UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

3/13/75

In the Matter of	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A
THE TOLEDO EDISON COMPANY, ET AL. (Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

APPLICANTS' SUPPLEMENTAL BRIEF

Of Counsel:

ALAN P. BUCHMANN
SQUIRE, SANDERS & DEMPSEY
DONALD H. HAUSER
VICTOR F. GREENSLADE, JR.

The Cleveland Electric Illuminating Company

MICHAEL M. BRILEY
PAUL M. SMART
FULLER, HENRY, HODGE & SNYDER

The Toledo Edison Company

DAVID McN. OLDS
JOSEPH A. RIESER, JR.
REED SMITH SHAW & McCLAY

Duquesne Light Company

TERRENCE H. BENBOW
STEVEN A. BERGER
STEVEN B. PERI
WINTHROP, STIMSON, PUTNAM & ROBERTS

Ohio Edison Company and Pennsylvania Power Company

WM. BRADFORD REYNOLDS
ROBERT E. ZAHLER
SHAW, PITTMAN POTTS & TROWBRIDGE
1800 M Street, N. W.
Washington, D. C. 20036

Counsel for Applicants

TABLE OF CONTENTS

LEGAL CITATIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A
THE TOLEDO EDISON COMPANY, ET AL. (Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

APPLICANTS' SUPPLEMENTAL BRIEF

Pursuant to the Appeal Board's invitation in its Order of January 12, 1978, Applicants in the above-captioned proceeding submit this Supplemental Brief discussing the antitrust decision rendered by the Appeal Board in Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-452, 6 N.R.C. ____ (December 30, 1977) (hereinafter cited as "ALAB-452, slip op. at * * *"), and the applicability of that decision to the instant case. Since it obviously is not possible to present a complete analysis of the Consumers opinion within the specified page limit for this filing, we have focused our attention on four general areas that seem to have particular relevance to the case at hand, namely: market structure, monopoly power, alleged misconduct and relief.

At the outset, it should be noted that there is much in ALAB-452 that Applicants find heartening. For example, we are

encouraged by the detailed factual review undertaken by the Consumers Appeal Board. As we have previously indicated (see App. Opening Br. at 137-39; App. Reply Br. at 76-77), there are reasons here, at least as compelling as those found in ALAB-452, for this Appeal Board to make the same sort of careful examination of the full evidentiary record -- which was only superficially considered by the Licensing Board below. Compare ALAB-452, slip op. at 270-74. Similarly encouraging is the thorough discussion in ALAB-452 devoted to market analysis. But for the section of the opinion dealing with retail markets, the market analysis in Consumers parallels in virtually every material respect the position taken by Applicants on this subject throughout the present proceeding. Compare ALAB-452, slip op. at 105-67, 200-12 with App. Opening Br. at 93-97 and App. Reply Br. at 41-45; see pp. 20-33, infra. Finally, we can also take a degree of satisfaction in the fact that -- unlike the relief framed below -- Applicants' suggested approach with respect to the formulation of an appropriate remedy comports fully with the Consumers Appeal Board's abbreviated but instructive remarks in this area. Compare ALAB-452, slip op. at 431-32 with App. Opening Br. at 293-97 and App. Reply Br. at 15-24.

There are, however, portions of ALAB-452 which Applicants find somewhat disquieting. One example is the exceedingly narrow perspective of the Consumers Appeal Board in its approach to the difficult, but very necessary, task of reconciling antitrust policy and enforcement with the economic and market realities of the electric utility industry. As a result, it is evident that the

Appeal Board there succumbed too timidly to the temptation to rely on broad antitrust pronouncements, judicially formulated in entirely different market settings, to avoid coming to grips with important factual distinctions that plainly differentiate the antitrust analysis in this context from the earlier precedents found to be controlling. Predictably, this doctrinaire approach led in several instances, as, for example, in the Board's discussion of monopoly power, to inaccurate conclusions because a legal rule has been misapplied in terms of the unique market setting that characterizes the electric utility industry.

Applicants would caution this Appeal Board against such an indiscriminate use of antitrust methodology, which has largely been developed to meet competitive concerns (not realistically at play here) under markedly different circumstances. A tidiness of theory, although perhaps superficially appealing, is never reason to sweep within the general rubric that which, on substantive analysis, simply does not fit the formalistic prescription. This is not to suggest that ALAB-452 is to be totally ignored. However, the evidentiary record compiled in this proceeding is obviously a different one than the Appeal Board had before it in Consumers. The task of this Appeal Board is, of course, to apply the law as it understands it to this new set of facts. In so doing, we believe there certainly is room for some refinement, and in a few instances correction, of the modes of analysis set forth in ALAB-452. In an effort to highlight what Applicants perceive to be the essential points of departure, we will commence our discussion with the obvious factual differences between this proceeding and Consumers.

A. SIGNIFICANT MARKET STRUCTURE DIFFERENCES BETWEEN THE MICHIGAN LOWER PENINSULA AND NORTHERN OHIO-WESTERN PENNSYLVANIA

The most striking feature of the Consumers Appeal Board's analysis of the Michigan lower peninsula market is the relatively large quantity of self-generation by the small electric systems. See generally ALAB-452, slip op. at 89-100. Only six of the 23 municipal systems in that region are full requirements wholesale customers of a large privately-owned electric utility (id. at 97); nine generate the great bulk of their own power needs (id. at 95-97); and the remaining eight generate a part of their own needs and purchase the rest of their power requirements from others (id. at 97 & n.215). Likewise, the two G & T cooperatives self-generate most of their needs (id. at 93). All told, the small Michigan systems have about 1000 mw of generating capability.[1/]

In comparison,[2/] of the 46 municipal systems in northern Ohio and western Pennsylvania only two generate the majority of

---

1/ While ALAB-452 reports that the total generating capacity of the non-Consumers systems was approximately 800 mw, or 70% of their own firm power requirements (slip op. at 99), adding up the previously reported generating figures for Lansing (628 mw), Holland (81.5 mw), Edison Sault (73 mw), Northern Michigan (61 mw), Wolverine (57 mw), Grand Haven (38.6 mw), Traverse City (35.6 mw), Coldwater (16.6 mw), Zeeland (14 mw), and Alpena Power (7 mw), gives a total generating capacity of 1012.3 mw.

2/ It should be understood that, unlike the situation in ALAB-452, this proceeding is not simply confined to a single homogeneous market setting. Rather, the conduct of each of the five Applicant companies must be assessed in the context of the market structure existing within the service area of each company. Despite the misguided attempts by the opposing parties and the Licensing Board below to resolve this proceeding in terms of an artifically constructed "CCCT," there is no basis in fact or law for such an undiscerning, broad-brush approach to this Commission's antitrust responsibilities. See App. Opening Br. at 23-25 & n.30, 293-94.

their own power needs; 42 systems are full requirements wholesale customers; and the remaining two are partial requirements customers.[3/] At the close of the record the total operating capacity of municipal systems was around 100 mw.[4/] With reference to the 11 rural electric cooperatives located in northern Ohio (there are none in western Pennsylvania), they all receive their full requirements from Buckeye Power, Inc. as wholesale

---

3/ In the TECO area, all fifteen of the municipal systems are full requirements wholesale customers. Those systems are: Bowling Green, Bradner, Bryan, Custer, Edgerton, Elmore, Genoa, Haskins, Montpelier, Napoleon, Oak Harbor, Pemberville, Pioneer, Tontogoney (which is served by Bowling Green and, thus, indirectly by TECO), and Woodville.

In the OE area, twenty-one of the municipal systems are full requirements wholesale customers: Amherst, Beach City, Brewster, Columbiana, Cuyahoga Falls, Galion, Grafton, Hubbard, Hudson, Lodi, Lucas, Milan, Monroeville, Newton Falls, Marshallville (which is served by Orrville), Niles, Prospect, Seville, South Vienna, Wadsworth and Wellington. There is, in addition, one partial requirements customer (Oberlin), and one other municipal system, located on the far edge of the OE service area which generates the majority of its power needs and has almost completed plans to interconnect with Ohio Power Company.

In the CEI area, Painesville generates the majority of its power needs, while Cleveland is a partial requirements wholesale customer.

In the Duquesne area, Pitcairn is a full requirements wholesale customer.

In the PP area, all five municipal systems are full requirements wholesale customers. Those systems are: Ellwood City, Grove City, New Wilmington, Wampun and Zelienople.

4/ The generating capacity of municipal systems is as follows: Oberlin - 12.9 mw net dependable capacity (D-594, schedule 16); Orrville - 39.2 mw net dependable capacity (D-593, schedule 16); Painesville - 38 mw installed capacity (Pandy 3299(8)); Cleveland - while Cleveland allegedly has a net demonstrated capability of 180 mw (see C-161(Mayben) 8(14)), on cross-examination Mr. Mayben, Cleveland's expert technical witness, conceded that Cleveland's working capacity has been as low as 10 mw (Mayben 7650(10-16)). Even crediting the Cleveland system with 15 mw of capacity, which may well overstate its capabilities (see App. Br. Opposing Exceptions Filed by the City of Cleveland, Exhibit A), the total generating capacity of the non-Applicant systems would be 105.1 mw.

power customers under 35-year contracts (see S-188, Appendix B; see also App. Reply Br. at 46 n.42).

Thus, there is a dramatic difference in market structure on the facts of this proceeding when compared with the factual underpinnings in Consumers. This difference is highly significant for a number of reasons.

