UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Atomic Safety and Licensing Appeal Board

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

BRIEF OF THE CITY OF CLEVELAND IN OPPOSITION TO THE EXCEPTIONS FILED BY APPLICANTS

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BRIEF OF THE CITY OF CLEVELAND IN OPPOSITION TO THE EXCEPTIONS FILED BY APPLICANTS

City of Cleveland (City) submits this brief in opposition to the exceptions filed by Applicants to the Licensing Board's Decision of January 6, 1977. City will undertake to reply to Applicants' arguments made in their brief in support of exceptions and will show that Applicants' exceptions are without merit. City will not repeat herein its statement of the case made in its brief filed on April 14, 1977.

Applicants' brief contains no statement of the issues but rather launches a broad attack against the entire January 6, 1977 decision. Broadly stated City believes the issues raised by Applicants to be as stated below:

1. Whether the Licensing Board was required under Section 105(c) of The Atomic Energy Act to make a determination that competition in the electric utility industry is in the public interest.
2. Whether the Licensing Board correctly defined the relevant markets for antitrust analysis.
3. Whether the Licensing Board correctly held that certain prior rulings of administrative agencies should not be accorded res judicata or collateral estoppel effect.
4. Whether the Licensing Board adequately considered the nature of the electric utility industry.
5. Whether the Licensing Board correctly found Applicants' conduct to be unreasonable.
6. Whether the Licensing Board correctly found nexus between the situation inconsistent with the antitrust laws and Applicant's activities under the licenses.
7. Whether the Licensing Board's decision is adequately supported by the record.
8. Whether the license conditions ordered by the Licensing Board are properly designed in the public interest to eliminate the situation inconsistent with the antitrust laws.

SUMMARY OF ARGUMENT

In its initial decision the Licensing Board found that a situation inconsistent with the antitrust laws existed in the markets relevant for antitrust analysis in this case. The Licensing Board also found that granting licenses for the Perry and Davis-Besse units would maintain the situation inconsistent with the antitrust laws and that Applicants' activities under the licenses would exacerbate the situation. Applicants have taken this appeal filing some 643 exceptions to the initial decision. City opposes Applicants' exceptions.

Applicants have not quarreled with the Licensing Board's discussion of the applicable antitrust law but rather they have complained of the Licensing Board's failure to make a determination as to whether it is in the public interest to apply the law in this case. City believes that the Licensing Board is not required to make that determination. As was pointed out by the Appeal Board in ALAB-279, it is too late in the day to dispute that the antitrust laws are applicable to the electric industry. The courts have decided otherwise long ago.

Applicants also argue that the Licensing Board failed to consider that under applicable law, and as a result of the economic characteristics of the electric utility industry, there is only de minimis competition in the markets. The record is replete with descriptions of actual competition which has occurred at retail and wholesale and competition which would have occurred but for restraints placed on competition through Applicants' abuse of their market power. The law in both Ohio and Pennsylvania permits competition at all market levels.

Applicants also argue that the Licensing Board erred in failing to accord proper deference to decisions and actions of other regulatory agencies. Neither the facts nor the law support Applicants' attempt to give collateral estoppel or res judicata effect to decisions of other regulatory agencies. The parties are not the same; the issues are not the same; the issues were not actually adjudicated; the issues were not material or relevant to the disposition of the prior proceeding; and the resolution of the issues was not essential to the judgment rendered by the other forum.

Contrary to the arguments raised by Applicants, the Licensing Board correctly identified the relevant product and geographic markets and correctly measured Applicants' market power within those markets. The retail market is relevant because it governs the development of all other functions of the industry. Whether a monopoly exists in the retail market has consequences with respect to the alternatives available elsewhere. The retail market, the bulk power services market and the regional power exchange market accurately reflect the realities of the marketplace.

Applicants argue that they did not unlawfully refuse to permit small electric entities to join CAPCO because small entities cannot effectively engage in power pooling. The testimony of Applicants' own witnesses belies the argument. Mr. Slemmer testified that an arrangement could in fact be made which would provide each party with significant net benefits. Further, the record provides many examples of small systems providing benefits to Applicants.

Applicants also argue that their refusals to admit new members to CAPCO were based upon good faith business judgment and that in any event there was no joint action involved in the denials of membership. Once again the facts sustain the findings of the Licensing Board and refute Applicants arguments. The chief executive officer of The Cleveland Electric Illuminating Company (CEI) testified that the decision to exclude City from CAPCO was a joint CAPCO decision not an individual decision of CEI. That testimony is corraborated by many items of independent evidence. Applicants do not deny joint consultation but argue that joint consultation will not prove conspiracy where there are other non-conspiratorial motives for the action. The cases upon which Applicants rely do not stand for that proposition. Rather those cases hold that a conspiracy may be found even in the presence of many non-conspiratorial motives.

The evidence clearly reflects that Applicants did not rely upon good business judgment in denying CAPCO membership to Pitcairn and City. Mr. Slemmer testified that he could not imagine Applicants turning down a request for CAPCO membership without first making a study. Nevertheless, that is precisely what Applicants did. Further, evidence of Applicants' unlawful intent to deny municipal systems access to coordinated operations and development is found in Applicants' manipulation of the CAPCO reserve sharing formula as a weapon to discourage municipalities from seeking CAPCO membership.

Applicants argue that the Licensing Board's findings are not supported by the record. The City submits that the record provides more than enough

support to sustain the findings of the Licensing Board.

Applicants argue that the Licensing Board erred in failing to make a nexus finding with respect to each individual anticompetitive act. No such particularized showing of nexus is required. The Licensing Board was correct in finding a nexus between the "situation" inconsistent with the antitrust laws and the activities under the license.

Finally Applicants argue that the license conditions ordered by the Licensing Board are contrary to public interest and that the Licensing Board erred in failing to make specific findings with respect to the interplay of the license conditions and the public interest. The Licensing Board had a duty to impose license conditions which would obviate and rectify the situation inconsistent with the antitrust laws. There is a strong public interest in promoting competition in the electric utility industry as in other industries. Applicants failed to show that the license conditions ordered in the initial decision are not in the public interest.

I

THE LICENSING BOARD CORRECTLY APPLIED THE ANTITRUST LAWS

A. The Licensing Board Is Not Required To Determine Whether Application Of The Antitrust Laws Is In The Public Interest.

Applicants have argued in their brief that the Licensing Board erred in applying the antitrust laws without regard to the unique nature of the electric utility industry (Brief p. 28). Generally applicants do not object to the Licensing Board's statement of the law to be applied but rather object to its method of applying those laws. Applicants argue here, as they did in their motion for a stay of license conditions, that the Licensing Board erroneously failed to reconcile application of those laws with the public interest (Brief p. 33).

