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April 19, 1973

Benjamin H. Vogler, Esq.
Assistant General Counsel
United States Atomic Energy Commission
Washington, DC 20545

Dear Mr. Vogler:

Re: The Toledo Edison Company and The
Cleveland Electric Illuminating Company
(Davis-Besse Nuclear Power Station),
Docket No. 50-346A

At a meeting held in your office on March 1, 1973, representatives of the City of Cleveland ("City") were asked by the Staff of the Atomic Energy Commission to state the City's view of the "nexus" between the anticompetitive activities of Cleveland Electric Illuminating Company ("CEI"), of which the City complains, and the joint ownership and operation of the Davis-Besse Nuclear Power Station by CEI and Toledo Edison Company, from which the City is excluded. You had requested submission of the City's views within three weeks from March 1. For a number of reasons, including the City's employment of new special counsel, the City requested and received your agreement for enlargement of the time for such submission.

In the meantime, Staff has filed its Supplemental Answer to City's petition to intervene. In this letter City takes cognizance of and responds thereto. Accordingly, City requests that this letter be made part of the formal file in this case and that it be treated as City's reply to Staff's Supplemental Answer.

At the meeting, AEC Staff directed the attention of the City's representatives to the Memorandum and Order of the Atomic Energy Commission, issued February 23, 1973, in Louisiana Power and Light Company (Waterford Steam Electric Generating Station - Unit No. 3), Docket No. 50-382A. This response takes cognizance of the Commission's Memorandum and Order in the Louisiana case as well as of the Notice and Order for Prehearing Conference issued on March 14, 1973, by the Board appointed in that case. The parties and petitioners for intervention in the Louisiana case were advised by the Board that they were to confine their presentation at the prehearing conference to a definition of the alleged situation inconsistent with the antitrust laws or the policies underlying them that will be created or maintained by

activities under the proposed license. They were instructed not to present a recital of the anticompetitive activities of the electric utility there involved.

In light of Staff's reference to the Louisiana case, the City has assumed in this response that its discussion of anticompetitive conduct should be confined to a definitional description of such activities. In any case, an evidentiary discussion at this stage of the proceeding would not be appropriate. The City, of course, is aware that at the antitrust review hearing it has the burden to support its assertions of anticompetitive conduct by CEI. The City will meet that burden.

Any definitional description of the anticompetitive conduct of CEI must be considered in the context of the competitive situation that exists between the City's Municipal Electric Light Plant system ("MELP") and CEI. The City and CEI both operate electric systems throughout the City of Cleveland. To an unusual degree both systems actively compete with one another for customers. They are engaged in direct street-by-street and house-by-house competition. It is not unusual within the same street block to find one building served by CEI and a neighboring building served by MELP. At the present time, MELP serves about 20 percent of the electric customers and CEI serves about 80 percent.

From any viewpoint, the competitive situation in the City of Cleveland between MELP and CEI is the proverbial one of David and Goliath. On the one hand, there is the City's small electric system. It is forced to operate on an isolated basis and to plan for its expansion on that basis. Operation and planning on an isolated basis does not produce power at a cost which permits successful competition for potential customers and retention of existing customers. Such operation and planning has required MELP to rely on small, relatively inefficient, and high-cost generating units.

Control of all high-voltage transmission lines in the area is in the hands of CEI. MELP does not have access to these facilities. Without such access, MELP is unable to participate with other systems in power pooling, reserve sharing, coordinated development and planning of generation and transmission. These arrangements are the rule today among electric utility systems. They make for greater reliability of service and provide economies of operation not otherwise obtainable. Access to coordination with other systems and the consequent ability to utilize large and efficient base-load units constitutes

a significant economic advantage. Without access to the area or regional power exchange markets, entities such as MELP, regardless of size and efficiency, cannot achieve optimum economy and reliability and cannot compete effectively with interconnected, integrated systems that have access to the area or regional power exchange market. MELP's isolation from other electric utility systems, which has been a factor in its inability to realize economies of scale and reliability of operations associated with coordinated development and planning and integrated operations, is not accidental. It is the design of CEI.

CEI, on the other hand, does not operate in isolation. To the contrary, CEI conducts its business in the manner which, although denied to MELP, is the almost universal practice in the ration. CEI operates an integrated electric system which is interconnected and coordinated with neighboring electric utility systems. CEI is a member of a five-company power pool known as CAPCO (Central Area Power Coordination Group), organized in 1967. The other four members of the power pool are Toledo Edison Company, Duquesne Light Company, Ohio Edison Company, and Pennsylvania Power Company, a subsidiary of Ohio Edison.