First, as ALAB-452 expressly states: [A] utility without any generating capacity of its own * * * cannot rely on coordination power to meet its customers' firm power needs." Slip op. at 142. Indeed, the cross-examination of Dr. Pace is cited approvingly for the proposition that "'there would be no point' for [a nongenerating] utility to contract for coordination power and associated services." Id. This is, of course, precisely the point Applicants have been emphasizing throughout this proceeding. See App. Opening Br. at 16-17 & n.20, 95-96, 102-05; App. Reply Br. at 43, 74-75. It is of importance here because such a market structure necessarily impacts on the relevancy of any coordination services market in the present context (see pp. 21-22, infra). Moreover, realization that the nongenerating municipal entities in northern Ohio and western Pennsylvania are unsuitable as coordination partners bears directly on the reasonableness of Applicants' alleged unwillingness to coordinate with such entities (see pp. 38-44, infra).

Second, the conclusion reached in ALAB-452 that coordination services are, in the Michigan market setting, significantly less expensive than wholesale power purchases (see slip op. at 151-56), simply does not follow in the factual context of this proceeding. The Consumers reasoning in this area was based on an analysis of

the impact of Consumers' ratchet clause (id.). However, where an entity needs a source of power full-time -- as is true of utilities lacking self-generation -- the impact of the ratchet clause has little, if any, pricing significance (see ALAB-452, slip op. at 149).[5/]

5/ More important in such situations is the manner in which the energy charge is calculated. The conclusion in ALAB-452 that the energy charges in a wholesale power contract and a coordination services contract are "roughly the same" (slip op. at 151-52 & n.328), is generally (as here) not true. The energy charge for wholesale power is based on an average, system-wide cost (see App. Opening Br. at 127-28). This means that the purchasing entity shares in the benefits of low energy cost nuclear units, as well as the burdens of high energy cost oil units. In comparison, the various coordination service schedules (but for economy interchange) typically price the energy cost at out-of-pocket expenses plus 10% (see Bingham 8272(21-22), 8286(4-9), 8291(4-6)). Thus, the purchaser pays for the incremental cost of supplying the additional energy and, therefore, is not likely to receive any of the energy cost benefits associated with nuclear plants. Moreover, when a utility is selling power to more than one entity pursuant to a coordination service schedule, an energy cost "pecking order" is established. A purchaser buying power under a limited-term schedule (which has higher demand charges than short-term or emergency power) will have its energy costs computed before an entity purchasing short-term power; and the short-term power purchaser will have its energy costs computed before an entity purchasing emergency power (see Bingham 8290-91). And, where two entities are purchasing power under the same coordination schedule, the entity first requesting power will have its energy costs calculated first (see Bingham 8290(6-18)). As a result, the energy cost of such power varies depending on the service schedule it is purchased under, the timing of the purchase request, and the incremental costs to the seller at the time of sale. The resulting cost differences can indeed be very significant, as the facts surrounding CEI's power supply relationship with Cleveland confirm.

Pursuant to FPC order, CEI was selling power to Cleveland under a schedule that included emergency, short-term and limited-term pricing elements (see S-204, schedule A; Bingham 8297-99). In 1976 a firm power or wholesale contract was negotiated under which CEI offered to sell Cleveland power on the basis of average, system-wide costs (see A-271). Given the Cleveland system's long-term need for relatively large quantities of power, it chose to receive service under the wholesale contract, notwithstanding that the demand charges under such a contract were significantly higher than the demand charges associated with the various coordination service schedules. Wholesale power was less expensive for Cleveland because the energy charges under the wholesale contract were less than the comparable energy charges under the coordination service schedules.

Consequently, Applicants' position that the full benefits they derive from coordinated operation and development are passed on to the non-Applicant entities (which are their full requirements customers) by way of wholesale power sales (see App. Opening Br. at 104-05, 127-28; App. Reply Br. at 20 & n.19) is not only an accurate statement with respect to this proceeding, but also has not been undermined at all by the contrary conclusion reached under the different circumstances involved in ALAB-452 (compare slip op. at 426-27).

Third, the lack of appreciable self-generation among the northern Ohio and western Pennsylvania municipal and rural electric cooperative systems bears directly on the ability of those systems to be viewed as actual or potential competitors of Applicants in any relevant market. Obviously, with respect to the coordination services market, the previous discussion demonstrates that these other systems neither compete with Applicants to sell coordination services to others nor compete with Applicants to purchase coordination services from others. Moreover, the economic barriers (see App. Opening Br. at 45-50; App. Reply Br. at 27-29) and legal restraints (see App. Opening Br. at 50-56; App. Reply Br. at 29-36) that initially precluded the establishment of appreciable self-generation in this market area, make it extremely unlikely that any such competition might potentially develop in the future (see App. Opening Br. at 95-97; App. Reply Br. at 43).

Similarly, in the wholesale power market the non-Applicant systems do not now (see App. Opening Br. at 65-71), and are not in the future likely to (see App. Reply Br. at 40-46), compete

with Applicants in the sale of wholesale power to others. Nor when viewed from the other side of the coin -- that is, the altogether different mode of competition for the purchase of wholesale power (see Kampmeier 5758-59(12-25 & 1)) -- can it be said that such competition exists between Applicants and non-Applicant entities, since Applicants self-generate their own needs and, therefore, rarely, if ever, enter the wholesale market to purchase firm power from others. Thus, although the smaller systems must either purchase wholesale power from an Applicant or from a non-Applicant source,[6/] Applicants plainly do not compete with them as purchasers in the wholesale market.

Finally, with respect to the retail market,[7/] the absence of measurable self-generation, when evaluated in the context of the extant economic and legal barriers to retail competition in northern Ohio and western Pennsylvania, effectively eliminates all prospects of actual or potential competition at retail between non-Applicant entities and Applicants (see App. Opening

---

6/ The reference in the text to non-Applicant wholesale power sources should not be understood to suggest that any such sources do exist for municipal systems in northern Ohio and western Pennsylvania. Indeed, the record below fails to reveal any such potential power source (see App. Opening Br. at 67-70). This absence of alternative wholesale suppliers should not, however, be viewed as conferring monopoly power on Applicants. For, as we explain later, Federal Energy Regulatory Commission ("FERC") jurisdiction over wholesale power sales removes Applicants' ability to set prices or exclude competition in the wholesale market (see pp. 26-27, infra), in the absence of a demonstrated abuse or attempted abuse of the regulatory process (see App. Reply Br. at 53-54).

7/ Applicants also believe that the retail market is not relevant for assessing in this proceeding the conduct challenged as inconsistent with Section 2 of the Sherman Act. Compare App. Opening Br. at 89 and App. Reply Br. at 38 with ALAB-452, slip op. at 172 n.360; see also pp. 22-24, infra.

Br. at 60-65; App. Reply Br. at 39-40). Putting aside for one moment the treatment in ALAB-452 of the "open" and "closed" checkerboard approach to retail markets -- an approach also urged by Applicants here, and one which we continue to believe has vitality on the facts of this case (see n.20, infra) -- the Appeal Board's emphasis on the "potential competition that exists by virtue of each local government's right to replace its existing retail power supplier" (ALAB-452, slip op. at 182), indicates to us a clear recognition that the door-to-door direct competition postulated in this proceeding by DOJ, the NRC Staff and Cleveland is simply not a viable concept. We believe the rejection of that concept to be particularly sound in the context of this market structure, as we have heretofore explained (see App. Opening Br. at 60-65).

As for the potential at the retail level for "franchise competition", as described in ALAB-452, we will have more to say about that matter in a moment (see pp. 23-24, 30-32 infra). For now, however, it is important to note that conceptually such "competition" differs dramatically from the direct door-to-door competition normally evaluated in antitrust cases. Indeed, such retail "competition" is so unique that its viability depends on no factors relevant to the retail marketing function. Rather, a municipal system's entry into the retail market in this manner depends on its ability either to construct generating facilities on its own (in which case the municipality may or may not also require coordination services) or to purchase wholesale power from a generating entity with sufficient capacity to provide such power.

In northern Ohio and western Pennsylvania, however, the lack of any appreciable self-generation among the municipalities strongly suggests that, if any such franchise competition does ever take place in this market, it will not be by means of constructing new facilities, but rather through wholesale power purchases.[8/] This is of no small consequence. As we have already indicated, Applicants and municipal systems do not compete with each other to purchase wholesale power. Thus, even in terms of the remote possibility of "franchise competition", such a prospect is insufficient in this market setting to make out a case for the existence of a potentially competitive situation between any Applicant and non-Applicant entity (see also n.27, infra). Moreover, the exercise by a municipal system of its franchising power depends not at all on an Applicant's position in, or share of, the retail market, but only on the municipal

---

8/ This conclusion is fact-based and is unique to northern Ohio and western Pennsylvania. Whether it is true in other areas depends on the particular market facts present elsewhere. Factors relevant to a municipality's decision to self-generate or purchase wholesale power include: the size of the municipality to be served compared to the applicable scale economies, the availability of low cost power alternatives, the distances and costs associated with long-term power transmission, the ability to raise large capital sums through taxes or bonding to finance generation, and, perhaps, the region's traditional methods of doing business. The lack of self-generation in this case demonstrates that, taken together, these factors lean heavily in favor of wholesale power rather than self-generation. The fact that the Supreme Court in Otter Tail or the Appeal Board in Consumers may have found self-generation, and a need for coordination services, to be a viable alternative in the factual settings presented by those cases provides no support for such a conclusion in this case. Before a contrary result can be reached here, it must be demonstrated, upon an application of the criteria enunciated in United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973), and in United States v. Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973), that the municipal systems can properly be labeled as potential competitors. No such evidentiary showing was made, or even attempted, in this proceeding. See App. Reply Br. at 44-46.

system's ability to make wholesale power purchases. Such wholesale transactions are, of course, subject to comprehensive control by FERC; accordingly, in this area as well, the potential for "franchise competition" has been placed by regulatory legislation outside of Applicants' control. See n.6, supra; and see pp. 26-27, infra.

