September 15, 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 THE SEPTEMBER 5, 1975 FILINGS OF THE OTHER PARTIES TO THIS PROCEEDING

1. On September 5, 1975, the Nuclear Regulatory Commission Staff ("NRC Staff"), the City of Cleveland ("City"), and American Municipal Power-Ohio, Inc. ("AMP-Ohio") filed Statements pursuant to Prehearing Conference Order No. 4 advising Applicants of the nature of the case each of them intends to present at the hearing. The Department of Justice ("Department") set forth its specific allegations in a filing of the same date entitled "Response of Department of Justice To Applicants' Interrogatories And Requests For The Production Of Documents."

2. With the exception of AMP-Ohio's Statement, which merely adopts the City's filing, each of the parties' Statements contains numerous allegations concerning activities imputed to a particular Applicant or Applicants, which activities are said to be of an anticompetitive nature. In view of the limited time given to Applicants to file a response to these charges under the hearing schedule adopted by the Licensing Board (Prehearing Conference Order No. 4, as amended), Applicants do not understand that they are expected at this time to deal with each specific allegation; that is not, therefore, the function or purpose of this paper.

3. Rather, this response is designed to assist the Board in framing the issues which are appropriate for hearing. Preliminarily, however, it should be made entirely clear for the record that each Applicant denies unequivocally and emphatically each and every allegation in the respective September 5 filings claiming that it engaged, either alone or in concert, in some sort of anticompetitive conduct in its dealings with municipal electric systems, rural electric cooperatives, other private or public utilities (including other Applicants), or anyone else. Accordingly, nothing contained herein is intended to be, or should be constured as, a waiver by any of the Applicants of their right to dispute the specific matters alleged by the other parties to this proceeding and to make any argument relevant to such matters.

4. With this in mind, we turn to the several filings on September 5, 1975. One troublesome feature of the Statements of the NRC Staff and the City concerns their suggested delineation of a relevant market or markets for purposes of this antitrust hearing.[1/] The City asserts that "the relevant product markets for antitrust analysis are the regional power exchange market, the wholesale power market and the retail market" (City's Statement, p. 5). The NRC Staff offers as "the relevant product market * * * the bundle of bulk power transactions or bulk power services that are required for coordinated operation and development" (NRC Staff's Statement, p. 10).

5. We are unable to discern any substantive difference between what the City labels as the "regional power exchange

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1/ We note with some degree of frustration that, despite the clear instructions of the Licensing Board for each of the parties to provide Applicants with an explicit statement of the nature of its cases to be presented at the hearing, we still have been provided nothing by the Department to indicate its position on the definition of the relevant market. See also paragraph 24, infra. Applicants are certainly entitled to have this information by now. Indeed, the Appeal Board in Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit 1), ALAB-279, NRCI-75/6, 559, 575-576 (June 30, 1975), clearly indicated that a delineation of the relevant market relied upon should be set forth by the parties seeking antitrust review at the very outset of the proceeding. On remand, the Licensing Board in Wolf Creek reinforced this proposition by pointing to the prospective intervenor's failure to delineate the relevant market in his petition as at least one significant factor supporting the denial of intervention. See Memorandum and Order in Docket No. 50-482A, dated September 9, 1975, at pp. 8-9.

market" and what the NRC Staff prefers to describe as "the bundle" of transactions and services associated with coordinated operation and development. Whatever nomenclature is adopted, this so-called "market" is not confined to any particular products or services, but embraces virtually every activity incidental to a power pooling arrangement. Moreover, as the City and the NRC Staff conceive of it, this "market" knows no realistic geographic boundaries; it effectively stretches from coast-to-coast and includes any and all power transactions between or among power pools, as well as intra-pool power exchanges (See City's Statement, pp. 5-6).