At the outset is must be observed that there is no public interest which exists apart from and in opposition to the antitrust laws. Cantor v. Detroit Edison Co., ___ U.S. ___, 49 L. Ed. 2d 1141, 1152 (1976). The term "public interest" is an amorphous one encompassing a variety of matters some of which may at any one time be in opposition to others. Thus the problem, if there is one, is to reconcile competing public interest goals for surely the antitrust laws are an expression of the public interest.

The issue is not whether the antitrust laws are applicable to the electric utility industry for they clearly are. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Rather it is whether the nature of the electric utility industry requires an adjustment in the application of the antitrust laws and if it does did the Licensing Board make such an adjustment.

While it is a mere truism to state that regulation makes the electric utility industry different from the shoe polish industry, it does not follow that there is only a limited and circumscribed area for application of the antitrust laws.

The genesis of federal regulation of the electric utility industry was described by the court in Duke Power Company v. Federal Power Commission, 401 F.2d 930 (CADC 1968) at 934:

> In that year [1927] came the celebrated Attelboro decision to the effect that the states are constitutionally incapable of fixing the rates at which sales at wholesale in interstate commerce are to be made. In the laissez-faire milieu thus created utility holding companies flourished, and behind the Attelboro shield abuses became flagrant. It was to correct these abuses that . . . Congress enacted the Public Utility Holding Act of 1935 to bring holding companies under federal goverance. And it was primarily to fill the "Attleboro gap" that Congress concomitantly passed the Federal Power Act as its first exertion of national authority over the operating electric utilities.
>
> Congress did not, however, in formulating the proscriptive provisions of the Power Act, undertake to exhaust its constitutional prerogatives. (Footnote omitted.)

The purpose of Congress in enacting the Federal Power Act was considered by the U.S. Supreme Court in Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359 (1973). The Court in Otter Tail held that Congress had rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships (410 U.S. at 374). The Court found nothing in the legislative history of the Federal Power Act which revealed a purpose to insulate electric power

companies from the antitrust laws. Rather the Court found that the legislative history "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest" (410 U.S. at 373-74). Thus, it is clear that Congress adopted a scheme of regulation to control public utilities in the areas which could not effectively be controlled by application of the antitrust laws.

The theory of complementary regulation was discussed at some length in Northern Natural Gas Co. v. FPC, 399 F.2d 953 (1968). There the court found support for the theory in Supreme Court cases holding that regulated industries must to some degree accommodate to antitrust laws and in cases requiring agencies obliged to act in favor of "public convenience and necessity" to consider antitrust problems. However the court noted that such agencies do not have jurisdiction to enforce the antitrust laws and are not bound to follow them. In particular, the Court noted that a rate regulation needs to be complemented by competition saying at pages 964-65:

> . . . competition, even in a regulated industry, secures benefits which might otherwise be unattainable. Admittedly the Commission possesses a rate-making power and this power is designed to protect the consumers of natural gas. But it is clear that this power is largely a negative one. Thus the Commission may set a selling rate for a supplier only after it has been demonstrated that the present charge is unjust, unreasonable, unduely discriminatory or preferential, a heavy burden even for specialists as intimately familiar with the natural gas industry as is the Commission. On the other hand, if competition exists, albeit in a limited area, there would be incentives for innovation by the regulated companies themselves and for their coming forward with proposals for better services, lower prices, or both. (Footnotes omitted.)

Unless it can be demonstrated that Congress intended to insulate activities from antitrust laws those laws must be applied.

Applicants rely upon a number of cases involving actions of regulatory bodies exercising their "public interest" review function for the proposition that the Licensing Board is required to make an affirmative finding that application of the antitrust laws is in the public interest. This Appeal Board has already noted that a distinction exists between authority to regulate an industry for the public convenience and necessity on the one hand and authority to enforce the antitrust laws on the other.[1/] The Nuclear Regulatory Commission (NRC) administers no pervasive regulatory scheme but is charged with applying the antitrust laws within the context of licensing nuclear power plants.

Thus while the Federal Power Commission (FPC) must consider the antitrust laws in exercising its jurisdiction in the public interest it is not bound by the dictates of antitrust law. Northern Natural Gas Co. v. FPC, 130 U.S. App. D.C. 220, 399 F. 2d 953 (1968). However a finding by the FPC that a certain activity is in the public interest is no bar to a subsequent finding by a court that the same activity violates the antitrust laws. California v. FPC, 369 U.S. 482, 489, 8 L. Ed. 2d 54 (1962); United States v. Radio Corp. of America, 358 U.S. 334, 3 L. Ed. 2d 354 (1959).

Courts have already considered many aspects of the electric utility business and found them subject to antitrust laws. In Pennsylvania Water & Power Co. v. Consolidated G.E.L. & P. Co., 184 F.2d 552 (CA 4, 1950)

1/ ALAB 385, p. 22.

cert. denied 71 S.Ct. 282 (1950) the Court found that price fixing and territorial agreements between utilities were violative of the antitrust laws even when the parties urged that these restrictions on competition permitted the utilities to operate in the most economical manner. The Court relied upon a series of cases which apply per se rules to hold that a price fixing agreement and territorial agreements between two electric utilities were illegal. The Court found it unnecessary to consider contentions that the contract was beneficial to the public. (184 F.2d at 559). Specifically the Court rejected the defense that the agreement was designed to encourage the maximum cooperative utilization of power and energy resources to the end that the joint use of the property should give the greatest practical benefit to the public and avoid duplication of investment and unnecessary costs of maintenance and thus contribute to a high standard of service. The Court said at page 559:

> Congress has determined that the greater good is served by the maintenance of free competition and its decision in the field of interstate commerce must control.

It is also worthy of note that in Penn Water the activities of the interconnected parties had been previously commended by the FPC as producing electric energy at the lowest cost as well as insuring reliability of service. (184 F.2d at 565).

Although not directly addressed to the issue of whether an agency or court enforcing the antitrust laws must balance regulatory goals with anti-

trust goals, the Court in Northern Natural Gas Co. v. Federal Power Commission, 399 F.2d 953 (CADC 1968) did point out at page 970:

> And when new facilities must be built, the competitive advantages afforded by a new entrant might often be more meaningful than any economies of scale which could be obtained by permitting the present monopolist, or dominant market force, to construct the new facilities and fulfull the increased demand.

In Otter Tail the Supreme Court affirmed the district court's application of per se antitrust rules to territorial allocation schemes. The court found no reason to engage in any analysis as to whether competition in the electric utility industry was in the public interest. The court noted that the Sherman Act assumes that "an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency." A utility may not substitute anticompetitive uses of its dominant economic power for competition.