In summary, then, the significant differences in generating capabilities between the small non-applicant systems located in the Michigan lower peninsula, on the one hand, and the small non-Applicant systems located in the northern Ohio-western Pennsylvania area, on the other hand, require this Appeal Board to reach conclusions on the facts of record here which, while not taking issue with Consumers' evaluation of the facts it was given, are at variance with the results reached there with respect to: (1) the coordination services market, (2) the cost of coordination power versus wholesale power, and (3) the existence or nonexistence of competition in any relevant market. Nor should this come as any surprise. Obviously, Consumers does not serve as a blueprint for all antitrust review of electric utilities undertaken by this Commission any more than a single antitrust case in the judicial arena automatically disposes of all others. The principles announced in one market setting frequently require another result when applied in a markedly different market setting. Such is the case here.

We would in this connection make one additional observation concerning market structure that serves to underscore the point: namely, that the historical development of the market participants in northern Ohio and western Pennsylvania differed in certain

material respects from the historical development of the market participants in the lower peninsula of Michigan. As in the Consumers proceeding (see ALAB-452, slip op. at 49 n.68), the initial acquisition of market dominance by the Applicants in this case was neither challenged by any party, nor otherwise placed in issue and litigated. The Licensing Board below explicitly found that the development of the individual Applicant companies as large, horizontally and vertically integrated utilities was due, in part, "to natural scale economies, technological advances such as alternating current, and improved transmission techniques" (I.D. at 109; see also App. Opening Br. at 100-02 & n.120). Both technical and economic evidence was introduced in some detail at the hearing to support this finding and to show the economies achieved through the vertical integration of the Applicant companies (see App. Opening Br. at 46 & n.49; App. Reply Br. at 27-29 & n.27). None of this evidence has ever been disputed. By comparison, as stated in ALAB-452, "[n]either Consumers nor any other party [in that proceeding] offer[ed] any technical or economic reasons that require the two functions [i.e., production and transmission] to be combined in one company" (slip op. at 206-07).

This record difference is of central importance, because the technical and economic evidence introduced in the instant proceeding on this point also confirms that those few municipal systems which left the northern Ohio-western Pennsylvania market after September 1, 1965,[9/] did so not because of any anticompetitive

---

9/ The Licensing Board below ordered a September 1, 1965 cutoff date on discovery, and, but for good cause shown, adopted that (continued next page)

conduct on the part of any Applicant, but because those electric systems were in a sorry state of disrepair by reason of financial and technical inattention over the years. See generally App. Opening Br. at 101 n.120. These acquisitions of "failing systems" simply will not support the general conclusion reached on other facts in ALAB-452 that a goal of municipal acquisition suggests an "intent * * * to monopolize the retail and wholesale power markets" (slip op. at 298, quoting from 2 N.R.C. at 104).[10/] Compare United States Steel Corp. v. Fortner Enterprises, Inc., 97 S. Ct. 861, 863-64 n.1 (1977).[11/]

Nor will the mere fact that such acquisitions occurred support a conclusion that Applicants here have actually monopolized any market by using their market dominance in a manner intended to

---

9/ (cont'd)
date in limiting evidence during the hearing (see I.D. at 93 n.**). As to the period before the cutoff date, the Licensing Board properly stated that it "draws no anticompetitive inference from the trend toward concentration prior to 1965 * * *" (I.D. at 109).

10/ In this regard, the failing nature of the acquired systems, like the investment motive found in United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 568 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961), negatives a general intent to monopolize any market. Compare ALAB-452, slip op. at 290 n.516.

11/ In Fortner II, the Supreme Court reversed a finding by the district court that petitioners had violated Section 2 of the Sherman Act, noting that "'increasing sales' and 'increasing market share' are normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize. The evidence in this case does not bridge the gap between the District Court's findings of intent to increase sales and its legal conclusion of conspiracy to monopolize." 97 S. Ct. at 864 n.1. While the Court also remarked that petitioners lacked a dominant market position, that conclusion was not essential to its holding in the quoted language above. See also General Communications Engineering, Inc. v. Motorola Communications & Electronics, Inc., 421 F. Supp. 274, 286 (N.D. Cal. 1976) (applying standard where specific intent to monopolize is alleged).

maintain that position of dominance. In the first place, such a thesis would have no application whatsoever to CEI or Penn Power, since neither of those two companies acquired any systems during the relevant time period. For that matter, the relative market share between CEI and Cleveland has not changed in any appreciable way since September 1965, notwithstanding that the City, as a whole, experienced a significant decrease of more than 10% in the number of customers taking service from either CEI or the municipal system during these years (see Appendix A).

As for the few acquisitions by the other Applicants, the evidence shows conclusively that the acquired systems were so small and ineffective as to preclude any suggestion that they were of competitive significance. Thus, Duquesne Light's sole acquisition, the Aspinwall borough system, had a peak load of about 1.5 mw or about six one-hundredths of one percent of Duquesne Light's system peak (see Appendix B). Likewise, the combined loads of the two systems acquired by Toledo Edison -- Waterville and Liberty Center -- amounted to less than 2.5 mw or about two-tenths of one percent of Toledo Edison's system peak (see Appendix B). Finally, the four small systems acquired by Ohio Edison had a total combined peak load of less than 22.5 mw or about one-half of one percent of the Ohio Edison system peak (see Appendix B). All told, the average size of the acquired systems was less than 3.8 mw, and the median size was but 1.6 mw (see Appendix B). Recognition of these uncontested facts, when considered along with the internal difficulties that each of the acquired systems was experiencing at the time of acquisition due to its own financial and managerial problems, removes

entirely any inference of wrongful intent on the part of the acquiring Applicants.[12/]

Nor is this conclusion undermined in any respect because one or another of the Applicants may have expressed a company goal to acquire municipal systems (see App. Opening Br. at 98-102).[13/] While the decision in Consumers makes reference to the observation by the Supreme Court that "knowledge of actual intent is an aid" in determining anticompetitive purpose or effect (ALAB-452, slip op. at 297 n.539), application of that rule here presumes that statements by company personnel on acquisition goals in a natural monopoly industry are reflective of an "actual intent" to monopolize. That premise, however, is the very point Applicants dis-

---

12/ Language in ALAB-452 arguably might be construed to indicate that the small size of the acquired systems is irrelevant. See slip op. at 289-90. Such a reading of the decision would, however, be inaccurate. All we understand the Appeal Board to have held is that, as a matter of law, the fact that an acquisition may be lawful under Section 7 of the Clayton Act does not mean that it cannot be evidence of a general intent to monopolize. The Appeal Board did not go further and hold that acquisitions will always support the general intent finding. The evidence in this proceeding shows that the small size of the acquired systems was a major reason for their inability to continue providing inexpensive and reliable service (see A-189(Garber) 12-23; App. Opening Br. at 101 n.120). As we already have indicated (see n.10, supra), the failing nature of the acquired systems is sufficient to prevent, as a matter of fact, a finding of a general intent to monopolize on the basis of the acquisitions.

We would only add that if the citation to United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665 (1964) (see ALAB-452, slip op. at 289-90 n.516), means that an acquisition otherwise lawful under Section 7 of the Clayton Act can be condemned under Sections 1 or 2 of the Sherman Act, it is clearly incorrect. See, e.g., Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 794 (S.D. Tex. 1971).

13/ There is nothing in the record which even arguably could be said to evidence such a company goal on the part of OE or PP.

pute. Such statements in a market setting such as this one reflect nothing more than the expected, and indeed the desired, result in a natural monopoly situation, i.e., that the market can, and for very legitimate reasons should, ultimately sustain but a single entity.[14/]

On these terms, we continue to believe that Consumers' position to the effect that "success in a natural monopoly situation cannot be unreasonable per se" (slip op. at 285 n.510) is well taken; nor do we find the footnote response in ALAB-452 to this

---

14/ There will, of course, be some limited competition of an "infra-marginal" nature during the "transition" period prior to the emergence of a single dominant firm. ALAB-452 misconstrues the significance of this competition by noting that if Consumers had acquired its last competitor "the market would remain but the competition would be gone" (slip. op. at 211). The error in this analysis arises from attributing to the market an expectation that competition is a continuing concept in the context of this case. While such an expectation might be true in other market settings, it certainly is inaccurate with respect to the natural monopoly for production and distribution of electric power in northern Ohio and western Pennsylvania.

Further evidence of a failure to appreciate fully the significance of the natural monopoly nature of the electric utility industry is found in the Consumers Appeal Board's rejection of a part of the company's market analysis because, as stated in ALAB-452, acceptance of the utility's argument would make it "impossible to find Consumers guilty of monopolization even if it had used predatory means to acquire the small systems" (ALAB-452, slip op. at 199 n.392). Such a response suffers from overstatement. Obviously, even in a natural monopoly market environment, where it can be proven that the dominant utility possessing monopoly power used predatory means to hasten the demise of a small system, and so acquire its dominant position, monopolization is established. That conclusion does not permit, however, a quantum leap to a finding of monopolistic intent under different circumstances, such as presented in the instant case, merely because small systems left the market, without a showing that such exit was the result of predatory conduct. Such reasoning is simply untenable here, where the evidence of record demonstrates the failing nature of the acquired systems as the causative effect of their eventual demise.

sound reasoning to be particularly helpful.[15/] There, the Appeal Board has addressed Consumers' argument in the context of whether predatory conduct must be proved to show an inconsistency with Section 2 of the Sherman Act. That is, however, quite a different question from the one which is relevant to the position we urge here -- i.e., whether a utility's declaration that it desires to succeed in a natural monopoly market by acquiring other electric systems is evidence of an intent to monopolize. The cited authorities do, we submit, require a negative response to that inquiry. Nor is the footnote in ALAB-452 on solid ground with its dismissal of those cases having reference to a "natural monopoly situation" by pointing to Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). Hanover Shoe neither mentioned nor dealt with the natural monopoly situation. We have previously cautioned against the doctrinaire use of antitrust principles formulated in a much different market context to dispose of matters that necessarily assume another character when viewed in light of the market setting in this industry (see App. Opening Br. at 98-100; App. Reply Br. at 57-61).

