in some detail the jurisdictional limit which Congress has imposed on the Licensing Board in the present context under Section 105c of the Atomic Energy Act (42 U.S.C. 2135(c)), as reflected in both the language of the statute and its legislative history. 3/ The Commission succinctly identified the

3/ See Applicants' Reply To The Request of AMP-Ohio For Reconsideration Of The Licensing Board's Tentative Denial of AMP-Ohio's Petition To Intervene, dated April 19, 1974, at paragraphs 9-16, a copy of the relevant portions of which is attached hereto as Exhibit A.

nature of the jurisdictional boundaries in its second Waterford decision in the following terms: "* * * alleged anticompetitive practices -- however serious -- which have no substantial connection with the nuclear facility, are beyond the scope of antitrust review under the Atomic Energy Act" (Waterford, September 28, 1973, supra, RAI-73-9, at p. 621). As there stated (ibid.): "If activities relating to a facility have no substantial connection with the alleged anticompetitive practices, there is no need for a hearing as to such practices or proposed forms of relief from them." See also 10 C.F.R. §2.714(b). And this is so notwithstanding that the complaining intervenor might otherwise have been able to demonstrate its standing to intervene.

10. It is Applicants' position, as more fully articulated in the moving papers, that the 1973 refusal of The Cleveland Electric Illuminating Company ("CEI") to transfer over its transmission system 30 MW of PASNY power to MELP at the request of AMP-Ohio has, as a matter of undisputed fact, no connection whatsoever to any of the activities that will be associated with the designated nuclear facilities when they become operational in 1979 and 1980. AMP-Ohio alleged in its pleadings that a sufficient nexus could be found in the areas of future transmission capacity and future transmission stability on the reinforced CEI system. It is, however, clearly set forth in Applicants'

Statement of Material Facts (paragraphs 9, 11, 12 and 13), required to be filed by the moving party under Section 2.749(a) of the Commission's Restructured Rules of Practice, that, after the installation of Perry Nos. 1 and 2, no transmission capacity problems and no transmission stability problems will result on the reinforced CEI system which would impact adversely on a regular 30 MW transfer of PASNY power from the Ohio-Pennsylvania border to the City of Cleveland. No counterstatement disputing Applicants' fact statements has been filed by AMP-Ohio, and thus, pursuant to Section 2.749(a) of the Commission's Rules "[a]ll the material facts set forth in the statement required to be served by the moving party will be deemed to be admitted * * *" (emphasis added). See National Life Insurance Company v. Silverman, 454 F2d 899, 909 (C.A.D.C. 1971).

11. In its present posture, then, the motion for summary disposition plainly should be granted. AMP-Ohio's only real argument to forestall such a ruling is based on the surprising assertion, made here for the first time, that the alleged anticompetitive "situation" set forth in AMP-Ohio's petition to intervene involves more than the isolated refusal by CEI to transmit 30 MW of PASNY power to the City of Cleveland.

12. There is, however, no support in the pleadings for a reading of AMP-Ohio's contention more broadly than the

language itself seems to suggest. In their initial opposition to the February 15, 1974 petition to intervene, Applicants stated that "AMP-Ohio places exclusive reliance for permitting its intervention here on a refusal by Cleveland Electric Illuminating Company * * * to participate in an agreement to wheel PASNY power on its existing transmission system from a point of interconnection with Pennsylvania Electric Company to the City of Cleveland" (Applicants' Reply to Petition of AMP-Ohio To Intervene, dated February 26, 1974, p. 2; emphasis added). In response thereto, AMP-Ohio filed a Supplement to its petition on Febuary 28, 1974. Not only was no issue taken with Applicants' statement of the anticompetitive "situation" alleged, but, indeed, AMP-Ohio there affirmatively confirmed Applicants' understanding of the pleadings, stating (Supp. Pet., p. 3):

> AMP-Ohio seeks only a review of that relationship mandated by the Commissioner, and only upon the specific facts alleged in its petition, i.e., denial of access to CEI transmission for the wheeling of PASNY power. [Emphasis added.]