In United States v. El Paso Natural Gas Co., 376 U.S. 651, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964), the court applied Section 7 of the Clayton Act to a merger of two natural gas pipelines without engaging in any analysis as to whether or not competition between natural gas pipelines was in the public interest. The merger thus disapproved had previously been approved by the FPC.

Indeed the Supreme Court has specifically rejected the argument that the competitive standard imposed by antitrust legislation is inconsistent with the "public interest" standard enforced by regulatory agencies. Cantor, supra.

Even under the public interest standard applied by the FPC it has been held that promotion of competition is an important component of regulation. Alabama Power Company v. Federal Power Commission, 511 F.2d 383 (1974).

The Appeal Board itself stated in Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 571 (1975) (Slip Op. pp. 27-28):

> It is far too late in the day to dispute that it runs counter to basic antitrust precepts to exercise monopoly power--however lawfully acquired initially--to foreclose competition or to gain competitive advantage, or to use dominance over a facility controlling market access to exclude competitors and preserve a monopoly position. Electric utility companies are no more free than others to engage in those practices; their unjustified refusals to wheel power to or to interconnect with smaller entities in the field have regularly been called to account as violative of antitrust policies. It was a key purpose of the prelicense review to " . . . nip in the bud any incipient antitrust situation." (Footnote omitted.)

Recently the FPC has held that stimulation of yardstick competition in the retail electric markets in Pennsylvania is in the public interest. Philadelphia Electric Company, FPC Opinion No. 791, issued April 6, 1977 at page 21.

B. The Licensing Board Properly Considered The Scope Of Competition Possible In The Relevant Markets.

Applicants argue that the Licensing Board failed to consider the barriers to competition in the electric utility industry generally and in

Ohio and Pennsylvania in particular (Brief, pp. 45 et seq.). Applicants list six economic barriers to competition: (1) industry is capital intensive, (2) investment is long lived, (3) plant and equipment are not mobile, (4) service can only be provided to connected customers, (5) product cannot be stored, and (6) industry is characterized by large economies of scale (Brief, p. 45). These economic facts it is argued lead to vertical and horizontal integration of the industry as a basic natural monopoly (Brief, pp. 46-47).

Contrary to the arguments made by Applicants, the Licensing Board found that during the period from 1967 to date Applicants increased their market share by policies of refusing to engage in third party wheeling, emergency interconnection or reserve sharing with non-applicant entities (5 NRC 144). The Licensing Board specifically rejected the idea that Applicants' increase in market share was passive or accidental.

The Licensing Board pointed to the errection by Applicants of artificial barriers to prevent competitors from attaining access to the benefits of nuclear generation (5 NRC 144-45). The Licensing Board also considered the fact that economics may have contributed to the disappearance of some small entities (5 NRC 144 fn. 10).

The Licensing Board found that Applicants had joined in CAPCO to take advantage of economies of scale in nuclear generation which could not be attained by any of them acting alone (5 NRC 155-56). Economic reasons frequently make it infeasible for small entities to construct duplicative tranmission facilities (5 NRC 156).

The Licensing Board also considered the fact that The Cleveland Electric Illuminating Company (CEI) had acquired a number of municipal systems at least in part as a result of seeking the economies of central station generation (5 NRC 166).

The Licensing Board accepted Mr. Gerber's testimony that mergers and acquisitions made by Ohio Edison before 1965 were attributable at least in part to natural scale economies and technological advances (5 NRC 188). Moreover, the Licensing Board also took into consideration the assertion that the demise of the Norwalk system may have been inevitable because of natural economic forces (5 NRC 190 fn. 88). The Licensing Board also considered the economic fact that customers must be directly connected to the seller giving rise to the phenomena of "one time competition" in assessing the impact of territorial allocation agreements (5 NRC 194-95).

The Toledo Edison Company's (TECo.) acquisition and absorption of many small systems was found to be a product of a considered and deliberate acquisition policy which could only in part be attributed to natural economic forces (5 NRC 211-12).

The Licensing Board even accepted Applicants' proposed findings of fact that the CAPCO Pool was formed to permit Applicants to take advantage of economies of scale (5 NRC 238-39).

Throughout its Decision the Licensing Board demonstrated an awareness of the economics of the electric utility industry. The Licensing Board's focus quite properly was on activities of the Applicants which established

barriers to competition in addition to any naturally occurring economic barriers.

There is substantial record support for the Licensing Board's assessment of the economic characteristics of the electric utility industry.

The record shows that each of the Applicants is a product of long-standing policies of acquisition and merger systematically pursued for decades (Wein dt. DJ 587 p. 63). Acquisitions were a way of life in the utility industry (Besse deposition DJ 559 p. 64). Today only two municipal systems survive in the area served by CEI (Wein dt. DJ 587 p. 63) and only one survives in the area served by Duquesne (Wein dt. DJ 587 p. 74).

Large economies of scale exist in the installation and operation of electric generating units. Investment costs per kw of capacity for a 100 mw plant is about 60% more than for a 1,000 mw plant and fuel costs for a 100 mw plant are about 60% higher than for a 1,000 mw plant. Operating and maintenance costs for a 100 mw plant are three times as much as for a 1,000 mw plant (Kampmeier dt. DJ 540 pp. 22-23).

Economies of scale are also present in the transmission of electricity. The capacity of a transmission line increases approximately as the square of the rated voltage of the line (Bingham Tr. 8155-56). So long as costs increase at a rate lower than the increase of the square of the voltage, higher voltage transmission lines are more economical as voltage increases (Wein dt. DJ 587 p. 50; Mozer dt. NRC 205 pp. 14-15). Additional economies in transmission result from the fact that a given transfer capacity at higher

voltage requires less right of way than an equal amount of transfer capacity at lower voltage (Caruso Tr. 10,911).

It has long been recognized in the electric utility business that reliability of service and economies of bulk power supply can best be achieved through coordination (Mayben dt. C-161 p. 16). Forms of coordinated operations found in interchange or power pooling agreements among utilities include (Mayben dt. C-161 p. 17; Slemmer dt. Applicants' 21 pp. 8, 15-16; Kampmeier dt. DJ 540 pp. 10-13; DJ 588):

(a) Reserve sharing and mutual emergency support;

(b) Emergency energy interchange;

(c) Maintenance scheduling and maintenance power exchange;

(d) Transmission service;

(e) Short-term power and energy interchange;

(f) Spinning reserve interchange;

(g) Diversity interchange;

(h) Economy interchange.