The point we wish to stress is simply this: unlike the analysis in ALAB-452, the Appeal Board here should not undertake

---

15/ In addition to the cases listed in footnote 510 of ALAB-452, Applicants would direct the Appeal Board's attention to: Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972); Ovitron Corp. v. General Motors Corp., 295 F. Supp. 373 (S.D.N.Y. 1969); United States v. Harte-Hanks Newspapers, Inc., 170 F. Supp. 227 (N.D. Tex. 1959); United States v. Western Union Telegraph Co., 53 F. Supp. 377 (S.D.N.Y. 1943); Shenefield, Antitrust Policy Within The Electric Utility Industry, 16 Antitrust Bull. 681 (1971).

its assessment of the challenged conduct from the starting point that these Applicants, because of past acquisitions, necessarily have a general intent to monopolize a relevant market. Rather, the application of antitrust principles to the facts of record in this proceeding should recognize the need to examine both the monopoly power question, and the separate issue as to whether any of these Applicants demonstrated a "deliberate or willful purpose to exercise monopoly power",[16/] without any preconceived notions of culpability based on judicial pronouncements that attached antitrust significance to market dominance in factual settings not present here. Proceeding on this basis, we believe, for the reasons which follow, that the Appeal Board will find

---

16/ We perceive in some of the language of ALAB-452 a view to interpret the conduct element of the monopolization offense as broadly as it has ever been interpreted by any court and then to apply that liberal interpretation to a factual setting vastly different than that heretofore presented to the courts (see, e.g., slip op. at 58-59, 283-86). Such a view is certainly not required by previous judicial precedent and Applicants would urge against such an approach here. Instead, we would recommend the approach taken by the Second Circuit in International Rys. of Central America v. United Brands Co., 532 F.2d 231 (2d Cir.), cert. denied, 97 S. Ct. 101 (1976). The applicable rule was therein stated as follows (532 F.2d at 239):

> While we agree that a specific intent to monopolize need only be found in a case where a defendant is charged with conspiracy or attempt to monopolize [citations omitted], it does not follow that any act of the alleged monopolist irrespective of intent constitutes a section 2 violation. Judge Hand's comment was that no monopolist "monopolizes" (emphasis in original) unconscious of what he is doing. The action alleged to offend section 2 must be one which is monopolistic. The Supreme Court has clearly indicated that in order to establish such a section 2 violation, the plaintiff must establish that the defendant had a deliberate or willfull purpose to exercise monopoly power. [Citations ommitted.]

that the conclusions reached by Consumers on these other issues are not warranted in this case.

B. ANOTHER LOOK AT RELEVANT MARKETS AND MONOPOLY POWER PRINCIPLES IN THE NORTHERN OHIO-WESTERN PENNSYLVANIA AREA IN LIGHT OF ALAB-452

We have previously set forth in great detail Applicants views of the relevant markets for purposes of the present antitrust inquiry (see App. Opening Br. at 88-90, 93-95; App. Reply Br. at 38-46). Our assessment of whether any of the Applicant companies possesses, or is likely to possess, monpoly power in any of those markets has also been fully treated (see App. Opening Br. at 91-93, 95-97; App. Reply Br. at 47-56). There is neither room nor need to rehearse those positions here. Instead, we will concentrate our discussion at this stage on pointing out where our earlier analysis conforms with the decision in ALAB-452, and, conversely, where the two analyses differ, including in the latter instance, some suggestion for reconciliation. The starting point is, of course, with market definitions.

1. The coordination services market. The "coordination services" market defined in ALAB-452 consists of that "cluster of products and services" typically referred to in the electric power industry as "operational coordination" (slip op. at 121). However, the Consumers Appeal Board specifically rejected the effort also to include in that market those forms of coordination typically referred to as "developmental coordination" (id. at 167). In so doing, that Appeal Board effectively sounded the death knell to the various proposals here by DOJ, the NRC Staff and Cleveland to lump developmental coordination into their general market definitions -- an approach erroneously adopted by the Licensing

Board below. Applicants have opposed any such indiscriminate bundling of services (see App. Opening Br. at 93-95; App. Reply Br. at 41-43), and thus we are in fundamental agreement with the more refined delineation of a "coordination services" market in the coherent manner expressed in ALAB-452.[17/] Indeed, Consumers' coordination services market corresponds to the "short-term operating coordination transactions" submarket described by Applicants' expert economist, Dr. Pace, in this proceeding. Compare A-190(Pace) 31(10-16); App. Opening Br. at 95.

It still remains to be determined whether any of the Applicant companies can be said to have monopoly power in this particular coordination services market. We have maintained not, and continue to adnere to that view. The non-Applicant entities in northern Ohio and western Pennsylvania neither need, nor can they participate in, the coordination transactions in this market (see App. Opening Br. at 95-96; App. Reply Br. at 43). Thus, Applicants cannot compete with, or exercise monopoly power against, non-Applicant entities (either actual or potential) in this market. The inescapable conclusion in such circumstances is, therefore, that on the facts of this case the coordination services market

---

17/ Because the coordination services market is not relevant to this proceeding, the Appeal Board need not reach the question here of the geographic bounds of such a market. We would note in passing, however, that the facts of record in this proceeding would, in any event, not support delineation of a submarket measured either in terms of the CCCT (Combined CAPCO Company Territories) or in terms of each Applicant's service area. Compare ALAB-452, slip op. at 168-71 with App. Opening Br. at 97-98 n.116.

is not relevant to the present inquiry.[18/] Indeed, the Appeal Board's decision in Consumers has already foreshadowed this result (see p. 6, supra).

2. The retail market. We are equally convinced that the market for retail distribution of electric power is of no relevance to this proceeding (see App. Opening Br. at 89; App. Reply Br. at 38). In this regard, Applicants here are in disagreement with the retail market analysis of the Consumers Appeal Board (see ALAB-452, slip op. at 172-200). The sole basis set forth in ALAB-452 for finding relevancy at this market level is that "[a] utility's bulk power practices can have serious anticompetitive effects on the retail market * * *" (ALAB-452, slip op. at 172 n.360). Even accepting that conclusion, however, it provides no good reason for attaching any importance to the retail activities of any of the Applicants here. As the Consumers Appeal Board fully recognized, there is little direct, door-to-door retail competition in this industry (see ALAB-452, slip op. at 179-80). In fact, such a situation exists only in the City of Cleveland in the present case (see App. Opening Br. at 61 n.69). To the extent that the door-to-door competition there may have been indirectly affected by CEI's "bulk power practices" (and no evidence suggests as much), the antitrust concern (if any) is properly at the wholesale level where the alleged suspect prac-

---

18/ In his prepared testimony, and then again during cross-examination, the staff expert economist, Dr. Hughes, testified that market power is always exercised with respect to some identifiable group of market participants, either actual or potential (see S-207 (Hughes) 9(15-18); 3937(6-10)). Obviously, in the absence of such actual or potential market participants the delineated market cannot be viewed as relevant.

tices are said to have taken place, not at the retail level where it is claimed that some residual impact has perhaps been felt.[19/]

Nor do we find the situation to be any different if, as in ALAB-452 (slip op. at 180), the emphasis at retail is, instead, on the potential "competition for the right to be the sole distributor in these individual natural monopolies". Obviously, protection of such potential competition turns solely on factors affecting the municipal systems' ability to purchase in the wholesale market, not on their ability to sell in the retail market. See Alabama Power Co. (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), LBP-77-24, 5 N.R.C. 804, 889-90 (1977); App. Reply Br. at 38. Concerns of this nature both can and should be resolved by analyzing the competitive situation (such as it is) at the wholesale level; retail activities are of no relevance to the pertinent antitrust inquiry in such circumstances and the retail

---

19/ The situation here should be contrasted to that considered by the Supreme Court in United States v. Griffith, 334 U.S. 100 (1948). There, the government claimed that the defendants had used the theatre circuit buying power inherent in their retail monopoly to gain a competitive advantage over unaffiliated firms in negotiating the purchase of films from distributors. The Court agreed with the government's position, holding "[w]hen the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire." 334 U.S. at 108; see also id. at 109; Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948).

By comparison, in this proceeding, there never has been a claim that any Applicant has attempted to use its dominance at the retail level to secure more favorable wholesale power terms. Thus, there is no need here to analyze the retail market to determine whether Applicants do or do not possess monopoly power. For, unlike Griffith and associated cases, even if monopoly power existed at the retail level -- and it does not -- such power would not bear on the lawfullness of the conduct challenged in this proceeding.

market thus should properly be considered of no significance by this Appeal Board.[20/]

3. The wholesale market. This still leaves, of course, the wholesale electric power market. The Consumers Appeal Board found this to be a relevant market on the facts of that case, and then proceeded to resolve the dispute among the parties as to the makeup of that market (see ALAB-452, slip op. at 200-12).[21/] Applicants here have included similar wholesale power transactions within the submarket defined by long-term developmental coordination transactions (see App. Opening Br. at 95), and, therefore, do not object to an antitrust analysis which proceeds on the basis that wholesale power sales constitute a relevant market for purposes of this proceeding (see App. Opening Br. at 95-97; App. Reply Br. at 44-46).

