11/15/78

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
The Toledo Edison Company	) 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)	)	

REPLY OF THE CITY OF CLEVELAND

TO APPLICANTS' COMMENTS ON

OHIO HOUSE BILL NO. 577

By letter of October 13, 1978, Applicants requested the Appeal Board to take judicial notice of Ohio House Bill No. 577. By its order of October 20, 1978, the Appeal Board requested Applicants to advise it by November 3, 1978: (1) whether the bill had been enacted into law; and (2) what relevance the enactment has to the issues before the Appeal Board in this appeal. Other parties were given until November 20, 1978,

to comment upon Applicants' November 3 filing. City of Cleveland (City) submits the following comments.

First, the statute makes no change in the existing competitive relationships between municipalities and investor-owned or consumer-owned electric utilities. This is clear from a reading of the statute, and City does not understand Applicants to contend otherwise (Applicants' comments p. 5). Rather Applicants rehash their arguments relating to limitations on the ability of wholesale or partial requirements municipal customers, to sell "surplus" energy outside of the municipal boundaries. Their arguments were rejected by the Licensing Board and have been fully briefed and argued on Appeal. City will not repeat its arguments; suffice it to say City does not agree with Applicants.

Second, the statute has no application to sales for resale or sales in the regional power exchange market (House Bill No. 577, Section 4933.81(F)).

Third, the only effect of the statute is to reverse the long standing Ohio policy of no certificated retail market areas for investor-owned and consumer-owned electric utilities. Such utilities will, after July 1, 1979, have state certified retail sale areas. Applicants argue that the statute formalizes the policy behind the "90-day disconnect provision" which had established defacto exclusive service areas (Applicants' comments p. 6). In fact, the new legislation differs in many respects. The "90-day disconnect provision" did not prevent an existing

customer from changing electric suppliers unless the existing supplier objected. Moreover, the "90-day disconnect provision" did not preclude competition for new retail customers, although it did stiffle franchise competition which is specifically preserved by House Bill No. 577.

With this understanding of House Bill No. 577, City will turn to Applicants' discussion of the relevance of the statute to these proceedings.

Territorial Agreements

Applicants first assign relevance to the Licensing Board's findings that Applicants entered into territorial agreements dividing among themselves various retail markets, (Applicants' comments p. 7). Here again, it is well to keep in mind that the statute has no relevance to territorial limitations imposed by contract upon Applicants' municipal wholesale customers. Nor does the statute have any relevance to the territorial agreements between Applicants insofaras they apply to wholesale sales (IDFF 113). The only relevance then is to territorial agreements dividing retail markets between investor-owned or consumer-owned utilities.

The statute does not purport to ratify or make legal pre-existing retail market divisions. Nor does the statute authorize or require that any utility extract an agreement establishing service territories as a condition of the sale, or exchange of electric energy, or the grant, or sale of

bulk power services. Accordingly, there is no conflict between the statute and License condition 1. a.

Importantly, the statute specifically preserves the opportunity for franchise competition in the retail market. The final sentence of Section 4933.83(A) states:

> In the event that a municipal corporation refuses to grant a franchise or contract for electric service within its boundaries to an electric supplier whose certified territory is included within the municipality, any other electric supplier may serve the municipal corporation under a franchise or contract with the municipal corporation.

It can not be argued that the policy of the State of Ohio is that there should be no retail competition of a franchise nature in light of enactment of House Bill No. 577. Quite the contrary is true. The Supreme Court held that franchise competition was protected by the antitrust laws in Otter Tail Power v. United States, 410 v. 366, as did the Appeal Board in its decision in Consumers Power Company (Midland Plant Units 1 and 2) ALAB-452 (Slip Op. p. 180-183).

The territorial agreements, which Applicants argue, are somehow validated by House Bill No. 577 precluded the very franchise competition which the State of Ohio seeks to have continue.

The Licensing Board found "insufficient evidence that the territorial allocation agreements have been terminated" and that "the effects of such agreements continue" (IDFF 114). House Bill No. 577 does nothing to remove those effects on franchise competition.

The Buckeye Agreement

Applicants argue that repeal of the 90-day disconnect statute, by House Bill No. 577, removes any restriction on sales of wholesale power under the Buckeye Agreement and thus eliminates antitrust concern. Applicants' thesis is that the Buckeye Agreement merely incorporated by reference Section 4905.26.1 Revised Code of Ohio, and repeal of the Section renders the incorporation by reference meaningless, (Applicants' Comments p. 8-9).

In fact, the actual language of the Buckeye Agreement does more than merely incorporate by reference Section 4905.26.1. The agreement states (NRC 188 p. 3):

> ...there shall not be included in the Buckeye Power Requirement any quantity of electric power and/or energy furnished to any consumer when the furnishing of power and/or energy to such consumer by a Buckeye Member is proscribed by the law of the State of Ohio reflected in Section 4905.26.1, Revised Code of Ohio, as said Section is in effect at the date of this agreement.

