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

MEMORANDUM AND ORDER ON APPLICANTS' MOTION FOR AN ORDER STAYING, PENDENTE LITE, THE ATTACHMENT OF ANTITRUST CONDITIONS

Contending that they have made a strong showing that they are likely to prevail on the merits of the appeal and that without relief they will be irreparably injured, Applicants, on January 14, 1977, moved the Appeal Board for an order staying, pendente lite, the attachment of antitrust conditions to the Davis-Besse and Perry nuclear stations. By order of January 17, 1977, the Appeal Board referred the motion to the Licensing Board. The NRC Staff, the Department of Justice and the City of Cleveland filed responses opposing the grant of a stay.

Applicants contend, and the other parties agree, that four criteria enumerated in Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921 (1958), should be applied to decide this motion. These criteria have been adopted by the Appeal Board. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-192, 7 AEC 420; Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, NRCI-76/7, 10, 13, July 14, 1976. The burden of proof necessary to carry this motion rests upon Applicants (10 CFR §2.732).

Prior to commencing our assessment, we make one threshold comment. In its responding papers, Justice argues that the request for stay misconceives the nature of the Licensing Board's action and its relation to the statutory scheme. Justice disputes Applicants' contention that the initial decision has cleared the way for issuance of the requested operating licenses and construction permits. We agree that these conditions are not appendages to the licenses but rather are a predicate to the very issuance of the license. Justice points out that the issuance of a license without conditions will not preserve the status quo but instead will alter it since power from the nuclear stations will have an immediate impact on

competitive conditions within the Combined CAPCO Company Territories (CCCT).

Since operation of the facilities without condition will not preserve the status quo, it is our view, for the reasons stated in our decision of January 6, 1977, that activities under a license without immediately effective conditions would create and maintain a situation inconsistent with the antitrust laws. Denial of a stay, on the other hand, will help to preserve the position of competitive entities or potential competitors within the CCCT.

We turn now to an evaluation of Applicants' contentions that their motion meets the criteria set forth in Virginia Petroleum Jobbers. The following questions apply.*

(1) Has the movant made a strong showing that it is likely to prevail on the merits of its appeal?

(2) Has the movant shown that, without such relief, it will be irreparably injured?

(3) Would the issuance of a stay substantially harm other parties interested in the proceeding?

(4) Where lies the public interest?

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*259 F.2d at 921, 925.

A. Has the movant made a strong showing that it is likely to prevail on the merits of its appeal? It is the Applicants' burden to make a strong showing that it is likely to prevail on the merits of its appeal. Mere establishment of possible grounds for appeal does not meet this standard. Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 338, 366 (W.D. Mo. 1972), aff'd. 477 F.2d 1033 (8th Cir. 1973).

Applicants have listed nine grounds of possible reversal which we discuss seriatim. It should be noted that even in the event the Licensing Board is determined to have been in error with respect to one or more of these grounds, Applicants still might fall short of meeting their overall burden. So long as there remain findings of antitrust law violation as to which the likelihood of reversal is not strong, a sufficient basis for applying relief will be present. Applicants' burden, therefore, is to demonstrate a strong probability that no ground of violation will remain upon which to base relief.

One general observation applies. Applicants contend that this is a proceeding of a "ground breaking" nature and they refer to "the relatively unsettled state of the law" as a factor requiring caution in the imposition of

license conditions. We cannot agree with this contention of novelty. There is nothing novel in our finding that Applicants' territorial allocation violates the antitrust laws. Neither is there anything novel in holding that customer allocations transgress the requirements of the Sherman Act. There is nothing "ground breaking" in our determination that price fixing is illegal, nor is the law "relatively unsettled" in condemning group boycotts and denial of access to "bottle-neck" facilities. No "substantial" question (the reference mark which the Appeal Board has alerted us to consider) is presented as to the applicability of the antitrust laws to numerous activities of Applicants.

It thus appears that our determination that a situation inconsistent with the antitrust laws exists within the CCCT is well founded in fact and in law. We also believe that our conclusion that activities under the license will create or maintain the anticompetitive situation are supported in ample measure by our findings. The nexus standard we employed was conservative. We held nexus to have been established both on structural grounds and through direct restraints in alienation which Applicants sought to apply to power from Davis-Besse and Perry. We

indicated that either ground standing alone would support relief.

It is asserted that there are numerous errors of law and fact apparent in the Licensing Board's initial decision, but Applicants list in summary fashion only nine possible grounds for reversal.

a) Turning now to these broad contentions of error, we address first the Board's asserted failure to take into account "significant economic and legal barriers to competition in the electric utility industry which requires evaluation of antitrust principles other than the procompetitive presumption relied upon by the Board."*

Applicants have not specified which significant economic and legal barriers we failed to consider. The record reflects, however, that we considered their argument

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*The reference to a "procompetitive presumption" (Applicants' Motion, p. 7), is somewhat baffling. Although it is possible that we used that term in our initial decision, we have no recollection of having done so, and certainly such a concept was not advanced in those precise words as a foundation to our decision. If Applicants mean nothing more than that there is a presumption of competition in the electric utility industry, as in all other industries, and that it is their burden to establish the presence and boundaries of any statutory scheme reducing such competition, then Applicants correctly have grasped our position. If Applicants have something else in mind, their unarticulated reference does little to educate us as to what their thinking may have been.

relating to asserted barriers to electric industry competition at substantial length. Slip Opinion, pp. 229-239. In addition, we addressed aspects of this argument throughout our findings. See, e.g., ff 185, 186, Slip Op., pp. 190-192. Applicants' complaint appears misdirected. It is not that we failed to take into account their arguments, but rather their disagreement occurs as to the result we reached.