20/ If the retail market is to be viewed as at all relevant, analysis of that market should proceed on the basis of the "open" and "closed" checkerboard of markets Applicants have previously advanced (see App. Opening Br. at 89-93). While this approach was rejected in ALAB-452 (see slip op. at 172-200), this was only because the Appeal Board there operated on the faulty premise that protection of potential franchise competition was a legitimate concern at the retail level. If, as we believe (see pp. 30-32, infra), this "protection" is more appropriately addressed under the wholesale market analysis, the checkerboard concept plainly still has vitality at the retail level. The point we wish to emphasize here is simply that the evaluation of direct retail competition in the electric utility industry should be undertaken on the basis of the various "open" and "closed" markets shown to exist.

21/ Applicants here, like Consumers, challenged the inclusion of their "in-house" self-generation as part of their share of the wholesale market (see App. Opening Br. at 96 n.114). Even accepting the contrary analysis in ALAB-452, we do not consider such reasoning to require the same conclusion here. This is because the lack of self-generation among the municipal systems in northern Ohio and western Pennsylvania realistically removes such entities

(continued next page)

At this point, however, we part company with the wholesale market analysis of the Consumers Appeal Board, especially with the significance ALAB-452 attaches to statistical market shares (ALAB-452, slip op. at 240-42). Applicants here have repeatedly argued against any assessment of monopoly power on the basis of market share statistics (see App. Opening Br. at 85-88). Rather, we have urged that it be determined, on the basis of the economic and institutional realities in the marketplace, whether any Applicant in fact has "the power to control prices or exclude competition" in the wholesale market (see App. Opening Br. at 84). Since the Licensing Board below chose not to engage in such an analysis, its "imputed" findings of monopoly power are, we believe, entitled to no weight. The discussion in ALAB-452 concerning the matter of monopoly power at the wholesale level (see ALAB-452, slip op. at 243-61) plainly cannot be so easily dismissed, however. Accordingly, we will take a moment to evaluate that discussion in light of the arguments advanced here by Applicants, keeping in mind as we do so the distinguishing factor here that the non-

---

21/ (cont'd)
from the market to sell wholesale power (see pp. 8-9, supra). Thus, "in-house" self-generation should be excluded from the wholesale market shares of all entities, not because the municipal systems are unlikely to supply Applicants' wholesale "needs," but because those systems do not now, and are unlikely in the future to, supply the wholesale needs of any market entity. It therefore, matters not in this proceeding whether, as a theoretical matter, Applicants' self-generation "reduces pro tanto the demand for wholesale bulk firm power", since in the realities of the marketplace there are no municipal entities, either actual or potential, that sell wholesale power. In any event, we continue to believe, for the reasons stated below, that little purpose is served by calculating market shares in the context of this proceeding, whatever computational formula may be used.

Applicant entities in this proceeding (unlike in Consumers) lack appreciable self-generation.

Turning first to those non-Applicant electric entities already in the wholesale market, we have previously observed that their lack of self-generation effectively removes such systems from meaningful consideration as sellers of wholesale power. Thus, to the extent the Consumers wholesale analysis is focused in this area (cf. ALAB-452, slip op. at 204-12), it is inapposite to the present proceeding. Where this Appeal Board should look, instead, to resolve the monopoly power issue in this particular market is in the area of wholesale power purchases to determine whether Applicants do indeed have a measure of control over the ability of municipal entities to engage in such purchasing transactions. We think not. Despite some dictum suggesting otherwise in ALAB-452 (see slip op. at 259-60 n.477; but see id. at 256), the statistical dominance of these Applicants simply does not give them power to control the prices at which wholesale power may be purchased by non-Applicant entities (or anyone else).[22/] Nor, in view of FERC's well recognized authority to order

---

22/ Applicants do not believe that the proper inquiry is whether FERC regulation produces rates identical to what might exist in a hypothetical, highly competitive market, for even in such situations, market participants retain some measure of control over prices charged. Rather, the appropriate inquiry is whether rate regulation is sufficient to divest Applicants of enough independent control over prices to negate a finding of monopoly power. Compare S-207(Hughes) 8(12-14); Hughes 3719(11-14). In this regard, the rate regulator might be viewed as the equivalent of a competing firm in an unregulated industry, and the issue is whether the existence of that competing firm is sufficient to deny the entity under scrutiny the ability to control price. With respect to wholesale power, we think it unquestionable that the existence of

(continued next page)

interconnections,[23] can it be said that Applicants here are able to exclude municipal systems from the wholesale market by refusing to sell wholesale power to them (see App. Opening Br. at 96-97). In this connection, it is not without significance that there are no isolated systems in northern Ohio and western Pennsylvania. And see n.26, infra.

This still leaves the question whether Applicants can be said to have monopoly power because allegedly they can refuse to transmit other sources of wholesale power to the municipal systems (compare ALAB-452, slip op. at 257-58). The answer to this inquiry must also be "no". In the first place, the evidence

---

22/ (cont'd)
FERC rate regulation is at least sufficient to demonstrate that Applicants do not have significant control over price.

In addition, we believe the Consumers Appeal Board's reference to the testimony of Dr. Wein suggesting that rate regulation confirms the existence of monopoly power (ALAB-452, slip op. at 255), unfortunately perpetuates a serious misconception. The point is that rate regulation currently exists in the relevant wholesale power market in northern Ohio and western Pennsylvania and has for some time. Thus, these institutional restraints on electric power rates are very much a part of the given "situation", and their very existence prevents Applicants from controlling prices. In these terms, the fact of FERC regulation over wholesale rates confirms the nonexistence of monopoly power in this market setting, not its existence.

23/
See App. Opening Br. at 78-79. The fact that the Appeal Board in Consumers may have found FERC authority with respect to the whole range of coordination services less than complete (see ALAB-452, slip op. at 230-38, 257-59), is no reason to discount FERC's authority with respect to the entirely separate wholesale power transaction when assessing Applicants' alleged monopoly power in the wholesale market. It is well to remember that northern Ohio and western Pennsylvania municipalities do not, and cannot, participate in the coordination services market; thus, FERC's authority over the coordination transactions in that market (or, for that matter, the lack thereof) is of no real import in connection with the relevant antitrust concerns here.

in this proceeding shows that it would be feasible for a municipal system such as the Cleveland system to obtain alternative sources of wholesale power (if any existed) without use of Applicants' transmission by constructing its own transmission facilities (compare App. Opening Br. at 97 n.116, 171-72 & n.204 with ALAB-452, slip op. at 78, 170, 215). Second, and perhaps even more significant, is the fact that the record below demonstrates that there are not now, have not in the past been, and will not in the foreseeable future be, any alternative wholesale power sources available to the municipal systems in northern Ohio and western Pennsylvania (see App. Opening Br. at 67-71, 173-76), so as to make the "wheeling" issue of realistic concern in the present context. If there is no wholesale power to be transmitted, the highly theoretical prospect of a possible refusal to undertake such transmission is too slender a reed on which to rest a finding of monopoly power.[24/] And, third, this is particularly so where, as here, the transmission policies of the Applicants, as evidenced, for example, by Toledo Edison's and Ohio Edison's transmission of Buckeye power (see App. Opening Br. at 202 n.232, 232), demonstrate that if alternative sources of wholesale power existed, a

---

24/ The absence of alternative sources of wholesale power, like any other market structure element, is properly considered as part of the threshold evaluation of an entity's power to control prices or exclude competition. The inquiry at this initial stage is properly focused only on whether an Applicant, in and of itself, actually possesses monopoly power. We do not believe an affirmative response to that question is permitted simply because one can conclude that the Applicant under scrutiny may theoretically be able to refuse to transmit power that does not in fact exist. Indeed, the logic of such an argument would require the absurd finding that a local supermarket, for example, has monopoly power, notwithstanding the existence of ten other supermarkets actively

(continued next page)

method for transmitting that power could be arranged.[25] Taken together, these three considerations make it absolutely clear that the Applicants in this proceeding do not have the power to exclude the existing municipal systems from access to wholesale power, notwithstanding the different conclusion reached on other facts in Consumers and Otter Tail.[26]

24/ (cont'd)
competing in the same area. Obviously, the local supermarket theoretically has the ability to set prices, but it is precluded from actually doing so by the ten neighboring supermarkets as much as the abovesaid Applicant is precluded from actually refusing to transmit wholesale power from outside power sources because none exists. Thus, when the theoretical possibilities are placed in the realities of the market setting involved, a finding of monopoly power is precluded in each case.

It need only be added in conclusion that the absence of alternative sources of wholesale power would also eliminate any possibility of an exercise of monopoly power in the wholesale market, if, for entirely unrelated reasons, one were able to find -- contrary to the situation here -- that the Applicant in question had an ability to control prices or exclude competition.

25/
But for Duquesne and Penn Power, who have never been requested to wheel power and, therefore, have never had occasion to formulate a policy, the wheeling policy of each of the Applicants is established in the record. See App. Opening Br. at 171-76 (CEI), 200-03 (TECO), 228-34 (OE); see also pp. 43-44 & n.38, infra.

26/
We would note that each of the three factors described in the text distinguishes this case from Otter Tail. Moreover, unlike Otter Tail, where the Supreme Court condemned a utility's refusal both to sell wholesale power and to wheel wholesale power from outside suppliers, the Applicants here have willingly made wholesale power available to the municipal systems (see App. Br. Opposing Exceptions Filed by the City of Cleveland at 10-12). Thus, we do not have here the Otter Tail situation where an Applicant has set out to abuse the regulatory process by refusing to sell wholesale power (compare App. Reply Br. at 53-54 & n.48).