13. Significantly, neither the City of Cleveland,[4/]

4/ The City of Cleveland argues that there is a substantial connection between the present refusal to make a 30 MW transfer of PASNY power and the "future marketing" of nuclear power to be generated at the nuclear plants. This is essentially the position also taken by DOJ. We note initially that no such argument has ever been advanced by AMP-Ohio as a basis for finding nexus, and, therefore, this is neither the proper time nor place for it to be considered. Even apart from that consideration, however, it is clear, as discussed, infra, at pp. 21-25, that reliance on the "marketing (Cont'd)

the Department of Justice,[5/] nor the AEC Regulatory Staff has suggested in its October 10 papers that there is more to AMP-Ohio's contention than the isolated PASNY situation. Moreover, the Licensing Board has consistently treated AMP-Ohio's pleadings as being so restricted. Thus, in its Final

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4/ (Cont'd)
of power", as the activity under the nuclear license which relates to the PASNY situation, is insufficient for purposes of meeting the Waterford nexus standard.

The City of Cleveland further takes issue with Applicants' argument that the matter of transmission instability on the CEI reinforced system, due to outages at Perry Nos. 1 and 2, can arguably be used as a basis for showing nexus in the present context only if CEI agrees to wheel the PASNY power. The City characterizes this position as inherently absurd on the theory that it permits Applicants to "shield their unlawful refusal to wheel PASNY power from antitrust review by this Board through the simple expedient of persisting in that unlawful activity" (City's Response, p. 3). Passing for now the City's erroneous characterization of the PASNY refusal as "unlawful", the simple answer to the City's argument is that Congress did not confer on the Atomic Energy Commission sweeping jurisdiction to consider the antitrust implications of every activity of a power company alleged to be unlawful. Rather, as pointed out earlier, it narrowly defined the agency's antitrust jurisdiction to those situations having a substantial connection with activities under the nuclear licenses being sought. Thus, in the absence of a satisfactory showing of nexus, "alleged anticompetitive practices -- however serious -- * * * are beyond the scope of antitrust review under the Atomic Energy Act" (Waterford September 28, 1973, supra, RAI-73-9, at p. 621). This, of course, does not mean, as the City seems to suggest, that the alleged unlawful activity is, in the absence of a showing of nexus, "shielded" from antitrust review. Clearly, the party claiming injury can adequately pursue his antitrust claims in court.

5/ While the Department of Justice discusses the nexus question in a much broader context than the refusal of CEI to make an isolated transfer of 30 MW of power to the City of Cleveland, it grudgingly admits that the AMP-Ohio's pleadings deal only with the narrow PASNY situation (DOJ Response, p. 4 n.2).

Memorandum and Order of April 16, 1974, the Licensing Board described the "situation" referenced in AMP-Ohio's petition (as supplemented) as involving AMP-Ohio's "ability to provide [the City of] Cleveland with an alternate source of bulk electric power from the Power Authority of the State of New York" (p. 5). And, directly thereafter, in requesting further proof on the nexus question, it asked for a clarification regarding certain "relationships that [AMP-Ohio] asserts could lead to [AMP-Ohio] being unable to fulfill its commitment to [the City of] Cleveland" (ibid.)

14. It is, therefore, too late in the day for AMP-Ohio now to begin restructuring its pleadings as an afterthought. Moreover, the argument it makes in an effort to support a more expansive reading of the PASNY contention, is, in any event, not well taken. AMP-Ohio asserts that the "refusal of CEI to wheel the initial 30 MW bloc of PASNY power represents only the first step of a pattern of refusals which would inevitably preclude [AMP-Ohio] from the opportunity to deliver large quantities of low-cost power to its members" (AMP-Ohio Response, p.4). There is absolutely no basis for this statement.

15. In the first place, CEI's refusal to transmit the PASNY power to the City of Cleveland was based primarily on a "competitive situation" in the City which "is clearly unique" (CEI Letter to AMP-Ohio of August 30, 1973, Exhibit

L to AMP-Ohio Pet.);[6/] CEI is not confronted with a similar situation vis-a-vis any of the other municipalities which are members of AMP-Ohio. Accordingly, the response given by CEI to AMP-Ohio's request regarding a PASNY power transfer to the City of Cleveland in no way portends "a pattern of refusals". Nor has it ever been suggested that there exists any evidence whatsoever of other refusals by CEI, or any other Applicant herein, to similar requests made by AMP-Ohio.