Reserve sharing enhances reliability, provides economies and permits parties to take advantage of economies of scale (Keck deposition DJ 576 p. 8; Slemmer dt. Applicants' 121 pp. 16-17; Dempler deposition DJ 570 p. 41; Lindseth deposition DJ 568 pp. 39-41). The possibility of economy interchange may, by itself, lead a municipality to perfect an interconnection (Lewis Tr. 11,426).

Electric utilities engage in coordinated planning and development to obtain the most economic method of expansion of power generation and transmission facilities (Masters deposition DJ 567 p. 28; Keck deposition DJ 576 p. 32). Forms of coordinated development found in the industry include (Mayben dt. C-161 p. 18; Kampmeier dt. DJ 450 pp. 14-15):

(a) Generating unit participation:

  (i) Common ownership;

  (ii) Unit power purchases;

(b) Transmission participation;

(c) Transmission system interconnection and expansion;

(d) Staggered construction of generation units accomplished through planned exchanges of surplus power;

(e) Diversity power interchange;

(f) Firm power sales.

Staggered construction is an economic advantage available to interconnected utilities (Lindseth deposition DJ 568 pp. 40-41). Interconnections permit the interconnected utilities to carry a lower level of reserves (Lindseth deposition DJ 568 p. 39).

Reserve sharing pursuant to an interconnection agreement could enable a small utility with a 100 mw load and a single 100 mw generating unit to insure its customers a steady supply of electricity without the necessity of constructing a second 100 mw unit (Firestone deposition DJ 575 p. 77).

A synchronous interconnection provides the interconnected utilities with frequency stabilization support which improves the quality of service.

Frequency support is not available over a non-synchronous interconnection (Firestone deposition DJ 575 pp. 53-54).

In a speech to an Institutional Investors Seminar in the fall of 1969, Mr. Rudolph, President of CEI, stated that two or more electric systems interconnected and coordinated could achieve (1) greater reliability of service, (2) reduction of capital investment, and (3) increased economy of operation. Mr. Rudolph noted that nearly all major power systems in the United States, including CEI, are members of one of six principal interconnected groups. Interconnection increases the effectiveness of large, efficient generating plants and make possible sizeable reductions in capital costs. In 1969, installation of a 250 mw unit cost about $165 per kw. Through interconnections, CEI was able to install a 625 mw unit at a cost of $140 per kw. A single system, Mr. Rudolph said, would be unable to absorb the cost of additional generation needed to "back-up" the larger unit. "Pooling," Mr. Rudolph said, "makes possible a move to nuclear plants and EHV (extra high voltage) transmission grids." Mr. Rudolph predicted that "[t]he electric industry will put increasing reliance on the formation of power pools and other technological developments to meet the challenges of the next several decades" (C-131).

An electrical interconnection among systems is required to make coordinated operation possible. The interconnection must be kept closed despite load variations and equipment failures. There must also be pooling of reserves and sharing in the providing of reserves and arrangements for wheeling so that two participants who are connected only through the facilities

of a third can transmit power through its facilities. (Kampmeir dt. DJ 450 p. 12)

Without wheeling, an intervening party who will transmit power only under a buy-sell arrangement would in effect have a right of first refusal and be in a position to frustrate attempts to coordinate. For that reason, in the pre-CAPCO era CEI found it advantageous to construct a transmission line across Ohio Edison territory to Ohio Power Company. Not only did that transmission line avoid Ohio Edison's right of first refusal but it also improved CEI's bargaining position in the regional power exchange market. (Besse deposition DJ 559 pp. 123-25) CEI's direct interconnections with Ohio Edison, Ohio Power and the PJM pool were an advantage to CEI in that they permitted CEI to shop for power. (Ganther deposition DJ 561 p. 36) Absent wheeling, it was more economical to have a direct intertie with a third party because under a buy-sell transmission arrangement the intervening party will resell the most expensive power on its system (Ganther deposition DJ 562 pp. 40-41).

Without access to coordination services, it would not have been practical for the Applicants independently to construct and operate large nuclear units (Sullivan deposition DJ 578 p. 27; Keck deposition DJ 576 p. 32; Masters deposition DJ 567 pp. 32, 57-68; Mozer dt. NRC 205 pp. 11-12; Firestone Tr. 9228).

Joint planning has changed the ways of doing business in the utility industry. It not only effects the size of the unit being planned, but also the type of unit selected. This is because nuclear units become economically

more attractive when large plants can be used without unduly increasing installed reserves. The cost per kw of installed capacity of a nuclear unit decreases at a more rapid rate as plant size increases than is the case for fossil-fuel plants. The greater opportunity for use of nuclear plants is one of the impacts of pooling on system plans. (C-131)

Practical and economic facts of life made it nearly mandatory that Ohio Edison join a power pool to engage in coordinated operations and development (White Tr. 9813-14).

Applicants have compared the costs of nuclear generation and fossil-fuel generation and have determined that base load nuclear units are most economical (Rudolph deposition DJ 558 pp. 165, 168, 175; Masters deposition DJ 567 pp. 55-56; Kekela deposition DJ 574 p. 123; Sullivan deposition DJ 578 p. 211 DJ 374). Applicants have not committed themselves to install a coal-fired base load unit since 1970 (Williams Tr. 10,556) and have agreed that no additional base load coal-fired units should be committed (DJ 92). Coal availability problems increase the desirability of constructing nuclear generating units (DJ 511 pp. 90-91).

In 1974, Mr. Masters of CEI noted that cost comparisons for a 1200 mw base load unit for operation in 1977 revealed that annual costs for a nuclear unit would be 10% less than for a coal unit for the years 1981-1986 and 17% less than for a coal unit for the fifteen-year period 1981-1995 (DJ 285). Economies of scale are more significant for nuclear units than for fossil-fuel units (Lindseth deposition DJ 568 pp. 42-43).

The President of Toledo Edison admitted that in certain instances nuclear generation may be as much as 40% less costly than coal-fired generation (Williamson deposition DJ 581 p. 38). The economies of nuclear generation were so pronounced that no detailed studies were required for Applicants to conclude that the Davis-Besse 2 and 3 units should be nuclear rather than fossil-fueled units (Rudolph deposition DJ 558 p. 174). As soon as the Davis-Besse 1 unit begins operating, Applicants will save $300,000 to $400,000 each and every day in reduced fuel costs alone (Williams Tr. 10,527).

Applicants have recognized the economies of nuclear generation in asserting to this Commission (Motion for Determination that Davis-Besse Unit #1 is "Grandfathered" for Purposes of Operation, p. 2):

> . . . Davis-Besse Unit 1 will be an important factor in assuring the reliability of the power supply in the State of Ohio and, because of its relatively low fuel costs, it is expected to contribute to the stability of electric power costs for consumers of electricity in Ohio . . . .

