UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

3/13/78

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

SUPPLEMENTAL BRIEF OF CITY OF CLEVELAND

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TABLE OF CONTENTS

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SUPPLEMENTAL BRIEF OF
CITY OF CLEVELAND

By order of January 12, 1978, this Appeal Board granted the parties leave to submit supplemental briefs confined to a discussion of the applicability of the Appeal Board decision in Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC ____ (December 30, 1977) to this case. City of Cleveland (City) believes that for the most part, it is clear that the Consumers Power decision compels affirmance of the Licensing Board's decision in these proceedings. However, there are a few points which City wishes to comment upon specifically.

ARGUMENT

I

MARKETS

The discussion of relevant markets in the Consumers

Power decision is fully applicable to this case and validates the market analysis urged by the City and approved by the Licensing Board.

A. Retail Market

The Licensing Board found that the sale of firm power to ultimate consumers at retail constitutes a discrete product market geographically coterminous with the service territory of each Applicant. (5 NRC 162-65)

Applicants argue that there is insufficient opportunity for competition in the retail market to make the market relevant. Moreover, Applicants urge this Appeal Board to find that retail competition in the electric utility business is not in the public interest. (Applicants' Initial Brief in Support of Exceptions pp. 41-65) Similar arguments were made by Applicants during oral argument.

The economic characteristics of the electric utility industry, e.g., capital intensive, investment long lived, plant and equipment are not mobile, product can not be stored, service can only be provided to connected customers and large scale economies, are the same in this case as they are in Consumers Power.

The legal barriers to retail competition in Ohio are less restrictive than those in Michigan. In Ohio a municipal electric system may sell outside the municipal boundaries its surplus energy up to an amount equal to 50% of the kilowatt-hours sold inside the municipal boundaries. (Art. XVIII Sect. 6, Ohio Constitution) In Michigan the law is more restrictive.

Consumers Power (Slip Op. pp. 94-95). The restriction on sales of surplus power outside municipal boundaries in Ohio does not prevent municipal wholesale customers from selling power outside of their service areas. (Hillwig Tr. 2425-27; Lyren Tr. 1879-1882)

In Ohio there are no certified allocations of service territories. The only territorial restraints on retail competition arise from the franchise laws in municipalities and voluntary territorial allocations entered into between large private electric utilities and territorial allocations imposed upon municipal wholesale customers in the contracts for the sale of wholesale power.

Also in Ohio, unlike Michigan, there are no legal restraints upon competition for new customers. Section 4905.261 of the Ohio Revised Code does provide that an existing retail customer of a privately owned utility cannot change suppliers over the objection of its present supplier without a 90 day hiatus between disconnection from its present supplier and commencement of service with its new supplier. Thus, Ohio law does not by itself restrict competition for existing retail customers. Moreover, the so-called 90-day law does not apply to competition between private utilities and municipal systems. It is not unique to find situations in Ohio where a customer can be served by either a privately owned or publicly owned electric system. (DJ 582 p. 38)

Ohio statutes provide that no utility may use the public streets within a municipalty without first obtaining a

franchise from the municipality. (§4933.16 ORC) A franchise granted to an electric utility is non-exclusive and may not be perpetual. (1917 OAG Vol. 1 p. 325) Ohio municipalities may acquire the electric facilities of a franchised supplier by condemnation. (53 P.S. §§314, 46501; Ohio Constitution Art. XVIII, §4) No franchise is required to construct within a municipality an electric line of 22 kv or greater. The Cleveland Electric Illuminating Company v. City of Painsville, 239 NE 2d 75.

Applicants' argument (Brief on Exceptions pp. 89-93) that the retail market has no relevance to the licensing of the Perry and Davis-Besse nuclear units, is similar to the ruling of the Licensing Board in Consumers Power which was rejected by the Appeal Board at pages 111-112 of its decision in Consumers Power. Similarly, Applicants argument that the retail market must be broken into "open" and "closed" markets, should be rejected on authority of Consumers Power (Slip Op. p. 174-184).

The analysis which led to the finding of a relevant retail market in Consumers Power compels approval of the retail market defined by the Licensing Board here.