Although Applicants are wrong in asserting a failure to consider their position, nonetheless, it may be useful to the Appeal Board for us to comment on the merits of Applicants' argument. Applicants urge that we erred in refusing to hold that legal and economic barriers somehow remove the electric utility industry from the application of the antitrust laws.* But as long ago as 1950, in Pennsylvania W. & P. Co. v. Consolidated G., E. L. & P. Co., 184 F.2d 552, 559 (4th Cir. 1950), cert. den., 340 U.S. 906 (1951), it was held:

> In short, the grant of monopolistic privileges, subject to regulation by governmental body, does not carry an exemption, unless one be expressly granted, from the anti-trust laws, or deprive the courts of jurisdiction to enforce them.

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*Of course, Applicants' argument is subject to the basic defect that if legal barriers prohibited competition in the electric utility industry, §105(c) of the AEC Act would be nullified.

> This principle of law has been applied not only to public carriers, see U. S. v. Terminal R. Assn. 224 U.S. 383, 32 S. Ct. 507, 56 L.Ed. 810; U.S. v. Reading Co., 253 U.S. 26, 40 S. Ct. 425, 64 L.Ed. 760, but in the insurance field, U.S. v. Southeastern Underwriters Assn., 322 U.S. 533, 559, 561, 64 S. Ct. 1162, 88 L.Ed. 1140; in the telephone field, U.S. Tel. Co. v. Central Union Telephone Co., 6 Cir., 202 F. 66; and also in the field of gas and electric energy, In re American Fuel & Power Co., 6 Cir., 122 F.2d 223.

As discussed in our January 6, 1977, decision, the Supreme Court re-affirmed the applicability of antitrust law considerations to the electric utility industry in two decisions during its last term. Cantor v. Detroit Edison, U.S. , 96 S. Ct. 3110 (1976), and Conway v. FPC, 425 U.S. 957, 99 S. Ct. 1999 (1976).

b) Applicants next complain of the failure of the Licensing Board to make any assessment as to whether competition between electric entities in the electric utility industry is, in fact, in the public interest. We were unaware that we are empowered to decide this broad policy issue which we would think is better addressed to Congress than to the NRC. We are aware that this assessment is not the test set forth in Section 105(c) of the AEC Act. We are equally certain that the antitrust laws do not require such an appraisal in cases alleging violations of the Sherman Act.

Several of the violations we have found, such as price fixing and territorial allocations, are per se in nature, and the Supreme Court has indicated that for this category of offense it is not even necessary to engage in rule of reason analysis.*

c) Applicants next cite our failure to follow in a meaningful manner the nexus requirements of the Commission and accuse the Board of adopting a standard that bears no relation to the practicalities of the electric utility industry. Since Applicants have not specified the particulars in which we deviated from the Commission's standard, and since our opinion addresses nexus with reference to and within the context of the Commission's guidelines, we are unable to contribute an evaluation of their chances of prevailing on appeal.

d. and e) It next is asserted that the Licensing Board failed to find and apprise the reviewer of fact whether Applicants possess monopoly power in any relevant market or possess a degree of market power sufficient to suggest a dangerous probability that they

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* However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958)(emphasis added).

will acquire such power. Coupled with this is a charge that we neglected to indicate if the conduct found to be inconsistent with the antitrust laws constituted monopolization, attempted monopolization, or conspiracy to monopolize. In answer, see Slip Op., p. 252. See also pp. 22-26; ff 189, Slip Op. pp. 193-94. Finally, we note that our opinion ultimately addressed specific questions posed in the eleven issues in controversy which gave structure to the entire evidentiary phase of the proceedings. We also note that the same activities can constitute violations of Sections 1 and 2 of the Sherman Act and Section 5 of the FTC Act at the same time. FTC v. Cement Institute, 333 U.S. 683 (1948).

Applicants would have us examine each anticompetitive act as a separate thread without reference to the fabric as a whole. In our findings we have identified many frayed threads but the sum of the individual acts is a broad blanket of suppressive activities. As noted in our legal discussion, Slip Op. p. 22, activities, each reasonable in isolation, may violate the Sherman Act where their collective or bundled effect is to work an unreasonable restraint on trade. United States v. International Business Machines, 1975 Tr. Cas., ¶60,445 (S.D.N.Y. 1975). We found not only activities unreasonable in their collective effect, but many activities unreasonable even when considered separately.

f) Applicants' sixth allegation is that the Licensing Board did not indicate which of the relevant product markets and geographic markets it designated involved monopolization, attempted monopolization or conspiracy to monopolize. Although we made findings of the existence of three relevant product markets, the overwhelming majority of those findings concerned the bulk power services product market in the geographic market of the CCCT. We believe this to be abundantly clear from our opinion which repeatedly refers in specific terms to restraints affecting bulk power services in the CCCT.

As to the individual Applicant service area markets, the findings relating to each company frequently refer to activities within such service markets or affecting competitors within each such market. In addition, we analyzed Applicants' joint, concerted and combined activities to exclude competition in the CCCT as a whole. For Applicants' Section 1 offenses, it was not necessary for us to define relevant product or geographic markets. Section 1 concerns restraints on interstate commerce. CAPCO itself is engaged in interstate sale and transmission of electrical energy through its member companies.

g) Applicants then criticize the asserted failure of the Licensing Board to determine whether any of the

alleged restraints on alienation or alleged refusals to interconnect, wheel power or offer pool membership were unreasonable within the meaning of the antitrust laws.