In this regard, we would caution against a reading of some of the language used in ALAB-452 to describe the monopoly power holding in Otter Tail in an overly expansive and incorrect manner. In particular, we do not believe that Otter Tail can accurately be read to hold that a utility's "control over transmission and generation facilities" is in and of itself sufficient to establish
(continued next page)

Nor is a finding of monopoly power any more warranted in the present context when we consider those entities not already in the wholesale market which potentially might seek to enter that market in the future by way of retail franchise competition as denominated in ALAB-452. The points just made as to these Applicants' inability to control prices or exclude competition are equally applicable in this area, and effectively remove the possibility of monopoly power over this potential competition. There is one further observation to be made, however, in light of what we regard to be an error in reasoning contained in ALAB-452. The Consumers Appeal Board concluded that the significant economic and legal barriers to market entry, which were said to exist in

---

26/ (cont'd)
monopoly power (compare ALAB-452, slip op. at 257). If that were the case, virtually every investor-owned utility could be said, as a matter of law, to possess monopoly power. Such a conclusion would fly in the face of judicial precedent in this area, which establishes as the applicable standard for measuring "monopoly power" not simply a showing of dominance in the marketplace, but rather a showing of power to control prices or exclude competition (see App. Opening Br. at 83-88). Thus, an essential ingredient in the "monopoly power" analysis is, especially in a highly regulated industry such as the electric utility industry, the extent to which the regulators in the marketplace have or have not imposed institutional restraints on a dominant firm's ability to control the pricing and marketing activities of other firms in the marketplace. It is within this analytical framework that Otter Tail necessarily must be read. What that decision teaches is that the existance of regulatory safeguards against a misuse of strategic dominance does not necessarily end the "monopoly power" inquiry. Where, as in Otter Tail (but not here), there are indications of an abuse of the regulatory process by the dominant utility -- i.e., a flaunting of the regulatory restraints -- in an effort to exclude other entities from the marketplace, a finding of "monopoly power" is warranted, and may well lead to the conclusion that the dominant firm is guilty of an attempt to monopolize, or, if the abuse has advanced far enough, of actual monopolization (see App. Reply Br. at 53-54 & n.48; compare ALAB-452, slip op. at 257 n.474). To read Otter Tail in any other, more sweeping, manner is beyond the permissible bounds of the majority opinion.

the lower peninsula of Michigan, reinforced, rather than attenuated, Consumers' market dominance, and, therefore, confirmed the existence of monopoly power (see ALAB-452, slip op. at 248-49). On much the same reasoning (see ALAB-452, slip op. at 249-52), that Appeal Board dismissed as inapposite Consumers' reference to those cases where market share analysis was found insufficient to establish monopoly power (compare App. Opening Br. at 85-88; App. Reply Br. at 47-52). However, such an approach fails to correlate properly the competitive market structure that was found to exist in Consumers with the analysis in ALAB-452 of the monopoly power question. As a result, the reasoning there is suspect and should not be followed here.

Our view of this matter has already been alluded to. In the typical market, where direct competition is postulated, a large firm which is alleged to possess monopoly power may well attempt to rebut a presumption associated with statistical market dominance by contending that significant potential competitors exist and are "so positioned on the edge of the market [as to] exer[t] beneficial influence on competitive conditions in that market" (see App. Reply Br. at 36-37). In such a situation, ALAB-452 correctly reports that high entry barriers reinforce the inference of monopoly power, while low barriers serve to rebut such an inference (see slip op. at 248-49). However, the Appeal Board in Consumers did not have as its reference point a direct competition market. Rather, it considered the potential of municipalities displacing their existing retail distributor. That is, of course, the nature of whatever franchise competition might also be said to exist in this proceeding.

Under such a regime of potential competition, the fact that natural barriers to entry may be very high -- and as a consequence may naturally preclude such potential competition -- is at the very crux of the existing utility's inability to preclude such potential entry by refusing to provide wholesale power. Just as in United States v. Marine Bancorporation, 418 U.S. 602 (1974), where state regulatory restraints made the acquiring firm an unlikely potential entrant, and thus of minimal procompetitive influence, so too here, if natural barriers to market entry are high, making it equally unlikely that a municipality will displace its existing electric distributor, that circumstance is not in any sense an indicator of the existing distributor's monopoly power, but rather serves to underscore the artificiality of attaching any significance to potential franchise competition in this market setting.[27/] Indeed, high natural barriers to entry in this context realistically go a long way toward negating (not

---

27/ Indeed, any notion that potential franchise competition is at all possible in the service areas of Duquesne or Penn Power is belied by the corporation law of Pennsylvania. As of 1968, the Pennsylvania legislature repealed those provisions which granted municipalities the authority to franchise public utilities (see Act. No. 216, §§ 1204(c) & (d), approved July 20, 1968), and replaced it with a provision authorizing public utilities "to enter upon and occupy streets, highways, waters and other public ways and places" necessary to produce and distribute electric power, so long as the utility complies with the reasonable, nondiscriminatory police regulations governing maintenance, etc., of the facilities (see id. § 322E, codified at 15 P.S. § 1322E). Thus, there simply is no franchise that a Pennsylvania municipality can refuse to renew if it seeks to displace the existing electric supplier. Moreover, even if a municipality possessed such authority, it still would have to demonstrate to the Pa PUC the inadequacy of the present supplier's service before the certificate of public convenience and necessity required to acquire the existing distribution facilities could be issued (see 66 P.S. § 1122(e)).

reinforcing) the existence of monopoly power in the same sense as heretofore explained with reference to the regulatory controls over pricing and marketing functions at the wholesale level. Compare ALAB-452, slip op. at 251 n.465.[28/]

For all these reasons we believe the facts of this proceeding establish that none of the Applicant companies possesses monopoly power in the wholesale market. Compare A-190(Pace) 29-30, 32. Such a conclusion necessarily pretermits any need to evaluate Applicants' activities under Section 2 of the Sherman Act.[29/] Nevertheless, because some of the charges claim inconsistency with Section 1 of the Sherman Act, and also in order to demonstrate that even had Applicants been found to possess monopoly power no finding of monopolization would have been warranted, we briefly review Applicants' conduct in light of ALAB-452.

28/ For similar reasons, the holdings in United States v. General Dynamics Corp., 415 U.S. 486 (1974), and in United States v. Citizens & Southern National Bank, 422 U.S. 86 (1975), are relevant in determining whether Applicants possess monopoly power. Each case holds that, despite high market share figures, elimination of an entity by way of merger would not substantially lessen competition because other market factors discounted the competitive significance of that elimination. Applicants understand these cases to support the position they have advanced that a theoretical ability on the part of Applicants to foreclose their replacement as the sole supplier of retail power in various municipalities does not establish monopoly power, if natural market forces make it unlikely that such potential replacement would ever occur in the absence of any activities by Applicants. Compare ALAB-452, slip op. at 250 n.464.

29/ It should be clear that, unlike the argument advanced by Consumers -- which ALAB-452 viewed as "an attempt to slip in via the back door a proposition the courts have barred at the front" (slip op. at 237) -- Applicants' position on monopoly power is not on "end-run" around Otter Tail. The evidence in this proceeding establishes as a matter of fact that no Applicant company

(continued next page)

C. APPLICATION OF THE ALAB-452 REASONABLENESS PRINCIPLES TO THE CONDUCT OF THE APPLICANT COMPANIES

In briefly taking yet another look at the specific conduct challenged in this proceeding, it is well to reemphasize three observations which are especially germane to the antitrust analysis being undertaken by this Appeal Board. First, it bears repeating that the fact here that the non-Applicant entities possess no appreciable self-generation, and therefore are not appropriate coordination partners, obviously pervades every aspect of Applicants' dealings with the municipal systems -- which are in reality wholesale power customers of one or another of the Applicants. Second, the fact remains, notwithstanding the erroneous reference in ALAB-452 to Otter Tail as suggesting otherwise (see slip op. at 282), that all the Section 2 "refusal to deal" cases mentioned in Consumers, including Otter Tail, rely on the discontinuance of a previously provided service as the fundamental

---

29/ (cont'd)
has the power to control prices or exclude competition. One facet of this factual conclusion is, of course, the existence of FERC regulation without any showing of an attempted abuse thereof. But equally important is the lack of appreciable self-generation in the relevant area, the economic realities of the electric utility industry (which both justify the horizontal and vertical integration of Applicants and raise substantial barriers to new entry in this natural monopoly industry), the legal restraints to competition imposed by Ohio and Pennsylvania, and the other factors discussed in more detail in our earlier Briefs. The record developed here, and the arguments advanced by these Applicants, do not constitute an all-purpose legal argument which finds every dominant utility without monopoly power, or urges blanket immunity from the antitrust laws. Rather, what is presented is a carefully tailored factual argument, that must be addressed on its own merts. Moreover, Applicants' success on the "monopoly power" issue is not intended to suggest that antitrust review must consequently come to an end, since this Appeal Board obviously still must resolve the separate Section 1 charges made against these companies.

basis for finding the requisite intent to monopolize.[30] That is the present state of the antitrust law to be applied by this Appeal Board. Third, the apparent view in ALAB-452 that the

---

30/ Despite its lack of clarity in other areas, Mr. Justice Douglas' opinion in Otter Tail could not be more direct in stating that the defendant's conduct had been for the purpose of attempting "to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system" (410 U.S. at 368; see also id. at 370-71). While the specific products being provided -- i.e., retail electric power versus wholesale power -- may have been different, Otter Tail still represents a situation where a supplier previously dealing with a customer refuses at a later date to continue dealing. This discontinuance is essential because in most instances it provides the necessary evidence to establish the requisite intent. This analysis is cogently set out in A. Neale, The Antitrust Laws of the United States of America (2d ed. 1970). It is therein stated (id. at 132-33; emphasis added):

> It is clear that in condemning these one-man boycotts [i.e., refusals to deal] the courts must have particular regard to intent and purpose. It would be another faulty use of the analogy between restrictive agreements and the behaviour of single powerful firms to argue that, because a boycott agreement is illegal per se, therefore any refusal by a dominant firm to trade must also be illegal per se. In this form the analogy once again suppresses the vital element of intent. * * * There may be many sound business reasons for such a firm to change its supplier of some material or to drop an account among its dealers. It would be an obviously impossible position if a dominant firm were put under an obligation to deal with all who wished to trade with it. The courts have recognized this in practice, and it is when normal business reasons cannot plausibly be offered as an explanation for refusing to deal and when, on the contrary, there is evidence of a purpose to suppress smaller rivals, as in the cases quoted above, that the individual refusal to deal becomes actionable as a misuse of monopoly power. Nevertheless, the powerful firm undoubtedly has to exercise the greatest caution, as the law stands, about cutting off a dealer or taking its business away from an established supplier; this is particularly the case when the firm has integrated backwards or forwards and has its own distributing or supplying subsidiaries, for in such a case it is only too easy for the refusal to deal to appear, rightly or wrongly, as a purposive exclusion of competition with the subsidiary companies.

conduct of a natural monopolist is to be evaluated under the same strict standard applied to monopolists in a more typical, freely competitive market (see slip op. at 283-86 & n.510), ignores judicial precedent to the contrary.[31] We would, once again, caution this Appeal Board against such an undiscerning application here of general antitrust principles formulated to meet different competitive situations in wholly dissimilar market environments.