B. Wholesale Market

Before the Licensing Board, City and the Department of Justice urged that one market relevant for antitrust review in this case is the market for the sale of firm power for resale. NRC Staff urged, as it did in Consumers Power, that there was only one relevant market, which was, in effect, a combination of the wholesale market and the regional power exchange market.

The Licensing Board found in favor of the regional power exchange market and the retail market defined by Dr. Wein and supported by City. However, the Licensing Board adopted the the bulk power services market urged by Staff rather than the wholesale market defined by Dr. Wein. 5 NRC 160-61 Importantly, in footnote 44, the Licensing Board stated (5 NRC 161):

> the Board considers Dr. Wein's proposed market definitions to have been enumerated rationally and in accordance with applicable legal guidelines. Our analysis of the situation inconsistent and our findings would not be different had we adopted without change the definitions suggested by Justice.

City did not take an exception to the Licensing Board's findings with respect to the wholesale market but did observe in its brief in opposition to exceptions by the Applicants that the record would have also supported a wholesale market defined as the market for the bulk sale of firm power for resale. (City's Brief p. 46)

Like NRC Staff, Applicants argue that the wholesale market should be combined with coordinating services. However, Applicants would then divide the combined market into two markets, viz. The market for short-term support services and the market for long-term dependable capacity. (App. Brief on Exceptions p. 95)

The rationale of the Consumers Power decision in placing the sale of bulk firm power for resale in a separate wholesale market is applicable to this case. Also for the reasons given in Consumers Power, the "captive" retail distribution networks should be included in determining Applicants

shares of the wholesale market. Accordingly, Ohio Edison has approximately 99% of the wholesale market in its service area (DJ 587, Dr. Wein, Table 2) Toledo Edison's share of the wholesale market in its service area is approxmiately 98.6%. (DJ 587, Dr. Wein, Table 3) CEI's share of the wholesale market in its service area is approximately 95%. (DJ 587, Dr. Wein, Table 1) Since Pitcairn ceased self-generation, Duquesne Light has maintained a 100% share of the wholesale market in its service area.

The wholesale market involves a separate function in buying bulk power and reducing it to the voltage at which the ultimate consumer makes use of it. (DJ 587, Dr. Wein, Direct p. 98, Dempler Tr. 8854)

C. Regional Power Exchange Market

The Licensing Board found the regional power exchange market defined by Dr. Wein to be a relevant market for antitrust analysis. (5 NRC 160) There are no factual differences between this case and Consumers Power which would permit the finding here of a market different from the regional power exchange market found by the Licensing Board.

As in Consumers Power, the rate for wholesale firm power differs substantially from the rates for coordinating services. For example, Duquesne offered to sell emergency power to Pitcarin in 1967 at a rate of 30 mills. (Gilfillan Tr. 8, 464) However, despite cost escallations since 1967, Duquesne charges for wholesale sales to Pitcarin for the years 1974 and 1975 averaged only 20 mills. (Gilfillan Tr. 8459-60)

Mr. Bingham's testimony clearly establishes that wholesale firm power is priced differently from forms of interchange power. While wholesale firm power is priced on a fully distributed cost basis, Mr. Bingham said that four factors are considered in pricing interchange power. (Tr. 8268) The factors enumerated are "degree of firmness in the transaction," "duration or expected duration of the transaction," "purpose for which the transaction is being carried out" "and whether there is a degree of mutuality for the service being provided."

Firmness effects the assignment of short run costs and possibly whether capital costs will be included. (Tr. 8268) Thus no capital costs would be assigned to emergency power sold as, when, and if available. Duration determines whether capital costs will be assigned to the transaction. (Tr. 8268-69) Thus a limited term sale for one week may be assigned no capital costs. The purpose of the transaction applies to such transactions as economy energy sales which are priced on value of service. (Tr. 8268-69)

II

REFUSALS TO WHEEL

Applicants have attempted to justify refusals to wheel power to or from municipal systems by asserting that the requests to wheel were general, vague, and would convert Applicants into common carriers. Not all wheeling requests were general inquiries. CEI refused several very specific requests for wheeling power to the City of Cleveland. (5 NRC 173-5) Ohio Edison refused specific requests for wheeling

service for Buckeye. (5 NRC 195-197) Toledo Edison refused specific requests by the City of Napoleon for wheeling services. (5 NRC 218) However, at various times, CEI, Ohio Edison and Toledo Edison, all gave negative responses to general wheeling requests. (5 NRC 178, 195, 197, 217)