Applicants' criticism is demonstrably inaccurate. For example, see ff. 166, Slip Op., p. 171, in which the Board holds that TECO's contract provision 8, imposing restraints on the ability of TECO's municipal customers to market power purchased from TECO to customers outside of municipal limits, was unreasonable. We made findings as to the absence of any credible evidence setting forth the necessity of the clause. See also ff. 173-175, Slip Op., pp. 177-180, which did not specifically use the word unreasonable in describing obstacles to wheeling imposed by TECO but which lead to no conclusion other than one of blatant unreasonability. Further, see ff. 131, Slip Op., p. 135, which specifically holds that Ohio Edison failed to act reasonably in negotiations with WCOE relating to bulk power supply options and the denial of wheeling services. The basis for this conclusion was developed at substantial length in the immediate preceding pages of the opinion.

We believe that a monumental case of unreasonable conduct emerges from our findings. Repeating "unreasonable" after the description of each unjustifiable anticompetitive action would add little to the opinion except extra pages.

Having identified at least two instances which directly rebut Applicants' contention that no findings of unreasonability were made, there is no need to prolong the exercise by identifying other such findings.

h) Applicants' next complaint relates to the inclusion of numerous findings of fact which they say are not supported by substantial evidence on the record considered as a whole. The impossibility of responding and analyzing Applicants' chances to prevail on this unsupported charge are apparent.

The charge is followed by a footnote which identifies as error "the consistent failure of the Licensing Board even to recognize, let alone grapple with and evaluate, most of the evidence introduced by Applicants" during the hearing. With respect to the complaint that the Board failed to analyze each and every argument and contention advanced in the more than 1000 pages of proposed findings, briefs and rebuttals, suffice to say that Applicants once again are in error. On page 250 of the Slip Opinion, we stated:

> We have reviewed all of the parties' proposed findings and have considered the record as a whole as we developed our findings and conclusions. To the extent that we have not commented upon any particular proposed finding or argument, it is because that discussion is subsumed into material appearing elsewhere in

> our opinion or because there would be no material effect upon our conclusion and findings were we to accept the argument.

A failure to consider is far different from consideration and rejection of a patently untenable condition. No useful purpose would have been served by repeating testimony in instances where its content would not have altered our findings or where the testimony was unpersuasive.

A fair reading of the opinion will indicate substantial reference to and reliance on many of Applicants' proposed findings of fact and our acceptance, to a point, of many of Applicants' most ardently espoused contentions.*

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*We were careful to indicate, for example, our recognition that wide area power pools can serve a beneficial purpose and that the Applicants' incentive to organize CAPCO resulted largely from unobjectionable factors. Likewise, we recognized that the P/N reserve sharing formula adopted by CAPCO represented an attempt to design a rational method of reserve sharing. We also took into account management inefficiencies and neglect of plant as one reason for the demise of small electric generating entities in the CCCT. These neutral or not anticompetitive factors, however, were offset by other actions motivated by a desire to eliminate competition. The point to be made is that we did not engage in wholesale rejection of Applicants' arguments but carefully weighed these representations against evidence presented by opposition parties. Finally, we note that much of the evidence upon which we relied in making findings adverse to Applicants consisted of documents generated by Applicants and obtained by the opposition parties during the discovery process.

Further, the Board made many specific findings relating to witness credibility. Where appropriate, the Board evaluated the relative credibility of witnesses called by Applicants and by the opposition. See, e.g., Slip Op., p. 176, in which the Board sets forth its reasons for discounting the testimony of Applicants' witness Moran and indicating its assignment of credibility to the testimony of opposition witness Lewis. Of similar import is ff. 114, Slip Op., pp. 121-122, explaining that Mr. White's testimony at that point was troublesome and ran counter to logic. Another notable example of our evaluation and rejection of Applicant-sponsored testimony occurs in ff. 105, Slip Op., pp. 114-115. We measured Mr. White's oral testimony that the territorial allocation maps signed by his company may have been nothing more than study materials for legislative purposes with exhibit DJ 517 wherein the OE Coordinator of Division Distribution Practices advised TECO's President in writing of the operational impact of the maps. Of like effect is DJ 519 which states explicitly that these confidential maps were used in Ohio Edison's day-to-day operations.

Other instances in which we deliberately made no findings based on evidence proffered by Applicants occurred with respect to Pennsylvania Economy League testimony and

Department of Justice business review procedures. The Pennsylvania Economy League, an ostensibly independent organization, apparently conducted studies purporting to analyze the status of Pennsylvania municipal electric systems which were considering selling their assets to Duquesne. Aspinwall was such a system. Since the evidence revealed that the League was supported by substantial contributions from Duquesne and other electric utilities and the League's Board of Directors was composed in part of Duquesne executives, we place no weight in the recommendations of the League. We also were aware that the League's "expertise" was thin with respect to electric utility analysis.

Ohio Edison urged that we give substantial or binding weight to the fact that another company - Ohio Power, a non-Applicant - obtained a business review clearance from the Department of Justice with respect to its contract arrangement with Buckeye, a rural electric cooperative. According to Ohio Edison, this insulated it from any charge that its dealings with Buckeye or potential Buckeye customers were anticompetitive with respect to the sale or transmission of Buckeye generated energy. Since Ohio Edison was not the recipient of the clearance and since the clearance by the express terms of the Justice Department's own procedures is nothing more than an assurance

that a criminal action will not be instigated based upon facts fully revealed in the request, it would have been improper to reach the conclusion urged by Ohio Edison. This was not a case where we neglected to consider comprehensively Ohio Edison's evidentiary submittal and argument but rather a case where we deemed it unnecessary to discuss the matter in our opinion.