With these introductory remarks, we turn to a more particularized examination of certain of the challenged conduct.

1. Nuclear access. Unlike the situation found to exist in ALAB-452 (see slip op. at 389-402), there is not even a

---

31/ Were the conduct of a natural monopolist viewed no differently from that of a monopolist in a freely competitive market, there would be little point in inquiring into whether the monopoly is the result of natural market forces. This reasoning has not been lost on the courts. In Ovitron Corp. v. General Motors Corp., supra, 295 F. Supp. at 378, it was stated: "Where a natural monopoly exists, somewhat more latitude is allowed. The natural monopolist is entitled to compete vigorously and fairly in a struggle for a market which cannot support more than one supplier." See also Union Leader Corp. v. Newspapers of New England, 284 F.2d 582, 584 (1st Cir. 1960). In fact, the Union Leader court raises, but does not answer, the interesting question "whether the antitrust laws were intended to protect one natural monopolist against another, in view of the fact that there was no competiton before the battle began and there would be none afterwards" (id. at 584 n.4).

Whichever way one is inclined to respond to that question, there should be no dispute about one point. Precisely because of the differing conclusions that a court will attach to market dominance when, on one hand, that dominance is achieved in a natural monopoly market where bigness is anticipated, and, on the other hand, that dominance is achieved in a more typical market where bigness is not anticipated (and therefore inherently suspect) (see App. Opening Br. at 98-100; App. Reply Br. at 48, 57-61), a more discerning analysis is plainly required for evaluating the conduct of an alleged natural monopolist like the Applicants here -- one which takes full cognizance of, and attaches full weight to, the technical, economic and institutional factors that exist in the marketplace that is under scrutiny.

claim in this proceeding that any Applicant either "refused to consider", or declined to allow, small systems access to the Davis-Besse or Perry nuclear facilities being licensed here. Indeed, the uncontested evidence is that only Cleveland and Painesville ever requested access to a nuclear plant, and in each instance CEI offered to make such access available (see App. Opening Br. at 145-50, 180-82). The Licensing Board found CEI's offer to be "an outrageous affront to the policies underlying the antitrust laws." We have previously noted our disagreement with that assessment and pointed out the errors implicit in such a conclusion (see App. Opening Br. at 150-54). Nothing stated in ALAB-452 leads us to believe our remarks in this regard require any modification.

We would simply add that each of the Applicants has stated on the record the details of its nuclear access policy.[32/] Despite a Licensing Board finding that this policy, too, was inconsistent with the antitrust laws, an objective assessment of the terms of nuclear access offered by Applicants demonstrates

---

32/ It hardly needs to be added that Applicants' nuclear access policy could not in any sense be dismissed out-of-hand as a "post-hearing" policy like Consumers' changed wheeling policy was in ALAB-452 (see slip op. at 314-19). In the first instance, there is nothing in the record which even faintly indicates that the policy set down in A-44 constitutes any "change" from prior policy. In point of fact, because no request for nuclear access was ever received until after the commencement of the Davis-Besse 1 proceeding, Applicants could not, as a practical matter, have formulated a formal policy prior to the time A-44 was developed. Second, since Applicants have repeatedly stipulated that A-44 could be attached to their licenses notwithstanding the outcome of these proceedings, there is no doubt that the commitments contained in A-44 constitute the "permanent" policy of the companies. Finally, A-44 does not, on its face, contain anticompetitive provisions -- unlike the finding in ALAB-452 with respect to Consumers' wheeling policy.

that all of the non-Applicant systems will receive thereunder whatever benefits Applicants themselves may derive from construction and operation of the nuclear plants (see App. Opening Br. at 129-34; App. Reply Br. at 20-24). A policy of nuclear access on such terms suggests no antitrust inconsistency.

2. Pool participation. The evidence of record in this proceeding shows that the requests of Cleveland and Pitcairn to join the CAPCO Pool as full members were rejected for valid technical and business reasons, entirely consistent with both Sections 1 and 2 of the Sherman Act (see App. Opening Br. at 106-13; App. Reply Br. at 10-12). In contrast, the decision in ALAB-452 found on different facts that Consumers had unreasonably excluded small systems from the Michigan Pool (see slip op. at 402-12). The Appeal Board's reference in that case to the unreasonableness of Consumers' action correctly measures the company's conduct in this area under a rule of reason standard, rather than condemning it out of hand as per se unlawful. The rule of reason standard is no less appropriate here for purposes of assessing the pool membership issue (compare App. Opening Br. at 35-40; App. Reply Br. at 61-67); the per se analysis employed by the Licensing Board below must be rejected.

3. Reserve sharing. Unlike the circumstances presented in ALAB-452 (see slip op. at 358-89), no Applicant in this proceeding has ever refused to enter into a coordination arrangement with a small system contemplating that reserves would be shared on an "equalized percentage basis". In those two instances where a non-Applicant has sought to coordinate its operations with an Applicant -- i.e., Cleveland and Painesville -- CEI agreed to share reserves and did not even require the small system to maintain any minimum

reserve obligation (see S-203; S-204; App. Opening Br. at 170, 179). Nevertheless, because the CAPCO arrangements include an agreement among the Applicant companies to maintain reserves on the basis of the "P/N formula", the claim has been advanced in this proceeding that such an agreement among the Applicants is inconsistent with the antitrust laws. A review of the technical reasons advanced by Applicants to justify the P/N formula as reasonable (see App. Opening Br. at 113-20), in light of the standards enunciated in ALAB-452, confirms our original position that reserve sharing on such a basis is reasonable both in purpose and effect.[33/]

4. Coordination. In ALAB-452, the Appeal Board found that in three specific instances Consumers unjustifiably refused to enter into operational coordination agreements with Northern Michigan, Wolverine Electric and Edison Sault (see slip op. at 330-39). While the Licensing Board below also found several instances of refusals to coordinate by these Applicants, those findings are not well based, as we have earlier pointed out. After carefully reviewing the Appeal Board's discussion in Con-

---

33/ The test of reasonableness adopted in ALAB-452 is that each interconnected utility should bear its proportionate share of the responsibility of interconnected operation (slip op. at 376). The P/N formula does precisely this by assigning capacity responsibility so that "each party's contribution to the reserves of the CAPCO group is directly proportional to its potential use of said reserves" (S-184, § 4.2). Unlike the evidence in the Consumers proceeding, calculations under the P/N formula do not penalize the last system to join a large interconnected network (see slip op. at 377-78 & n.651), because the P/N ratio is calculated for each individual member of the pool under the hypothesis that each system is operating in isolation (see I.D. at 212). Thus, while the CAPCO pool calculates the total generating needs of all members on a one-system basis, allocation of that generating capacity is on the assumption that no pool exists. Thus, a later joining member suffers no penalty whatsoever vis-a-vis existing pool participants.

sumers regarding this matter, it is clear to us that the facts there were significantly different from the facts here. As might be expected in light of the strikingly different market structures involved in the two proceedings (see pp. 4-19, supra), we can find nothing in Consumers which provides support for a finding here of unreasonable refusals by any of the Applicants to engage in operational coordination with non-Applicant entities.

Thus, in the case of CEI, the facts show that CEI did enter into comprehensive coordination agreements with both Painesville and Cleveland (S-203; S-204; A-271), and that those agreements are fully consistent with applicable antitrust principles (see App. Opening Br. at 140-41, 170-71, 179-80; App. Reply Br. at 82).[34/] As for Toledo Edison, the only claim of a refusal to coordinate is contained in the Licensing Board's misguided finding that the company refused to consider joint ownership of large scale generating facilities with Napoleon and other unnamed municipal systems. The facts of record are so clearly to the contrary as to make it abundantly clear that, at best, only a piecemeal review of the evidence was undertaken below (see App. Opening Br. at 209-11;

34/ In contrast to Consumers, where the Appeal Board found that the applicant there did not challenge the underlying facts but rather sought to justify its coordination dealings (see ALAB-452, slip op. at 321, 340), CEI challenges the factual finding that it refused to coordinate. There is no genuine dispute among the parties as to the whole range of coordinating services (including emergency, short-term, limited-term and firm power, economy interchange, and coordinated maintenance) that CEI has made available. Instead the opposing parties and the Licensing Board claim that CEI delayed in reaching those agreements and that certain operating problems are due to the conduct of CEI. We have previously set out the details of these factual disputes (see App. Opening Br. at 154-71, 176-80), and we once again urge the Appeal Board to review carefully the record for itself to determine the validity of our position.

