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 Davis-Besse Nuclear Power Station, Units 1, 2 & 3)	)	NRC Docket Nos. 50-346A 50-500A 50-501A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 & 2)	)	NRC Docket Nos. 50-440A 50-441A

STAFF'S ANSWER TO APPLICANTS' MOTIONS
FOR ORDERS DISMISSING ALL, OR SPECIFIC,
ALLEGATIONS MADE BY THE NRC STAFF

On April 21, 1976, Applicants served motions on the Staff which moved the Board to dismiss all, or in the alternative some, of the allegations made by the Staff in its September 5, 1975, Nature of Case to be Presented by NRC Staff pleading. 1/ For the reasons set forth below, each of these motions should be denied in its entirety.

I. STAFF'S GENERAL POSITION

A. Rule 41(b)

Applicants rely on Rule 41(b) of the Federal Rules of Civil Procedure for the procedure and standard to be used by the Board in ruling on their motions to dismiss. They contend that when a defendant moves for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief, it is the "duty of the court" to render a decision for the defendant on the merits if, after "carefully weighing the evidence", the court finds that the plaintiff

1/ Applicants, individually and as a group, filed a total of six motions for orders of dismissal. Applicants as a group filed a concerted motion for an order dismissing all the allegations made by the NRC Staff, the Department of Justice, and the City of Cleveland. In addition, each Applicant individually filed separate motions (except that Ohio Edison and Pennsylvania Power, a wholly owned subsidiary of Ohio Edison, filed a joint motion).

has not "convincingly shown a right to relief" or has not proven his case "by a preponderance of the evidence." [2/] Applicants then argue that by analogy, such procedure and standards, and the policy considerations underlying Rule 41(b), are fully applicable to a prelicensing antitrust review proceeding before the NRC. Applicants are in error.

Rule 41(b), in pertinent part, provides:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). (Emphasis added.) [3/]

The above quoted portion of the rule makes clear that Applicants are wrong in asserting, as they have in their motions, that when the weight of the evidence is insufficient to prove plaintiff's case, it is "the duty of the court" to render a judgment for the defendant and that Applicants are thus "entitled" to an order of dismissal. The above language, contrary to the arguments of Applicants, makes it clear that under the rule the court is vested with discretionary authority to "decline to render any judgment until the close of all the evidence".

2/ See Applicant's Motion, pp. 4-6; Motion of Applicant Toledo Edison Company for an Order Dismissing Allegations Made Against It, pp. 3-4, 17-18.

3/ Although Applicants quote only portions of Rule 41(b) in support of their motions (e.g., Applicants' Motion, p. 3; Ohio Edison's and Pennsylvania Power's Motion, p. 2), they do not quote those portions of the rule which gives the court complete discretion to deny a dismissal motion until the close of all the evidence.

In line with their theory of the rule, Applicants have suggested that this Board adopt the procedure of "weighing the evidence" and granting their motions to dismiss if the Staff has not proven its case by a "preponderance of the evidence". It is the Staff's position that this procedure cannot be applied to a Rule 41(b) motion, since by definition, such motion is made after only one side has presented evidence; there is, consequently, nothing to weigh on the other side. 4/ Similarly, Staff submits it is meaningless to require the Staff to have proven its case by a "preponderance of the evidence." Rather, the Board should require only that the Staff has established a prima facie case with respect to the issues and matters in controversy as set forth by the Licensing Board in Prehearing Conference Order No. 2, dated July 25, 1974. 5/ In short, as a noted scholar has argued:

4/ As noted by Professor Charles Alan Wright: "[A] noted scholar...contends that it is artificial to speak of weighing the evidence when nothing has been heard from the other side against which plaintiff's evidence can be weighed...", citing Steffen, The Prima Facie Case in Non-Jury Trials, 27 U. Chi. L. Rev. 94 (1959) C. Wright, Federal Courts §96, at 429 (2d ed. 1970).

5/ Even if the Board found that the Staff, the Department of Justice and the City of Cleveland have failed to prove each of the allegations contained in their respective Nature of Case pleadings of September 5, 1975, that in and of itself would not warrant terminating this proceeding because the record to date as a whole may still support a finding that "the activities under the license would create or maintain a situation inconsistent with the anti-trust laws" or the policies underlying those laws.

> [W]here plaintiff has made out a prima facie case, the court should hear all the evidence from both parties, and thus have the whole controversy before it prior to determining which side should win. 6/

The procedure of hearing all the evidence once a prima facie case is established is especially well suited to this proceeding because Applicants have the ultimate burden of proving that the activities under the license will neither create nor maintain a situation inconsistent with the antitrust laws or the policies underlying those laws. It is the Staff's position that once the parties opposed to an unconditioned license establish a situation inconsistent with the antitrust laws that will be created or maintained by the activities under the license, the burden of proving that an unconditioned license should be granted shifts to Applicants. As recently stated by the Appeal Board:

> "We concluded in ALAB-283 that the Atomic Energy Act intends the party seeking to build or operate a nuclear reactor to bear the burden of proof in any Commission proceeding bearing on its application to do so. On reconsideration, we find the basis of that conclusion sound." 7/
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> We therefore rule that to withstand a respondent's motion to dismiss a show cause proceeding, the staff (or the intervenor if there be one) must at a minimum come forward initially with evidence sufficient to cause a reasonable licensing board to inquire further. Such a demonstration of a legitimate basis for further inquiry requires the respondent to satisfy its burden of proof...8/

6/ C. Wright, Federal Courts §96, at 429 (2d ed. 1970), citing Steffen, The Prima Facie Case in Non-Jury Trials, 27 U. Chi. L. Rev. 94 (1959); Rogge v. Weaver, 368 P.2d 810, 813 (Alas. 1962).

