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

APPLICANTS' RESPONSE TO REQUEST BY THE DEPARTMENT OF JUSTICE FOR LEAVE TO AMEND PLEADINGS

1. Under the guise of proceeding pursuant to Section 2.740(e) of the Commission's Rules of Practice -- which addresses the matter of amending responses to discovery requests -- the Department of Justice ("Department") now seeks to expand its September 5, 1975 statement of allegations to include at the eleventh hour yet another contention that Applicants generally, and Ohio Edison Company in particular, have had no reason to focus upon in preparing for the November 20 hearing. This effort is not only another demonstration of the callous attitude which the Department and the other parties have had toward Applicants' due process rights;

it also flies in the face of the Commission's own rules; brazenly ignores this Board's instructions regarding the framing of issues, and runs roughshod over the most basic pleading requirements for introducing new issues into a proceeding.

2. The Department's so-called "amendment" should be forcefully rejected. This Board has a responsibility to control the upcoming evidentiary hearing in a manner that will insure a manageable and orderly presentation of relevant evidence only -- evidence which goes directly to issues that are properly within the scope of this Board's antitrust review responsibility and that concern matters with respect to which Applicants have had adequate advance notice for purposes of preparing for the hearing. The present filing by the Department provides an appropriate occasion for the Board to advise all parties that it intends to assume this responsibility. There are a number of strong reasons to support such a ruling.

3. The Department relies on Section 2.740(e) as the excuse for adding to its September 5 allegations the following separate contention:

> Beginning at some time prior to March 1965, and continuing thereafter, Ohio Edison and Ohio Power Company engaged in a territorial allocation agreement, thereby foreclosing competition in supplying electric power.

Reference to the above provision of the Commission's Rules is in the circumstances not merely disingenuous, it is totally misleading and irresponsible. The Department itself made a request at Prehearing Conference No. 4, held on April 21, 1975, for permission to use answers to pending interrogatories as the vehicle for setting forth its statement of specific allegations. This accommodation was granted by the Board in Prehearing Conference Order No. 4, dated April 29, 1975, and the Department was even allowed an extension of time within which to answer certain interrogatories until the September 5 date for filing the Department's statement of allegations.

4. The point need not be belabored. All of the parties to this proceeding, as well as the Board, have understood and treated the Department's September 5 filing in the same manner as the similar filings by the NRC Staff and the City of Cleveland. This is clearly an instance where the particular form chosen by the Department entitles it to no special dispensation. The September 5 filings marked the cut-off date for specifying allegations. Whatever style the parties elected to follow to formulate the nature of the case to be presented, they must now proceed with that formulation. Neither Section 2.740(e) of the Commission's Rules of Practice, nor any other Section to our knowledge, provides a basis for

recognizing the Department's effort to make a last-minute addition to its contentions.

5. The reason is manifest. In every adversary proceeding there comes a time when the door must be closed on attempts to remodel the pleadings. The most basic concepts of due process require that defendants who are being charged with misconduct be given adequate advance notice of the allegations against them so that they will have a reasonable opportunity to prepare their case. Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, RAI-74-7, 13, 20 (July 5, 1975).[1/] In the present proceedings, such notions of fundamental fairness have all but been ignored. Applicants have been forced by the other parties into a position which, to anyone even remotely familiar with traditional litigation procedures, disregards Applicants' rights to due process and sets a dangerous precedent.

6. This accusation is not made lightly. Applicants, despite repeated attempts to obtain from all other parties a meaningful statement of allegations, were ordered to proceed with discovery on the strength of (1) the City of Cleveland's and AMP-Ohio's petitions to intervene, which were directed primarily at The Cleveland Electric Illuminating Company, (2) no statement of

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1/ It is generally recognized that "[t]he key to pleading in the administrative process is nothing more than an opportunity to prepare." 1 K. Davis, Administrative Law Treatise §8.04, at 525 n. 9, and §8.05, at 530 (1958).

allegations by the NRC Staff, and (3) very generalized recommendations for antitrust review contained in the Department's Advice Letters in Perry and Davis-Besse 2 and 3.[2/] Applicants conducted discovery as best they could on the basis of the generalized charges made. They attempted to obtain more specific information from the Department and the NRC Staff through written interrogatories, but the answers thereto were deferred, over Applicants' objection, to the end of the discovery period. Meanwhile, the other parties were engaged for more than three full months in extensive deposition discovery of Applicants. Finally, after the Board's designated period of discovery had come to a close, Applicants' received for the first time the other parties' specific allegations on September 5, 1975, barely two months before the evidentiary hearing is to commence.