6. For purposes of the present antitrust inquiry, it serves no useful purpose to approach the allegations in so broad a context. As the Licensing Board recently recognized in its Wolf Creek decision denying a petition requesting intervention and the convening of an antitrust hearing, the "power exchange market", while perhaps susceptible to broad definition by an indiscriminate grouping of the "cluster of services" necessary to achieve coordination, does not fit comfortably into the traditional market concepts that attend antitrust analysis. See Memorandum and Order of September 9, 1975, at pp. 15-16 . The observation made there is well taken (ibid.):

> [The power exchange market] is not a market as such, wherein a small utility can simply buy wholesale or bulk power. Rather, all of the pool members exchange as available such things as surplus capacity, economy energy, dump hydro energy, seasonal power, and diversity

> exchange power. In addition, they may engage in the staggered construction of generating units, coordination of transmission facilities, equalized reserve sharing, development of maintenance outage schedules, and the sharing of spinning reserves. [Emphasis added.]

7. Accordingly, Applicants dispute the assertions by the NRC Staff and the City that the so-called "regional power exchange market," or a reasonable facsimile thereof under some different label, is somehow an appropriate focus -- either on a geographic or product basis -- for examining the competitive situation under scrutiny here. It is, we submit, in no sense a relevant market in the present circumstances, since the City's municipal system, as well as the electric systems of the other municipalities and rural electric cooperatives named in the September 5 filings, are neither actual nor potential competitors of Applicants in virtually all of the areas swept within the imprecise phrase "power exchange market." As observed by the Licensing Board in its recent Wolf Creek decision (id. at p. 16), these other systems have "no services to pool or to exchange in a power exchange market."

8. It would be perfectly appropriate in these circumstances for the Licensing Board to eliminate altogether any consideration of the "regional power exchange market," or its equivalent, as a permissible competitive area for scrutiny in this proceeding. At the very least, the NRC Staff and the City should be put to the task of meeting their heavy burden -- which we doubt they can do -- of showing both that this so-called "market"

is susceptible to meaningful definition, both geographically and by product, and that, as so defined, it is a relevant market for examining the specific allegations made in the respective Statements.

9. As to the retail market referred to by the City (City's Statement, pp. 7-8), Applicants have less conceptual difficulty. There plainly is a product market for the purchase and sale of electric energy to ultimate consumers. Within the framework of the present proceeding, it is our view that at least five such retail markets are identifiable, each separately defined by the reach of the five Applicants' transmission and distribution facilities -- i.e., Applicants' respective service areas.

10. This is not to say, however, that all five of these retail markets are relevant markets for purposes of examining the allegations contained in the City's Statement.[2/] Indeed, we seriously doubt that any of them have meaningful relevance to the essential thrust of this proceeding, which, pursuant to congressional mandate (42 U.S.C. §2135c), is to focus only upon

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2/ Since neither the NRC Staff nor the Department of Justice have expressed an intent to rely on Applicants' separate retail markets in connection with the presentation of their respective cases, the discussion here properly concentrates only on the City's reference to retail markets as being relevant to the instant antitrust inquiry. We note in passing, however, that a look at retail markets in the context of the NRC Staff's and the Department's allegations would be no more appropriate in a proceeding of this sort than is the reference to retail market activity in the City's allegations. Moreover, we are hard pressed to find any retail

(footnote continued)

activities under the designated nuclear licenses. To the limited extent, however, that the City may ultimately be permitted to intrude into the area of Applicants' retail activities -- which we do not believe should be allowed here -- its excursion should be strictly limited to a retail submarket of the Cleveland Electric Illuminating Company's ("CEI") service area, defined by the geographic area in and immediately surrounding the City's corporate limits. This alone is the relevant area of retail competition between the City and CEI; whatever CEI's retail practices may be elsewhere has no real impact on the City and should not be swept into this proceeding by an impermissibly broad definition of the relevant retail market.