7/ Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-315, NRCI-76/2 105 (1976) (emphasis added).

8/ Id. at 112.

With respect to burden of proof, the Appeal Board has held that:

> while the applicant has the ultimate burden of proof on the question of whether the permit or license should be issued, a party which contends that, for a specific reason, the permit or license should be denied has the burden of going forward with evidence to buttress that contention. Once it has introduced sufficient evidence to establish a prima facie case, the applicant must assume the burden of proof on the contention. 9/

The Staff submits that these holdings of the Appeal Board are applicable to this antitrust proceeding.

9/ Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1018 (1973), citing Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, RAI-73-5, 331 335 (1973).

B. Joint Action

Applicants have argued that no joint action among Applicants inconsistent with the antitrust laws has been proven. The Staff disagrees. As noted in Staff's December 3, 1975, Answer of NRC Staff to Applicants' Statement of Procedural Matters to be Considered, which the Staff incorporates herein by reference, and as noted again in Staff's argument on Applicants' Federal Rule of Evidence 105 motion,[10] which also is incorporated herein by reference, the Staff has not charged Applicants with a conspiracy. The Staff has however, in its September 5th Nature of the Case Pleading and in its Trial Brief set forth clearly and specifically the legal and factual arguments relied on by the Staff with respect to group action by the Applicants. As Staff argued in its Rule 105 argument, this Board is now in a position to draw reasonable inferences from the evidence.[11] We supported this argument with examples of the type of evidence which is in the record and which reasonably supports inferences of concerted action by Applicants.[12] In Staff's opinion, these examples alone form a sufficient basis for a ruling from the Board that, based on the record to date, Applicants have engaged in joint action inconsistent with the anti-

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10/ Transcript, pp. 8071-87.

11/ Applicants agree with the Staff on this matter. See Applicant's Motion, P. 9.

12/ Transcript, pp. 8079-82.

trust laws.[13]

In addition and alternatively, the Staff relies on the case of Gamco, Inc. v. Providence Fruit & Produce Building, Inc.[14] In that case, defendants were lessors of a building which served as the center for local trade in fruits and vegetables. Plaintiff, a corporation, one of the lessees of the building, purchased fruits and vegetables in large quantities from interstate dealers for resale to jobbers and retailers. After control of the plaintiff corporation passed to out-of-state interests, defendants' refused to renew plaintiff's lease. Plaintiff brought a treble damage action against defendants alleging that defendants' exclusion of plaintiff from the building constituted a violation of §§1 and 2 of the Sherman Act. The District Court concluded that "there was no clear proof of an articulated concert to exclude non-residents"[15] and found for defendants on the ground that whatever attempt to monopolize or monopoly there was, defendants acts had not actually suppressed, or tended to suppress, competition. On appeal, the Court of Appeals reversed, holding that where defendants have the power to deny their competitors access to the market, evidence that competition has not actually declined is inconclusive for the purposes of §§1 and 2 of the Sherman Act. The Court rejected defendants' contention that there couldn't be any monopolization of the building because there

13/ Some of the propositions advanced by Applicants are astounding. E.g., "an inference of conspiracy is permissible only where the conduct was adopted by a competitor in apparent contradiction to its own self-interest." To see the absurdity of this, one need only realize that the truth of that statement implies the truth of the statement: "An inference of conspiracy is not permissible where the conduct was adopted by a competitor in its own self-interest." The Staff doubts that any competitor ever entered into a conspiracy except for the purpose of advancing his own self-interest.

14/ 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952).

15 / Id. at 488 (emphasis added).

were alternative selling sites available to plaintiff, stating: "[A] monopolized resource seldom lack substitutes; alternatives will not excuse monopolization." The Court further held that "the failure conclusively to prove...a conspiracy is not fatal to plaintiff's cause as a matter of law." 16/ If the failure to prove a conspiracy is not fatal to plaintiff's cause in a traditional bottleneck case where plaintiff is charging the defendants with violating sections 1 and 2 of the Sherman Act on the grounds of exclusion of a competitor from an essential resource, it follows a fortiori that the failure to prove a conspiracy cannot be fatal in this pre-licensing antitrust review proceeding where the standard is merely an inconsistency with the antitrust laws, including the FTC Act, or the policies underlying those laws.

In arguing that no joint action has been proven, Applicants demonstrate that they still do not understand that contracts, combinations and conspiracies are not necessarily one in the same. 17/ The Staff adopts its position as stated in our Answer of NRC Staff to Applicants' Statement of Procedural Matters to be Considered, dated December 3, 1975, and note that this Board has already ruled on this and other issues in the Board's February 9, 1976, Memorandum and Order With Respect To Applicants' Request for Certain Procedural Rulings.