16. Moreover, it is undisputed that the PASNY situation involved "the last remaining 30 megawatts of power generated at the Niagara Power Project that were available for out-of-state distribution" (Applicants' Statement of Material Facts, para. 2). Thus, in the future, AMP-Ohio will obviously have to look elsewhere for "large quantities of low-cost power" (AMP-Ohio Response, p. 4) for its members. Since all but one (the City of Painesville) of its members is located outside of the CEI service area, it is speculative, at best, that AMP-Ohio will ever again need the use of CEI's transmission system to transmit to its members the low-cost power it may obtain. Th refore, to state, as AMP-Ohio has, that "[t]his initial refusal represents only the cutting

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6/ The August 30 letter stated in part: "The Illuminating Company competes with the Cleveland Municipal Electric Light Plant on a customer-to-customer and street-to-street basis in a sizable portion of the City. The competitive situation is clearly unique."

edge of a weapon held by CEI which threatens the very existence of [AMP-Ohio] as a viable wheeling entity" (AMP-Ohio Response, p.5), is a complete distortion of the true facts. Such misleading allegations certainly provide no legitimate basis for the kind of restructuring of the narrow PASNY contention set forth in the pleadings that AMP-Ohio now seems to be urging.

17. Nor is there any reason to fault the Davidson Affidavit on the basis of AMP-Ohio's post hoc pronouncements that it intended to frame a more expansive contention. The charge is made that the Davidson Affidavit and its underlying studies are incomplete because they do not consider the effect of the Perry plants on other member municipal utilities of AMP-Ohio, either in the context of a delivery of PASNY power or in the context of a delivery of any other amounts of power (AMP-Ohio Response, p. 11). This argument conveniently ignores the fact, however, as reflected in AMP-Ohio's Supplemental Petition (p.2) and again in its explanatory letter to the Licensing Board on March 4, 1974, that AMP-Ohio at all times articulated its nexus position in terms of the impact of the designated nuclear facilities on "the delivery of PASNY power to the City of Cleveland for and on behalf of AMP-Ohio, Inc." (AMP-Ohio letter of March 4, 1974). It has heretofore always been this particular transfer -- involving only a 30 MW bloc of power and only to

the City of Cleveland -- that lay at the heart of AMP-Ohio's nexus claim.

18. The Davidson Affidavit, and the data described therein, properly concentrated on the only "situation" alleged. It is unrealistic now to claim "incompleteness" because other member municipal utilities of AMP-Ohio -- which are not interconnected with CEI system, and, but for the City of Painesville, are located outside the CEI service area -- did not figure in the referenced studies, especially since AMP-Ohio was under a contractual commitment to deliver the PASNY power only to the City of Cleveland. (See Exhibit D to AMP-Ohio Petition To Intervene).

19. Nor can it reasonably be asserted that the supporting data submitted by Applicants is deficient because it focuses primarily on a 30 MW transfer of power. AMP-Ohio has not, until now, given any indication that "other amounts of power" are even potentially available to it. Moreover, without a more definitive quantification, it would be virtually impossible to study the impact of the Perry plants on a speculative transfer of power in the abstract -- it is necessary to know how much power is contemplated in the transfer to determine the effect that the installation of the nuclear facilities will have thereon. In this regard, it is significant to note, however, that the studies described in the Davidson Affidavit indicate, that the post-

Perry reinforced CEI system could accomodate a transfer of power well in excess of 30 MW without any disruptions (Davidson Aff., para. 9).

20. Summary disposition is therefore entirely appropriate in the present cicumstances. While AMP-Ohio asserts, through an attached affidavit by Mr. Illingworth, that it has not had an opportunity to evaluate the planning studies on which Mr. Davidson's Affidavit is based, there is, significantly, no material fact contained in the Davidson Affidavit which has been placed in dispute. Indeed, Mr. Davidson's fact findings are set forth in Applicants' Statement of Material Facts (paras. 9-13); that Statement has not been challenged, and thus the matters therein must, under Section 2.749(a) of the Commission's Rules, now be deemed to have been admitted by AMP-Ohio (see p. 9, supra).