The Appeal Board in Consumers Power rejected the suggestion that a formal request for a specific wheeling transaction is necessary to establish a refusal to deal. (Slip Op. p. 302-303) It is enough if it can be shown that a monopolist had a general policy against wheeling power for small utilities. This is particularly true in this case where the Licensing Board found the general refusals to wheel were threshold in nature and so negative and final as to discourage the municipal systems from developing more specific proposals. (5 NRC 197)

Moreover in Consumers Power the Appeal Board found that it is no longer open to dispute that a utility's refusal to wheel in order to protect its monopoly is anticompetitive. CEI's refusal to wheel PASNY power to the City was admittedly motivated by an intent to maintain CEI's monopoly. (5 NRC 174) Similarly Ohio Edison's refusals to wheel insulated Ohio Edison from competition from outside sources of power. (5 NRC 198) An important factor in Toledo Edison's refusals to wheel was the effect wheeling would have on municipal systems ability to compete with Toledo Edison. (5 NRC 217-18)

Ohio Edison's contention that it did not refuse to wheel for WCOE but merely had no answer to the wheeling request, is similar to the assertion by Consumers Power that it simply

had no wheeling policy. Such an argument was found by the Appeal Board in Consumers Power to be disingenuous. (Slip Op. p. 321)

III

REJECTION OF THE MUTUALITY OF BENEFITS THEORY

The Licensing Board found that formation of an area wide power pool on fair and nondiscriminatory terms would not necessarily be anticompetitive. However, the Licensing Board did find that the means by which CAPCO was formed and managed did give rise to antitrust consequences. (5 NRC 227 fn. 123)

Applicants argue that exclusion of small municipal electric systems from the CAPCO pool was not anticompetitive because such entities could not participate in the pool on a basis of mutuality. The concept of mutuality apparently means that each party to the pool must be capable of contributing to bulk power reliability and economy, and that all share in pool responsibilities in proportion to the benefits to be derived therefrom. (App. Brief on Exceptions pp. 15-16)

City has pointed out in its brief in opposition to exceptions that Applicants' own witnesses do not support this argument. (Brief p. 66-70) In fact in recent years Ohio Edison has made purchases of economy power from APS but has been unable to sell -- a one way transaction. (DJ 573 pp. 25-26) The argument that pooling requires mutuality was in effect rejected by the Appeal Board in Consumers Power. The mutuality argument requires that the CAPCO members receive more than net benefits from pooling with a small utility. Consumers

Power was unwilling to admit that it would obtain net benefits in any amount by pooling with small utilities. The Appeal Board in Consumers Power found that net benefits would occur and that it was anticompetitive to refuse to coordinate where the large utility would receive net benefits (Slip Op. pp. 351-52) A fortiorari, a refusal to coordinate except where the party seeking coordination could demonstrate mutuality is anti-competitive.

IV

RESERVE SHARING

The Licensing Board found that the Applicants had adopted the P/N reserve sharing formula with full knowledge of its adverse impact upon small systems which might seek to participate in the CAPCO Pool. Applicants deviated from the formula in determining their own reserve obligations but agreed to impose the formula results on any new pool members. (5 NRC 237) The Licensing Board did not condemn the P/N formula but found its manipulation by pool members to be discriminatory and anti-competitive. Accordingly the Licensing Board ordered that new members of CAPCO must have the option of having their reserve obligation determined by either the equal percent reserve method or P/N for the first twelve years that they are pool members. (5 NRC 258)

Application of the P/N formula to small utilities would cause them to carry an abnormally high level of reserves. For example, under P/N WCOE would be required to maintain approximately 280% reserves. (Cheessman, Tr. 12158) The Licensing Board found that the P/N formula would require small utilities

to forgo economies of scale in the sizing of generating units in order to avoid excess reserve requirements. (5 NRC 236)

In its Consumers Power decision the Appeal Board noted that as general principles the terms of an interconnection agreement should be based on a proportionate sharing of the burdens. (Slip Op. 376) There should be no economic penalty for being the last one on the interconnected network. (Slip Op. 376) A reserve formula should not discourage a small system from seeking economies of scale. (Slip Op. 380) The Appeal Board adopted these standards as an appropriate guide for measuring the reasonableness of reserve sharing agreements. (Slip Op. 382) Moreover, the Appeal Board found that a reserve requirement that discourages small utilities from installing larger, more economical generating units definitely has anticompetitive consequences.

