UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

RESPONSE OF THE DEPARTMENT OF JUSTICE
TO APPLICANTS' RENEWED MOTION FOR AN ORDER STAYING,
PENDENTE LITE, THE ATTACHMENT OF ANTITRUST CONDITIONS

On January 6, 1977, the Atomic Safety and Licensing Board (Licensing Board) issued an Initial Decision (Antitrust) in the above-captioned proceeding. On January 14, 1977, Applicants filed a Motion for an Order Staying, Pendente Lite, the Attachment of Antitrust Conditions with the Atomic Safety and Licensing Appeal Board (Appeal Board). By Memorandum and Order dated January 17, 1977, the Appeal Board referred Applicants' Motion to the Licensing Board. By Order dated February 3, 1977, the Licensing Board denied Applicants' Motion. Applicants' Renewed Motion for an Order Staying,

Pendente Lite, the Attachment of Antitrust Conditions (Renewed Motion) was filed with the Appeal Board on February 14, 1977. By Order dated February 15, 1977, the Appeal Board ordered that all responses to Applicants' Renewed Motion be filed no later than the close of business on March 2, 1977. The Department of Justice hereby files its Response to Applicants' Renewed Motion for an Order Staying, Pendente Lite, the Attachment of Antitrust Conditions.

Because the Licensing Board's well-reasoned decision of February 3, 1977, has effectively shown that there is no validity to Applicants' arguments in favor of a stay, we do not believe that a point-by-point rebuttal of Applicants' Renewed Motion is necessary. Nevertheless, since Applicants have introduced new arguments and enlarged upon some of their prior arguments, we believe that we must respond to Applicants' Renewed Motion.

I. Granting Of A Stay Will Not Preserve The Status Quo

While Applicants continue to assert that they only wish to preserve the status quo, it is clear that permitting issuance of the operating license and construction permits without the antitrust conditions prescribed by the Licensing Board as a predicate to the very issuance of that license and those permits will have a substantial effect on the status quo. Status quo has been defined as the last uncontested status which preceded the pending controversy. Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (9th Cir. 1963), cert. den. 375 U.S. 821; Westinghouse Electric Corp. v. Free Serving Machine Co., 256 F.2d 806, 808 (7th Cir. 1958); Flood v. Kuhn,

309 F. Supp. 793, 798 (S.D.N.Y. 1970), aff'd 443 F.2d 264 (2d Cir. 1971); aff'd 407 U.S. 258 (1972), and cases cited therein. 1/ As such, the status quo is a situation where Applicants do not have an operating license for Davis-Besse Unit 1 or construction permits for the other units which are the subject of this proceeding and are not required to adhere to the conditions which have been found by the Licensing Board to be an essential part of the above-described operating license and construction permits. The situation Applicants urge, where they would proceed blithely to acquire the benefits of the operating license and construction permits -- but not the obligations of the Licensing Board's conditions -- is certainly not the status quo. 2/

Applicants themselves have stated that power from Davis-Besse Unit 1 should begin to flow in July. This is almost certainly prior to the time that the Appeal Board will issue its decision on Applicants' appeal on the merits. The low-cost power from this unit will immediately commence to benefit Applicants and, unless the conditions ordered by the Licensing Board are attached, will allow them to

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1/ These cases all concerned applications for preliminary injunction, where substantially the same tests are applied as in requests for a stay.

2/ In fact, Applicants can preserve the status quo without any action whatever on the Appeal Board's part. If the license conditions involve costs which in Applicants' view exceed the benefits to be gained from interim operation of Davis-Besse Unit 1, Applicants may simply decline to commence operations until the appeal is resolved. It is inconceivable, of course, that Applicants will ultimately forego operation and construction of plants which represent a substantial investment in order to maintain a dogged refusal to conform to antitrust standards.

enhance their competitive position at the expense of the non-Applicant systems which are already suffering the effects of Applicants' anti-competitive behavior.

II. Applicants Have Not Made A Strong Showing Of Likelihood Of Success On Appeal

As stated by the Licensing Board:

> It is the Applicants' burden to make a strong showing that it is likely to prevail on the merits of its appeal. Mere establishment of possible grounds for appeal does not meet this standard. Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 338, 366 (W.D. Mo. 1972), aff'd 477 F.2d 1033 (8th Cir. 1973). Memorandum and Order on Applicants' Motion for an Order Staying, Pendente Lite, the Attachment of Antitrust Conditions at p. 4.