It is true that we did not single out each and every instance in the more than 12,000 page record in which we indicated skepticism with respect to Applicant-sponsored testimony* (or opposition testimony). Such a task is not required nor is it possible if decisions are to be confined to reasonable length.

i) Applicants' final assertion as to why they are likely to prevail on the merits concerns only one of the ten license conditions we ordered. Applicants claim that the Licensing Board exceeded its jurisdictional authority and that of the Commission by requiring relief as to future nuclear units not the subject of the present proceeding. Applicants' chances of prevailing on this issue may be

*For example, we did not comment specifically about our concern over the credibility of Mr. Arthur, the Duquesne Light Chairman of the Board. But see page 8375 of the transcript in which the Board advised counsel of its difficulty accepting witness's testimony.

asse ,ed by reference to the decision of the Licensing Board in Waterford* which required essentially the same relief as that encompassed within the Applicants' complaint. A Waterford license provision contemplating access to future units was reviewed and upheld by the Appeal Board.**

We conclude that Applicants have not carried their burden in establishing a strong probability of prevailing on the merits in any of the nine areas delineated in their moving papers.

B. Has the movant shown that, without such relief, it will be irreparably injured?

Once again, we find Applicants' motion long on polemics and short on specifics. In our attempt to make an assessment which will be of value to the Appeal Board, we have identified only four contentions of harm. The first is that compliance with license conditions may require the filing of appropriate rate schedules with the FPC. This in turn would involve certain costs and expenses involved in the negotiation of contracts with non-Applicant entities. Second, Applicants allege, without support, that they will suffer financial injury because they must yield up to ten percent of the capacity of the Davis-Besse and Perry units. Third, they

*Louisiana Power & Light Co. (Waterford No. 3) 8 AEC 718 (Oct. 24, 1974).

**Waterford, supra, (ALAB-258) 1 NRC 45 (February 3, 1975). In fact, the Appeal Board actually drafted a compromise provision specifically relating to access to future units. Id. at pp. 47, 48.

allege that competing entities might elect to ship some portion of the power they generate out of the CCCT. Fourth, they allege that the required access to their transmission network for wheeling purposes may affect their own preplanned use of that network.*

We begin by referring to the explanation of the Court of Appeals in Virginia Petroleum Jobbers as to what the test of irreparable injury should be. At page 925 the court stated:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, and time, and energy necessarily expended in the absence of a stay are not enough.

A stay will not be granted "against something merely feared as liable to incur at some indefinite time in the future." Eastern Greyhound Line v. Fusco, 310 F.2d 632, 634 (6th Cir. 1962).

Applicants' argument that compliance with license conditions would require unspecified and inarticulated costs associated with the negotiation and filing of interconnection and sales agreements is unpersuasive. Applicants routinely engage in such negotiations with their wholesale municipal customers, with each other within the confines of

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*In some of these contentions, Applicants also purport to identify harm to their customers. The possibility of harm to consumers in the CCCT is more appropriately addressed to public interest considerations.

the CAPCO agreement, and with outside systems. No special burden, let alone irreparable injury, is foreseen by the license requirements.

With respect to Applicants' protest relating to the requirement that they yield a certain percentage of the capacity of the Davis-Besse and Perry nuclear units, surely Applicants had the same opportunity to request clarification with respect to license conditions as did the City of Cleveland. It strikes us as a matter of bad administrative practice to claim irreparable injury on the basis of their failure to understand a license condition without first seeking an explanation from the forum of initial decision. While we do not believe that other parties regarded our condition as ambiguous, we have no hesitation in explaining the provision of license condition 9(a) to Applicants. That provision means that non-applicant entities may request and receive a total of 10% of each Davis-Besse or Perry unit's output. No more than 10% of the output need be made available even if the total amount for which requests are received exceeds this figure. It was our intention that requests would be handled on a first-come, first-granted basis. Thus, if one non-applicant entity requested a 5% share of Davis-Besse 1 and a second non-applicant entity thereafter

requested an 8% share, the second requesting entity would be informed that it could not obtain more than 5% of the unit's capacity.*

For purposes of additional clarification, we discuss why we selected the 10% figure for Davis-Besse and Perry. Applicants' proposals for access (Ex. A-44, attached to Applicants' motion) offers participation only in "reasonable amounts." Throughout our findings, however, we have indicated that what Applicants advance as reasonable may in fact be unreasonable and anticompetitive. There was evidence of record that Applicants' offers to supply wholesale power to the WCOE group contained limitations tied or related to existing load levels of Ohio Edison wholesale customers. These limitations themselves were anticompetitive in that they gave Applicant companies assurance that any competition for retail customers would be limited. Restrictions also were placed on the use of wholesale energy obtained from Applicant companies to prohibit sale to industrial customers presently served by

*If the first requesting entity reduced its request prior to the date by which firm commitments need be given, then, of course, the second requesting entity might expect to receive additional capacity.

Applicants. Thus, we encountered a situation in which growth opportunities of Applicants' disadvantaged competitors were restrained. It, therefore, became necessary for the Board to ensure that energy from the Davis-Besse and Perry units be available to competitive entities in amounts we considered reasonable and that this energy be made available without restraints which would limit the owners of the power from competing with Applicants. We selected 10% as a figure not likely to be disruptive of Applicants' intended use of Davis-Besse and Perry power* while at the same time preventing denial of requests because Applicants label them unreasonable. The difficulty in permitting Applicants to be the arbitor of the reasonability of requests for access should be obvious.