21. In this connection, it should not be overlooked that Applicants' motion for summary disposition was served by hand on counsel for AMP-Ohio on August 15, 1974, well in advance of the August 26 date set by the Licensing Board for filing discovery requests. Yet, AMP-Ohio has made no request for production of the planning studies described in the Davidson Affidavit; nor has it served on CEI any interrogatories addressed to the matter of CEI's transmission capacity and CEI's transmission stability both before and

after installation of the Perry units.[7/] If AMP-Ohio seriously intended to dispute the fact statements set forth in Applicants' motion papers, it surely would not have affirmatively elected to bypass the discovery process which is specifically designed to provide litigants with the opportunity to explore such matters fully. Its silence in this regard can only be viewed in the same light as its failure to file the counter-statement required under Section 2.749(a) of the Commission's Rules -- i.e., as but a further indication of AMP-Ohio's implicit recognition that, as to the matter of nexus in the context of its PASNY contention, there indeed exists, as Applicants' motion papers clearly demonstrate, no genuine issue of material fact.

22. There is no reason in these circumstances to postpone any longer a decision on the Applicants' motion in deference to AMP-Ohio's request to "probe the credibility" of Mr. Davidson (AMP-Ohio Response, pp.9-10). Mr. Davidson's statements were made under oath, and AMP-Ohio has pointed to no specific facts which cast doubt on his veracity. To be sure, Mr. Davidson is an officer of CEI; but that alone should not be considered a basis for automatically inferring that he has filed with the Licensing Board an untrustworthy

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7/ In view of AMP-Ohio's decision not to engage in any pretrial discovery against CEI, the suggestion by the AEC Regulatory Staff in its opposition paper of October 10, 1974, to postpone ruling on the present motion until discovery is completed is particularly inappropriate.

affidavit. This is espcecially so here, where Mr. Davidson's statements are based in part on independent studies conducted by national and regional associations and where AMP-Ohio has not challenged the accuracy of any statements made.

23. Indeed, to give any recognition to AMP-Ohio's speculative assertions regarding Mr. Davidson's credibility would undermine the entire summary disposition procedure. Such broad, unsupported allegations could always be made in this context; but, as the Commission's Rules make clear, argumentative statements of this sort are not to be considered a sufficient opposition to a motion for summary disposition in the absence of "specific facts showing that there is a genuine issue of fact" (10 CFR 2.749(b)). AMP-Ohio's October 9 filing clearly fails to meet the requisite standard, and Applicants' motion should therefore be granted.

III. DOJ's Opposition Paper

24. Before concluding, there is need for a brief additional comment on the October 10 filing of the Department of Justice ("DOJ") in opposition to Applicant's summary dispostion motion. In its paper, DOJ devotes considerable space to a discussion of the nexus question in the context of wheeling generally, thereby effectively disassociating itself from the "admitted" narrower focus of AMP-Ohio's pleadings on "a specific anticompetitive act (i.e., a refusal

to wheel power from a third party to the City of Cleveland)". (DOJ Response, p.4).

25. There is, however, no need at this time to resolve the more complex nexus question raised by DOJ in order to dispose of Applicants' motion. Whatever might ultimately prove to be the Licensing Board's attitude with regard to its jurisdiction in this proceeding over a general refusal-to-wheel contention, its determination in that regard will have no real bearing on the separate question presented here as to whether an isolated refusal to wheel a 30 MW bloc of power on the existing CEI transmission system has any relationship to future activities under the nuclear licenses for Perry Nos. 1 and 2. Nor is the response given to the latter question necessarily dispositive of the former matter. And, in view of the Matters in Controversy framed by the Licensing Board in Prehearing Order No. 2, dated July 25, 1974 (see Item (5), p. 11), it now seems that the issue of general third-party wheeling has crept into the hearing, notwithstanding the fact that it appears nowhere in the various pleadings, and will remain a matter to be litigated whatever the outcome of Applicants' summary disposition motion.

