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)	)	
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A and 50-441A
(Perry Plant, Units 1 and 2)	)	

STATEMENT IN CLARIFICATION OF THE
CITY OF CLEVELAND

This Statement in Clarification is submitted by the City of Cleveland (Cleveland), pursuant to the Board's direction in its Order Requesting Clarification docketed June 28, 1974. In this statement, Cleveland has utilized the assumptions set forth by the Board in paragraph 3 of its Order. However, Cleveland notes that the Board did not include the regional energy exchange market in its definition of "relevant product market." Cleveland believes that the regional energy exchange market is a separate and distinct market which is relevant to the issues before the Board. For the purposes of this statement, Cleveland accepts the Board's definition with the proviso that Cleveland is including the regional power exchange market within the rubric of wholesale bulk power transactions.

A. In view of the Atomic Energy Act, as amended, its legislative history, and applicable case law, is dominance by Applicants of a relevant market sufficient in and of itself to constitute "a situation inconsistent with the antitrust laws" under Section 105c of the Act?

To date, no commission nor judicial case law exists to provide a commission or judicial gloss to the term "a situation inconsistent with the antitrust laws." Until such time that the commission or the courts have construed the phrase no party can be certain that its view of the phrase's meaning will prevail. Certainly, the phrase indicates that something less than a violation of the antitrust laws is intended. How much less is uncertain. The legislative history is helpful but fails to dispel the uncertainty. It is said in House Report No. 91-1470 (U.S. Code Congressional and Administrative News (91st Congress 2nd Session) p. 4981, 5011):

> The legislation proposed by the committee provides for a finding by the Commission 'as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in section 105 a'. The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in the standard; nor is mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws. 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.

> 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 laws. 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.'

The starting point is to examine whether dominance of the relevant market would violate the antitrust laws for if such were the case, it would be unnecessary to speculate as to what lesser showing rises to the level of "a situation inconsistent with the antitrust laws." Despite the numerous statements in the cases that mere "bigness" is not a violation of the Sherman Act, it is clear that dominance is a matter apart from "bigness" and may violate the antitrust laws in certain situations.

Dominance may be evidence of monopoly power. Monopoly or monopoly power is the ability to fix or control prices in, or exclude competition from, a relevant market. If neither of these abilities may be shown directly, they may be presumed if there is control of a massive percentage of the relevant market. To find a violation of the Sherman Act it is necessary that there have been an intent to obtain the monopoly position through unfair or forbidden business practices. If the position of power was achieved through normal business methods, then in order to prove a violation there must be evidence that the firm is seeking to maintain or expand its position

by the use of unfair or unconscionable means. These unfair or other-than-normal business methods are generally considered to be those restraints of trade cognizable under Section 1 of the Sherman Act, and include refusals to deal, boycotts, and tying. If no such predatory practices can be shown, there must be an indication of general intent to obtain or expand a position of dominance or power in the relevant market. Kintner, An Antitrust Primer (2nd. Ed. The Macmillian Company). If dominance alone is a violation of the antitrust laws, it must be because of a general intent to obtain or expand the position of dominance in the relevant market.

For example, in United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (CA 2, 1945), the Court ruled that it is sufficient that one possessing a monopoly power act in such a way as to maintain its monopoly power to prove a violation of the antitrust laws. In Gamco, Inc. v. Providence Fruit and Produce Building, 194 F.2d 484 (CA 1, 1952) the Court said that "the Sherman Act condemns the power which makes pricing abuse possible as well as the abuse itself." The Supreme Court said in United States v. Griffith 334 U.S. 100, 92 L. ed. 1236, 68 S. Ct. 441 (1948) that:

> It is, however, not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the antitrust laws have been violated; it is sufficient that a restraint of trade or monopoly results as a consequence of a defendant's conduct or business arrangements.

In Schine Chain Theaters, Inc., v. United States, 334 U.S. 110, 92 L.ed 1245 (1948), the Court said, "Monopoly power is not condemned by

the Act only when it was lawfully obtained. The mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the [Sherman] Act is aimed." See, also United States v. Paramount Pictures, Inc., 334 U.S. 131, 92 L.ed. 1260, 68 S. Ct. 915 (1948).