As to the provision that Applicants yield up to 20% of the capacity of future nuclear plants - which provision is effective for only a limited number of years - we perceive no basis for complaint that this license condition frustrates Applicants planning to service future load

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*After all, Applicants purport to be committed to yielding reasonable amounts of such power even under the policy commitments.

growth. Applicants have adequate notice of the possibility that up to 20% of the power from any newly proposed plant may be requested by competitive entities. At the same time, we have imposed strict time limitations during which such requests must be honored. Thus, well prior to the completion of the license proceeding, Applicants will know exactly how much power must be allocated to competitive entities and their plans will become firm long prior to the operation of the unit.

The reason we selected 20% rather than 10% as the amount of capacity to be made available for future units is because we do not want non-applicant entities to encounter a ceiling on their ability to compete. As competition is enhanced these entities may need and desire additional generation.

It is anticipated that most of the power which may be requested either from present or future units will be used to supply energy requirements within the CCCT which otherwise would be supplied by Applicants. Thus, we discern a tradeoff between the reduced amount of power which will be available to Applicants and the lesser demands which will be placed upon their systems.

As to the allegation that some of the capacity they may be required to yield in certain nuclear units may result in the ability of their competitors to export power out of the CCCT, Applicants have failed to explain any irreparable injury to their own companies. One of the points of greatest concern throughout these proceedings has been Applicants' unfair and anticompetitive efforts to restrict and control the use of all power generated or transmitted within the CCCT. Our conditions should be read as insistent that power purchased by a competitive entity in a nuclear unit be available for whatever purposes it may designate. It is not Applicants' burden nor their privilege to decide on behalf of other entities where or to whom that power shall be sold.

It also might be noted that Applicants themselves engage in regional power exchange transactions which involve exports of power from the CCCT to neighboring power pools. The CAPCO agreement contemplates such sales and even provides a mechanism whereby one Applicant company wheels for another to accomplish this result. It is absurd for Applicants to challenge a license condition which does nothing more than make available to their competitors what Applicants long ago obtained through agreement with one another. If irreparable harm results from the export of power from the CCCT, then perhaps Applicants should consider revision or abandonment of the CAPCO agreements.

Applicants' fourth complaint is that the Board's conditions grant "preferential access" to some of their facilities. They state that irreparable financial loss to Applicants will result and they suggest that the Commission is not authorized to grant such relief in any event. Absolutely no facts to support their conjecture as to financial loss are offered. Moreover, financial loss in and of itself does not constitute irreparable injury.

The so-called preferential access which we have required must be analyzed in the context of the situation Applicants have established within the CCCT and with reference to their own conspiratorial self-dealings. Interconnections standing alone give no preferential access. Requirements that Applicants supply emergency and maintenance power are conditioned upon the availability of that power without jeopardy to the supplying system's customer requirements. What Applicants really have in mind when they speak of preferential access is transmission services. The record indicates that there is abundant capacity available to meet license condition requirements. CEI has stipulated capacity to wheel PASNY power to Cleveland. See Applicants' Motion for Summary Disposition, August 15, 1974. Ohio Edison has agreed to sell

displacement power to wholesale customers who otherwise would request direct wheeling from Buckeye's Cardinal generating station. TECO purports to be willing to effect transmission services for the Southeastern Michigan Cooperati[illegible] Duquesne has only one full requirements wholesale cus[illegible]ning. The record is devoid of any showing of hardship associated with our access requirements.

Our conditions reflect concern that Applicants may attempt to use the monopolistic contracts constituting the CAPCO arrangement for continued exclusionary purposes. Our pre-emption clause merely insures that Applicants will not cut off competitors and potential competitors under the guise of honoring contract commitments with one another, which commitments we deem to be an integral part of Applicants' combined monopolization of bulk power services in the CCCT.

A further point of note is that Applicants are engaged in the planning and construction of new transmission capacity. Their own documents indicate that much of this planning and construction is directly related to the anticipated licensing of the Davis-Besse and Perry stations. Therefore, there is a direct nexus between the operation of those stations and a

requirement for transmission services which make the bulk power service option viable. We require that Applicants not be allowed to favor one another and thereby deprive other entities of these services.

As to the contention that we may have exceeded the power of the Commission in ordering this relief, we disagree. We do agree the NRC is not intended to be a general purpose antitrust enforcement agency. Contrary to the suggestion that we engaged in an all purpose antitrust review which more properly was under the purview of the Department of Justice in a civil proceeding, we carefully restricted both discovery and the introduction of evidence to those matters bearing upon the resolution of the issues in controversy. For example, our review of Applicants' merger activities concentrate on how specific recent activities affect the structure of the market in the CCCT. We did not engage in any independent Section 7 analysis of the literally hundreds of acquisitions consummated by Applicants during the last 75 years.

Applicants seem not to recognize that the conditions specify what they must do in order to obtain a license. If they do not want the license, then they need not observe the

conditions. In order to obtain antitrust relief it then would be the burden of the Department of Justice or private parties to institute actions in forums other than the NRC. Before this agency grants any license, however, it must be satisfied that activities under the license not contribute to the maintenance or creation of an anticompetitive situation.

Once the matter is within NRC jurisdiction, then relief should be fashioned so as to comply with the statutory directives of Section 105(c). If that relief requires a change in the status quo then we are entitled to grant such relief. Indeed, where an anticompetitive situation has existed for a period of years, it is mandatory that the status quo be amended.

> [I]t would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it has no right to acquire - namely, to restrain commerce by suppressing competition - and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Northern Securities Co. v. United States, 193 U.S. 197, 357.

The Supreme Court has stressed that relief should cure the ill effects of the illegal conduct and assure the public of freedom from its continuance. United States v. United States Gypsum Co., 340 U.S. 76, 88 (1950). The

purpose of the relief must be to restore competition, even though this involves restrictions on the respondent company. Ford Motor Co. v. United States, 405 U.S. 562 (1972).