16/ Id. at 489 (emphasis added).

17/ See, e.g.,Applicants' Motion, p. 7 n.3.

Throughout this proceeding it has become evident that Applicants have been laboring under the mistaken belief that they can justify their individual and group conduct by asserting a "business justification" defense. [18] The Staff's position is that the type of defense Applicants have in mind in this regard specifically has been rejected by the Supreme Court. In Otter Tail Power Co. v. United States [19] the Supreme Court stated:

> Otter Tail argues that, without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill. The argument is a familiar one. It was made in United States v. Arnold, Schwinn & Co., 388 U.S. 365, a civil suit under §1 of the Sherman Act....We said: "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." Id. at 375.
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> The same may properly be said of §2 cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collides with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power. [20]

18/ See, e.g. Applicants' Motion, pp. 8, 25; Motion of Applicant Duquesne Light, pp. 5, 23, 25-30; Ohio Edison's Motion, pp. 11, 20.

19/ 410 U.S. 366 (1973).

20/ Id. at 380. See also The Peelers Co., 65 F.T.C. 799 (1964), enforced in part sub nom. LaPeyre v. F.T.C., 366 F.2d 117 (5th Cir. 1966).

C. Nexus

Applicants once again raise the nexus issue. Their position on nexus previously has been rejected by this Board, [21] by the Appeal Board [22] and by the Commission itself. [23] The Staff incorporates herein by reference its Trial Brief, with specific emphasis on Staff's Legal Argument contained therein. [24]

D. Collateral Estoppel

Two of the Applicants [25] have moved for an order dismissing certain issues on the grounds of collateral estoppel alone. It is the Staff's position that the necessary prerequisites for the application of the doctrine of collateral estoppel in this proceeding have not been satisfied. Even if they had been satisfied, the reasons against its application in this proceeding outweigh those in its favor, and therefore the use of the doctrine should be rejected. [26]

21/ Ruling of the Board on Applicant's Motion for Summary Disposition of September 23, 1975, dated October 21, 1975.

22/ Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Generating Station, Unit No. 1) ALAB-279, NRCI-75/6 559 (1975) (Wolf Creek).

23/ Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3) CLI-73-7, 6 AEC 48 (1973) (Waterford I); Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3) CLI-73-25, 6 AEC 614 (1973) (Waterford II).

24/ Part IV of Trial Brief, dated November 10, 1975.

25/ The Cleveland Electric Illuminating Co.(CEI) and Toledo Edison Co.

26/ "The sound view is...to use the doctrine of res judicata where reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor." Davis, Administrative Law Text §18.02, at 360 (3d ed. 1972).

It is well established that there are three prerequisites to the application of the doctrine of collateral estoppel in a proceeding to prevent the litigation of issues which were litigated in a prior proceeding: (1) identity of parties; (2) identity of issues; and (3) a final adjudication of those issues on the merits in the prior proceeding. 27/ In this matter, not one of these prerequisites is satisfied.

With respect to the identify of issues prerequisite, it should be noted that the issues and matters in controversy in this proceeding are the ones set forth by the Board in Prehearing Conference Order No. 2, not as Applicants seem to believe, the statements of the nature of cases which were filed on September 5, 1975, by the parties opposed to Applicants. Those statements were extra relief in order to inform Applicants more specifically of the nature of the evidence that the parties would introduce with respect to the issues and matters in controversy. Consequently, Applicants have misdirected their collateral estoppel motions when they seek to eliminate aspects of this proceeding which differ from the issues and matters in controversy of Prehearing Conference Order No. 2. When those issues and matters in controversy are examined, it becomes clear that there is no identify of issues between this proceeding and either the FPC litigation or the Consumers Power proceeding cited by Applicants as the "prior litigations for purposes of collateral estoppel.

27/ See, e.g., 1B J. Moore, Federal Practice, Paragraph 0.441[2], at 3777 (2d ed. 1974).

The Federal Power Commission, for example, did not have before it in that earlier proceeding the antitrust standard set forth in §105 of the Atomic Energy Act. Nor is that agency charged with such an antitrust review function. To the best of Staff's knowledge, the FPC has never examined an electric entity with a view towards determining whether its activities would create or maintain a situation inconsistent with those antitrust laws enumerated in §105a. In fact, until the Supreme Court decided Gulf States Utilities v. Federal Power Commission,[28/] the FPC construed its antitrust review responsibility under the Federal Power Act narrowly, and made that argument in that case before the Supreme Court. Since Gulf States was decided after the 1971-72 FPC proceedings (between CEI and the City) relied upon by Applicant CEI in its collateral estoppel motion, it is apparent that in that prior proceeding the FPC itself did not assume an antitrust review which even approached the scope of review which Congress required of the NRC.