In a given case then the Courts may sustain a finding of a violation of the antitrust laws predicated solely on dominance. But, a case under the antitrust laws predicated upon dominance alone would not be strong. One would be greatly disadvantaged if he were forced to rely on dominance alone to make out a violation when other proof were available to him.

Lowering the burden of proof from that of showing a violation to the somewhat lesser but at present a somewhat more untested standard of showing a "situation inconsistant with the antitrust laws or the policies underlying them" makes dominance alone stronger evidence upon which to ground one's case. Here it should be noted that §105c of the Act as is made clear by the statement from the House Report, supra, not only reduces the quantum of evidence required to something less than a violation but also reduces the degree of proof required from a preponderance of the evidence to a "reasonable probability."

It is also relevant to consider the policy underlying the antitrust laws for that is one yardstick given for identifying "situations inconsistent." Among

the policies underlying the antitrust laws are the beliefs set forth by the Court in Alcoa, supra, that:

> Possession of unchallenged economic power deadens initiative, discourages thrift, and depresses energy.
>
> Competitors versed in the craft as no consumer can be, will be quick to detect opportunities for savings and new shifts in production.
>
> Because of indirect social and moral effects a system of small producers, each dependent for success upon his own skill and character is preferable to one in which the great mass of those engaged must accept the direction of a few.

In his dissent to United States v. Columbia Steel Co., 334 U.S. 495, 536, 92 L.ed. 1552, 68 S. Ct. 1107 (1968) Justice Douglas used the following language to describe the philosophy of the Sherman Act:

> Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudice, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy and command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.

Cleveland submits that it is probable that a showing of dominance by Applicants of a relevant market is sufficient in and of itself to constitute a situation inconsistent with the antitrust laws under Section 105c of the Act. Cleveland, however, is well aware that the statute is yet to be tested in a court of law. Indeed, as stated earlier it is yet untested within the admini-

strative process. Any decision rendered by this Board is likely to be appealed ultimately to the Courts. The Board, the Commission, and the parties are in uncharted waters. 1/ It would be foolhardy in the extreme for Cleveland now to limit its proofs to a theory of yet untested validity. Cleveland intends to prove more than mere dominance. Cleveland believes that it is entitled to present its strongest case. It would be unfair to foreclose to Cleveland the opportunity to present its best case limiting it to a simpler presentation on an untested theory. To do so may appear to result in administrative economy. Cleveland submits that it may well be false economy which would ultimately necessitate reopening hearings after protracted litigation. In any event substantial discovery will be required to permit the parties to litigate the issues relating to the remedies required to eliminate the "situation."

Cleveland is opposed to limiting discovery, the matters in controversy or the presentation of evidence in such a way as to preclude the parties from proving more than mere dominance.

1/ Alabama Power Company (Farley Nuclear Units) AEC Docket Nos. 50-348A and 50-364A, Prehearing Order on Joint Prehearing Conference, March 20-21, 1973, docketed April 26, 1973.

B. If dominance by Applicants of a relevant market constitutes a "situation inconsistent with the antitrust laws" under Section 105c of the Act, need anything else be alleged and proven under Section 105c to permit the Board to condition a license? Could such conditions provide other electric entities with access to Applicants' generating facilities by means of ownership shares, or unit power sales? Could such conditions provide other electric entities with access to Applicants' transmission system by means of wheeling?

Section 105c of the Act requires the Commission to make "a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." Proof of dominance alone would only show a situation inconsistent with the antitrust laws. To enable the Commission to make the finding required by statute it would be necessary also to allege and prove that the "situation" would be created or maintained by the Applicants' activities under the license. In short, there must be proof of a relationship between the activities under the license and the "situation."

Once the Board makes the statutory finding, the Board, on the basis of its findings, "shall have the authority . . . to issue a license with such conditions as it deems appropriate", §105c(6). The Board has broad discretion to fashion conditions which will eliminate the situation inconsistent with the antitrust laws. There is no language in the statute which would restrict the Board to eliminating the anticompetitive situation only with respect to those parties who intervened but not with respect to others.