In summary, no irreparable harm to Applicants has been identified, let along proven, and Applicants are incorrect as a matter of law with respect to limitations on the ability of the NRC to condition a license upon terms which will not maintain a situation inconsistent with the antitrust laws.

C. Would the issuance of a stay substantially harm other parties interested in the proceeding?

Again without specificity, Applicants argue that the only change in the status quo which would result if the operating license were issued without condition would be operation of Davis-Besse 1 and further construction of Perry 1 and 2. The problem is that the status quo was determined to be a situation inconsistent with the anti-trust laws. Without the Board's conditions being in effect, there is every reason to believe that the anticompetitive situation will continue. The longer the situation continues, the more devastating its effect upon competition and potential competition in the CCCT.

Our findings noted the continuing demise of smaller systems within the CCCT. Cleveland apparently is in desperate straits. The adverse consequences of isolated operation continue to be experienced by the majority of non-Applicant entities within the CCCT. We conclude that the issuance of a stay undoubtedly would harm other parties interested in the proceeding.

It is unnecessary to comment once again upon the inadequacies of Applicants' exhibit A-44, the so-called policy commitments to afford access. The only additional comment we might make is that despite Applicants' assertion to this Board that the policy commitments have become effective irrespective of any action the Commission may take, the existence of this policy was not revealed to those entities which had expressed an interest in access to Davis-Besse or Perry.

D. Where lies the public interest?

We confess our astonishment at seeing Applicants don the mantle of defender of the public interest of energy consumers within the CCCT. We have made specific findings of CEI's efforts to raise consumer electric prices by entering into a price fixing agreement with the City of Cleveland. We have observed customer tradeoffs between

Applicants pursuant to their territorial allocation agreements, which tradeoffs were made for the convenience and benefit of the Applicant companies and not the affected consumers. Indeed, the consumers had no voice whatsoever in the procedures by which they were allocated to one Applicant or another. We have observed TECO's unreasonable refusal to waive the 90-day total disconnect provision which refusal prevented Napoleon from concluding what it considered to be an economically advantageous contract with Buckeye. Applicant CEI refused to establish synchronous interconnection with the City of Cleveland and imposed unreasonable delays in energizing the non-synchronous interconnection when Cleveland experienced power outages. In much of the CCCT Applicants resisted the establishment of any interconnection with isolated generating entities.

Whatever the public interest may be, we are certain that it does not lie in the continuation of a pattern of violations which we have found to be massive in content and oppressive in design. We are dealing with violations many of which are per se in character and there is no public interest in staying conditions intended to prevent their continuance.

The contention that application of license conditions may raise consumer costs in the CCCT is conjectural. A

more likely result is the lowering of costs, or a dampening of such cost increases as may occur by reason of inflation in the economy.

Applicants' charge of "nuclear blackmail" has no substance. Two of the primary opponents of Applicants were the NRC Staff and the Department of Justice, each a public interest agency. Not only do we lack any knowledge or showing of delay instigated by either agency for the purpose of forcing a concession from Applicants, but we can conceive of no reason why either agency would be tempted to engage in such a course of conduct. The charge of nuclear blackmail as applied to the City of Cleveland comes with ill grace from the same Applicants which for a period of years have denied the City access to nuclear facilities.

Because there was no necessity to do so, we made no findings with respect to any delay in the proceedings occasioned by the parties themselves. We might state for the record, however, that on numerous occasions we granted extensive delays to Applicants. One of the earlier but more significant incidents of delay occurred at the conclusion of the first discovery period when, instead of producing relevant documents in Washington as anticipated by the Board and the opposition parties, Applicants on the very last day

informed other parties that they were free to journey to miscellaneous cities in the CCCT to inspect documents which had not been indexed to discovery demands or made available in a usable fashion. This necessitated a substantial delay in the commencement of the hearing. See Prehearing Conference Order No. 3, January 14, 1975. We also recall that it was the Board which repeatedly urged Applicants to utilize sufficient counsel to complete in timely fashion the discovery process, and it was the Applicants who advised that the task was being performed by a limited number of lawyers.

Throughout these proceedings, the opposition parties have displayed commendable willingness to meet rigid deadlines imposed by the Board* and the Applicants repeatedly have requested delay. We were sympathetic to Applicants' contention that some coordination between individual companies was required and that this coordination takes time. That was the basis upon which we granted numerous extensions to Applicants. In light of these numerous extensions attributed to Applicants, however, it borders on irresponsible to charge

*Opposition parties sometimes requested additional time. These requests were granted though usually for lesser periods than asked. Delays or extensions requested by Applicants substantially exceeded those of opposition parties.

that Applicants' opponents have engaged in "blackmail."

CONCLUSION

It is apparent that Applicants have failed to meet any of the four criteria which they concede must govern their application for a stay. Since they have not prevailed on any one criteria, they cannot prevail considering the four criteria as a group.

We have written at substantially more length than necessary to reach this resolution. We did so in an attempt to make our familiarity with the record available to reviewing forums. We were mindful of the Appeal Board's January 17, 1977 Order that this matter be determined "on the basis of the papers considered by the Licensing Board, together with the reasons given by the Board for declining itself to grant stay relief." By footnote the Appeal Board indicated that any party may supplement its filing before the Licensing Board "for the purpose of commenting on those reasons" (emphasis added.)