Neither was there an identity of parties between this litigation and either of the two prior litigations. The NRC Staff was not a party to the FPC litigation. Nor is the Staff in privity with any party to that proceeding, for although another agency of the United States (the FPC) was a party, it did

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28/ 411 U.S. 747 (1973).

not have the authority to represent the interests of the United States and bind the United States with respect to any of the issues or matters in controversy in this proceeding for the purposes of determining "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" or the policies underlying those laws. 29/ Additionally, and most importantly, the FPC was not intended by Congress to have the primary power to decide the types of issues which Congress intended to be considered by this Commission pursuant to its prelicensing antitrust review duty under section 105c of the Atomic Energy Act. With respect to the Consumers proceeding, Toledo Edison Company admits that it was not a party nor is in privity with a party to that proceeding. That fact alone is sufficient for denying its motion.

Also, because the Staff believes that the issues and matters in controversy in this proceeding are different from those of the two prior proceedings relied upon by Applicants, there clearly was no final adjudication of those issues.

Finally, even if the Board found the three prerequisites to the application of the doctrine of collateral estoppel, the Staff submits that the Board should reject the use of that doctrine because the reasons against its application in this proceeding outweigh those in its favor. 30/ For example, the Appeal Board has considered the application of the doctrine of res judicata and

29/ See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402 (1940).

30/ See Davis, Administrative Law Text §§18.03 and 18.10 (3d ed. 1972) for an excellent summary of the reasons why the doctrine of collateral estoppel should be relaxed or rejected.

collateral estoppel to proceedings before this Commission [30a/] and has noted that "the courts have recognized that res judicata and collateral estoppel principles should not be invoked where there are competing public policy factors which outweigh those supporting the application of the doctrine." [30b/]

II. STAFF'S PRIMA FACIE CASE

Staff will now briefly review the evidence and record [31/] in light of the issues in controversy set forth in Prehearing Conference Order No. 2. Staff submits that the evidence and record clearly establish a situation inconsistent with the antitrust laws that will be created or maintained by the activities under the applied-for licenses.

30a/ Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2). ALAB-182, 7 AEC 210 (1974). The issue on appeal was whether a party to the litigation of an issue considered and decided by the Licensing Board in the construction permit phase of the proceeding could raise the same issue in the operating license phase of the proceeding involving the same reactor. The Appeal Board ruled that under those circumstances the identical issue could not be relitigated. That case is clearly distinguished from the instant proceeding, however, because here Applicants seek to invoke collateral estoppel with respect to issues which allegedly were litigated before another agency or in a different proceeding involving different nuclear units.

30b/ Id. at 213.

31/ All citations to exhibits and transcript pages are for the sole purpose of directing the Board to general area of the record where support can be found for the propositions advanced by the Staff. In no case should these citations be construed as limiting Staff's right to make different and/or additional citations at the close of the hearing in support of our proposed findings of fact and conclusions of law.

BROAD ISSUE A Of Prehearing Conference Order NO. 2 is:

Whether the structure of the relevant market or markets and Applicants' 32/ position or positions therein gives them the ability, acting individually, together, or together with others, to hinder or prevent:

(1) Other electric entities 33/ from achieving access to the benefits of coordinated operation 34/ either among themselves, or with Applicants:

(2) Other electric entities from achieving access to the benefits of economy of size of large electric generating units by coordinated development, 35/ either among themselves, or with Applicants:

Staff has demonstrated that each of the Applicants has the ability both individually and acting together to hinder or prevent other electric entities in various markets from achieving access to the benefits of coordinated operation and coordinated development. Specifically through the expert engineering testimony of Witness Mozer, Staff has demonstrated that each Applicant has numerous options to select the power supply arrangements and joint ventures needed to obtain an economic and reliable power supply system, and that other electric entities in the CCCT 36/ lack most of the options needed to obtain an

(Where a footnote is preceded by quotation marks it is a verbatim quotation from the Licensing Board's Statement of the Issues.

"32/ Applicants are the five participants in the Davis-Besse and Perry Nuclear Units: Cleveland Electric Illuminating (CEI), Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company and Toledo Edison Company. The Applicants are also the five members of CAPCO, referred to below."

"33/ Other electric entities refers to commercial firms, (other than the five Applicants), cooperatives, governmental units or similar organizations that generate, transmit or distribute electric power within the relevant market(s)."

"34/ Coordinated operation includes but is not limited to such activities as reserve sharing, exchange or sale of firm power and energy, deficiency power and energy, emergency power and energy, surplus power and energy, and economy power and energy."

"35/ Coordinated development includes but is not limited to joint planning and development of generation and transmission facilities."

36/ Combined CAPCO Company's territories.

economic and reliable power supply system. Witness Mozer has demonstrated, through his testimony and exhibits attached thereto, that Applicants, individually and collectively, engage in numerous power supply transactions and joint enterprises (both with each other and with non-CAPCO electric entities) which significantly reduce the costs of their bulk power supply systems while maintaining or enhancing the reliability of their systems. Witness Mozer has concluded, in part, that absent suitable arrangements with Applicants, other electric entities in the CCCT do not have the ability to engage in the power supply transactions and joint enterprises in which Applicants engage, because of the size, location, and lack of facilities of these other electric entities or because Applicants have neither provided them with the necessary services as requested, nor permitted them to enter into joint arrangements with Applicants. Thus, Staff has demonstrated, that as a result of the capability and expanse of their transmission systems, generation capacities, and power exchanges with other electric entities Applicants individually, and as a group, have the ability to grant or deny power supply options and opportunities to other electric entities.