Nuclear power is most advantageous environmentally and offers the best hope for long-range economy and dependability (Williamson Speech DJ 93). In economic terms nuclear power is a unique resource (Wein Tr. 7240).

Nuclear generation shows operating characteristics which differ from fossil-fueled base load generation. Nuclear units are less flexible and are not cycled up and down to follow load. Careful attention to fuel burn control requires operation at a steady level of production. Thus, an owner of nuclear generation may find it more advantageous to sell base

load power from nuclear generation as economy power than to cut back on generation to conserve fuel (Mayben Tr. 7815-22; Kampmeier dt. DJ 450 p. 51; Dempler Tr. 8873).

As a practical matter, nuclear technology is usable solely and exclusively by large electric systems or those which are part of a large interconnected and coordinated network (Kampmeier dt. DJ 450 p. 25; Mozer dt NRC 205 p. 62).

Small municipal systems without access to coordinated operations and development cannot install nuclear generating units (Kampmeier dt. DJ 450 p. 25; Mozer dt NRC 205 p. 8). It would not be economically feasible for the City of Cleveland to install nuclear generation by itself (Hinchee Tr. 2618; Mayben dt. C-161 p. 22). It would not be feasible for the municipal system in Bryan, Ohio, with an electric load of 23 mw, to install nuclear generation (Keck deposition DJ 576 pp. 123-24). Painesville could not economically construct its own nuclear generating plant (Pandy Tr. 3,120). It would be grossly impractical for Newton Falls to install nuclear generation units (Craig Tr. 2952).

Development of nuclear generation will make self-generation by small isolated municipal systems increasingly inefficient by comparison (Toledo Edison memorandum DJ 557). The President of Ohio Edison has testified that the failure to utilize the best technology, which today is nuclear generation, could result in the failure of Ohio Edison as a company. (White Tr. 9815).

Nuclear generation must be used in conjunction with a mix of other power supply resources (Williamson deposition DJ 581 p. 38; Slemmer Tr. 9137-38; Smart Tr. 10,130). Among the coordinating arrangements necessary are reserve sharing, emergency power, and maintenance power (Mozer tr. 3,350-52). Effective use of nuclear power requires coordinated development and operation of all of the different kinds of generation throughout the region. Each type of generation compliments and supplements the others. Flexibility in wheeling various kinds of power throughout the region is one of the essential elements in acheiving their optimum use. (Kampmeier dt. DJ 540 p. 51).

Interconnections among the Applicants makes possible joint ownership of generating units (Firestone deposition DJ 575 p. 43).

There is a strong and direct relationship between base load generating units and 345 kv transmission networks (Mozer dt. NRC 205 p. 18). Applicants have constructed transmission lines associated with the installation of the Beaver Valley 2 and Perry 1 and 2 nuclear units (Mozer dt. NRC 205 p. 17). Applicants' jointly planned generation during CAPCO planning periods I - IV has a pronounced relationship to the jointly planned 345 kv transmission system (Mozer dt. NRC 205 p. 14). Generating plants are tied together by transmission lines for purposes of economy and reliability (Bingham Tr. 8,198). Extra high voltage transmission lines are almost always planned as the result of the generation expansion plan (Caruso Tr. 10,916-17). "The CAPCO transmission agreement recognizes the need for a CAPCO system of bulk transmission lines to enable the parties to transfer

land for a right of way to build a duplicate facility (Caruso Tr. 10,943). Impact on the environment may also be considered in a condemnation action to obtain right of way for duplicating transmission lines (Caruso Tr. 10,956).

The CAPCO Pool was created by Applicants to take advantage of economies of scale and opportunities for coordination. At the same time, as will be shown elsewhere, CAPCO was designed to deny the benefits of coordination and economies of scale to others. The purpose of CAPCO was to coordinate the installation of generation and transmission capacity to further reliability of bulk power supply through assurance of an adequate reserve capacity level with reserve capacity coordination and an adequate transmission network and to take advantage of such economies of scale as will be available. (NRC 184 p. 1; Firestone dt. Applicants' 122 pp. 9-10) The CAPCO Memorandum of Understanding provides that (NRC 184 p. 10):

> Each of the parties hereto recognizes a mutual interest and advantage in maintaining a continuous and uninterrupted supply of electric power and energy available to customers of all the parties hereto.

The CAPCO Memorandum provides for the planning of bulk power supply facilities on a one-system basis (Firestone dt. Applicants' 122 p. 10). The CAPCO Basic Operating Agreement provides that the installed reserve capacity of the parties will be shared under a one-system concept (Firestone dt. Applicants' 122 p. 12).

When CAPCO adopts a particular bulk power supply expansion plan under the one system approach, it selects one plan from several alternative plans (Firestone Tr. 9,422).

CAPCO plans to maintain sufficient capacity so that on only one day each year will it need to rely on power resources not owned by Applicants. This is referred to as the one negative day concept (Schaffer Tr. 8,535). The one negative day standard was adopted as a compromise (Schaffer Tr. 8,699; Firestone Tr. 9,415). There is no means of determining that one negative day is the right reliability criterion (Firestone Tr. 9,417). Prior to joining CAPCO, Ohio Edison had maintained reserves equivalent to a 3/10 negative day standard while CEI's reserve level equated to a 10 negative day standard (Firestone Tr. 9,415). Ohio Edison thus reduced its reliability standard in order to achieve economies of scale through CAPCO (Firestone Tr. 9,417).

Within CAPCO, capacity responsibility is apportioned among the Applicants by the P/N method (Schaffer Tr. 8,535). "P" represents the days when a party can contribute excess capacity to the pool. "N" represents the days in which a system must draw on others for capacity (Schaffer Tr. 8,536). The P/N method has never been used to determine ownership shares in CAPCO units (Schaffer Tr. 8,601).

Participation in CAPCO permits the Applicants to improve reliability, take advantage of economies of scale and participate in reserve sharing arrangements (Schaffer Tr. 8,537; White Tr. 9,712; Williams Tr. 10,369-70). Without participating in CAPCO, Applicants would not be able to construct and operate nuclear generating units.

All 14 of the planned CAPCO generating units provide the advantages of economies of scale (Masters deposition DJ 567 p. 36).

Applicants also argue that no municipal system purchasing power at wholesale can have "surplus" power to sell outside its municipal boundaries. Applicants cite to no Ohio decisions to support their interpretation which is contrary to a long and well recognized practice in the state. Indeed Mr. White, President of Ohio Edison, testified that contractual restrictions on the sale of electricity outside of municipal boundaries by Ohio Edison's wholesale power customers could artifically restrict the growth of those systems (White Tr. 9719). Clearly if those systems were precluded by state constitution from selling power outside the municipal boundaries, the contractual restrictions could have no effect on the growth of the municipal systems.