Obviously this commentary should not include new or additional allegation of error or harm. If additional specifications were made the purpose of the original referral would be frustrated and the task we perform here would be an idle exercise. The Appeal Board would be left

to examine substantial portions of the record as a whole without assistance or comment from the trial forum. Parties supporting the Licensing Board position would need opportunity to respond to the new material. Moreover, a situation of second and third chances to articulate a basis for relief would introduce an element of chaos into the administrative process.

It was for this reason that we attempted to deal more expansively with some of the moving parties' allegations than circumstances otherwise would warrant. Some allegations, such as a failure to apply nexus standards properly, did not permit considered analysis. No support was offered for the charge.* Our overall effort, however, has been to treat the matter in a comprehensive manner and to give full consideration to each argument raised.

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*The nexus charge is an example of an allegation where additional amplification should be disallowed. Presumably Applicants made their argument in full when they first applied to the Appeal Board for relief. Permitting Applicants to expand or rewrite their supporting material would demean the administrative process.

Our review of Applicants' papers convinces us that no stay is warranted and that such relief would be adverse to the public interest.

Motion Denied.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Douglas V. Rigler, Chairman

John M. Frysiak, Member

Ivan W. Smith, Member

Dated at Bethesda, Maryland,
this 3rd day of February 1977.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY, ET AL.	)	Docket No.(s) 50-346A
CLEVELAND ELECTRIC ILLUMINATING	)	50-440A
COMPANY	)	50-441A
	)	50-500A
(Davis-Besse Nuclear Power	)	50-501A
Station, Unit No. 1; Perry	)	
Nuclear Power Plant, Units 1&2)	)	

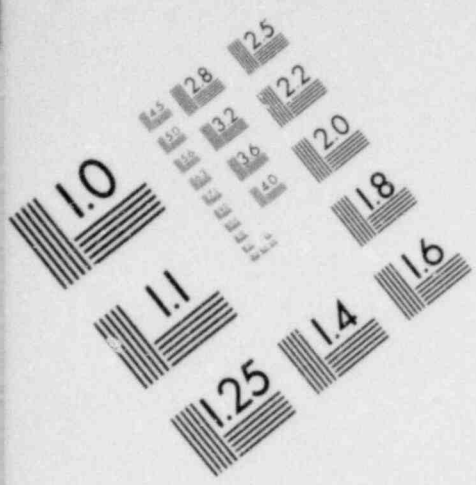
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) * upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
4th day of Feb 1977.

P.A. Dawning
Office of the Secretary of the Commission

*1- Memorandum of the Bd re to the City of Cleveland's Motion for Clarification of License Conditions dtd 2/3/77.
2- Memorandum and Order on Applicants Motion for an Order Staying [illegible] attachment of Antitrust Conditions dtd 2/4/77



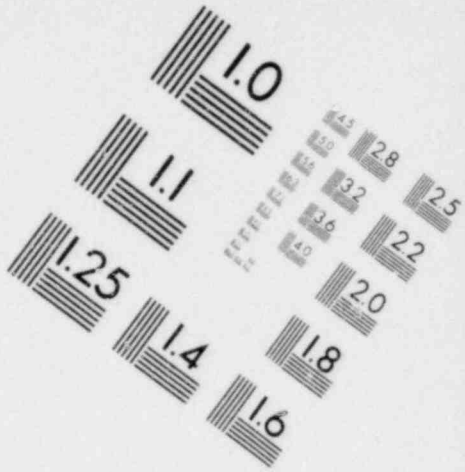


IMAGE EVALUATION
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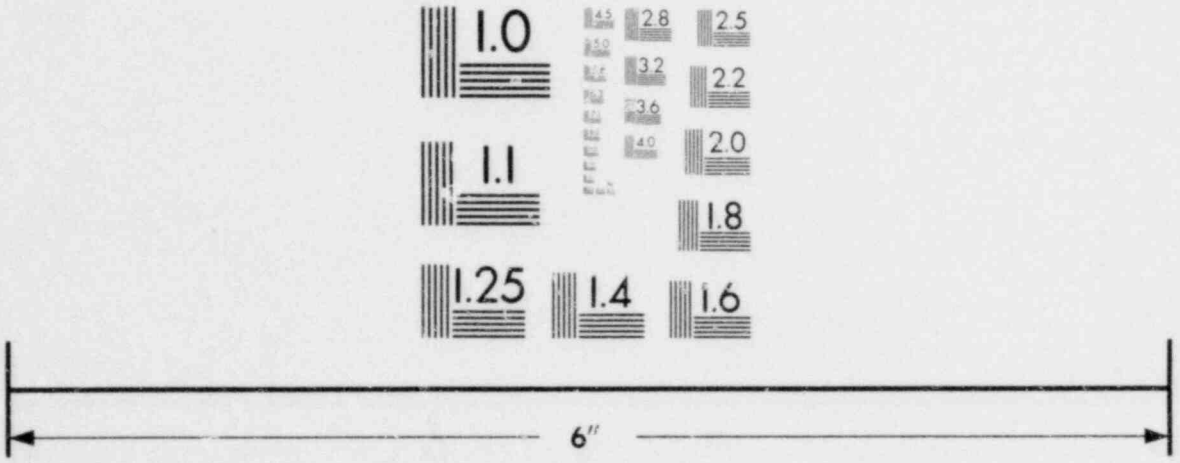
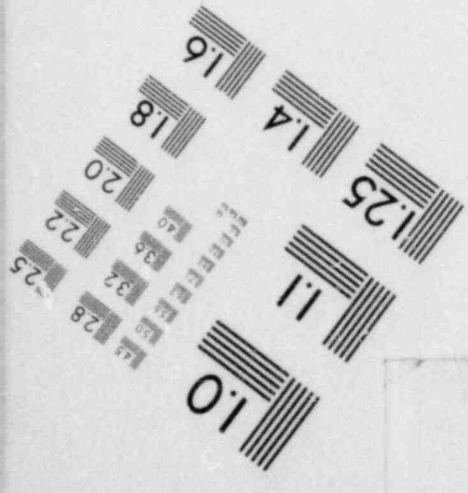
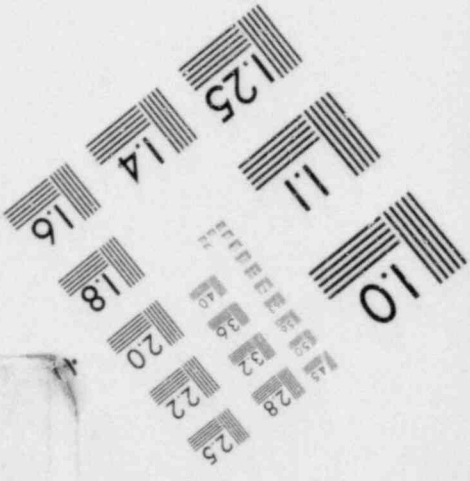
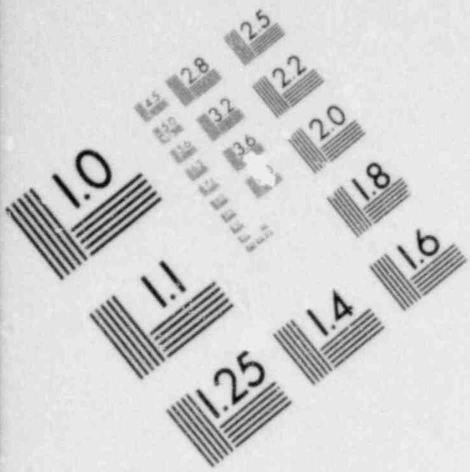