On the authority of the Consumers Power decision, the P/N formula of the CAPCO pool is anticompetitive. Ample basis exists for striking the formula in its entirety. However, City did not take exception to the license condition formulated by the Licensing Board which would permit small utilities a twelve year period to transition into the P/N formula. City believes that the Licensing Board's resolution of the reserve sharing issue is more than fair to Applicants and is one that small utilities can live with.

V

DENIALS OF ACCESS TO
NUCLEAR GENERATION

The Licensing Board found that CEI responded to City's

request for access to nuclear generating units being constructed by CAPCO members 2 1/2 years after the request was made. CEI's long delayed response was an offer of access which was "an outrageous affront to the policies underlying the antitrust laws." (5 NRC 175-6) The Licensing Board found that when the City of Painsville requested access to the then recently announced Perry nuclear units, CEI advised Painsville that a simple interconnection agreement would provide Painsville with the same benefits as access to the Perry units. (5 NRC 179)

City of Pitcairn sought access to the Beaver Valley unit in 1968. Duquesne Light responded by stating that Pitcarin could only participate in CAPCO nuclear units by becoming a member of CAPCO. (5 NRC 185). Pitcairn's request to join CAPCO was then denied. (5 NRC 186-7)

In 1971 and 1972 Toledo Edison refused to consider joint ownership with the City of Napoleon of any large scale electric generating facilities. (5 NRC 222-23)

Ohio Edison's offers of bulk power supply arrangements with WCOE denied members of WCOE the benefits of coordinated operation and development and denied them access to nuclear generation. (5 NRC 200)

Permitting these small systems to participate in CAPCO nuclear units would have benefited the Applicants by providing additional sources of capital at a time when Applicants were deferring units because they were unable to raise capital for construction costs. (Mozer Tr. 3609) Moreover granting access to small utilities would have benefited Applicants by permitting

increased economies of scale through increasing the size of the 900 mW Davis-Besse Unit 1 to 1100 mW. (Mozer Tr. 3608)

In Consumers Power, the Appeal Board rejected arguments that participation requests were untimely when made four years after the units were planned and sized. In this case there is a history of refusals of participation dating back to 1968, five years before the Perry units were announced. Nevertheless, Applicants did not plan the Perry units to accommodate earlier requests for participation. In Consumers Power (Slip Op. 399), the Appeal Board found that participation in the Midland units by small utilities would benefit the Applicant. In this case, the record demonstrates that Applicants would have benefited from participation in the CAPCO units by municipal electric systems.

In Consumers Power, the Appeal Board found that a denial of access to nuclear generation coupled with refusals to share reserves completed the circle of foreclosing small systems from economical generation. (Slip Op. 400-01) In this case there have been refusals to wheel, refusals to share reserves on an equitable basis, refusals to interconnect, refusals to sell wholesale power, and territorial agreements among others all coupled with denials of access to nuclear generation. Even more than in Consumers Power, the denials of access to nuclear generation in this case are anticompetitive.

VI

NEXUS

Applicants argue strenuously that the Licensing Board

applied an incorrect nexus standard. The Licensing Board found that the market structure created by Applicants within the CCCT combined with their refusals to deal created a direct nexus between the situation inconsistent with the antitrust laws. (5 NRC 241) Additionally the Licensing Board found particularized nexus in Applicants attempt to place restraints on the use of the output of the licensed facilities. (5 NRC 241-3)

Applicants argue that no nexus exists between the licensed facilities and any inconsistencies with the antitrust laws because all benefits of the license facilities are made available through wholesale sales of power. (App. Brief on Exceptions pp. 127-128) the same argument was well disposed of in the Consumers Power decision (Slip Op. 426-27) As the Licensing Board noted (5 NRC 249):

> the position that these competitors should now be left in the hands of Applicants to obtain their bulk power supply is akin to delivering these entities into the hands of their adversaries.