While Applicants deny that this is the standard by which their arguments concerning reversal on appeal should be judged, they have introduced no cases supporting any other standard.

On appeal, Applicants have shifted the focus of their arguments concerning reversal to the assertion that the Licensing Board should have made findings as to whether competition in the electric utility industry is in the public interest. However, all of the cases on which Applicants' rely for this assertion arose under statutes in which Congress had mandated economic regulation of an industry by the regulatory agency concerned and had required that agency to make its economic regulatory decisions guided by a "public interest" or "public convenience and necessity" test. For example, Applicants quote extensively from Federal Communications Commission v. RCA Communications Inc., 346 U.S. 86 (1953) (Renewed Motion, pp. 6-7).

That decision reviewed an order of the FCC which had authorized new entry into the business of international radiotelegraph service -- entry which the FCC had a duty to regulate under the Federal Communications Act of 1934. The Court held that the national policy favoring competition would not, without more, permit the FCC to abdicate its duty to pass upon applications to provide new service. In considering applications, the FCC was to employ the "public interest" standard. 346 U.S. at pp. 92-93. 3/

The Nuclear Regulatory Commission's role under Section 105c(5) is far different. The Commission is instructed that:

> it shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . [emphasis supplied].

The Commission has no responsibility to administer an economic regulatory scheme in the electric power industry. It is not authorized

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3/ Each of the other cases cited by Applicants likewise concern decision-making by an agency with a legislative mandate to apply a scheme of economic regulation to an industry: Hawaii Telephone Co. v. Federal Communications Commission, 498 F.2d 771 (D.C. Cir. 1974) (Decided under the Communications Act of 1934, 47 U.S.C. §214(a)); California v. Federal Power Commission, 296 F.2d 348 (D.C. Cir. 1961) rev'd on other grounds, 369 U.S. 482 (1962) (Decided under Section 7(c) of the Natural Gas Act, 14 U.S.C. §717); Pennsylvania Water & Power Co. v. Federal Power Commission, 193 F.2d 230 (D.C. Cir. 1951) aff'd 343 U.S. 414 (1952)(Decided under the Federal Power Act, 16 U.S.C. §791(a) et. seq.); S.S.W., Inc. v. Air Transport Ass'n of America, 191 F.2d 656 (D.C. Cir. 1951) cert. den. 343 U.S. 955 (1952) (Decided under the Civil Aeronautics Act, 49 U.S.C. §401 et. seq.); Northern Natural Gas Co. v. Federal Power Commission, 399 F.2d 953 (D.C. Cir. 1968) (Decided under Section 7 of the Natural Gas Act, 15 U.S.C. §717f(c)); Latin America/Pacific Coast S.S. Conference v. Federal Maritime Commission, 465 F.2d 542 (D.C. Cir. 1972) (Decided under Section 15 of the Shipping Act, 46 U.S.C. §814).

to act as doorkeeper to the electric power industry, controlling who shall be permitted to participate in electric power markets. It has no power to regulate rates. It has no authority to pass upon mergers. In short, it is not the NRC's function to act as economic regulator for the electric power industry. Only in such role would it be relevant for the Commission to address the question raised by Applicants. Quite properly, therefore, the Licensing Board eschewed playing the role of economic regulator.

The "public interest" comes into play under the Atomic Energy Act only after the Commission has made an affirmative antitrust finding under Section 105c(5). Section 105c(6) reads:

> In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate [Emphasis supplied].

In commenting on this provision, the Joint Committee on Atomic Energy said:

> While the Commission has the flexibility to consider and weigh the various interests and objectives which may be involved, the committee does not expect that an affirmative finding under paragraph (5) would normally need to be overriden by Commission findings and actions under paragraph (6). The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same

> time, accommodating the other public interest concerns found pursuant to paragraph (6). Normally, the committee expects the Commission's actions under paragraph (5) and (6) will harmonize both antitrust and such other public interest consideration as may be involved.