7. As to all Applicants other than The Cleveland Electric Illuminating Company, these September 5 filings contained charges which had theretofore never been advanced, and, in light of the petitions to intervene and the Department's Advice Letters, could not have been reasonably anticipated. These Applicants thus find themselves faced with the unfair prospect of being rushed into an antitrust inquiry without the benefit of any prehearing discovery on a large number of the

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2/ The Department recommended against antitrust review in Davis-Besse No. 1, but an antitrust inquiry was instituted at the request of the City of Cleveland, pursuant to the City's petition to intervene.

allegations against them. On top of this, the Department now comes along at the last minute with yet another allegation from out of nowhere which it seeks to "bundle" with the rest. Even under the very minimal requirements of due process, this situation is intolerable.

8. In the normal course, Applicants obviously would seek a stay of the hearing in order to afford an opportunity to conduct discovery on the recent September 5 claims -- discovery which they are entitled to have as a matter of due process of law. However, such a step at this particular time has been effectively discouraged by the carefully orchestrated delay tactics of the other parties. Under present schedules, Applicants must obtain an operating license for Davis-Besse Unit 1 and a construction permit for Perry Units 1 and 2 in the Spring of 1976. As the other parties know well, both energy needs and financial considerations dictate meeting these schedules. The Department, the NRC Staff and the City, all operating on the assumption that antitrust review can hold up issuance of the permits, have inexcusably stalled these proceedings at every possible stage. In short, they have used the leverage of the imminent plant schedules to whipsaw Applicants into the untenable position of either rushing into a complex antitrust hearing (without regard to fundamental consideration of due process) in order to meet the start-up dates for construction and operation,

or reluctantly accepting onerous license conditions (which would prove to be unwarranted if a hearing could be conducted in an orderly fashion) in order to settle the inquiry prior to the aforesaid critical dates.

9. Nor should this Board allow itself to be fooled by the posturing of the other parties on the matter of delay. In the Davis-Besse Unit 1 antitrust proceeding, for example, the NRC waited a full two years after the filing of Applicants' response to rule on the City of Cleveland's petition to intervene. No good explanation has yet been provided for this action. Other delay tactics have included (1) the use of vague and expansive interrogatories and document requests requiring production of well over 2 million documents (most of which were of so little relevance they were not even brought to Washington, D. C.), (2) intentionally conducting depositions at a snail's pace so as to prolong unnecessarily the prehearing discovery period, and (3) repeatedly extending filing dates to obtain postponements of the hearing date.

10. The net effect of this concerted effort by the Department, the NRC Staff and the City has been to push the hearing back to November 20, 1975, only a few months before the critical dates for commencing major construction or actual operation of the respective nuclear facilities. By also succeeding in withholding from most of the Applicants until September 5, 1975, the nature of the cases to be presented

against them, the other parties have left Applicants with a Hobson's choice: go to hearing with no opportunity for meaningful discovery on the newly-raised claims, or seek to delay the hearing in order to conduct such discovery and thus effectively eliminate all possibility of meeting the schedule deadlines for Davis-Besse Unit 1 and Perry Units 1 and 2.

11. Given these alternatives, Applicants have been forced by the exigencies of the situation to compromise drastically their prehearing discovery and proceed with the hearing, notwithstanding a distinct disadvantage; the due process argument will have to be made, if at all, in the Court of Appeals. The other parties could, of course, eliminate the unfairness inherent in the present situation by consenting to post-license antitrust review. They have repeatedly turned aside Applicants' requests for such an accommodation, however. Nor has the Board been willing to grant this relief to Applicants, either in connection with Davis-Besse Unit 1 operating license or the Perry Units 1 and 2 construction permit.