It is true that municipal systems may deny a franchise to a competing electric system but that has not eliminated competition within municipalities in Ohio. The record is clear that CEI is free to compete with City throughout the City of Cleveland (Hinchee Tr. 2783; DJ 340, DJ 341, DJ 346, DJ 558 pp. 58-59; 120-22; DJ 560 p. 14; DJ 563 pp. 36-37; DJ 604; DJ 605; C 11-14, C 19, C 90, C 160). Ohio Edison serves industrial customers and 150 meters in Newton Falls, Ohio (Craig Tr. 2910) and serves customers inside the City of Wadsworth (Lyren Tr. 1897-98, 1968). Moreover, municipalities may not utilize their franchise authority to prevent the construction within the municipality "of any electric line having a voltage of twenty-two thousand or more volts" constructed in accordance with Ohio Revised Code §4905.65. The Cleveland Electric Illuminating Company v. City of Painesville, 239 NE2d 75. Toledo Edison has utilized 23 kv lines for distribution lines in the City of Toledo (Moran Tr. 10,063). CEI distributes power to large industrial cus-

tomers off its 138 kv lines (Bingham Tr. 8157) and other industrial customers are served off its 33 kv lines (Bingham Tr. 8174). Ohio Edison serves large industrial customers directly off its 138 kv lines (Firestone Tr. 11,174) and considers 23 kv lines distribution lines (Firestone Tr. 11,175). Since franchises are only required if the electric lines are to pass through a street, alley, lane, square, place or land of a municipal corporation (O.R.C. §4933.16) and since lines of 22 kv and above can be constructed even without a franchise, in Ohio, a utility can compete within a municipality for any customers to which it can connect from a line of 22 kv and above without crossing a public street, alley, lane, square, place or land of the municipality.

The Ohio 90-day disconnect law does not apply to retail competition between investor-owned utilities and municipal utilities. Moreover there is no authority for the proposition that the 90-day disconnect law has any applicability to wholesale competition or to competition in the regional power exchange market.

Applicants also point to statutory limitations on competition in Pennsylvania which provide: (1) that no public utility may serve in the state without first obtaining a certificate of convenience and necessity; (2) a municipal system must obtain a certificate of convenience and necessity before serving outside of the municipal boundaries; (3) a municipality may refuse to consent to the operation of a competing utility within the corporate boundaries; and (4) it is alleged that the authority of the Pennsylvania Utilities Commission to certificate new facilities creates defacto authority to certify wholesale territories (Brief pp. 52-53).

Despite the regulatory authority of the Pennsylvania Public Utility Commission and the other statutory restraints, it is clear that competition at both retail and wholesale does occur in Pennsylvania. For example, Penn Power serves industrial customers within the municipal boundaries of Ellwood City (Urian Tr. 4967, Luxemberg Tr. 6394) and Grove City (Allen Tr. 4765). The City of Pittsburgh has its own street lighting system although Duquesne Light generally provides electric service in Pittsburgh (Gilfillan Tr. 8429).

Additional evidence that retail competition exists may be inferred from the fact that from 1965 until 1976, Pennsylvania Power Company's wholesale power supply contracts with municipalities in its service territory contained restrictions on the resale of the power sold (DJ 67-76). Penn Power's wholesale contract with Grove City provided that (DJ 76):

> 5. Except with the written consent of the Company, service furnished hereunder shall not be resold for use at any premise now or hereafter being furnished electric service directly by Company.

Elsewhere the agreement provided that the power be resold only at retail.

Mr. Gilfillan testified that Duquesne Light was reluctant to sell power at wholesale because there are 147 municipalities in the area served by Duquesne Light and the company did not want a lot of municipal distribution systems to develop (Tr. 8427).

Moreover, as the Licensing Board found, one of the advantages of acquiring the Aspinwall electric system recognized by Duquesne Light was that the company had eliminated a municipal system with growth potential (5 NRC 180).

Applicants also argue that there can be no rate competition because all of Applicants rates are subject to regulation (Brief pp. 55-56). In fact the record demonstrates that rate competition does occur. Rates and quality of service were and are the principal elements of competition between City and CEI. (DJ 588 pp. 121-24; DJ 559 pp. 57-60; DJ 565 pp. 21-23; DJ 566 p. 62). In designing rates for industrial customers, CEI does consider competition from competing sellers of electricity (Bingham Tr. 10,271, 10,330). To counter lower electric rates offered by City, CEI provided promotional considerations such as free internal wiring in areas in which the two systems compete (DJ 588 pp. 16-17; Tr. 10,323-10,325).

Ohio Edison's service policy granting allowances to developers for underground distribution service is a form of indirect rate competition which induced real estate developers to take service from Ohio Edison rather than from Wadsworth (Lyren Tr. 2251).

The Licensing Board correctly found that in discussing the allocation of fringe areas in connection with the territorial allocation agreement between Ohio Power and Ohio Edison, the companies discussed the possibility of adjusting rates to avoid rate competition (DJ 520; DJ 523; DJ 525; DJ 527; DJ 530). It was recognized that rate differences between the companies would create problems in exchanging customers. Ohio Power initially sought to deal with the problem by equalizing rates at the fringes (DJ 520; DJ 523; DJ 525) 5 NRC 191.

Moreover, it has been recognized that within a scheme of rate regulation, public utilities retain rate flexibility which permits a price response

to competition. Professor Turner pointed out: 2/

> As for rates, regulatory commissions can only disallow rates that yield an unreasonably high rate of return. But reasonable rates occupy a zone, not a point. A rate may not be so unreasonably high as to warrant rejection, and yet be considerably higher than the rate the regulated company would be willing to accept under the pressure of competition.

Applicants argue that there exists scant opportunity for competition among electric entities in the CCCT (Brief p. 56). Applicants have failed to demonstrate any economic or institutional restraints on competition in the regional power exchange market. As discussed above many examples of actual competition in the wholesale and retail markets in the CCCT may be found despite the economic and institutional restraints relied upon by Applicants.

Additional evidence of competition by public utilities in Pennsylvania is found in Manufacturers Light and Heat Company v. Peoples Natural Gas, 39 Pa. PUC Rep. 440 (1962) attached to Applicants' brief. There the Pa. PUC said at page 446:

> In support of Peoples' averment that it is not uncommon in western Pennsylvania for an industrial plant to receive natural gas from more than one source, Peoples' treasurer testified that of its 209 industrial customers, 14 receive service from another gas utility, and 10 have additional private sources of supply.