S. Rep. No. 91-1247, 91st Cong., 2d Sess., p. 31 (1970). It is clear that the Joint Committee on Atomic Energy expected that a finding that a situation inconsistent with the antitrust laws would be created or maintained by the licensed activities would not be overridden by the Commission under Section 105c(6); rather, the Committee contemplated that license conditions would eliminate that situation while at the same time permitting construction and operation of the nuclear facility if the Commission, in its role as the licensor of nuclear facilities, found such construction and operation to be in the public interest. The legislative history nowhere suggests that Section 105c(6) intends the Commission to reconsider, after making an affirmative Section 105c(5) finding, whether and to what extent the antitrust laws and antitrust policy really should apply to the electric power industry and then to temper its antitrust relief according to some notion of the economic policy it believes should apply to that industry.

Although Applicants now charge that the Licensing Board failed to consider the public interest with respect to its Section 105c(6), findings Applicants have never addressed themselves to the specific

public interest factors which should, in their opinion, be considered. 4/ The Licensing Board asked the parties to address the issue of relief under Section 105c(6) in their post-hearing filings. In their 900 pages of post-hearing filings, Applicants addressed this question only as follows:

> Quite obviously the public interest is best served by this Board's tailoring its license conditions to fit the particular inconsistency that it finds is in need of a cure. And this, of course, is the paramount consideration with respect to any remedy devised (See Section 105c(6)). It is especially important in the present context, since, in view of the fundamental nature of the electric utility industry (See Part IV, supra), any more sweeping approach to the remedy question could well defeat the very "public interest" objective trying to be achieved.

Applicants' Joint Brief in Support of Their Proposed Findings of Fact and Conclusions of Law, at p. 696.

Even after Applicants had seen the relief requested by the parties opposed to an unconditioned license, Applicants failed to address the issue of whether such relief might impair the public interest. See Applicants' Joint Reply Brief, ¶26 at pp. 44-45. We find it difficult to understand Applicants' sudden concern with respect to this issue which they have consistently ignored in the past.

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4/ Desite their present protest (Renewed Motion at p. 12), Applicants understood and agreed to a proposal that this proceeding encompass both the issue of creation or maintenance of a situation inconsistent with the antitrust laws and the issue of the relief to be granted if the former finding is affirmative. Tr. 1076-79.

Since Applicants have not made known any substantial reasons why the license conditions would not comport with the public interest, we are unable to comment on their reasons. We can comment, however, on the public interest consideration set out specifically in Section 105c(6): The need for power in the area. We find it anomalous that these very Applicants, who now express concern that under the license conditions power may be removed from the CCCT, have in the past acted to prevent power from coming into the CCCT when that power would supply its competitors. The Licensing Board found the following:

> The Cleveland Electric Illuminating Company (CEI) attempted to forestall the City of Cleveland (MELP) from building new generation (Slip Opinion, ff. 39, p. 62);
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> CEI refused to wheel power from New York State (PASNY power) to MELP (Slip Opinion, ff. 58, p. 77);
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> CEI maintained a wheeling policy which prevented MELP from obtaining power from Buckeye Power, Inc., Orrville, Ohio, and Richmond, Indiana (Slip Opinion, ff. 59, p. 78);
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> Ohio Edison Company (OE) and Toledo Edison Company (TE) entered into territorial agreements with Ohio Power Company (OP) which prevented the introduction of OP power into the area (Slip Opinion, ff. 106-07, pp. 115-16; ff. 164(b), p. 167);
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> OE engaged in activities which made it impossible for Norwalk to retain its generation and distribution system, thereby removing a source of power from the area (Slip Opinion, ff. 102, pp. 110-113);
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> OE attempted to enter into a territorial agreement with Columbus & Southern Ohio Edison Company (Slip Opinion, ff. 109, p. 116);
>
> OE refused to wheel power to the Wholesale Customers of Ohio Edison (WCOE) (Slip Opinion, ff. 116, p. 124; ff. 124, pp. 128-129);

TE refused to wheel for Bowling Green at a time when Bowling Green had an expression of interest from OP to supply it with wholesale power (Slip Opinion, ff. 171, p. 174).

TE refused to wheel Buckeye power for Napoleon (Slip Opinion ff. 172, p. 175).

These activities of Applicants belie their belatedly expressed fears that the power needs in the CCCT area may not be met. Further, Applicants' concern is belied by their decision to delay the construction schedules of Davis-Besse Units 2 and 3 for two years and of Erie Units 1 and 2 for two years, as well as to delay completion of Manfield Unit 3 for one year. Applicants' reasons for delaying these units include "revised forecasts of customer's electrical requirements." S-7 Registration Statement, Preliminary Prospectus dated January 28, 1977, at p. 3 (attached as an exhibit to this pleading). 5/ The relief prescribed by the Licensing Board is in fact entirely consistent with meeting CCCT area power needs; it will allow non-Applicant systems in the CCCT to obtain power from elsewhere, as well as from efficient, economical nuclear generation in the area.