Applicants argue that their offer of access made after commencement of these proceedings removes any nexus. (App. Brief 129) There is no showing that Applicants offer of access was ever communicated to any small system. City learned of it only by virtue of its participation in these proceedings. Moreover, the reserve sharing arrangements required by Applicants offer of access do not meet the standard enunciated in Consumers Power.

The Appeal Board in Consumers Power took particular note of the present difficulties in obtaining fossil fuel sup-

plies. (Slip Op. 424-25) These problems exist and have had an adverse impact upon small electric systems in the CCCT. For example, Newton Falls began seeking an interconnection with Ohio Edison in mid-1973 when it became apparent that supplies of natural gas and oil to fuel its own generators could no longer be assured. (Craig, Tr. 2845-47) The City of Bryan lost its natural gas allocation. (DJ 157) Even CEI experienced difficulty in obtaining sufficient quality coal supplies. (App. Ex. 200) Toledo Edison advised the Ohio Power Siting Commission that because of problems in obtaining oil, gas, and coal, Toledo Edison must rely upon nuclear generation. (DJ 511 pp. 43, 90-91) Moreover environmental legislation has made use of fossil fuels for generation more costly and in some instances impossible. (Pandy, Tr. 3119) An FPC Staff report published in June 1977 stated:[1/]

> the oil embargo, increasingly short supplies of gas and oil, the coal miners' strike in 1974, inflation and rapidly escalating mine development costs, and ever more stringent air pollution standards have all contributed to instability of coal supplies and higher coal prices, which are expected to go even higher. From 1970 to 1975 the FOB utility average coal prices increased 160 percent from 31.5 cents per million Btu to 81.4 cents per million Btu. (footnotes omitted)

The Licensing Board's findings of nexus comports fully with the decision in Consumers Power.

1/ "Electric Utility Captive Coal Operations," Staff Report by the Bureau of Power Federal Power Commission June 1977, pp. 4-5.

VII

REMEDIES

Although the Appeal Board in its Consumers Power decision did not directly concern itself with the remedy to be applied to a situation found to be inconsistent with the antitrust laws, it did offer general guidance. The Appeal Board stated that no remedy was precluded so long as it was fashioned "to insure the smaller utilities a fair access to nuclear power under conditions which permit them a reasonable opportunity to make effective use of its potential and to see to it that [Applicants] activities undertaken pursuant to . . . [t]he licenses neither create nor maintain an anticompetitive situation. (Slip Op. 431-2)

In this case the Licensing Board focused upon relief which would provide "access to power from the nuclear units in a manner in which it allows it to be used without restraint and with the availability of necessary bulk power service alternatives." (5 NRC 256) The standard applied by the Licensing Board is consistent with Consumers Power.

But for the failure to require Applicants to make sales of firm all requirements power at wholesale and the failure to require admission to CAPCO of small utilities with full voting rights and the failure to make the license conditions applicable to the operating license for Beaver Valley Unit No. 1, City believes the license conditions in this case meet the Consumers Power standard. The Licensing Board imposed no condition which would "restructure" the industry. The Licensing Board left in-

tact the existing power pool and did not abolish the P/N formula. All of the conditions were carefully designed to cause the least possible disruption of the industry structure.

CONCLUSION

The Appeal Board's decision in Consumers Power puts to rest many of the recurring disputes which have been common to NRC antitrust review proceedings. The rationale of Consumers Power requires affirmance of the Licensing Boards decision in this case on each point with respect to finding of a situation inconsistent with the antitrust laws except the definition of the bulk power services market. However, rejection of the bulk power services market found by the Licensing Board and substitution therefore of separate wholesale firm power and regional power exchange markets, would require no changes in the Licensing Board's remaining findings. In effect, the Licensing Board itself made alternative market findings including the wholesale firm power market and the regional power exchange market. Under either market analysis, the Licensing Board said that its findings would be the same. (5 NRC 161)

Accordingly, upon the authority of Consumers Power, the Licensing Boards findings in this case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing "Supplemental Brief of City of Cleveland" upon all the parties listed on the attachment hereto, this 13th day of March, 1978, by depositing copies thereof in the United States mail, first class postage prepaid.

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