26. We do believe it is appropriate to add, however, out of an abundance of caution, that, even if DOJ's nexus discussion were deemed to be at all relevant to AMP-

Ohio's efforts, in a much narrower context, to show the necessary jurisdictional relationship, that discussion would, on careful analysis, be of little assistance. It is, in the first place, premised on the erroneous assumption that all transmission facilities of private power companies have common carrier obligations, requiring them, in essence, to wheel power upon request. Thus, according to DOJ, virtually any refusal by a dominant utility to wheel power to its actual or potential competitor(s) would constitute a "situation inconsistent with the antitrust laws" within the meaning of Section 105c of the Atomic Energy Act.

27. However, the recent Supreme Court decision in Otter Tail Power Company v. United States, 410 U.S. 366, 93 S. Ct. 1022 (1973), although cited by DOJ in support of its position, seems to undercut significantly the aforesaid rationale (see dissent by Mr. Justice Stewart 410 U.S. at 383-388, 93 S.Ct. at 1032-1034). The holding there was not that Otter Tail's refusal to wheel, standing alone, constituted a violation of the antitrust laws, even assuming arguendo that such refusal was for what some might consider to be anticompetitive reasons. Rather, it was the refusal to wheel power, in combination with a number of other obstructive activities, all with the predatory intent to prevent towns served by Otter Tail from establishing their own municipal systems, that was found by the Supreme Court to be in contravention of the antitrust laws.

28. The Otter Tail situation is materially different from the "situation" described by AMP-Ohio in its petition to intervene, Here, the refusal by CEI to wheel PASNY power stands alone; nor is there any indication that a predatory intent was associated with the refusal. Even if more than a 30 MW bloc of power were involved -- which is not the case -- DOJ's reasoning under the Otter Tail decision would, we submit, fall short of demonstrating, either in the PASNY context or in the context of wheeling generally, that a denial of access to the CEI transmission system was inconsistent with the antitrust laws. As pointed out by the dissent in Otter Tail, supra, 410 U.S. at 389, 93 S.Ct. at 1035: "Antitrust principles applicable to other industries cannot be blindly applied to a unilateral refusal to deal on the part of a power company, operating in a regime of rate regulation and licensed monopolies."

29. Of equal importance, moreover, is the fact that DOJ has still failed to demonstrate satisfactorily how a refusal now to wheel power on CEI's existing transmission system relates to future activites under the designated nuclear licenses. The only tie suggested by DOJ -- now being aired for the first time -- concerns the "marketing" of nuclear power, which, it is claimed, "demonstrably furthers Applicants' monopolization of the wholesale and retail power markets -- thus maintaining and exacerbating a situation

clearly inconsistent with the antitrust laws" (DOJ Response, p.9). This argument, however, sweeps too broadly to be of any real use in evaluating nexus.

30. As the Supreme Court recently observed in Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 759, 93 S.Ct. 1870, 1878 (1973), the electric power industry, because it is so extensively regulated, operates "within the confines of a basic natural monopoly structure * * *." Consequently, a finding that a private utility is "dominant" in its service area, even to the point of possessing monopoly power, is the rule, rather than the exception. Mr. Justice Stewart, dissenting in Otter Tail, explained the situation quite well, stating that "[t]he very reason for the regulation of private utility rates -- by state bodies and by the Commission -- is the inevitability of a monopoly that requires price control to take the place of price competition" (410 U.S. at 389, 93 S.Ct. at 1035; emphasis added).

31. In light of this "situation" -- which the Supreme Court has recognized does not necessarily suggest any inconsistency with the antitrust laws (see United States v. Marine Bancorporation, Inc., 418 U.S. _____, 94 S.Ct. 2856 (1974)) -- it is no answer to the nexus inquiry to point simply to the "marketing of power" under the designated licenses. Obviously, much of the power that will eventually

be generated at the Perry plants will be marketed; and it is at least arguable that this additional marketing potential will contribute in some measure to the maintenance of the dominant position already held by Applicants in their respective service area.[8/] To conclude, however, that such a showing is sufficient to satisfy the Waterford nexus standard, is essentially to remove the nexus jurisdictional limitation from the statute. For, such a nexus can be shown in every case.