Similarly, Applicants' assertion that they are likely to prevail on the merits of their appeal, because the Licensing Board erred by relying upon the per se doctrine, is totally without merit.

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5/ Other reasons attributed for schedule delays were rapidly increasing construction costs and the difficulty of raising funds in today's money market. If we were to join Applicants in speculation, we might speculate that municipal participation in nuclear units might ease Applicants' financing difficulties.

Applicants have not cited any new law nor made any new arguments to support their contention. Indeed, Applicants are relying on the same cases and the same discussion which was presented to the Licensing Board (Applicants' Joint Brief in Support of Their Proposed Findings of Fact and Conclusions of Law, pp. 59-66) and rejected.

Furthermore, the Licensing Board found that only three types of conduct constituted per se violations of Section 1 of the Sherman Act: group boycotts or concerted refusals to deal, price fixing, and territorial and customer allocations (Slip Opinion, pp. 20-21). Applicants do not contend that group boycotts or concerted refusals to deal are not per se offenses (See Applicants' Renewed Motion, p. 14). Thus, at best, Applicants are urging that their likelihood of success on appeal on this subject rests on "possible" Licensing Board error in categorizing price fixing and territorial and customer allocations as per se antitrust violations. This hardly portends Applicants' ultimate success on appeal.

Even a cursory review of the authorities Applicants cite do not support Applicants' contention concerning the per se doctrine. It is indeed amazing that in this day and age Applicants are contending that price-fixing is not a per se violation of the antitrust laws. Applicants have conveniently ignored the plethora of cases which rebutt their contention. See, for example, United States v. Trenton Potteries Co., 273 U.S. 392, 397-98

(1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n. 59 (1940); United States v. Masonite Corp., 316 U.S. 265, 276 (1942); Northern Pacific Ry. v. United States, 356 U.S. 1 (1958); Citizens Publishing Co. v. United States, 394 U.S. 131, 136 (1969).

In addition, the Section of Antitrust Law of the American Bar Association in Antitrust Law Developments at p. 2 has stated:

> Agreements to fix prices, both "horizontal" and "vertical," have long been condemned under Section 1 of the Sherman Act. Horizontal agreements among competitors to fix prices have uniformly been considered by the courts to be per se unreasonable restraints. They present an "actual or potential threat to the central nervous system of the economy." Vertical agreements between a seller and his customers which fix the customers' resale prices stifle price competition among the customers and have also long been held to be per se violations of Section 1 [Emphasis supplied].

Applicants' reliance on United States v. Citizens & Southern National Bank, 422 U.S. 86 (1975), is similarly misplaced. The Court never questioned the applicability of the per se test to price fixing but merely concluded that a conspiracy to fix prices had not been proven. The Court's review of the banking practices involved went to the question of whether or not an agreement or conspiracy to fix prices existed and not to whether a price-fixing agreement would be reasonable under the circumstances.

Applicants' argument with respect to the inapplicability of the per se rule to territorial allocation agreements is also rebutted by United States v. Citizens & Southern National Bank, supra, where the Court stated at 118:

Market division is a per se offense under the Sherman Act:

> "This Court has reiterated time and again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition'". United States v. Topco Associates, Inc., 405 U.S. 596, 608, quoting White Motor Co. v. United States, 372 U.S. 253, 263.

Furthermore, the per se rule with respect to territorial agreements has been held to apply in the electric utility industry. Otter Tail Power Co. v. United States, 410 U.S. 366, 378 (1973). Applicants have cited no case to the contrary.

However, even if we assume arguendo that Applicants are correct in their assertion that the Licensing Board erred in relying on the per se doctrine, they still fall short of demonstrating likelihood of success on the merits of their appeal, since they have not cited any evidence in the record which would indicate that the group boycotts, price-fixing and territorial agreements in which they engaged would be held to be reasonable conduct under the rule of reason test. 6/ Moreover, there can be little question that such conduct would be inconsistent with the policies underlying the antitrust laws, and thus require an affirmative finding under Section 105c(5).