11. Similarly, the City should not be permitted to introduce any evidence in this proceeding regarding the competitive situation in the service areas of any Applicants other than CEI. It is undisputed that the City does not compete in these remote service areas. Moreover, in three separate petitions to intervene filed by the City in these consolidated proceedings, nowhere did the City set forth a single allegation regarding conduct by Ohio Edison Company ("OE"), Pennsylvania Power Company ("Penn Power"), The Toledo Edison Company ("TE") or Duquesne Light Company ("DL") vis-a-vis electric entities located within the respective service areas of these Applicants. It is, therefore, improper for the

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(Footnote continued)

practices engaged in by Applicants other than CEI which are addressed in the specific allegations set forth in the various September 5 filings.

City now to include any reference to such activities as part of its case to be presented, and, to the extent it has sought to do so (see, e.g., City's Statement, pp. 4, 9, 10, 13, 14), these allegations should be stricken.

12. There is one other market which is referred to in the September 5 filings, namely: the wholesale power market (City's Statement, p. 7). As defined by the City, this market embraces only firm power transactions on a sale-for-resale basis; it does not include power exchanges contemplating a resale which involve less-than-firm power, such as emergency power which is available on an "if, when and as available" basis. We tend to agree with the City that there is a market in the electric energy industry for wholesale sales of firm power. The relevance of that particular market to the present antitrust inquiry is far from clear, however. Nor can it be ascertained from the September 5 Statements what the geographic boundaries of that market are supposed to be. While the City and the NRC Staff have made a general reference to the CCCT as a relevant geographic market, we suspect that, as a minimum, the wholesale power market should perhaps extend beyond the CCCT to the areas immediately contiguous thereto for purposes of this proceeding.

13. Once again, however, we state that it is the complainants in an antitrust proceeding who carry the burden of establishing the relevant market or markets within which to examine the allegations of anticompetitive behavior. Applicants are not satisfied on

the basis of the September 5 filings that the wholesale power market, as therein described, is a relevant product market in this case, or that it has been adequately delineated in terms of its geographic reach. The other parties hereto should be put to the test of meeting their burden of proof in both respects.

14. Another point of concern with respect to the various Statements relates to the explicit reservations by the City (City's Statement, pp. 1-2) and the Department (Department's Statement, p. 13) of the right to present evidence of additional activities not specifically referred to in the September 5 filings. The NRC Staff has apparently attempted to keep alive the same option by using conclusory statements without any specification of evidence (see discussion infra, at paragraphs 16-17). To recognize such reservations would defeat the fundamental purpose of the procedure outlined by the Licensing Board. As the Board has itself emphasized, the September 5 Statements and Applicants' Response thereto were required in order to assist the Board in "the curtailment or elimination of issues." See Minutes of Conference Call with Board Chairman held August 20, 1975, p. 3. Indeed, the time for filing the papers now being discussed was extended on request precisely to give the parties ample opportunity to examine all discovery materials so as to avoid the possibility of adding new allegations.

15. These Statements, along with our Response, are to provide the framework for Prehearing Conference No. 5. At that

time the Board plans to consider "motions or arguments to curtail or eliminate issues." See Prehearing Conference Order No. 5, dated September 9, 1975; and see Prehearing Conference Order No. 4, dated April 29, 1975. If the NRC Staff, the City, the Department or AMP-Ohio remains free to add new allegations there can be no meaningful bounds to the scope of the hearing. The September 5 filings were not meant to be an empty gesture. All of the parties were advised repeatedly of their significance. The NRC Staff, the City, the Department and AMP-Ohio have had a full and fair opportunity to formulate their respective positions and put forth the allegations they intend to rely upon at the hearing. In fairness to Applicants, the other parties should now be strictly limited to presenting evidence only on the specific matters they have alleged to be relevant to the case they intend to present at the hearing.

16. Moreover, to the extent that the September 5 filings lack specificity, the other parties should be precluded from offering something new at a later date under the pretense of fleshing out their original allegations. There are numerous instances in the NRC Staff's and the City's Statements where general allegations are made without reference to specific situations, or where a blunderbuss "we will show" approach is taken, again without reference to the specific situations supporting the assertion. Such general recitals should be confined to the particularized allegations contained in the Statements so as to eliminate any

possibility of an effort later on to use these broad self-serving assertions as a justification for broadening the scope of the hearing whenever it suits the convenience of the other parties.