12. We have taken the time to set forth our strong objection to the manner in which Applicants are being "railroaded" into the present antitrust hearing because it bears directly on the Department's October 14 proposed "amendment". This late request to add yet another allegation is but a further manifestation of the total disregard that has been displayed

in this proceeding for Applicants' fundamental rights. At no time prior to the Department's October 14 filing was there any suggestion that a charge would be made regarding some alleged territorial allocation agreement between Ohio Edison Company and Ohio Power Company. Indeed, only one allegation of anticompetitive conduct on the part of Ohio Edison was contained in the Department's Davis-Besse 2 and 3 Advice Letter; it related only to the matter of establishing new delivery points. The Perry Advice Letter found no fault with Ohio Edison. In its September 5 filing the Department surprised Ohio Edison with a host of new allegations. And it now comes in without any advance warning with another surprise contention. Such a pleading practice is unconscionable; as the Department has undoubtedly calculated, it significantly reduces Applicants' chance for meaningful discovery on the claims.

13. The Department's tactics are all the more offensive to traditional notions of due process when the pretext for advancing the "amendment" is examined. The Department asserts that "at the time of its initial answer, it was wholly unaware of the facts underlying the amended answer" (p. 1). It then suggests that those facts were "contained, in part, in documents sought from the Applicants during discovery" (p. 2; emphasis added), but not produced. If there is any truth to this claim -- and it is both surprising and disappointing how

little there appears to be -- the underscored "in part" reference should state "in very small part." In a letter to the undersigned counsel dated October 10, 1975, the Department requested a total of 21 additional documents from Applicants, including 5 directly from Ohio Edison Company. Our response to that request is filed herewith. While it demonstrates generally that there is no legitimate basis for faulting Applicants on their document production of more than 2 million documents, it also reflects that only one of the listed documents has any possible bearing on the Department's newest allegation -- and its relevance is at best extremely tangential.[3/]

14. If therefore the Department is depending on its unfounded allegations of Applicants' so-called noncompliance with discovery requests as a basis for its amendment, it has totally failed to satisfy the good cause standard. Either it has no facts to support the charge concerning a territorial allocation agreement -- which we believe to be the case -- or the facts on which it intends to rely have, contrary to the Department's own statement, been in its possession for

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3/ The sole document which can be said to have even a remote relevance to the Department's proposed allegation as to an Ohio Edison-Ohio Power territorial allocation agreement is the Prentice letter of February 28, 1967, a copy of which is being provided to the Department under separate cover. That letter does not, however, provide any support for the Department's allegation. It is nothing more than a request by the Vice President & General Manager of Ohio Power for comments from a number of people, including Mr. White of Ohio Edison, on a draft proposal for a territory integrity law in the State of Ohio.

some time. In the latter event, the time has long since passed for using those known facts as a basis for now inserting an independent allegation into this proceeding.

15. There is one other basic reason why the Department's "amendment" is not entitled to recognition in this proceeding. Under the Commission pleading requirements in Section 2.714(a), it is not enough simply to set forth a contention without support or explanation. Rather, a party must, at the outset, state "the basis for his contention" (10 C.F.R. 2.714(a)), and specify with particularity "a meaningful nexus between the activities under the nuclear license and the 'situations' alleged to be inconsistent with the antitrust laws." In the Matter of Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (September 28, 1973) ("Waterford II"). The Department has not even made a superficial effort to meet these requirements.

16. Indeed, the October 14 filing exposes most dramatically the essential weakness in the Department's nexus position. Under its "bundling" theory of defining the anti-competitive "situation" in terms of an aggregate of activities, no one of which needs to have a meaningful connection with the licensed activities, every conceivable antitrust charge that can be levelled is swept within the Commission's review

authority under Section 105c of the Atomic Energy Act. This is precisely what the Commission cautioned against in Waterford II. As there stated (CLI-73-25, 6 AEC at 620):

> At the same time, however, we must emphasize that the specific standard which Congress required for antitrust review * * * has inherent boundaries. It does not authorize an unlimited inquiry into all alleged anticompetitive practices in the utility industry. The statute involves licensed activities and not the electric industry as a whole. [Emphasis is original.]

17. Only if the Department's ill-conceived notion of the nexus standard is followed would it be even remotely possible -- assuming timeliness, which is obviously not the case here -- to include within the present antitrust proceeding the allegation concerning a territorial allocation agreement between Ohio Edison Company and Ohio Power Company. This "situation" has no tie whatsoever to the nuclear facility. Even assuming arguendo that the charge has some validity, no licensed activities have even been suggested which might maintain such a "situation". It is equally clear that this alleged territorial allocation will not be created by issuance of the nuclear licenses. The Waterford nexus standard thus requires the elimination of this allegation from Commission scrutiny; it falls wholly outside the permissible scope of Section 105c antitrust review.