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6/ As the Court said in Otter Tail Power Co. v. United States, supra, quoting with approval United States v. Arnold, Schwinn & Co., 388 U.S. 365: "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct", 410 U.S. at p. 380.

III. Applicants Have Not Met Their Burden Of Showing That They Will Suffer Irreparable Injury If A Stay Is Not Granted

Applicants have made no arguments that they will suffer irreparable injury which have not already been discussed and found unjustified by the Licensing Board. 7/ Nor have they presented any evidence or made any factual statements which support their assertion.

Applicants also express concern that the license conditions will result in the irreparable injury of removal of needed power from the CCCT. We pointed out above the questionable validity of this contention in light of Applicants' past actions, condemned by the Licensing Board, to prevent additional power from coming into the CCCT and their decision to delay the construction of

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7/ Applicants' assertion that the Court in Stop H-3 Association v. Volpe, 353 F. Supp. 14 (D. Hawaii 1972), reached the conclusion that monetary loss was an inadequate indication of irreparable injury because of the posting of a bond, is a misreading of that case. While a bond was posted, the Court said, in full:

> Traditionally, the irreparable injury contemplated by Rule 62(c) is that which will make the appeal moot. United States v. El-O-Pathic Pharmacy, supra; Eastern Greyhound Lines v. Fusco, 310 F.2d 632 (6th Cir. 1962), citing Hitchman Coal and Coke Co. v. Mitchell, 345 U.S. 229, 38 S. Ct. 65, 62 L.Ed. 260 (1917).
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> Thus, prospective monetary damage is not irreparable injury. That injury, if wrongfully inflicted, is indemnified by bond under Rule 65(a), and in any event, even if the injury is suffered, the viability of the appeal is not affected [emphasis added] 353 F. Supp. at p. 18.

Davis-Besse Units 2 and 3 and Erie Units 1 and 2 and the completion of Mansfield Unit 3. 8/

We must admit that if Applicants were to observe the license conditions, the business practices to which they have become accustomed would be disrupted somewhat. Since Applicants have made it their practice to engage in anticompetitive activities, as the Licensing Board found, it is only to be expected that relief which requires that they now cease those activities will disrupt their methods of doing business. As the Court said in Otter Tail Power Company v. United States, supra, quoting with approval, Federal Trade Commission v. National Lead, 352 U.S. 419, 431 (1957): "those caught violating the Act must expect some fencing in." 410 U.S. at 381.

Finally, in this regard we wish to note that the Department is not counselling nor does it counsel municipal systems with respect to the length of time it would take a non-Applicant system to make use of license conditions. We have merely pointed out that because of the planning time involved, physical implementation of a license condition would likely not occur before a final decision is reached in this proceeding.

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8/ The Licensing Board has fully answered Applicants' concerns that large amounts of power will leave the CCCT and that Applicants' system planning will be disrupted by this possibility. Memorandum and Order, pp. 20-24. Even assuming arguendo that such a situation could occur, it is so speculative and so far in the future that it cannot be considered as "irreparable injury" for the purposes of a stay. If, at some time in the future, Applicants were faced with a shortage of power due solely to implementation of the license conditions, they could then ask for modification of the license conditions.

IV. Applicants Have Not Met Their Burden Of Showing That Other Interested Parties Will Not Be Substantially Harmed If A Stay Is Granted

Before discussing the question of substantial harm to others, we would reiterate that Applicants are not requesting that the status quo be maintained but rather that it be altered substantially: Applicants wish to obtain their licenses while at the same time continuing their anticompetitive activities.

If Applicants were permitted to obtain their licenses while at the same time staying implementation of the conditions which the Licensing Board has found to be requisite to issuance of those licenses, they would disrupt the status quo by obtaining a valuable asset which is unavailable in any meaningful manner to non-Applicant systems within the CCCT. 9/

On the question of substantial harm to others, Applicants have urged that this Board must find that there is "something unique about maintaining the status quo that would work to the disadvantage of parties other than Applicants" (Renewed Motion, p. 22). As we understand it, Applicants, in asserting that a unique situation must be found, are urging this Board to adopt an "irreparable injury" standard for the harm occurring to other parties. This is clearly not the law. The courts, when

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9/ We will not repeat our argument, which was accepted by the Licensing Board, concerning the inadequacy of Applicants' Exhibit 44 as relief in this proceeding.

delineating the tests for a stay, have consistently held that the party requesting the stay must show "irreparable injury" to himself while at the same time showing that no "substantial harm" will befall others.