In granting a license with conditions, the Board is charged with considerations which it "in its judgment deems necessary to protect the public interest," §105c(6). It clearly is not in the public interest to remove anticompetitive restraints against Cleveland but to allow the same restraints to continue against other electric entities.

The purpose of a hearing such as this is not to vindicate private rights but to advance the public interest, American Communications Association v. United States, 298 F.2d 648 (1962). A party is permitted to intervene upon a showing of its private interest but thereafter it is representative of the broad public interest.

The Board must utilize its broad discretionary power to fashion remedies in the public interest to eliminate the anticompetitive situation created or maintained by the activities under the license. The only limitations on its power to fashion remedies is that the remedy must be directed at eliminating the anticompetitive situation. Accordingly, if it is shown that conditions requiring that other electric entities be granted access to Applicants' nuclear generation and to Applicants' transmission facilities for wheeling are reasonably designed to eliminate the anticompetitive situation, the Board has sufficient power to impose such license conditions.

It is important to note that the question of remedies involves a complexity transcending simple questions of access and wheeling. Simply, by way of example, Cleveland would note that access must be coupled with

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)	)	
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A and 50-441A
(Perry Plant, Units 1 and 2)	)	

Certificate of Service

I hereby certify that service of the foregoing Statement In Clarification Of The City Of Cleveland, has been made on the following parties listed on the attachment hereto this 12th day of July, 1974, by depositing copies thereof in the United States mail, first class or air mail, postage prepaid.

David C. Hjelmfelt

David C. Hjelmfelt

Attachment

ATTACHMENT

Atomic Safety and Licensing Board
U.S. Atomic Energy Commission
Washington, D.C. 20545

Mr. Frank W. Karas, Chief
Public Proceedings Branch
Office of the Secretary
U. S. Atomic Energy Commission
Washington, D.C. 20545

John B. Farmakides, Esq.
Chairman
Atomic Safety and Licensing Board
U. S. Atomic Energy Commission
Washington, D.C. 20545

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

Dr. George R. Hall
Atomic Safety and Licensing Board
U. S. Atomic Energy Commission
Washington, D.C. 20545

Benjamin H. Vogler, Esq.
Joseph Rutberg, Esq.
Office of the General Counsel
Regulation
U. S. Atomic Energy Commission
Washington, D.C. 20545

Robert J. Verdisco, Esq.
Office of the General Counsel
Regulation
U. S. Atomic Energy Commission
Washington, D.C. 20545

Andrew F. Popper, Esq.
Office of the General Counsel
Regulation
U. S. Atomic Energy Commission
Washington, D.C. 20545

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

Abraham Braitman, Esq.
Office of Antitrust and Indemnity
U. S. Atomic Energy Commission
Washington, D.C. 20545

William T. Clabault, Esq.
David A. Leckie, Esq.
Department of Justice
Post Office Box 7513
Washington, D.C. 20044

Gerald Charnoff, Esq.
Shaw, Pittman, Potts & Trowbridge
910 - 17th Street, N.W.
Washington, D.C. 20006

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

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

David McNeil Olds, Esq.
John McN. Cramer, Esq.
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

John R. White, Esq.
Vice President and General Counsel
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

Pennsylvania Power Company
1 East Washington Street
New Castle, Pennsylvania 16103

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

Donald H. Hauser, Esq.
The Cleveland Electric Illuminating Co.
Post Office Box 5000
Cleveland, Ohio 44101

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

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeals Board
U. S. Atomic Energy Commission
Washington, D.C. 20545

Dr. John H. Buck
Atomic Safety and Licensing Appeals Board
U. S. Atomic Energy Commission
Washington, D.C. 20545

Dr. Lawrence K. Quarles
Atomic Safety and Licensing Appeals Board
U. S. Atomic Energy Commission
Washington, D.C. 20545

C. Raymond Marvin, Esq.
Deborah M. Powell, Esq.
Antitrust Section
8 East Long Street
Suite 510
Columbus, Ohio 43215