32. This plainly contravenes the intent both of Congress and of the Commission. First, the "marketing of power" is plainly not an acticity under the license within the contemplation of Section 105c of the Atomic Eneregy Act. Second, to agree that the "marketing of power" is sufficient in this context to establish nexus would be no different than to recognize as a sufficient showing of nexus that the power from the nuclear facilities will be commingled with

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8/ We point out in passing, however, that where dominance has been attained by legally permissible means, and, simply by virtue of the extensive federal and state regulatory restraints in the electric power industry, that dominance will be "maintained" whether or not there is available to the dominant utility an additional amount of nuclear power to market, it then is doubtful that the potential marketing ability associated with the nuclear plants can properly be said to contribute in any material way to the maintenance of the legitimate dominant position that is already recognized. Rather, that dominant portion will be "maintained" in any event by virtue of the fact that electric power companies are required to operate, as Mr. Justice Stewart stated in Otter Tail, supra, 410 U.S. at 389, 93 S.Ct. at 1035, "in a regime of rate regulation and licensed monopolies."

the power from other generating facilities on Applicants' respective systems. The Commission clearly stated in Waterford, however, that the commingling argument failed to establish the requisite "substantial connection". What it there said in finding such a contention insufficient for nexus purposes has equal application with respect to DOJ's "marketing" argument (Waterford, September 28,1973, supra, RAI-73-9, at p. 621):

> 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.

33. Accordingly, the "marketing" rationale advanced here for the first time by DOJ (and the City of Cleveland) clearly does not sustain a claim of nexus with regard to an alleged refusal to wheel power (whether viewed in the context of wheeling generally or wheeling on an isolated basis) on Applicants' existing transmission system. Instead, what must be shown is a meaningful tie between the present refusal to wheel and future generation or transmission activities under the nuclear licenses. Applicants submit that no such connection exists. Indeed, the Commission has itself expressed serious doubt as to whether the Waterford nexus standard can be met where the alleged anticompetitive "situation" involves a "denial of access to transmission

systems * * * [which] solely linked non-nuclear facilities [that] had been constructed long before application for an AEC license" (Waterford, September 28, 1973, supra, RAI-73-9, at p. 621). Nothing submitted by the Intervenors, the Department of Justice or the AEC Regulatory Staff suggests that those doubts can now be laid to rest.

IV. Conclusion

34. Accordingly, for the reasons stated herein, and in Applicants' motion papers, summary disposition should be granted. While DOJ has suggested that the Licensing Board might, if it is inclined to rule in Applicants' favor, defer such action in order to provide AMP-Ohio yet another opportunity to amend its pleadings, such a course is particularly inappropriate in this instance. AMP-Ohio already has had six separate chances to articulate its nexus position.[9/] Its responses to the requests of the Applicants and the Licensing Board for a further clarification of the relationship on which it intends to rely in order to meet the Waterford standard reflect a consistent refrain. There is thus no reason to anticipate that AMP-Ohio will provide any greater

9/ See AMP-Ohio's Petition to Intervene, dated February 15, 1974; its Supplemental Petition dated February 28, 1974; its explanatory Letter to Chairman Farmakides, dated March 4, 1974; its Request for Reconsideration, dated April 3, 1974; its Response to the Board's Request for Clarification, dated August 5, 1974; and its Opposition to the present motion for summary disposition, dated October 9, 1974.

illumination as to its position if afforded yet another opportunity to amend its pleadings. This is especially so in light of the fact that AMP-Ohio has elected not to engage in any pretrial discovery in an effort to refine and further develop it nexus arguments.

35. It would, therefore, serve no legitimate purpose to delay further the present proceedings by again inviting AMP-Ohio to restate its position on nexus. We are now well into pretrial discovery. This phase of the proceedings should not be interrupted to permit another round of legal arguments related to AMP-Ohio's PASNY contention where there exists no real likelihood that any new matters will be raised. Accordingly, the Licensing Board should now decide Applicants' motion, and, for the reasons stated, should terminate AMP-Ohio's participation in this hearing.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Gerald Charnoff

Counsel for Applicants

Dated: October 21, 1974

EXHIBIT A

EXCERPTS FROM "APPLICANTS' REPLY TO THE REQUEST OF AMP-OHIO FOR RECONSIDERATION OF THE LICENSING BOARD'S TENTATIVE DENIAL OF AMP-OHIO'S PETITION TO INTERVENE"