In 1972 CAPCO had four thermal generating units with total capacity of 2950 mw, of which CEI's ownership share was 736 mw. CEI and members of the pool own and operate high voltage transmission facilities (132 and 345 kv). CAPCO provides the framework within which the members coordinate their operations, interchange power, share reserves, and plan and construct generation units and transmission lines on the basis of the requirements of the members of the pool as though they were a single company, thereby making available to each member the economies of scale and reliability made possible only by such coordinated operation and planning.

Describing its membership in CAPCO, CEI has stated (1972 Annual Report to Stockholders, pp. 7 and 29):

> "Participation in CAPCO is one of our major efforts. The purpose of this five-company power pool is not only to obtain the economies derived from installing generating units larger than one company alone would require, but also to coordinate maintenance and strengthen interconnections among all members.
>
> * * *

> The CAPCO Power Pool is an agreement among regional utility companies to assure greater reliability of interconnections, back-up in case of emergencies, and better economies of operation .... The agreement among members includes the joint development of power generation and transmission facilities for all five companies."

Thus, although the ownership of the Davis-Besse plant is to be technically in CEI and Toledo Edison, all members of CAPCO will share in the economic and other benefits of the nuclear plant. In short, the economic benefits of the plant are to be made available to CAPCO members, but not to the City.

CEI has two 345 kv interconnections with Ohio Edison and one each with Pennsylvania Electric and Ohio Power. CEI also has three existing 132 kv ties with Ohio Edison. CEI's own service area comprises a 1700 square mile area in northeastern Ohio. CEI supplies electric energy at retail to 89 municipalities, including part of the City of Cleveland. CEI does not supply power to any municipally-owned electric system. In its service area there are only two such systems, one operated by the City of Painesville and the other the City's MELP system. CEI's peak load was 2822 mw, and its net system capability at year end 1972 was 3775 mw.

The continued existence of MELP is an anathema to CEI. As noted above, CEI sells no power at wholesale to any municipality, and there are only two municipal electric utility operations in the areas served by CEI's facilities. CEI's avowed plan for accomplishment within five years is enunciated in a CEI memorandum dated October 9, 1970, from R. H. Bridges to Lee C. Howley, Vice President and General Counsel of CEI -

> "To reduce and ultimately eliminate the tax-subsidized Cleveland and Painesville Municipal Electric System"

so that its monopoly will be total.

This objective is not a new one. It is not by accident, but by design, that MELP is an isolated system without interconnections and arrangements that would give it access to economies of scale associated with large generating units, back-up in case of emergencies, reliability, and better economies of operation.

In the competition between the City and CEI, quality and reliability of service have been significant competitive factors. In these respects, MELP's customers have suffered interruptions in service which would have been avoided if the MELP system were not isolated. These interruptions adversely affected the confidence of the City's customers in the reliability of the City's service with a consequent loss of customers to CEI. A temporary 69 kv non-synchronous tie between MELP and CEI exists, but only because it was ordered by the Federal Power Commission ("FPC"), and it is to be used only when MELP has an emergency. A permanent 138 kv synchronous tie (again, for use in emergencies only) will exist in about 18 months, but again, only because it was ordered by the FPC.

These interconnections for emergency use should not be equated with arrangements required by the City for access to power pooling, reserve sharing, coordinated development and planning, and access to the economies of scale available from participation in large scale generating units such as those enjoyed by CEI, Toledo Edison, and other members of CAPCO. The temporary 69 kv tie and permanent 138 kv tie ordered by the FPC do not provide such benefits. Such ties involve delivery only of emergency energy from CEI to MELP.

CEI has sought to give the impression that it has stood ready for years to interconnect with MELP in order to give MELP the benefits of coordinated planning and operation, but its representations are misleading and appear to have misled the Department of Justice and the Staff of the Atomic Energy Commission. Thus, in its Separate Answer to the City's Petition to Intervene, CEI asserts (Answer, p. 4):

> "CEI has advocated for many years a permanent interconnection with the municipal electric system."

The type of interconnection to which CEI refers is not of the type the City has sought and needs -- one which provides the benefits of coordination, access to economies of scale, reserve sharing, etc. The interconnection proposed by CEI would not have provided such benefits and ameliorated MELP's condition as an isolated electric system. The interconnection CEI proposed would have basically provided only for the sale of power and would have had the inevitable result of forever removing the City from contention as a viable competitor of CEI. In fact, CEI imposed a condition on the availability of even such an interconnection which made acceptance impossible: that MELP would raise its rates to the level of CEI's rates. Indeed, even the rates proposed by CEI in the

proceedings before the FPC for the emergency interconnections were proposed with a view to the competitive situation.