17. To illustrate our concern, we set forth below a few examples of recitals lacking specificity which are taken from the Statement of the NRC Staff:

> (i) under Broad Issue B, p. 4, lines 17-19, the reference to collective activity is followed by a list of individual actions without ever specifying any joint activity;
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> (ii) under Broad Issue B, p. 5, lines 11-12, the reference to collective activity by DL is again without specificity;
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> (iii) under Issue (6), p. 13, lines 20-23, the generalization about Ohio Edison denying the benefits of coordinated operation and development is without specificity;
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> (iv) under Issue (9), p. 15, lines 23-27, the conclusory statement about Applicants' exercise of their dominance over bulk power generation is without specificity;
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> (v) under Issue (10), p. 16, lines 7-11, the general reference to CEI and DL policies which are said to deprive designated electric entities from realizing the benefits of nuclear power is without specificity;
>
> (vi) under Issue (11), p. 16, lines 17-18, the statement that Staff will demonstrate a relationship between the anticompetitive situation and activities under the license is not further explained in any manner whatsoever.

There are other such conclusory remarks in the September 5 filings which find no support anywhere in the specific allegations. If the antitrust hearing is to have any meaningful definition,

broad assertions of this sort must be read as limited by the matters identified with specificity within the four corners of the respective filings.[3/]

18. This brings us to yet another point. While the City's Statement generally tracks the Matters in Controversy specified by the Board in Prehearing Conference Order No. 2, there are two places where the City has restated the issues. With respect to Issue (5),[4/] the City alters the question to ask whether Applicants have acted individually to preclude others from obtaining bulk power from utilities inside or outside the CCCT (City's Statement, pp. 9-10). Applicants do not object to either change, since such a reformulation of the issue may help to focus attention more directly on the relevant concerns of this inquiry.

19. On the other hand, the City's attempt to restructure

3/ We observe in this connection that as to a few specific allegations, reference is made to activities that occurred prior to September 1, 1965. Consistent with the Board's "Order On Objections To Interrogatories and Document Requests," dated October 11, 1974, wherein discovery was essentially confined to the period subsequent to that date, we would think it appropriate to limit the admissible evidence at the hearing in similar fashion in the absence of a particularized showing of good cause to depart from such a requirement.

4/ "(5) Assuming the answer to (4) is yes, whether Applicants have, do or could use their ability to preclude any electric entities within the CCCT from obtaining sources of bulk power from other electric entities outside the CCCT."

Issue (11),[5/] so as to obfuscate the crucial nexus question by eliminating any consideration of nexus as to each of the ten preceding matters in controversy (City's Statement, p. 23), is unacceptable. Applicants have already alerted the Board to their general position regarding the matter of nexus, and the Board has made it clear that it intends to consider this question at a later date. The City seeks now to undermine a full airing of the nexus issue without so much as offering a single reason to sustain such a result. This effort should be given no support. However, to accommodate the City, the Board might want to restate Issue (11) so that it is clear that nexus is not only a relevant consideration in the context of each individual Matter in Controversy, but in addition that the party or parties alleging such nexus must also show a nexus between the overall situation that is alleged to exist -- if indeed there be one -- and the licensed activities.

20. In this connection, we observe that the September 5 filings are totally inadequate in terms of informing Applicants of the nature of the case that the NRC Staff, the City and the Department intend to present on the nexus issue. Indeed, consistent with the stand Applicants have taken throughout this

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5/ "(11) Whether there are logical connections between the activities under the proposed licenses for the nuclear facilities and each of the matters in contention (1) through (10) that meet the nexus test established by the [Nuclear Regulatory] Commission."

proceeding, the several Statements strongly suggest that none of the other parties are yet able to formulate a position supporting the bald assertion that there exists a relationship between the alleged situation and the licensed activities which is sufficient to satisfy the nexus standard. It is in our view unfair to Applicants to require that they approach the hearing without any meaningful insight into what to anticipate by way of specific nexus allegations. As the Appeal Board pointed out in its recent Wolf Creek decision (ALAB-279, NRCI-75/6, supra at 569), "the Commission's antitrust mandate extends only to anticompetitive situations intertwined with or exacerbated by the award of a license to construct or operate a nuclear facility." At the very least, the other parties should be directed to advise Applicants immediately as to how they intend to show that the situation or situations they claim exist are "intertwined" with activities under the designated nuclear licenses or will be "exacerbated" by such activities.

