UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
The Toledo Edison Company and	)	Docket Nos. 50-346A
The Cleveland Electric	)	50-500A
Illuminating Company	)	50-501A
(Davis-Besse Nuclear Power	)	
Station, Units 1, 2 and 3	)	
	)	
The Cleveland Electric	)	Docket Nos. 50-440A
Illuminating Company, et al.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

MOTION OF APPLICANT TOLEDO EDISON COMPANY FOR AN ORDER DISMISSING AN ISSUE WHICH HAS BEEN FULLY AND FAIRLY LITIGATED BEFORE THE NUCLEAR REGULATORY COMMISSION IN A PRIOR PROCEEDING

Applicant Toledo Edison Company (hereinafter "Toledo Edison") respectfully requests this Board to issue an order dismissing the allegation made against it by the Staff of the Nuclear Regulatory Commission and the Department of Justice (hereinafter "opposing parties") in their respective September 5, 1975 filings to the effect that (1) Toledo Edison and the Consumers Power Company of Michigan have an "agreement or understanding" (hereinafter referred to as the "alleged agreement") that prevents either of them from serving the territory served by the other and,

(2) that said alleged agreement prevented the Southeastern Michigan Electric Cooperative from obtaining power at wholesale from Toledo Edison. It is the position of Toledo Edison that the opposing parties are collaterally estopped from raising this issue in the instant proceeding on the grounds that this issue has already been fully and fairly litigated by the opposing parties before the Nuclear Regulatory Commission in a prior proceeding. In the Matter of Consumers Power (Midland Plant, Units 1 and 2), Docket Nos. 50-329A and 50-330A.

The doctrine of collateral estoppel, like the related doctrine of res judicata, is a judicially formulated doctrine founded upon consideration of economy of judicial time and the public policy favoring certainty and fairness in legal relations. As noted by the United States Supreme Court:

> "Those who have contested an issue shall be bound by the result of the contest, and [that] matters once tried shall be considered forever settled as between the parties."
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> (Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 525, (1931))

It is now well established that the doctrine of collateral estoppel is not limited to the judicial arena, but, also applies with equal force to administrative proceedings. United States

v. Utah Construction and Mining Co., 384 U.S. 394 (1966); Federal Trade Commission v. Texaco, Inc., 517 F.2d 137 (D.C. Cir., 1975).

In the specific context of licensing proceedings, the Atomic Safety and Licensing Appeal Board has expressly recognized that collateral estoppel should be invoked, when appropriate, to prevent the relitigation of previously determined issues. In the Matter of Alabama Power Company, (Joseph M. Farley Nuclear Plant, Units 1 and 2), Docket Nos. 50-348 and 50-364, 7 A.E.C. 210 (1974). Consonant with the foregoing precepts, it is the position of Toledo Edison that the aforementioned allegation should be dismissed from this proceeding.

Traditionally, the applicability of the doctrine of collateral estoppel has been considered to be dependent upon a showing that three general criteria have been met; to-wit: (1) that the issue in question is the same issue that was raised in a prior proceeding involving the same questions of law and fact; (2) that such issue was previously decided upon the merits; and that (3) there exists an identity of parties.

With respect to the first criteria, it is necessary to compare the issue presently before this Board with the relevant

(for purposes of this motion) issue involved in the Consumers case. In this regard, it should be borne in mind that the term "issue" should be defined to encompass any material and controverted question of fact or law which the parties addressed. Paine and William Co. v. Baldwin Rubber Co., 113 F.2d 840 (6th Cir., 1940). It is patently clear that the issue regarding the alleged agreement appearing in the allegations made by the opposing parties in their September 5, 1975 filings in this proceeding is identical to the same issue previously addressed in the Consumers proceeding wherein it was also specifically alleged (and specifically held to be untrue) that Consumers had a territorial agreement with Toledo Edison not to cross state lines. This identity is further evidenced by the Board's ultimate findings on the Consumers case but, moreover, it is unequivocally apparent from an examination of the brief filed by the Department of Justice in that case wherein the Department devoted an entire section to "Applicant's Monopoly [is] Strengthened by its Major Refusals to Offer Wholesale Power in Applicant's Geographic Market Whether or Not Such Refusals Result from Conspiracies to Allocate Markets" (Brief of DOJ at 134, Emphasis added). Also, in that brief, as in the instant proceeding, the Department of Justice attempts to ascribe great weight to evidence purported to show some nebulous "Gentlemen's Agreement between Toledo Edison

and Consumers Power which supposedly prevented the Southeastern Michigan Electric Cooperative from obtaining wholesale power from Toledo Edison. Significantly, this arrangement, in the Department's own words, constituted "the best illustration of these [refusals]." (Brief of DOJ at 134). In addition, the Department's proposed findings of fact and conclusions of law contain the following passage:

> "29. The foregoing would be sufficient to establish violations of sections 1 and 2 of the Sherman Act: * * * Section 1 based on * * * the 'gentleman's agreement' concerning wholesale power sales to small systems to which the Applicant has been a party * * *."
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> (Brief of DOJ, at p. 265)

Thus, in the Consumers case the Department had and exercised ample opportunity to fully litigate the question of the existence of an "agreement or understanding" between Toledo Edison and Consumers Power which allegedly prevented the Southeastern Michigan Electric Cooperative from obtaining power at wholesale from Toledo Edison. To now assert that there could possibly exist any dissimilarity between the same issue that was involved in both proceedings would be beyond the realm of reasonable imagination and completely unmindful of the record in both proceedings. In this regard, however, there were several questions

raised in this proceeding with respect to identity of this issue which questions deserve special consideration herein.

Chairman Rigler raised some question as to the identity of the overall "geographic markets" involved in both proceedings [TR 5182]. It is clear that the overall geographic market defined by the Board in the Consumers case indeed may not be perfectly "co-extensive" with the overall relevant geographic market perceived by this Board to be involved in this proceeding. However, in the matter before this Board, the alleged territorial agreement in issue impacts upon a precisely defined geographic area; that is, that portion of the Southeastern Michigan Electric Cooperative's service area located in Michigan. This is quite obviously the same precisely defined geographic area considered in the Consumers case with respect to the alleged territorial agreement between Consumers Power and Toledo Edison. Therefore, for purposes of collateral estoppel the requisite identity must necessarily exist so long as this "area" is involved in both cases. On the other hand, if this Board believes that the area in question is not within the "geographic market" applicable to this proceeding, then this allegation should be dismissed as irrelevant on that basis alone.

Additionally, this Board's stated disagreement over the Consumers Board's view on nexus [TR 5182], whether accurate or not, should have no real effect upon the question of identity of issues to which this motion is directed. As Professor Moore aptly states:

> "Frequently a judgment involves questions both of fact and law or a certain rule of law is decided to apply to a certain set of facts. The reason for categorizing the cases is that the courts are more likely to apply the doctrine of collateral estoppel to conclude an issue of fact or of mixed fact and law than to conclude an issue purely of law. [1B J. Moore, Federal Practice and Procedure ¶0.442[1], at 3851.]"

In this regard, Toledo Edison is seeking to invoke the doctrine of collateral estoppel only with respect to the following determination made by the Board in the Consumers case:[1]

> "We find as a matter of fact there is no substance to the testimony concerning

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[1] Contrary to the assertions of the Department [TR 5172], the Consumers Board did in fact consider other evidence relating to the issue involved in this motion. Specifically, at page 117 of its opinion the Board made the following observations: (1) "Applicant has never had an oral or written agreement prohibiting wholesale sales beyond its present service area [TR 6070-6071]"; and (2) "Applicant's policy not to sell outside of Michigan is unilateral [TR 6476]".

'gentlemen's agreement' [between Consumers and Toledo Edison]."

(Consumers Opinion, at p. 160)
(Emphasis added)

That determination is, of course, made in addition to the Board's legal conclusions in Consumers that: (A) "We find no substantial evidence of a situation inconsistent with the antitrust laws arising out of boundary agreements."[2] (Consumers Opinion, at p. 162); and (B) We conclude as a matter of law that there is no nexus between the activities under the licenses and the said assumed situation." (Consumers Opinion, at p. 163). While the legal conclusions which the Consumers Board formulated clearly arise from its finding of fact, for the purposes of this motion, it is the finding of fact (and not the conclusions of law) which is relevant.