> It is understood and agreed that the term "consumer", as used in said Section 4905.26.1, applies to any customer of a power and/or energy supplier whether served at wholesale or at retail. (emphasis supplied)

Under the express terms of the Buckeye Agreement, repeal of Section 4905.26.1 does not eliminate the restriction in the Agreement. Moreover, it is clear that the parties to the Agreement did more than merely incorporate Section 4905.26.1; they expanded its scope to apply to wholesale customers. The Buckeye Agreement remains anticompetitive in that it restricts wholesale competition, and it restricts retail competition of a franchise nature, contrary to the antitrust laws, and the policy of the State of Ohio.

House Bill No. 577 Supports The Licensing Board's Retail Market Analysis

Applicants renew their argument that the Appeal Board must respond to the policy issues raised by the limited nature of competition in the electric utility industry in Ohio and Pennsylvania (Applicants' comments p. 10-13). House Bill No. 577 has absolutely no impact on the situation in Pennsylvania. Within Ohio, House Bill No. 577 does not impact upon the types of retail competition of most concern to the Licensing Board, i.e., franchise competition and competition between municipal electric

systems and Applicants. Even within the limited area of direct retail competition among investor-owned and consumer-owned utilities, the actual impact of House Bill No. 577 may be slight. The Licensing Board observed (IDFF 114, 5 NRC p. 194-195):

> It requires no analysis, it is axiomatic, that, with this factor in the industry, territorial and customer allocation agreements cause rigidity in the market. The longer they are in force, the less they are needed. As Ohio Edison expanded its transmission and distribution lines under unlawful protection from competition, it irreversibly carved out for itself strong competitive advantages tending to exclude entry into its market by outsiders.

There is nothing in House Bill No. 577 which requires a reaccessment of the manner in which the Licensing Board applied the antitrust laws to the electric utility industry in Ohio.

Conclusion

City does not object to the consideration of House Bill No. 577 by the Appeal Board. Enactment of the bill by the Ohio legislature clearly demonstrates that the Licensing Board was correct in its findings with regard to the retail market.

The State of Ohio has expressed its policy that franchise competition should remain free and unfettered. It is entirely appropriate that the antitrust laws be applied to strike down private agreements which would restrain franchise competition.

Respectfully submitted

David C. Hjelmfelt
Suite 830
300 West Oak
Fort Collins, Colorado 80521

Jack M. Schulman, Esq.
Director of Law
Robert D. Hart, Esq.
First Assistant Director of Law
Department of Law
City of Cleveland
Room 106, City Hall
Cleveland, Ohio 44114

Reuben Goldberg, Esq.
Goldberg, Fieldman & Letham, P.C.
Suite 650
1700 Pennsylvania Ave. N.W.
Washington, D.C. 20006

Counsel For The City Of Cleveland

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Reply of the City of Cleveland to Applicants' Comments on Ohio House Bill No. 577" were served upon each of the persons listed on the attached Service List by mailing copies, postage prepaid, all on this 15th day of November, 1978.

By: David C. Hjelmfelt

David C. Hjelmfelt
Counsel for
City of Cleveland, Ohio

SERVICE LIST

Alan S. Rosenthal, Esquire
Chairman, Atomic Safety and
Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jerome E. Sharfman, Esquire
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman, Esquire
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Donald L. Flexner, Esquire
Melvin G. Berger, Esquire
Janet R. Urban, Esquire
Antitrust Division
U.S. Department of Justice
P.O. Box 481
Washington, D.C. 20044

Wm. Bradford Reynolds
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Jack M. Schulman, Esquire
Director of Law
Robert D. Hart, Esquire
First Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

Frank R. Clokey, Esquire
Special Assistant Attorney General
Room 219
Towne House Apartments
Harrisburg, Pennsylvania 17105

Ivan W. Smith, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John M. Frysiak, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20006

Joseph Rutberg, Esquire
Benjamin H. Vogler, Esquire
Roy P. Lessy, Jr., Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Terence H. Benbow, Esquire
Steven A. Berger, Esquire
Steven B. Peri, Esquire
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Walter T. Wardzinski, Esquire
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

David McNeil Olds, Esquire
Reed Smith Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, Pennsylvania 15230

Joseph A. Rieser, Jr., Esquire
Reed Smith Shaw & McClay
Suite 900
1150 Connecticut Avenue
Washington, D.C. 20036

Donald H. Hauser, Esquire
Victor F. Greenslade, Jr., Esquire
William J. Kerner, Esquire
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Michael M. Briley, Esquire
Paul M. Smart, Esquire
Fuller, Henry, Hodge & Snyder
P.O. Box 2088
Toledo, Ohio 43603

Russell J. Spetrino, Esquire
Thomas A. Kayuha, Esquire
Ohio Edison Company
76 South Main Street
Akron, Ohio 44308

Christopher R. Schraff, Esquire
Assistant Attorney General
Environmental Law Section
361 East Broad Street, 8th Floor
Columbus, Ohio 43215

James R. Edgerly, Esquire
Secretary and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, Pennsylvania 16103

John Lansdale, Esquire
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Alan P. Buchmann, Esquire
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

Edward A. Matto, Esquire
Richard M. Firestone, Esquire
Karen H. Adkins, Esquire
Antitrust Section
30 East Broad Street, 15th Floor