21. The City also asserts that the Appeal Board decision in the Wolf Creek proceeding, supra, conclusively determined the matter raised by Issue (10),[6/] thereby removing the need to set that issue for hearing (City's Statement, p. 22). The decision referred to is neither as broad nor as determinative as the City

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6/ "(10) Whether Applicants' policy or policies with respect to providing access to their nuclear facilities to other electric entities in the CCCT, that are or could be connected to Applicants, deprives these other electric entities from realizing the benefits of nuclear power."

urges. The Appeal Board in Wolf Creek itself went out of its way to "stress the circumscribed nature of the issue [it was] called upon to decide" (ALAB-279, NRCI-75/6, 559, 573). Essentially, the inquiry there revolved around the petition to intervene and whether it alleged with sufficient particularity a meaningful nexus between the described "situation" and activities under the nuclear license. In that context, the allegations necessarily had to be taken as true. Thus, the asserted need set forth in the petition for supplementary peaking and intermediary power to support the base load nuclear power was not subject to dispute.

22. Here, by contrast, the policies of the Applicants regarding access to their nuclear facilities is a matter to be established at the hearing. Similarly, the impact of such policies on other electric entities is a contested matter to be developed by the proof. It plainly is inappropriate to excuse the City from its burden with respect to Issue (10) or to preclude Applicants from making their case in this area on the strength of an Appeal Board decision which, in the pleading context presented, required the Appeal Board to assume as true the very assertions that Applicants are now legitimately contesting.

23. Before concluding, a comment must be made about the remedy discussions in the September 5 filings. As to the proposed license conditions offered by the NRC Staff and the City, they are of little help to Applicants. What has been proposed at this stage are essentially nothing more than the standard

license conditions urged upon all applicants for licenses to build and operate a nuclear facility. There has been no meaningful effort by the NRC Staff or the City to tailor the proposed conditions to the specific allegations contained in their respective Statements. Nor does the fact that the NRC Staff suggests a possible subsequent modification of its license conditions on the basis of the evidentiary record ultimately compiled (NRC Staff's Statement, p. 17), provide a justification for not shaping its preliminary license conditions to the situation that the NRC Staff presently conceives to exist.

24. The response of the Department to the remedy question is even more disturbing. Applicants have been told that the Department has not yet formulated its proposed license conditions for this proceeding (Department's Statement, p. 14), notwithstanding that we have heard indirectly from other quarters exactly the contrary. In any event, we find it difficult to believe that the Department does not yet have any idea about the nature of the relief it intends to seek. If that is indeed the case, however, we urge the Board to direct the Department to focus on its anticipated remedy and provide Applicants with such information immediately. While the Department, like the NRC Staff, protests that license conditions can only be devised after the hearing record is developed, this type of assertion simply begs the question. No one is asking the Department to formulate a final irrevocable set of license conditions. Applicants only seek to

be advised regarding what sort of conditions the Department deems appropriate based on its present assessment of the case. Both the Wolf Creek Appeal Board (ALAB-279, NRCI-75/6, supra, at 574) and Licensing Board on remand (Memorandum and Order of September 9, 1975, p. 4) confirmed that such information should be made available early in the proceeding. In the interest of a fair and efficient hearing process, the Board should require the Department to furnish to Applicants, well before the onset of the evidentiary hearing, proposed license conditions which are appropriately tailored to the situation(s) specified in the Department's filing.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Response To The September 5, 1975 Filings Of The Other Parties To This Proceeding" 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 15th day of September, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: W. Bradford Reynolds
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Counsel for the Applicants

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