Based in part on the engineering testimony of witnesses Mozer and Guy, Staff witness Dr. Hughes has established, in part, that (a) Applicants possess market power, individually and as a group within the relevant market areas, and have exercised that market power.[37/] Dr. Wein on behalf of the Department of Justice has also established (b) the economics of the nuclear units as unique resources.[38/]

37/ Tr. 3640, lines 16-20.
38/ See also Department of Justice Exhibits 285 and 511 (DJ 285 and DJ 511).

BROAD ISSUE B is:

> If the answer to Broad Issue A is yes, has Applicants' ability been used, is it being used, or might it be used to create and maintain a situation or situations inconsistent with the antitrust laws or the policies underlying these laws.

Staff has demonstrated that Applicants individually have used, are now using, and are in a position to continue to use, their ability to create and maintain a situation inconsistent with the antitrust laws. Staff has demonstrated that Applicants collectively have used (and could use) their ability and dominant position to refuse necessary services when requested by other electric entities while at the same time have collectively not permitted (and might continue to not permit) these other electric entities from engaging in joint arrangements with Applicants. Absent appropriate license conditions, Applicants are in a position in the future to engage in any anticompetitive acts previously engaged in by them in the past. 39/

For example, Staff has established that -

Duquesne Light Company - has engaged in the following anticompetitive activities:

(a) Refused to sell bulk power at wholesale to the Borough of Pitcairn. 40/

(b) Refused to interconnect or reach an interconnection agreement with the Borough of Pitcairn. 41/

39/ Tr. 4073, lines 14-22.
40/ Testimony of witness McCabe (Tr. 1550 et seq.); NRC Staff exhibits 15, 16 and 17 (NRC 15, 16, 17).
41/ Id.

(c) Refused to permit access to the Beaver Valley Nuclear Unit to the Borough of Pitcairn. 42/

(d) Refused to permit the Borough of Pitcairn access to bulk power services through power pool membership. 43/

(e) The historical relationship between the Duquesne Light Company and municipal electric entities resulted in the present situation in which only one other electric entity (Pitcairn) remains in operation in the territory served by Duquesne. 44/

Thus, Staff has demonstrated that Duquesne has used and has the present ability to further use its ability, acting alone and in combination with others, to create and maintain a situation inconsistent with the antitrust laws. This action by Duquesne in combination with others is documented with respect to the Pitcairn refusal, a group boycott involving all of the CAPCO members individually and jointly. 45/

Staff has established for example that -

Ohio Edison Company, has engaged in the following anticompetitive activities:

(a) A past policy of requiring its wholesale customers to participate in customer allocation agreements which are inconsistent with the antitrust laws. 46/

(b) A past and present policy of refusing to provide or discuss the possibility of providing transmission services ("wheeling") of power over its transmission lines for the benefit of certain wholesale customers, notwithstanding a written request on behalf of its wholesale customers requesting such services on August 11, 1972. 47/

(c) A past and present policy of effectively frustrating competition

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42/ NRC 17, pp. 5-6.
43/ Testimony of witness McCabe, Tr. 1564, lines 9-10; also NRC 6.
44/ Not contested by Duquesne.
45/ See for example, NRC 1, 2, 3, 4, 5, 7, 12, 53, 54, 55, 56 and DJ 237.
46/ Testimony of witness Lyren (Tr. 1898-1977), also NRC 36, 37, 38, 39, 40, 63, 64, 65, 66.
47/ Testimony of witness Lyren (Tr. 1891-1920, 1980-2029), NRC 84 and 210 as well as the testimony of DJ witness Lewis illustrate that this policy of refusals to wheel estends to entities in addition to its wholesale customers (refusal to deliver Buckeye Power to Newton Falls).

between OE and with its wholesale customers for industrial loads. 48/

(d) A policy of imposing long-term capacity restrictions and financing restrictions in contracts and future contracts with wholesale customers which restrictions have an adverse effect on the operation and growth of the systems of said customers in a manner inconsistent with the antitrust laws. 49/

Staff has established for example that -

CLEVELAND ELECTRIC ILLUMINATING COMPANY has engaged in the following anticompetitive activities:

(a) Past and present refusals to wheel 30 mw of PASNY power for the benefit of the City of Cleveland or AMP-O, thereby (a) denying other electric entities access to power supply sources and options beyond the control of CEI and (b), thereby denying other such entities the ability to "wheel-out" any excess capacity. 50/

(b) Refusals to make either maintenance power or a range of interconnection services available to the City of Cleveland. 51/

(c) Refusals to provide a synchronous interconnection to the City of Cleveland. 52/

(d) Refusals to permit access to the Perry and Davis-Besse nuclear plants as requested in writing on April 11, 1973 by the Law Director of the City of Painesville, Ohio. 53/

(e) The terms and provisions of the CEI-Painesville agreement dated April 28, 1975 are anticompetitive. 54/

(f) The terms and provisions of April 17, 1975 CEI-MELP interconnection agreement impose unfair reserve responsibilities on the City of Cleveland. 55/

48/ Testimony of witness Lyren and DJ witness Kampmeier.
49/ Testimony of witness Lyren (Tr. 1976-78, 2041, 2322-23) and Craig (Tr. 2876-79, 2917-26), and NRC 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82 and 83.
50/ NRC 70. Also testimony of Warren Hinchee at Tr. 2581-2584.
51/ Testimony of Warren Hinchee (Tr. 2524-71).
52/ Id.
53/ See discussion in detail with respect to CEI under matter in Controversy 6 infra, at pp. 24-25. Also testimony of Joseph Pandy (Tr. 3116) and testimony of Hinchee (2612-18).
54/ See testimony of Joseph Pandy at Tr. 3121, l. 18 through 3126.
55/ Direct testimony of Harold M. Mozer, NRC 205, Q's 142-148.