The second criteria requisite to an application of the doctrine of collateral estoppel centers around the extent to which the issue in question was litigated before and decided by the trier of fact on the merits. While it has been held that collateral estoppel can be invoked only with respect to issues

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[2]The term "boundary agreements" was defined to encompass all oral or written territorial agreements.

that were actually litigated, courts have focused upon the opportunity to litigate rather than the quantum of evidence proferred. United States v. Silliman, 167 F.2d 607 (3rd Cir.), certiorari denied, 335 U.S. 825 (1948). In this regard, there is absolutely no question but that the opposing parties were accorded a full and fair opportunity to litigate this issue in the Consumers case. Indeed, the opposing parties not only raised the issue, but they introduced documentary evidence, cross-examined witnesses, and otherwise devoted a considerable amount of time and energy trying to persuade the Consumers Board to rule in their favor. Additionally, the issue was not only fully litigated, but the Board made specific findings of fact and conclusions of law on the merits with respect to it. It is true, as stated by the Board in this proceeding, that the portion of the Consumers opinion which sets forth the Board's ruling on the alleged understanding or agreement between Toledo Edison and the Consumers Power Company was characterized as unnecessary to the final disposition of the case because the Board viewed that issue as technically being neither within the relevant matters in controversy or within the relevant market area.[3] However, and

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[3]The Consumers Board ultimately viewed the relevant matters in controversy as being limited to the narrow question of whether

notwithstanding this characterization, the Board's careful consideration and final determination of this issue is certainly "material" for the purposes of this motion.

The clearest demonstration of the materiality of the evidence, the findings and conclusions made by the Consumers Board, is manifested by the opposing parties' response to the findings and conclusions made with respect to the alleged territorial agreement. By appealing this very issue, the opposing parties have themselves unequivocally demonstrated at least their belief in the "materiality" of this issue.[4] If the alleged understanding or agreement with Consumers was not material in that proceeding, then its determination would have the characteristics of dicta and would not ordinarily be subject to an appeal. Restatement (Second) of Judgments, §68, Comment h (Tentative Draft No. 1, 1973).

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the applicant had the power to grant or deny access to coordination (Consumers Opinion, at p. 9). It further concluded that the relevant market was not a product market but rather a service market which encompasses coordination services [Consumers Opinion, at p. 29].

[4]The Department of Justice's exception to the Consumers decision with respect to this issue provides:

> "The Board erroneously concluded that Applicant has never had an oral or written agreement prohibiting wholesale sales beyond its present service area." [TR 5176]

Based upon the foregoing, Toledo Edison is firmly convinced that the finding made with respect to the alleged agreement is sufficiently "material" to mandate the application of collateral estoppel.[5]

Finally, since the Consumers Board has made a final determination of this relevant issue on the merits, Toledo Edison is entitled to invoke the doctrine of collateral estoppel notwithstanding the pendency of an appeal. As Professor Moore states:

> "* * * the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo."
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> (1B J. Moore, Federal Practice and Procedure, ¶0.416(3), at 2252)

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[5]It should also be noted that in Choctaw Nation v. United States, 135 F.Supp. 536 (Ct. Cl. 1955), certiorari denied, 352 U.S. 825 (1956), the United States Court of Claims invoked the doctrine of res judicata because the issue had been raised, litigated, and expressly determined by the court on the merits even though the issue involved was immaterial.

The final criteria necessary to the application of the doctrine of collateral estoppel has been described as the requirement of an "identity of parties". In its embryonic stage of development, it was believed that collateral estoppel could not be invoked unless either there was an absolute identity of parties or that the operation of estoppel would have been mutual. The first element was considered to be satisfied only if the party asserting the doctrine was a party, or in privity with a party, to the earlier action. On the other hand, the record was considered to be satisfied if the movant would have been legally bound had the issue been determined adversely to his interest. If rigidly adhered to, these concepts would, of course, prohibit Toledo Edison from prevailing on this motion since Toledo Edison was neither a party in the Consumers case nor bound by the decision therein.

However, in recent years both state and federal courts have become increasingly aware that a rigid application of the antiquated concepts of "privity" and "mutuality" to situations similar to that presented in the instant proceeding is both undesirable and unwarranted. The better view of current authority holds that collateral estoppel may be invoked to bar the relitigation of previously decided issues notwithstanding the absence of

absolute identity of parties particularly when, as is presently the case, the moving party is seeking to employ the doctrine in a defensive manner; that is, by a non-party (Toledo Edison) against an identical plaintiff (the Department of Justice and the Staff of the NRC) who was a party in a prior proceeding (the Consumers case) in which the issue (a Consumers-Toledo Edison territorial agreement) was litigated and determined.