We believe that the question of whether substantial harm should be measured from the status quo per se or from a comparison of the status quo to the situation resulting after relief has been granted is a semantic dispute. Where, after a hearing on the merits, a court has ordered injunctive relief, it is saying that there is something inherently wrong with the status quo. It is impossible to measure this harm in a vacuum, that is, without comparing the situation as it existed before litigation to the situation as it will exist after the relief is effectuated.

In any event, whether substantial harm is measured from the maintenance of the status quo or from a comparison of the status quo versus the anticipated situation when relief becomes effective, Applicants have not met their burden of showing that issuance of the license without conditions will not substantially harm the non-Applicant entities within the CCCT.

As the Licensing Board stated:

> The problem is that the status quo was determined to be a situation inconsistent with the antitrust laws. Without the Board's conditions being in effect, there is every reason to believe that the anticompetitive

> situation will continue. The longer the situation continues, the more devastating its effect upon competition and potential competition in the CCCT.
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> Our findings noted the continuing demise of smaller systems witnin the CCCT. Cleveland apparently is in desperate straits. The adverse consequences of isolated operation continue to be experienced by the majority of non-Applicant entities within the CCCT. We conclude that the issuance of a stay undoubtably would harm other parties interested in the proceeding.

Memorandum and Order, pp. 29-30. 10/

V. A Stay Would Not Be In The Public Interest

Applicants have made no showing that the grant of a stay would be in the public interest, nor have they in any way contradicted the Licensing Board's well-reasoned findings that a stay would not be in the public interest.

VI. The Appeal Board's Authority To Condition The Grant Or Denial Of A Stay Upon The Posting Of A Bond

The Department is unaware of any authority which explicitly grants the Appeal Board the right to require the posting of a bond, or some other undertaking as a condition to the grant or denial of a stay. Nevertheless, we believe that the Appeal Board does have

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10/ In its Memorandum Relating to the City of Cleveland's Motion for Clarification of License Conditions, issued the same date as its Memorandum and Order on Stay, the Licensing Board noted, at pages 4-5, that Applicants now make available wholesale power to the municipal systems within the CCCT. The Licensing Board was thus clearly aware that the municipal systems within the CCCT were interconnected with the various Applicants. Its statement, quoted above, concerning "isolated operation" plainly refers to the continuing absence of coordinated operation and development between municipal systems within the CCCT and Applicants.

the inherent authority, derived from its authority to condition nuclear licenses, to condition the grant or denial of a stay upon some undertaking.

Because the Appeal Board has the delegated authority to issue, refuse to issue, or issue with conditions, nuclear licenses, we see no reason why the Appeal Board would not have authority to require the posting of a bond as a license condition. By the same reasoning, however, we do not believe that the Appeal Board has the authority to require a party who is not an Applicant to engage in any undertaking as a precondition to the denial of a request for a stay. 11/

Although we believe that this Board could lawfully order Applicants to post a bond, we believe that the posting of a bond here would raise such difficulties as to be completely unworkable.

The parties who could be substantially harmed if a stay is granted include present electric entities in the CCCT, potential

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11/ In any event, we are unaware of any cases in which the prevailing party was required to post a bond as a prerequisite for enforcement of the relief it has been granted. The posting of a bond of necessity involves some financial loss. To require that the prevailing party suffer this loss so that it may obtain the relief to which the trial court believes it is entitled would be inequitable. If anyone is to suffer the loss entailed by the posting of a bond, it should be the party who has, on its own motion, requested the court to stay its order.

Further, Rule 62(e) of the Federal Rules of Civil Procedure expressly exempts the United States or an agency therof from posting a bond where it has taken an appeal and the decision is stayed pending that appeal. We believe that this exemption should apply to proceedings before the NRC as well.

electric entities in the CCCT, 12/ and all retail customers in the CCCT. We believe that it would be an impossible task to accurately measure the damages accruing to these parties from a continued inability to compete effectively with Applicants, and from temporarily or permanently lost opportunities for coordinated operation and development with Applicants or non-Applicant systems.