(g) Attempts to establish exclusive service territories with the City of Painesville. 56/

(h) Attempts to extract agreements not to compete for future customers with the City of Painesville. 57/

Staff has established for example that -

TOLEDO EDISON COMPANY has engaged in the following anticompetitive activities:

(a) The effective refusal to provide transmission and other interconnection services as requested by the Cities of Napoleon 58/ and Bowling Green, Ohio. 59/

(b) The Toledo Edison - Bowling Green Contract restricted Bowling Green's ability to compete for customers outside the corporate limits of Bowling Green thereby preventing expansion and operating the Bowling Green system. 60/

56/ Testimony of Dale Helsel (Tr. 3622-28). Also NRC 144.

57/ Id.

58/ Testimony of DJ witness Wm. Lewis.

59/ Testimony of Staff witness Hillwig Tr. 2386, lines 13-19; Tr. 2388, lines 6-18; Tr. 2402, line 4 - 2403, line 6.

60/ Testimony of Staff witness Hillwig Tr. 2371-2382; also NRC Exhibits 45, 46.

MATTERS IN CONTROVERSY UNDER BROAD ISSUES A AND B

(1) Whether the Combined CAPCO-Company Territories (CCCT) [61/] is an appropriate geographic market for analyzing the possible creation or maintenance of a situation inconsistent with the antitrust laws or the policies underlying those laws.

Staff has demonstrated through the use of expert economic testimony of Staff witness Hughes that the Combined CAPCO-Company Territories (CCCT) is the relevant geographic market for antitrust analysis.

(2) Whether there are any relevant geographic submarkets, and, if so, what are the boundaries.

Although Staff has not specifically delineated relevant geographic submarkets, the area marked by each of the Applicant's transmission facilities, [62/] has been separately analyzed by Dr. Hughes for market shares analysis.

(3) Whether any or all of the following are relevant product markets for analyzing the possible creation or maintenance of a situation inconsistent with the antitrust laws or the policies underlying those laws:

"61/ The Combined CAPCO Company (Central Area Power Coordination Group) Territories (CCCT) refers to the region bounded by the outer perimeters of the geographic territories of the five CAPCO members, as shown on the map submitted by CEI as Exhibit F to Information Requested by the Attorney General for Antitrust Review in connection with the Perry Nuclear Power Plant Units 1 & 2. (The map is entitled "Principal Facilities of CAPCO as of October 31, 1969" and was prepared by Duquesne Light & Co.)."

62/ Chart following p. 26 of Prepared Direct Testimony of William R. Hughes, NRC 207.

(a) Regional power exchange transactions within power pooling arrangements involving exchanges and/or sales of electric power for resale.

(b) Bulk power transactions involving individual contracts for sale-for-resale of firm electric power or for emergency, deficiency or other types of wholesale power.

(c) Retail power transactions involving sales of electricity to ultimate consumers.

Staff has established through the testimony of Dr. Hughes that the bundle of bulk power transactions, or bulk power services,that are required for coordinated operation and development constitutes the relevant product market.

(4) Whether Applicants' stipulated 63/ dominance 64/ of bulk power transmission facilities in the CCCT gives them the ability to hinder or preclude competition in the transmission of bulk power.

In addition to relying on Applicants stipulated dominance Staff has demonstrated through the expert testimony of witnesses Guy,Mozer and Hughes that dominance in fact of bulk power transmission facilities gives Applicants the ability to hinder or preclude competition in relevant markets in the transmission of bulk power by foreclosing bulk power options to the affected power entities. Staff has also demonstrated, in a similar manner, that Applicants' transmission systems, individually and collectively, gives them the ability to grant or deny power supply options and opportunities to other electric entities.

63/ Transcript pp. 448-451; 473; 483-484.

"64/ Dominance here and below refers to percentage shares of 75% or more in relevant service market areas."

(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.

With reference to Staff's response to "Broad Issue B", Staff has demonstrated the following:

a. Through Staff witness Hinchee, Staff has demonstrated that CEI has had, does presently have, and most certainly in the absence of appropriate license conditions could continue in the future to have the ability to preclude other electric eneities, such as the City of Cleveland from obtaining alternative sources of bulk power. 65/

b. That Ohio Edison has refused to wheel for, or to discuss wheeling with other electric entities or to admit they wheel for other investor-owned utilities, and thus has denied, and may continue to deny access to opportunities to obtain for bulk power sources from other entities outside the CCCT, without appropriate license conditions. 66/

c. That Toledo Edison has and could, without appropriate license conditions, preclude electric entities from obtaining sources of bulk power from other electric entities outside the CCCT. 67/

d. Only one electric entity (Borough of Pitcairn, Pennsylvania) currently exists in the geographic submarket dominated by Duquesne Light Company. The dominance of Duquesne gives it the ability in the absence of appropriate license conditions to preclude that entity from obtaining sources of bulk power from other electric entities outside the CCCT.