* * * * *

9. Moreover, it must be demonstrated in the petition that the issues raised involve matters that are properly within the cognizance of the Commission. Plainly, "[a] petition that sets forth contentions relating only to matters outside the jurisdiction of the Commission shall be denied" (emphasis added). Section 2.714(b) of the Rules of Practice. It is in this connection that the nexus test articulated in the Waterford decisions becomes particularly important. In 1970, Congress conferred on the Atomic Energy Commission clearly-defined authority to intrude into the area of antitrust review. Section 105c of the Act, as then amended, contains a limited delegation of administrative responsibility for examining conduct which allegedly has an anticompetitive effect. The statute in specific terms restricts the Commission's authority in this area to a review of "activities under the license" in question which "would create or maintain a situation inconsistent with the antitrust laws * * *" (Section 105c(5)).

10. The legislative history underlying the 1970 amendment demonstrates that Congress intended the present language of Section 105c to have no broader sweep than is suggested on its face. Three bills prescribing antitrust review by the Commission received careful consideration in the 1st Session of the 91st Congress: S. 212 (the Anderson-Aiken bill); H.R. 8289 (the Holifield-Price bill); and H.R. 9647 or S. 1883 (the Atomic Energy Commission's bill). The Anderson-Aiken and Holifield-Price proposals would have authorized the Attorney General to advise, and the Commission to

consider, whether activities under any license would tend to create a situation inconsistent with the antitrust laws." The Commission's bill, which was endorsed by the Department of Justice, provided simply for the Attorney General to advise the Commission whether "issuance of such licenses or activities for which the license is sought would tend to create or maintain a situation inconsistent with the antitrust laws."

11. At the hearings in 1969 and 1970 on these bills, held before the Joint Committee on Atomic Energy (hereinafter "Joint Committee"), the nature and scope of the Commission's review authority was much discussed. There was a clear expression of concern on the part of the Joint Committee members that antitrust review not be used to protract the AEC licensing process unnecessarily, thereby causing an inordinate delay in bringing nuclear generating facilities on the line.[7/] Inquiry was thus made as to the types of anticompetitive practices that were contemplated as coming within the reach of the proposed legislation. In response to this question, the then General Counsel of the Atomic Energy Commission stated (Hearings, Pt. 1, at p. 97):

> * * * we do not anticipate that the prelicensing antitrust review authority would be used to reach general antitrust problems in the nuclear supply industry beyond the scope of the specific activities for which an application for a license has been made to the Commission. [Emphasis added.]

An AEC Commissioner at that time confirmed this understanding of the legislative proposals, urging that the language be read as requiring that the "antitrust principles * * * be applied with

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7/ See, e.g., Hearings on Prelicensing Antitrust Review of Nuclear Power Plants Before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess., Pt. 1, at pp. 42, 46, 92, 93, 98, 139; Pt. 2, at pp. 383, 394, 491, 515 (1969-1970) (hereinafter referred to as "Hearings").

attention to the particular circumstances and relationships involved in the activity to be licensed." Hearings, Pt. 1, at p. 283.

12. This construction was echoed by the Department of Justice. Thus, in discussing the nature of the Attorney General's advice procedure, the then Assistant Attorney General, Antitrust Division, stated: "Generally, we would expect that antitrust advice in AEC licensing cases would relate directly to the specific transaction in which the applicable utility would be involved, and to particular features of that transaction" (emphasis added). Hearings, Pt. 1, at p. 144. With respect to the kinds of activities or arrangements contemplated as within the scope of the agency's review authority, he added (Hearings, Pt. 1, at p. 145):

> We think that for some time to come the "access" issue will be predominant: In what circumstance and to what extent is the application 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?

And this understanding of the limited nature of the Commission's antitrust review authority was later underscored in testimony submitted by the Department of Justice before the Senate Antitrust & Monopoly Subcommittee.[8/] It was there explained that (Hearings, Pt. 2, at p. 366):

> * * * 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, * * *.