The FPC has considered competition in the electric utility business in two recent decisions. In Pennsylvania Power and Light Company, Docket No.

2/ Turner, "The Scope Of Antitrust And Other Economic Regulatory Policies", 82 Harvard Law Review 1207, 1235 (hereinafter "Turner").

E-8927, Order issued March 24, 1977, the FPC rejected price squeeze contentions raised by the company's wholesale municipal customers pointing to testimony introduced by the company that:

> . . . even where the resale rate was higher than the industrial retail rate it was still possible for its wholesale customers to compete for industrial customers . . . .

In Philadelphia Electric Company, Opinion No. 791, issued April 6, 1977, the FPC said at page 21:

> The fact that Lansdale is contractually entitled to a lower rate than the industrials for a minimum of five years, in fact, creates a competitive alternative to the current supplier and the price which it presently charges for retail service. It can hardly be maintained that this stipulation of yardstick competition in the retail market is contrary to the public interest.

And in Pennsylvania Water & Power Co. v. Consolidated G.E.L. & P. Co., 184 F.2d 552 (CA 4, 1950) the court found that but for certain unlawful contractual agreements allocating territories and fixing prices there would have been competition for the sale of electricity near Coatsville, Pennsylvania and for the sale at wholesale of power in the York and Lancaster areas of Pennsylvania.

In many respects competition in the electric utility industry is similar to competition in the natural gas industry described by Mr. Justice Douglas in United States v. El Paso Natural Gas Co., 376 U.S. 651, 659-60, 12 L.Ed. 12, 84 S. Ct. 1044 (1964):

> This is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals. In this regulated industry a natural gas company (unless

> it has excess capacity) must compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. . . . Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition. The competition then is for the new increments of demand that may emerge with an expanding population and with an expending industrial or household use of gas. (Emphasis in the original.)

Applicants fail to discuss competition for the right to serve blocks of retail customers in various municipalities. This of course was the very competition which was the heart of Otter Tail where the court described the competition at 410 U.S. 369-70:

> The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the entire retail market within the composite limits of a town and that competition is generally between Otter Tail and a prospective or existing municipal system. (Footnote omitted.)

It is argued that in the wholesale market opportunities for competition are also constrained because even if a municiapl system integrates vertically by purchasing unit or ownership capacity in generating units build by Applicants, the price of such power would simply reflect Applicants' costs (Brief pp. 66-67). Applicants argue that although municipal systems may have lower costs as a result of certain tax and financial advantages the resulting competition is "entirely artifical" and that "Competition is desirable only when

it results in lower prices by inducing greater productive efficiency" (Brief p. 67, fn. 76).

Applicants' argument is both factually and legally erroneous. The idea that competition is desirable only when it results in lower prices was rejected in Pennsylvania Water & Power Co., supra and Brown Shoe Co. v. United States, 370 U.S. 294, 344, 8 L. Ed. 2d 510 (1962) where the court said:

> But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

The notion that parties may justify anticompetitive behavior on the basis that the party affected thereby enjoys tax advantages not shared by the excluding parties was rejected by the court in American Federation of Tobacco Growers v. Neil, 183 F. 2d 869 (CA 4, 1950). The court said at 872:

> To say that a board of trade whose members have monopolistic control of a market may exclude an outsider who wishes to compete therein merely because he has an advantage in taxes or construction costs is to advance a proposition that has no support in any decision with which we are familiar, and none has been cited in support of it. Persons trading in and controlling a market, who have a heavy expense because they operate in an expensive building, would certainly not be justified on that account in excluding from competition a prospective competitor who was not burdened by such an expense; but there would be just as much reason

> in this as in permitting them to exclude him because his warehouse or factory was not subject to city costs and taxes. A restraint of trade involving the elimination of a competitor is to be deemed reasonable or unreasonable on the basis of matters affecting the trade itself, not on the relative cost of doing business of the persons engaged in competition. One of the great values of competition is that it encourages those who compete to reduce costs and lower prices and thus pass on the saving to the public; and the bane of monopoly is that it perpetuates high costs and uneconomic practice at the expense of the public.

Further, as was pointed out in Northern Natural Gas Co. v. FPC, 399 F. 2d 953 (CADC 1968) competition within regulated industries provides an incentive for innovation and for coming forward with proposals for better service and lower prices. An example of the effect of competition on lowered prices is the offer by Toledo Edison to Napoleon of a wholesale rate with a demand rachet reduction from 75 percent to 60 percent shortly before Napoleon was schedule to cease purchasing power at wholesale from Toledo Edison (Dorsey Tr. 5294).

The blend of power resources put together by Applicants for their electric systems may not be the optimum blend of power resources for a particular municipal electric system (Hughes Tr. 4136-67). The ability to pick and choose among all of the power options available through coordinated operation and development would give a municipal system an opportunity to develop a more economical blend of power supply resources (Kampmeier Tr. 5843). Accordingly, there can be no assurance that leaving untouched Applicants' monopoly would in fact lead to lower prices.

In fact there can be no assurance that absent the spur of competition a public utility will achieve the lowest costs. Professor Turner has noted: 3/

> The usual right of a regulated company to recover cost increases by rate increases tends to lessen resistence to unreasonable wage demands. Similarly, the right to a "fair" over-all rate of return tends to encourage uneconomical pricing of some services and may encourage a bias towards more extensive investment of capital than would otherwise be made. To varying degrees, these consequences have proved beyond effective regulatory control.

3/ Turner p. 1232.

II

APPLICANTS FAIL TO DEMONSTRATE THAT THE LICENSING BOARD FAILED TO ACCORD PROPER DEFERENCE TO DECISIONS AND ACTIONS OF OTHER REGULATORY AGENCIES

A. Applicants' Motion To Dismiss Was Properly Denied.

Applicant argues that the Licensing Board erred in denying motions of CEI and TECo. seeking dismissal of various allegations which had been previously litigated (Brief p. 75). Applicants point out that the Licensing Board failed to dispose of their motions with written orders. No objection was ever raised by any party to the Licensing Board's failure to issue written orders in the midst of the hearing. Accordingly any basis Applicants may have had to raise an objection based upon 10 C.F.R. §2.730(e) has been lost to them. Further Applicants do not present in their brief any reasons in law or fact why the Licensing Boards' ruling is erroneous. Rather Applicants suggest that the Appeal Board chase after some motions filed with the Licensing Board. 4/ For that reason alone Applicants' argument should be rejected.