18. This is exactly the position which Applicants have consistently taken in this proceeding. If nexus is to have any role at all in connection with the Commission's antitrust review responsibility -- and both Congress and the Commission felt strongly that it should -- this Board must determine as to each alleged anticompetitive practice whether it has a meaningful tie to the nuclear facility. The described "situation" or "situations" must be defined only in terms of such "related" practices. We repeat once again that it may well be appropriate to introduce evidence at the hearing as to "related" practices which are not alone violative of the antitrust laws -- in an effort, for example, to establish some pattern of "inconsistent" conduct. But in "bundling" suspect practices for purposes of determining whether the described "situation" runs afoul of the antitrust laws, the Waterford II decision makes it clear that each such practice so "bundled" must have an independent nexus with the licensed activities in order for this Board to take cognizance of it. This point was underscored in unmistakable terms by the one licensing board that has to date issued an Initial Decision following a full antitrust inquiry. As stated in Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329A and 50-330A, p. 42

(July 18, 1975): "The question of nexus remains a primary and predominant matter which must be resolved as to each alleged anticompetitive practice." [Emphasis added.]

19. The Department's newest allegation does not even come close to satisfying this nexus standard. If it is allowed to stand, there is nothing left to differentiate the Commission role under Section 105c from a full-blown antitrust inquiry in the courts. Indeed, to allow this last-minute amendment to the pleadings at a time when Applicants no longer have an opportunity to conduct discovery on the claim, and only a few short weeks before the hearing is to commence, would deprive Applicants of the basic due process protections that they could at least count on if this were a judicial proceeding.

20. This Board should take every precaution not to allow Applicants' fundamental rights to be trenched upon any more than has occurred already. The September 5 filings already contain too many new allegations which Applicants are hard pressed to explore in advance of the hearing because of the inexcusable delay tactics by the Department, the NRC Staff and the City. At some point, the peppering of this record with new, surprise charges that have nothing whatsoever to do with the antitrust review responsibility of the Commission

must be stopped. We urge that the Board take this occasion to so advise the other parties by forcefully rejecting the Department's proposed amendment.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Gerald Charnoff

Counsel for Applicants

Dated: October 21, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Response To Request By The Department Of Justice For Leave To Amend Pleadings" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to those persons in the Washington, D. C. area and by mailing a copy, postage prepaid, to all others, all on this 21st day of October, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

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SERVICE LIST

Douglas V. Rigler, Esq.
Chairman, Atomic Safety and Licensing Board
Foley, Lardner, Hollabaugh and Jacobs
Chanin Building - Suite 206
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

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

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.
Roy P. Lessy, Jr., Esq.
Jack R. Goldberg, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Joseph J. Saunders, Esq.
Steven M. Charno, Esq.
Melvin G. Berger, Esq.
Anthony G. Aiuvalasit, Esq.
Ruth Greenspan Bell, Esq.
Janet R. Urban, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

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

Wallace E. Brand, Esq.
Pearce & Brand
Suite 1200
1000 Connecticut Ave., 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

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

Mr. Raymond Kudukis
Director of Public 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.
General Attorney
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Victor A. Greenslade, Jr., Esq.
Principal Staff Counsel
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

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

Leslie Henry, Esq.
Michael M. Briley, Esq.
Roger P. Klee, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

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

David Olds, Esq.
William S. Lerach, Esq.
Reed Smith Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, PA 15230

Lee A. Rau, Esq.
Joseph A. Reiser, Jr., Esq.
Reed Smith Shaw & McClay
404 Madison Building
1155 15th Street, N.W.
Washington, D. C. 20005

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

Edward A. Matto, Esq.
Richard M. Firestone, Esq.
Karen H. Adkins, Esq.
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Christopher R. Schraff, Esq.
Assistant Attorney General
Environmental Law Section
361 E. Broad Street, 8th Floor
Columbus, Ohio 43215

Terence H. Benbow, Esq.
A. Edward Grashof, Esq.
Steven A. Berger, Esq.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005