8/ This testimony was inserted into the record of the Joint Committee hearings by the American Public Power Association. This group also pointed out that, in view of the overall responsibility of the Department of Justice for continuing enforcement of the antitrust laws generally, it was the accepted view, as expressed by the General Counsel of the AEC, that "the antitrust authority of [the] Commission will be an appropriate complement to the authority of the Attorney General, and, it would seem, should not be used by the Commission to duplicate authority already held by the Attorney General." Hearings, Pt. 2, at pp. 365-366.

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.]

13. Support for this formulation of the legislation under consideration also came from other sources. Thus, the Association of the Bar of the City of New York spoke at the hearings in terms of a carefully circumscribed area of administrative review on antitrust matters -- i.e., one "limited to the activities of the applicant directly associated with activities under the proposed license in order to preclude the possibility of Commission investigations into unrelated matters * * *." Hearings, Pt. 2, at 625. The testimony of Donald G. Allen, President of tne Yankee Atomic Electric Co., was to the same effect. Hearings, Pt. 2, p. 532.

14. To be sure, there were several spokesmen for the industry who proposed a much narrower standard of administrative review of antitrust matters. See, e.g., Hearings, Pt. 2, at pp. 320-342, 433-461. Similarly, proponents of the position that the Commission be accorded sweeping authority in this area were heard by the Joint Committee.[9/] The bill that ultimately emerged, however, did not adopt "either extreme view." House Report 91-1470, Joint Committee on Atomic Energy to Accompany H.R. 18679, p. 14 (hereinafter "Committee Report"). Rather, as Senator Pastore, floor manager of the bill in the Senate, told his colleagues: "The end product, as delineated in H.R. 18679, is a carefully perfected compromise by the committee itself * * *."[10/]

9/ The arguments for a broad review standard were summarized by Senator Aiken in his threatened dissent to the Joint Committee report. "Dissenting Views on H.R. 18679" (September 14, 1970).

10/ 116 Cong. Rec. S. 39619 (December 2, 1970). And see remarks of Representative Hosmer on the floor of the House. 116 Cong. Rec. H. 39819 (December 3, 1970).

15. It is this compromise bill (H.R.18679) which was enacted into law. By its terms, the amendment restricts the Commission's inquiry to whether "activities under the license would create or maintain a situation inconsistent with the antitrust laws" (emphasis added). Section 105c(5). Senator Aiken, a strong advocate of more comprehensive review authority, acknowledged that the language ultimately adopted was to some extent reflective of the effort "to cut back on the scope of the AEC consideration of antitrust issues * * *."[11/] The full extent of that cutback was delineated in the following terms by the Joint Committee in its Report on the adopted legislation (Committee Report, at p. 14):

> The committee is recommending the enactment of e-licensing review provisions which -- as in the proposed Atomic Energy Act of 1954 that the Joint Committee originally reported out, and as in the version of subsection 105c that the Senate passed on July 27, 1954 -- do not stop at the point of the Attorney General's advice, but go on to describe the role of the Commission with respect to potential antitrust situations.
>
> * * * *
>
> * * * It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws. [Emphasis added.]

16. The Commission did not lose sight of the clear statutory language and its legislative history when called upon in the Waterford proceedings to construe its antitrust review authority expansively. In its initial ruling, it shunned a broad reading of amended Section 105c, which would have permitted a roving investigation into all alleged antitrust implications generally associated

11/ "Dissenting Views on H.R. 18679" (September 14, 1970), p. 2.

with an applicant's generation, transmission, and distribution of electricity (Waterford, February 23, 1973, supra, RAI-73-2, at p. 49). Pointing out that the clear congressional intent was to confer a "limited" review authority in this area, the Commission properly viewed the scope of its jurisdiction over antitrust matters as confined to those allegedly anticompetitive situations which can be shown to have a "meaningful nexus" with the "activities under the license" (ibid.).

* * * * *

UNITED STATES OF AMERICA
ATOMIC ENERGY 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 "Applicants' Reply To The Several Memoranda Filed By The Other Parties In Opposition To Applicants' Motion For Summary Disposition" were served upon each of the persons listed on the attached Service List by U. S. Mail, postage prepaid, on this 21st day of October, 1974.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By _____
Wm. Bradford Reynolds
Counsel for Applicants

Dated: October 21, 1974.

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	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

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