65/ Tr. 2583, l. 19 through 2594, line 12. NRC 70.
66/ See note 47, supra.
67/ Testimony of Staff witness Hillwig. (Tr. 2404-07).

(6) Assuming that the answer to (4) is yes, whether Applicants have exercised, are exercising, or intended to exercise, their ability to prevent other electric entities in the CCCT from achieving:

(a) the benefits of coordinated operations either among themselves or with Applicants.

(b) access to the benefits of economy of size from large nuclear generating facilities.

(c) any other benefits from coordinated development either among themselves or with Applicants.

With reference to Staff's response to "Broad Issue B" and the previous responses to issues 4 and 5 above, Staff has demonstrated the following:

a. Through the testimony of witnesses Hinchee and Pandy, it is clear that CEI has, and continues to exercise its ability to prevent the Cities of Cleveland and Painesville, Ohio from achieving the benefits of coordinated operations and development. CEI has denied, continues to deny, and may continue to deny without appropriate license conditions the City of Painesville access as requested, to the economies of size of large nuclear generating units. Specifically, pursuant to NRC Exhibit 136A, Painesville wrote to CEI timely requesting access to the Perry nuclear plants. A description of CEI's response is contained in NRC 138, a letter from the Painesville law director to the Department of Justice stating, with respect to that request:

> I received an acknowledgment of my letter, a statement that it would involve millions of dollars in cost, a statement that other investors would have to be consulted if we were to participate. In short, I got neither an acceptance nor a refusal. In subsequent talks with Mr. Howley he asked why did we want to own a part of the facility when they were offering us a tie-in that would serve the same purpose and would not cost the money.

Of course, Painesville realized, as contained in NRC 137, "Unless they are compelled to sell us power from Perry Nuclear Plant they will, within a very few years, effectively monopolize the distribution of electric energy in this entire area." It is one of the Company's declared objectives to "eliminate" the Cleveland and Painesville plants. Further, Painesville still desires direct access to the nuclear plants (Tr. 3158, 11. 3-5). As witness Pandy testified (Tr. 3120, lines 4-6) Painesville does not have any opportunity for participation in the nuclear units other than with the cooperation with CEI. Also, witness Pandy testified (Tr. 3116, lines 19-21) that an interconnection is not the same as direct access to the nuclear plant. Finally, as in the case of all fact witnesses who testified on behalf of the NRC Staff, it is clear that CEI has not made available to Painesville any proposed terms offering access to Perry (Tr. 3162, 11. 1-4).

b. It has also been established that Ohio Edison has prevented, and without appropriate license conditions has the ability to continue to prevent other electric entities from achieving the benefits of coordinated operations and development and meaningful access to economies of size from base scale nuclear generating units. Staff Exhibit 44 contains a letter dated Feb. 28, 1975 from Lynn Firestone of Ohio Edison to Messrs. Duncan and Cheeseman which sets forth, in para. 1 of p. 2,OE's policies with respect to nuclear units. Those policies are that in order for the Wholesale Consumers of Ohio Edison to participate in a nuclear unit,

> "WCOE would be...obligated to share in the OE portion of each CAPCO base load unit over its lifetime."

The same paragraph provides another restriction. First, the maximum capacity available from a given unit would be limited to "10% of the estimated WCOE annual peak load for the year in which the participating unit is scheduled to come into service."

These restrictions were also confirmed by the testimony of witness Lyren (Tr. 2030), with the additional detail that the 10% capacity restriction for WCOE based on current loads was 50 MW. At Tr. 2031, lines 1-11, witness Lyren testified that OE refused to make available base load power from the nuclear units if that power was to be resold by members of WCOE to present industrial customers of OE. (See also Tr. 2338, ll. 14-16).

Further, witness Lyren testified that OE would not discuss or provide for the wheeling of Buckeye Power with WCOE (Tr. 2021) or discuss or provide any form of wheeling (Tr. 2022, ll. 7-10. This same refusal also applied to the FPC rate settlement (Tr. 2022, ll. 11-13, and Tr. 2023, ll. 1-8) and the subsequent R.W. Beck Power Supply Study (Tr. 1410, ll. 9-25, and Tr. 1915-1916).

c. Toledo Edison has prevented in the past and without appropriate license conditions has the ability to continue to prevent other electric entities such as Bowling Green, Ohio from achieving the benefits of coordinated operations and development.

d. As previously discussed, Duquesne Light Company alone and jointly with others has denied without appropriate license conditions and has the ability to continue to prevent other electric entities such as the Borough of Pitcairn, from achieving the benefits of coordinated operations and development. In addition, Duquesne had denied access to the benefits of the economy of size from the Beaver Valley nuclear unit to Pitcairn, the only electric entity in Duquesne's

territory who could participate in the unit.