This trend in judicial development was first conceived by the Supreme Court of California in the landmark Bernhard case. Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942). In that case the Court held that the defendant was "not precluded by lack of privity or of mutuality of estoppel from asserting the plea of res judicata against the plaintiff." Id. page 895. The Court specifically held that:

> "* * * there is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.
>
> "No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend."
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> (Id., at pp. 894-95)

More recently, for example, in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), the United States Supreme Court specifically concurred with and in effect adopted the principles of Bernhard. In this case, the plaintiff (an owner by assignment of a patent on T.V. antennas) brought an infringement action against the defendant Winegard Co., an antenna manufacturer. Prior to the conclusion of the proceeding, the plaintiff brought a second infringement suit against defendant Blonder-Tongue. Although the patent had already been held invalid in the first case, the lower court in Blonder-Tongue nonetheless ignored that decision and returned a verdict for the plaintiff. After these two divergent holdings were affirmed on appeal, the United States Supreme Court granted certiorari and held that the concept of mutuality did not foreclose a plea of collateral estoppel by a defendant to an infringement suit when a patent had previously been declared invalid.

In approving the defensive application of the doctrines of res judicata and collateral estoppel the Court significantly notes as follows:

> "* * * the broader question is whether it is any longer tenable to afford a litigant more

> than one full and fair opportunity for judicial resolution of the same issue. * * * In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is arguable misallocation of resources. * * * Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts hardly a worthy or wise basis for fashioning rules of procedure.' * * *"
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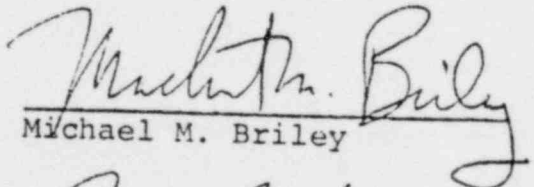
> (Id., at pp. 328-29)
> (Emphasis added)

Furthermore, in the Court's view one of the most significant factors considered in applying the doctrine of collateral estoppel notwithstanding the lack of identity of parties was the fact that the plaintiff "had a full and fair opportunity to litigate" (Id., at p. 329). This "full and fair" opportunity test announced by the Court has in the ensuing years gained wide acceptance. In fact, the proposed Restatement on Judgments, §88, has abandoned its former adherence to the concept of mutuality in favor of the rule laid down in Blonder-Tongue because "its [the former rule] abrogation projected in Bernhard v. Bank of America, [citation omitted] has now gained general acceptance." Restatement (Second) of Judgments, Reporter's Note on §88, at 98 (Tent. Draft No. 2, 1975).

Clearly, the very same factors that lead the courts in Bernhard and Blonder-Tongue to dispense with the concepts of privity and mutuality apply with equal and perhaps even greater force in the present proceeding. Since the opposing parties have already fully and fairly litigated the very issue to which this motion is addressed, this Board should apply the principles discussed above to avoid unwarranted and repititious litigation.

Based upon the foregoing, it is clear that all of the essential elements necessary to warrant the application of collateral estoppel are present. To permit the opposing parties to now relitigate the very same issue that was raised and lost in the Consumers case would be both unwarranted and unjust. Therefore, Toledo Edison respectfully urges this Board to grant its motion and to enter an appropriate order.

Respectfully submitted,



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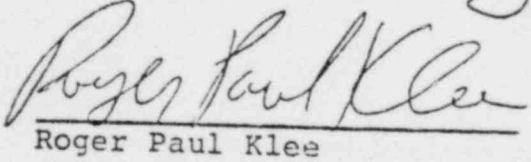

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion of Applicant Toledo Edison Company for an Order Dismissing an Issue Which has been Fully and Fairly Litigated Before the Nuclear Regulatory Commission in a Prior Proceeding has been made on the following parties listed on the attachment hereto this 20th day of April, 1976, by depositing copies thereof in the United States mail, first class or air mail, postage prepaid.

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