Furthermore, if Applicants do not prevail on appeal, and all preliminary indications are that they will not, what procedure would be used to determine what parties are entitled to damages and in what amounts? Would the Commission be expected to entertain actions for money damages and hold full-scale hearings to determine such damages? How would parties who are not presently involved in this proceeding (i.e., the municipal systems in the CCCT other than Cleveland) come before this Commission to seek their damages? How would the Commission evaluate the effect of the stay on cities which thought about establishing municipal electric systems but delayed or abandoned their plans due to the unavailability of the coordination required by the license conditions? How would

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12/ Potential electric entities would include those municipalities which, given the ability to obtain the benefits of coordinated operations and development with Applicants and other municipalities, might wish to enter the electric utility business.

the Commission determine the damages suffered by all consumers of electric power in the CCCT due to Applicants' continuation of their anticompetitive behavior which, for example, has kept low-cost PASNY power out of the CCCT? How would the Commission evaluate the damages suffered by retail consumers due to a lack of or further postponement of more effective yardstick competition? How would the Commission evaluate the damages which will result if, during the stay, any of the Applicants should acquire one of the municipal systems in the CCCT? This damage may well be irreparable.

Finally, while we believe that the Appeal Board may require Applicants to post a bond, we are unaware of any cases in which an administrative agency has required such an action. If the posting of a bond is required and is later found to be beyond the jurisdiction of the Commission, the parties for whose benefit the bond was posted, and not the Applicants, will suffer.

## CONCLUSION

For the foregoing reasons, the Department of Justice urges that the Atomic Safety and Licensing Appeal Board deny Applicants'

Renewed Motion for an Order Staying, Pendente Lite, the Attachment of Antitrust Conditions.

Respectfully submitted,

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JANET R. URBAN

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Washington, D.C. 20530

March 2, 1977

Registration No.

# SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D. C. 20549

## Form S-7
REGISTRATION STATEMENT
under
THE SECURITIES ACT OF 1933



## Ohio Edison Company
*(Exact name of registrant as specified in charter)*

| Ohio | 34-0437786 |
|---|---|
| *(State or other jurisdiction of incorporation or organization)* | *(I.R.S. Employer Identification No.)* |

76 South Main Street, Akron, Ohio 44308
*(Address of principal executive offices)*
Registrant's telephone number, including area code: (216) 384-5100

D. D. VOWLES, *Secretary*
76 South Main Street
Akron, Ohio 44308
*(Name and address of agent for service)*

*The Commission is requested to mail signed copies of all orders, notices and communications to:*

J. H. BYINGTON, JR.
WINTHROP, STIMSON, PUTNAM & ROBERTS
40 Wall Street
New York, N. Y. 10005

RICHARD M. DICKE
SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, N. Y. 10004

G. G. KING
GILBERT MANAGEMENT CONSULTANTS
80 Pine Street
New York, N. Y. 10005

*Approximate date of commencement of proposed sale to the public:*
As soon after the effective date of this Registration Statement as market conditions appear favorable.

CALCULATION OF REGISTRATION FEE

| *Title of each class of securities being registered* | *Amount being registered* | *Proposed maximum offering price* | *Proposed maximum aggregate offering price* | *Amount of registration fee* |
|---|---|---|---|---|
| Common Stock, par value $9 per share | 5,000,000 shs. | $20* per unit | $100,000,000 | $20,000 |

* Closing sale price on January 13, 1977, as reported by The Wall Street Journal in its report of Composite Transactions.

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.

PRELIMINARY PROSPECTUS DATED JANUARY 28, 1977

PROSPECTUS

5,000,000 Shares

# Ohio Edison Company

Common Stock

(Par Value $9 Per Share)

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THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

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In the opinion of Pennsylvania counsel (see "Experts"), the above shares are exempt under Pennsylvania law from all existing personal property taxes in Pennsylvania.

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This Prospectus is to be used in connection with Ohio Edison Company's public invitation for proposals for the purchase of the above shares. The proposals are to be presented to the Company at the office of Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York, N. Y., before 4:30 P.M., New York Time, on March 15, 1977. An information meeting will be held at the office of Bankers Trust Company, J. C. Kennedy Room, 19th Floor, One Bankers Trust Plaza, New York, N. Y., at 2:30 P.M., New York Time, on March 8, 1977.

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The Company's outstanding Common Stock is listed on the New York Stock Exchange and the Midwest Stock Exchange. Applications will be made to include the above shares in such listings upon the issuance thereof.