MICROCOPY RESOLUTION TEST CHART







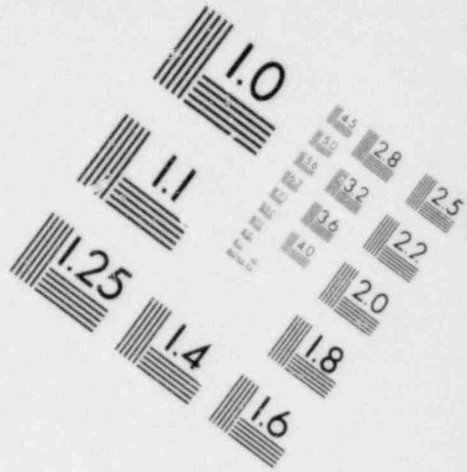
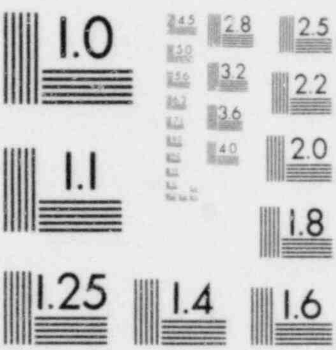
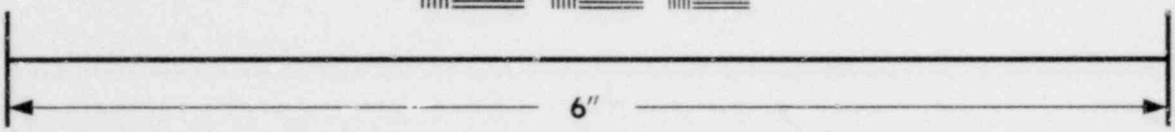


IMAGE EVALUATION TEST TARGET (MT-3)





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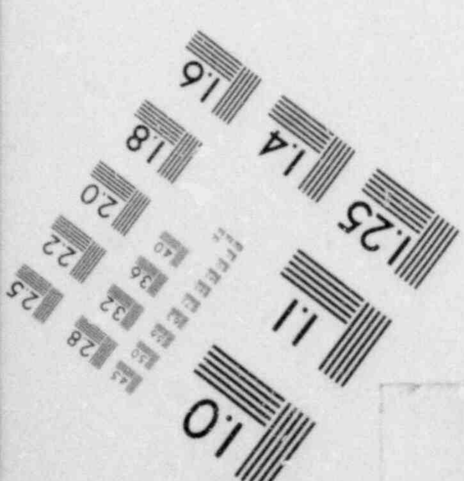

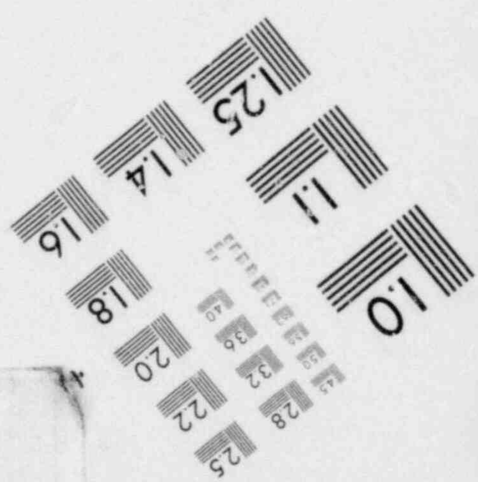

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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TOLEDO EDISON COMPANY, ET AL	)	Docket No.(s) 50-346A
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CLEVELAND ELECTRIC ILLUMINATING	)	50-440A
COMPANY, ET AL.	)	50-441A
(Perry Units 1 and 2)	)	
TOLEDO EDISON COMPANY, ET AL.	)	50-500A
(Davis-Besse Units 2 and 3)	)	50-501A

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