App. Reply Br. at 85-86 & n.68).

The charge against Ohio Edison is equally difficult to comprehend. The record shows that Ohio Edison accepted the only proposal ever advanced by its wholesale customers; i.e., the R.W. Beck recommended "prepayment of power purchases" plan, and at the close of the record was still awaiting a response from WCOE, which has yet to reach a consensus among its own members to go forward with the proposed plan (see App. Opening Br. at 217-23; App. Reply Br. at 89-90). We cannot help but note once again that, despite the legal conclusion of the Licensing Board that Ohio Edison's conduct should be measured by whether the company refused "to engage in transactions which would otherwise be economically beneficial * * *" (compare ALAB-452, slip op. at 324), there is absolutely no evidence of any such refusal by Ohio Edison. Finally, the alleged refusal by Duquesne Light to "coordinate" its operations with Pitcairn involves discussions that in reality do not even embrace the "coordination" concept. Instead, the referenced conduct amounts to nothing more than a 10-year-old pricing dispute that has long since been settled to the mutual satisfaction of all concerned parties (see App. Opening Br. at 269-71; App. Reply Br. at 97-99).

Thus, unlike the conclusion reached in different circumstances in ALAB-452, there is no basis on this record for faulting any of these Applicants as a result of their coordination practices. While it may not be of critical importance to the antitrust inquiry in this case in view of the foregoing responses by each of the Applicants to what have been referred to as "coordination" requests, we would further note in passing our misgivings with the

Consumers Appeal Board's conclusion that "reciprocity" is not a prerequisite to a utility receiving a benefit in a coordinating arrangement (see ALAB-452, slip op. at 328-29 & n.585). Indeed, the single underpinning for that conclusion -- the example of an economy interchange transaction -- points in exactly the opposite direction.[35/] Moreover, even if that example were apposite, it would provide no basis for discounting "reciprocity" as a necessary element for the other coordinating transactions (see App. Opening Br. at 102-05; App. Reply Br. at 69-76).

5. Wheeling. In ALAB-452, the Appeal Board made three essential findings with respect to Consumers' wheeling policy: (a) that Consumers wheels electric power for its neighboring large utilities (slip op. at 299); (b) that Consumers' conduct amounted to a general refusal to wheel power for the small systems (slip op. at 299-14); and (c) that Consumers' post-hearing change of its wheeling policy was still inconsistent with the antitrust laws (slip op. at 314-19). Not one of these findings can properly be made in this proceeding.

35/ The analysis of the economy interchange transaction by the Consumers Appeal Board was limited to an evaluation of the short-term incremental energy costs. No consideration was given to the maintenance costs and increased wear-and-tear associated with operating otherwise idle generation. If energy always flows in one direction, there is no guarantee that these expenses will be recouped under a compensation clause based on a "split-of-the savings". Moreover, when a supplying utility enters into an economy interchange arrangement, it must adequately assure itself of the reliability of the receiving utility's system, notwithstanding the supplying entity's right to "retract service on an instant's notice." This is because in an interconnected network, the supplying utility will not, as a practical matter, be able to "retract" service if the receiving entity cannot itself supply its own needs. Thus, "reciprocity" is an essential element of an economy interchange transaction both in terms of power costs and system reliability.

We previously have explained the difference between Applicants' transmission construction program, pursuant to which electric energy flows to the various load centers of each Applicant's system, on the one hand, and a wheeling arrangement, on the other hand (see App. Opening Br. at 121-24). The opinion in Consumers indicates that none of the parties so much as suggested that there existed in that proceeding such a distinction between Consumers' existing transmission arrangements with other entities and the wheeling arrangements it was requested, but apparently refused, to enter into. Here, by contrast, the difference is a substantive one, which depends upon the contractual relationship between the parties to the transmission arrangement. Even though the physical flow of energy may well be the same, a "wheeling" transaction is clearly distinguishable from other transmission arrangements on the basis of the contractual terms and conditions that define that particular arrangement (cf. slip op. at 136-37).[36/]

The contractual differences in transmission arrangements that have been shown (without contradiction) to exist in this case are particularly relevant to the present antitrust inquiry since the record here discloses no instance where these Applicants (either alone or with others) have ever refused to consider a joint trans-

---

36/ It is thus no more appropriate to attach the "wheeling" label to a transaction which, by its contractual terms, calls for a purchase and simultaneous resale of power over jointly constructed transmission facilities, then it is to attach, for example, a "leasing" label to a transaction that, by its contractual terms, calls for a purchase of a condominium (notwithstanding the fact that from all physical appearances, the transactions are indistinguishable).

mission construction program with any small system.[37] In addition, it has been affirmatively established that no Applicant has a general policy against transmitting electric energy for small systems.[38] Both Toledo Edison and Ohio Edison already transmit power for electric cooperatives pursuant to the Buckeye arrangement (see App. Opening Br. at 202 n.232, 232). In addition, both of these companies (App. Opening Br. at 200-08, 228-34) have offered to transmit electric energy for municipal systems; in each instance the municipal entities have failed to pursue the matter.[39] With respect to CEI, its transmission policy is also a clear matter of record (see App. Opening Br. at 171-76). Furthermore, each Applicant has committed itself to transmit power, when and as necessary, in connection with its offer of access to nuclear power (see A-44;

37/ In this regard, Applicants attach special importance to Cleveland's attempt to avoid its pro rata share of respsonsibility for the CAPCO transmission construction program when it sought to participate in the CAPCO Pool (see D-185, p. 7 of proposal).

38/ Neither Duquesne Light nor Penn Power has ever been requested by a small system in their service area to transmit power. Moreover, at no time throughout this proceeding have the transmission practices of these two utilities been challenged or any suggestion been made that either of them has a general policy against transmitting electric energy for small systems (see n.25, supra).

39/ The record shows that, with respect to the power to be transmitted, both Toledo Edison and Ohio Edison have sought to know the source of the power, the duration of the transaction, the backup arrangements, and other factors necessary for the pricing of the transmission arrangement. While such specificity may have been viewed as unnecessary in ALAB-452 where Consumers was found to have announced a general refusal to wheel power in absolute terms, the insistence on such essential information as a condition to entering into a "wheeling arrangement" provides no legitimate basis for antitrust condemnation here where there has been no such suggestion of a recalcitrant attitude against wheeling under any and all conditions. Indeed, for the proposed transactions to go beyond mere talk, such specificity is absolutely essential

App. Opening Br. at 133-34; App. Reply Br. at 22-23 n.20).[40/]

D. APPLICATION OF THE ALAB-452 RELIEF PRINCIPLES TO THIS PROCEEDING

Although dealt with but briefly, the Consumers Appeal Board's instructions with respect to appropriate relief properly delineate the outer reaches of the Commission's remedial authority (compare ALAB-452, slip op. at 431-32 with App. Opening Br. at 124-37, 294-97 and App. Reply Br. at 13-24). Even assuming arguendo that each and every one of the Licensing Board's findings deserved to be upheld on this appeal -- which we dispute -- application of the Consumers' relief instructions in the instant market setting would require at most the license conditions specified in A-44. Of course, in view of Applicants' stipulation to the attachment of those conditions to the Davis-Besse and Perry permits and licenses in any event, such relief could be ordered by the Appeal Board in this proceeding even without making any adverse findings under Section 105c.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

W. Bradford Reynolds

Wm. Bradford Reynolds
Robert E. Zahler

Counsel for Applicants

Of Counsel:

SQUIRE, SANDERS & DEMPSEY
FULLER, HENRY, HODGE & SNYDER
REED SMITH SHAW & McCLAY
WINTHROP, STIMSON, PUTNAM & ROBERTS

Dated: March 13, 1978

40/ While the present page limitations preclude a detailed review of the remaining areas where these Applicants have been accused of conduct inconsistent with the antitrust laws, we do not find the Appeal Board's decision in ALAB-452, analyzing facts which differ in a number of material respects from the facts of record here, to undermine in any way our earlier discussions of these matters.

APPENDIX A

The following table indicates the almost negligible changes in average number of customers, megawatt-hour sales, and revenue between CEI and Cleveland. For each category, the table shows the change between 1966 and 1975 in CEI's percent of the total retail market (i.e., residential, commercial and industrial) and CEI's percent of just the residential retail market:

	Total	Residential
Average Customers	+2.5%	+1.4%
MWH Sales	+0.7%	-0.4%
Revenue	+0.7%	-0.6%

Source: A-132, pp. 2-3.

APPENDIX B

ACQUISITIONS

Applicant	System	Date	Peak Load (mw)
CEI	None	-	-
Toledo Edison	Waterville [a/]	8-26-68	1.60
	Liberty Center [b/]	7- 3-74	.89
Ohio Edison	Lowelville [c/]	12-28-65	1.13
	Norwalk [d/]	10-31-72	14.40
	Hiram [e/]	1-31-73	1.70
	East Palestine [f/]	4- 7-75	5.20
Penn Power	None	-	-
Duquesne	Aspinwall [g/]	6-29-67	1.60
Totals			26.52
Average			3.79
Median			1.60

a/ S-158, at TE-37

b/ S-158, at TE-14; D-139a.

c/ S-158, at OP/PP-36; A-216; A-217; A-218.

d/ Id.; A-221; A-222; A-223.

e/ Id.; A-219; A-220.

f/ S-158 at OE/PP-15; there is no evidence in the record on the East Palestine acquisition since the charges with respect to East Palestine were dismissed by the Licensing Board prior to the start of the Ohio Edison direct case (see App. Opening Br. at 224).

g/ S-158, at DL-28; see also A-120; A-262; A-263.