(7) Assuming the answer to (6) is yes, has this ability to hinder or preclude competition been exercised for the purpose or effect of eliminating one or more of the other electric entities in the CCCT.

Both Staff and the Department have presented factual evidence indicating a high mortality rate among other electric entities in the relevant geographic markets. Noteworthy are documents received in evidence relating to the acquisitions by Duquesne of Sharpsburg, Aetna and Aspenwall; also Toledo Edison of Liberty Center and Waterville; and Ohio Edison of Hiram and Norwalk.

(8) Whether Applicants' stipulated dominance of bulk power generation in the CCCT gives them the ability to hinder or preclude competition in one or more relevant markets.

This matter in controversy is the same as number (4) above, except it focuses on Applicants dominance of bulk power generation, as opposed to item (4) above which focused on transmission. Staff hereby incorporates by reference that part of its response to (4) which deals with the significance of dominance as an aspect of this case. As previously discussed, Staff established dominance over generation facilities by the testimony of witnesses Guy, Mozer, and Hughes. That testimony also establishes that the Davis-Besse Units 1, 2 and 3 and the Perry Units 1 and 2 will materially maintain and indeed enhance Applicants dominance and their ability to hinder or preclude competition in the relevant markets.

(9) Assuming the answer to (8) is yes, whether Applicants have exercised control over bulk power facilities to deny to other electric entities in the CCCT:

(a) access to the benefits of coordinated operation, either among themselves, or with Applicants.

(b) access to the benefits of economy of size of large electric generating units.

(c) access to any other benefits from coordinated development, either among themselves or with Applicants.

Staff herein incorporates by reference its response to number (5) and (8) above. Staff has demonstrated that Applicants' dominance of bulk power generation (as well as transmission) has given them the ability to hinder or preclude competition in the relevant markets by foreclosing bulk power options and the benefits of coordinated operation and development to the affected power entities.

(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.

First, as to App. Exhibit 44, it is clear that no fact witness in this proceeding had been made aware that Applicants had adopted "policies" relating to access. In the absence of such evidence, indeed in the presence of plain evidence to the contrary that such "policies" had not been communicated even where the record disclosed a prior request for access to Applicants, it is clear that Applicants policies in fact do deprive other entities in the CCCT from realizing the benefits of nuclear power.

This Board can now take notice of the fact that while the CAPCO companies are applying for licenses to construct and operate five baseload nuclear units, not one non-Applicant CCCT entity has been permitted by Applicants to participate. CEI told Painesville, as was discussed previously, that access was not needed when an interconnection was available. Ohio Edison's position on access, as contained in the Firestone letter, (which on its face is inconsistent with Applicants exhibit 44) was so conditioned (all other units, 50 MW unit, no resale) as to be meaningless. And NRC 17, at pages 5 and 6, sets forth Duquesne's response to the only entity in its area who could utilize such power.

> McCabe said that he saw no reason why Pitcairn would need to become a party to all of the pool units, but that it would be enough that if, for example, Pitcairn could take a share of the new Beaver Valley unit.
>
> Dempler replied that the pool was not created on the basis of companies simply taking shares of particular units, but that consideration was given to continuing overall needs. He pointed out that each of the parties to this pool went in with the complete understanding of sharing all the risks and benefits of the pool, and hence no party could select any choice part of the facilities to accomodate his own desire.

It is thus been clearly established that Applicants policies deprives other electric entities within the CCCT from realizing the benefits of nuclear power.

(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 Atomic Energy Commission. 68/

Staff feels that the evidence as above discussed clearly demonstrates the relationship between the "situation inconsistent with the antitrust laws" and the "activities under the license". After full development of the factual context, the Board will be in a position to make a determination as to the existence of a reasonable nexus. [See In the Matter of Alabama Power Company, (Joseph M. Farley Nuclear Plant, Units 1 and 2), 6 A.E.C. 85 at p. 88 (February 9, 1973)].

Thus, the anticompetitive situation has been established by proof of the structure of the relevant markets and Applicants position therein, as well as a description of the market power, and its use by Applicants.

The relationship between that "situation" and the "activities under the license", i.e., the planning, building, and operation of the nuclear facilities plus the integration of the nuclear facilities in the bulk power supply systems, has likewise been demonstrated by expert testimony, particularly that of witness Mozer.

68/ The Licensing Board has ruled that "Matter in Controversy #11 should be read as relating to aggregate activities necessary to define a 'situation' and not as limited to individual nexuses between Matters #1-10 and the activities under the license." Sixth Prehearing Conference Order, October 2, 1975, p. 5.

In conclusion, the Staff opposes the Applicants' Motions to dismiss and asks this Board to deny Applicants' motions in their entirety.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 17th day of May 1976.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	NRC Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING	)	50-500A
COMPANY	)	50-501A
(Davis-Besse Nuclear Power Station,	)	
Units 1, 2 & 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING	)	NRC Docket Nos. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF'S ANSWER TO APPLICANTS' MOTIONS FOR ORDERS DISMISSING ALL, OR SPECIFIC, ALLEGATIONS MADE BY THE NRC STAFF, dated May 17, 1976, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail, this 17th day of May 1976:

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