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The date of this Prospectus is January , 1977.

| Site(a) | Type | Capability(b) | Estimated In-Service Date | Estimated Total Cost to the Company (c)(d) | Estimated Total Cost per Kilowatt (c)(d) | Expenditures by the Company as of September 30, 1976 |
|---|---|---|---|---|---|---|
| Beaver Valley Station, Unit 2, in Shippingport, Pa. (a) | Nuclear | 856 MW-initial 885 MW-ultimate | 1982 | $ 397,385,000 | $1,071.11 | $ 67,051,000 |
| Davis-Besse Station, Units 2 and 3, in Ottawa County, Ohio | Nuclear | 906 MW each | Unit 2—1983 Unit 3—1987 | $ 733,492,000 | $1,137.20 | $ 7,832,000 |
| Bruce Mansfield Plant, Units 2 and 3, in Shippingport, Pa. | Coal-fired | 825 MW each | Unit 2—Oct. 1977 Unit 3—1980 | $ 352,746,000 | $ 570.79 | $154,165,000 |
| Perry Plant, Units 1 and 2, in North Perry Village, Ohio | Nuclear | 1,205 MW each | Unit 1—1982 Unit 2—1983 | $ 732,161,000 | $ 830.33 | $ 37,707,000 |
| Erie Nuclear Plant, Units 1 and 2, in Berlin Heights, Ohio | Nuclear | 1,260 MW each | Unit 1—1986 Unit 2—1988 | $ 807,791,000 | $ 890.54 | $ 10,114,000 |
| | | | | $3,023,575,000 | | $290,869,000 |

(a) The Company and Pennsylvania will have undivided interests as tenants in common with one or more of the other CAPCO companies in each of the units listed above. Except for Mansfield Unit 2, their interests will be 93.6% and 6.25%, respectively. With respect to Mansfield Unit 2, these interests will be 39.37% and 6.87%, respectively. It is currently proposed that the Company will acquire Pennsylvania's 6.25% interest in Beaver Valley Unit 2. Steps are being taken to formulate the terms of the acquisition, to obtain all necessary regulatory approvals, and to do all things otherwise necessary to effect the acquisition.

(b) The rights of the owners of the various units to the energy produced by such units are subject to the capacity and energy entitlements described under "Business — CAPCO Programs". See "Business — Environmental Matters" with respect to the effect on capability that the pollution control equipment presently being installed at the Bruce Mansfield Plant will have.

(c) The costs listed do not include the cost of fuel for the nuclear plants (see "Business — Fuel Supply") nor do they include the costs ($15,772,000, of which $1,315,000 was spent prior to October 1976 and $2,354,000 has been or will be expended during October 1976-December 1977) of step-up transformers associated with the various units (except units at the Perry Plant) and related equipment necessary to provide connection to the system. The listed costs do include costs in connection with the air and water pollution control equipment presently known to be required.

(d) The costs listed do not reflect the effect of the CAPCO decision, discussed below, to defer the construction schedules of five of the units. Although the decision will increase the total cost of each of the deferred units, the Company has not yet determined the magnitude of such increase.

Pursuant to an agreement announced by the CAPCO companies on January 18, 1977, major deferrals have been made in the construction schedules for five electric generating units. The construction schedules for Davis-Besse Units Nos. 2 and 3 and Erie Units Nos. 1 and 2 have been delayed for approximately two years, and completion of Bruce Mansfield Unit No. 3 has been delayed for approximately one year. The resultant completion dates of these units are reflected in the above table. Preliminary estimates indicate that these changes in the CAPCO construction program will represent a reduction of approximately $850,000,000 in currently estimated costs for the period 1977-1981, the Company's share of such reduction being approximately $300,000,000 and Pennsylvania's share approximately $50,000,000. The CAPCO construction cutbacks reflect decisions based upon rapidly increasing construction costs, the difficulty of raising necessary funds in today's financial market, and revised forecasts of customer's electrical requirements.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF THE DEPARTMENT OF JUSTICE TO APPLICANTS' RENEWED MOTION FOR AN ORDER STAYING, PENDENTE LITE, THE ATTACHMENT OF ANTITRUST CONDITIONS have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand this 2nd day of March 1977.

Melvin G. Berger

MELVIN G. BERGER
Attorney, Antitrust Division
Department of Justice

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 |

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