In sum, CEI has pursued a course of conduct over the years which is inconsistent with the antitrust laws and the policies underlying them to foreclose competition by the City or to gain competitive advantage over the City's electric system through denial to MELP of access to low cost bulk power supply, coordinated development and planning, emergency backup, and by the use of unfair methods of competition.

Turning to the matter of the nexus of the "situation" to "activities under the proposed license", there is presently a situation inconsistent with the antitrust laws, which includes a total monopoly of high voltage transmission lines in the area, which stands in the way of MELP's access to the economies of large scale generation and coordinated development and planning. It is evident that a license without conditions would further concentrate generation and transmission resources in CEI and CAPCO members, would establish a 100 percent monopoly in nuclear generation, and would unlawfully impair the City's ability to compete with CEI by depriving MELP of the economies of such generating resources.

As noted earlier in this letter, Staff has recently filed a Supplemental Answer to the City's petition to intervene and request for a hearing. The City desires to respond to certain statements made by Staff in the Supplemental Answer.

Staff has stated (Supp. Ans. p. 4) that "it is inclined to agree with the Attorney General's view of the competitive situation in the area of concern that there is apparently no anticompetitive situation for the Commission to consider." Staff's reference is to the Attorney General's advice letter of July 9, 1971 in which it is said:

> "In these circumstances, we presently are of the view that an antitrust hearing would not be required pursuant to the reservation of authority contained in the Commission's construction permit." (emphasis supplied)

The "circumstances" to which the Attorney General referred were the City's application to the FPC for a permanent interconnection with CEI and to CEI's stated willingness to enter into an arrangement for such an interconnection. It appears from the Attorney General's advice letter that he was of the impression that the function and purpose of the interconnection was to give MELP access to coordinated development and planning, the economies of scale associated with large-scale generating units, reserve sharing, and other types of economic benefits which the Attorney General recognized as bearing on competition for load growth at the retail level. Under "these circumstances," it is not surprising that the Attorney General was of the view, presently, that an antitrust hearing would not be required to protect the City. Contrary to the Attorney General's impression, however, the interconnection involved in the FPC proceeding and which, by FPC Opinion No. 644 it directed be established for the limited primary term of five years, may be used only "to supply emergency service to the City" and does not provide the benefits envisioned by the Attorney General.

Fully informed of the limited nature of the emergency interconnection and that MELP would continue to be excluded from the benefits of coordinated development and planning that CEI and its CAPCO associates have made their exclusive domain, the Attorney General's recommendation would clearly have been for a hearing. In sum, even if, contrary to fact, the premises underlying the Attorney General's view ever existed, they do not obtain today.

Similarly, Staff's view that "there is apparently no anticompetitive situation for the Commission to consider," as set forth in its Supplemental Answer, is also based on invalid premises. Staff states (Supp. Ans. p. 3) that:

> "A review of the antitrust aspects of the FPC proceeding by the Staff has not revealed any evidence concerning anticompetitive practices or antitrust conduct by CEI."

We do not know whether Staff reviewed the total record before the FPC or some selected portions. If Staff reviewed the whole record then it is aware that the question of CEI's anticompetitive conduct, although put into the proceeding by the City, was never really pursued. Thus, the Presiding Administrative Law Judge observed from the Bench (FPC Record in Docket No. E-7631, p. 453):

> "This may be a pro forma issue, but I don't detect any sign at this stage in the proceeding that it is being pressed as a genuine issue of fact."

Simply put, the allegations of anticompetitive practices were not pursued because they were superfluous to the request for the specific relief sought from the FPC.

Moreover, as Staff is aware, denial of a license or issuance thereof with appropriate conditions by the Commission is not dependent upon proof of violation of the antitrust laws. The Commission is not required to find that CEI's activities under the license will constitute a full-fledged violation of the antitrust laws. It is sufficient that the Commission find that there is a reasonable probability that CEI's activities would run counter to the policies underlying these laws. Report by the Joint Committee on Atomic Energy to accompany HR 18697, enacted as P. L. 91-560. Consequently, any FPC finding on antitrust violation by CEI is not decisive of the Atomic Energy Commission's responsibilities under Section 105c of the Atomic Energy Act. As the Staff is also aware, under Section 105c if a situation inconsistent with the antitrust laws or the policies underlying these laws will be created by the issuance of an unconditioned license to CEI and Toledo Edison, it is immaterial that a situation inconsistent with the antitrust laws had theretofore not been maintained. Further, as was stated in S. Rep. No. 91-1247, 91st Cong., 2d Sess., at p. 14:

> "It is important to note that the antitrust laws within the ambit of Subsection 105(c) of the Bill are all the laws specified in Subsection 105(a). These include the statutory provisions pertaining to the Federal Trade Commission, which normally are not identified as antitrust law. Accordingly, the focus for the Commission's finding will, for example, include consideration of the admonition in Section 5 of the Federal Trade Commission Act, as amended, that 'Unfair methods of competition in commerce, and unfair and deceptive acts in commerce, are declared unlawful.' "

CEI has, as City will prove at the hearing on antitrust review, employed unfair methods of competition and unfair and deceptive acts against the City in an effort to destroy the City as a viable competitor. Such methods and acts have included harassment and coercion of MELP's customers

until they agreed to discontinue taking service from MELP and switch to CEI, disconnecting MELP's service facilities to customers without authorization and substituting CEI's services, making of cash payments by CEI to induce existing and potential customers of MELP to take service from CEI, and generating of lawsuits to jeopardize MELP's ability to maintain a competitive stance.

In its Supplemental Answer Staff states (p. 4):

> "In addition, it must be noted that the dispute between petitioner and CEI does not involve in any manner the majority shareholder and operating utility of the Davis-Besse facility, the Toledo Edison Company."

We do not understand the relevance of Staff's reference to the fact of Toledo Edison's present majority ownership of Davis-Besse Nuclear Plant in relation to the antitrust review. The presence of Toledo Edison as a partner in the ownership of Davis-Besse does not, as Staff seems to imply, immunize the project from a finding that unconditioned licensing thereof would maintain or create a situation inconsistent with the antitrust laws or the policies underlying such laws. Moreover, the City does not agree that Toledo Edison is not involved in the review of antitrust conduct. It is a member of CAPCO, from which the City has been excluded, and the benefits of Davis-Besse are restricted by action of Toledo Edison and CEI to CAPCO members only.

Staff's Supplemental Answer indicates that Staff is in doubt as to the precise relief sought by the City. City does not understand why there continues to be this doubt. In any event, to dispel any doubts or uncertainties that may exist respecting the relief sought, City states that any license issued to CEI and Toledo Edison should be conditioned to require them to grant participation in the Davis-Besse Nuclear Plant to the City either through ownership participation in the plant or through the sale of unit power (i.e., the dedication of a block of capacity), together with the transmission services necessary to deliver power to MELP and together with participation with CAPCO members in coordinated development and planning of bulk power supply and transmission.

City has heretofore requested a 200 mw share of Davis-Besse's 906 mw. This request was made without regard to the Perry Nuclear Station. Since then, on March 23, 1973, CEI filed an application for a license to construct and operate the Perry Nuclear Plant Units 1 and 2. The City proposes to request access to 150 mw of the Perry Plant. If the City were to secure 150 mw from Perry, City would amend its request for 200 mw from Davis-Besse to 50 mw.

CEI contends that under the Ohio State Constitution the City may not lawfully share in the ownership of the Davis-Besse Nuclear Station. Even if this were the case, there is no legal bar to City's purchase of unit power. Nor is there a legal impediment to ownership arrangement through AMP-O (American Municipal Power of Ohio, Inc.), as is evident from the fact that AMP-O has been offered participation in the Zimmer Nuclear Plant by Dayton Power and Light Company and Cincinnati Gas & Electric Company for the benefit of its members.

Section 1 of the Atomic Energy Act of 1954 (42 USC 2011) states that it is the policy of the United States to direct the development and use of atomic energy to strengthen free competition. Section 3(d) (42 USC 2013(d)) states that one of the purposes of the Act is to provide for a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes. In short, the statute recognized that the benefits of public moneys made possible nuclear generation and should, therefore, not be monopolized by investor-owned utilities to the exclusion of public power agencies. The monopolization of nuclear power by the members of CAPCO to the exclusion of public agencies, such as the City, is in direct conflict with the stated purposes and objectives of the Act.

It is respectfully submitted that the City is entitled to intervene, to an antitrust review hearing which it has requested, and to the inclusion in the license of appropriate conditions which give the City access to the benefits of Davis-Besse either through ownership participation or the purchase of unit power.

Very truly yours,

Reuben Goldberg
Attorney for City of Cleveland

cc: Joseph J. Saunders, Esq.
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UNITED STATES OF AMERICA
BEFORE THE ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	Docket No. 50-346A
	)	
	)	
Davis-Besse Nuclear Power Station	)	

Certificate of Service

I hereby certify that copies of the foregoing Letter to Mr. Benjamin H. Vogler dated April 19, 1973 were served this day upon the following persons by depositing a copy thereof in the United States mail, with first class or air mail postage affixed:

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April 19, 1973