If the Appeal Board does chase down and consider Applicants argument presented to the Licensing Board, City requests the Appeal Board to also consider City's answer to CEI's motion to dismiss which was filed with the Licensing Board on May 17, 1976 and is submitted in pertinent part and as

4/ Restatement of Applicants' arguments made to the Licensing Board would have caused their brief to exceed the page limitation order by the Board.

updated herewith as Appendix A. City would point out that Applicants argument must fail if for no other reason because there is no identity of parties. Consolidated Edison Co. of New York, Inc. (Indian Point Station No. 2) ALAB-399 decided May 20, 1977.

B. Applicants' Remaining Contentions That The Licensing Board Disregarded The Decisions And Actions Of Other Regulatory Agencies Are Without Merit.

Applicants argue that issues relating to rates and particularly allegations of price squeeze should be litigated before the FPC and not this forum (Brief p. 76). The adequacy of FPC rate regulation has been discussed earlier in this brief (pages 32-34, 38). Certainly, the duty to consider price squeeze allegations, which was thrust upon an unwilling FPC by the courts, does not create exclusive jurisdiction in the FPC, City of Mishawaka v. Indiana & Michigan Electric Co., 1975 CCH Tr. Cas. ¶60,318 (ND Ind. 1975; nor does it permit the FPC to grant complete relief, FPC v. Conway, 425 U.S. 957 (1976).

Applicants argue that as a result of state and federal rate regulation "none of the Applicants can raise prices to extract monopoly profits nor selectively lower prices in a given area to injure or destroy competition" (Brief p. 77, fn. 88). Within the zone of reasonableness, Applicants may adjust rates to meet competition.[5/] Additionally, under Ohio statutes initial rate filings are not subject to rate review (White Tr. 9648). CEI has negotiated and filed initial rates (Bingham Tr. 10,301-302). Rates for services such as street lighting are not subject to Ohio Public Utility Com-

5/ Turner, p. 1235.

mission (OPUC) review (Bingham Tr. 10,303). Under Ohio law a utility's retail rates may vary from municipality to municipality (Bingham Tr. 10,191; Wilson Tr. 11,095). Some rates are established solely on judgment without making an allocation of costs and in some instances assignments of costs is based upon judgment. For a large industrial customer, the presence of competition could be a factor in developing a rate (Bingham Tr. 10,271). Historically OPUC has not required utilities to make cost allocation studies in designing rates (Bingham Tr. 10.309). CEI has paid for consolidation of separate metering points to convert a customer from another supplier. This program was available only to customers in areas in which CEI competed with City or Painesville (Bingham Tr. 10,323-325). Rates at varying levels for the same service may be "cost justified" (Wilson Tr. 11,090-091).

Economists generally recognize that electric rates are inherently discriminatory.[6/] The facts demonstrate that that is true in this case where Mr. Wilson testified that separate cost studies are made for classes of cities, not each separate city. Within each class, the cost to serve particular cities would be different. Nevertheless the rate is developed for the class of cities (Tr. 11,111).

Applicants argue at page 79 that Section 203(a) of the Federal Power Act prohibits acquisition by one private utility of the facilities of another without approval of the FPC (Brief p. 79). Section 203(a) is applicable only to acquisition of facilities subject to FPC jurisdiction and thus is not appli-

6/ Wilcox and Shepherd, Public Policies Toward Business, p. 413.

cable to acquisitions of local distribution facilities. Duke Power Co. v. F.P.C., 401 F2d 930 (CADC 1968). Moreover, even when the FPC finds that an acquisition is consistent with the public interest, a court is free to find that the acquisition would violate the antitrust laws. United States v. El Paso Natural Gas Co., 376 U.S. 651, 12 L. Ed. 2d 12 (1964).

III

THE LICENSING BOARD CORRECTLY DEFINED THE RELEVANT MARKETS

The Licensing Board correctly notes that the parties were in substantial agreement regarding the law to be applied in defining the markets relevant for antitrust analysis. The parties were in dispute as to the definitions resulting from application of the law to the facts of this case. The Licensing Board defined the relevant markets largely as argued for by City and the Department of Justice (Department) and rejected Applicants' market definitions. The Licensing Board correctly defined the relevant markets.

A. The Retail Market.

The Licensing Board found that the sale of electricity to ultimate consumers constituted a discrete product market. The Licensing Board also found that a relevant geographic market was the service territory of each individual Applicant (5 NRC 162-65). Applicants argue that (1) the retail market is not relevant and (2) the geographic market for retail sales is composed of "open" and "closed" markets (Brief pp. 89-93). Applicants do not argue that retail sales do not constitute a product.

The retail market for firm power consists of sales of power to ultimate consumers. A very small proportion of the power sold to ultimate consumers is sold as interruptible power, i.e., the sale is subject to interruption to protect sales to others. Interruptible sales are made to a few large industrial customers. Retail sales are frequently divided by rate

schedules into residential, commercial and industrial based on the characteristics and size of the load (Wein dt. DJ 587 p. 97).

The retail market is relevant because it is the dominant market for electricity--ninety to ninety-five percent of the utilities revenues being derived from retail sales. It is necessary to judge the impact of all activities finally at the retail level. (Wein Tr. 6625). Retail markets govern the development of all other functions of the industry. Whether a monopoly exists in the retail market has consequences with respect to the alternative available elsewhere (Wein Tr. 6686). For example CEI refuses to wheel preference power to the City because that power could be used to compete with CEI in the retail market (Rudolph deposition DJ 558 p. 215) although in 1966 CEI did agree to wheel power for the City under the Detroit plan in which there would be no retail competition. (Loshing deposition DJ 560 pp. 33-35).

Importantly, in competing with City for retail customers CEI stressed the factor of reliability and economies from interconnections and CEI participation in nuclear units made possible through its membership in CAPCO. (Wyman deposition DJ 566 pp. 151-52; C 154; C 155; C 158; C 13; C 14; C 15.

That rate competition can occur in the retail market has been discussed at pages 40-42. Neither federal nor state regulation precludes competition at retail between municipal systems and other electric utilities in Ohio.

Applicants' argument ignores the notion of retail competition for blocks of customers within municipalities which may choose either to provide service through a municipal system or franchise another utility to sell electricity in

the City. See Otter Tail. Nor is there any geographic restriction on the areas outside of a municipality which may be served by a municipal system. In fact there are no certificated service areas in Ohio. Other than the limitations resulting from franchise laws, the only geographic restrictions on service areas in Ohio are those resulting from territorial agreements between utilities.

B. The Wholesale Market.

The Licensing Board did not adopt the precise wholesale market urged by City and Department but instead defined a bulk power services market which includes various coordinating and pooling services used in developing firm power for sale for resale as well as the wholesaling of firm power (5 NRC 160-62). City does not object to the bulk power services market as defined by the Licensing Board.

Applicants argue that rather than one bulk power services market there are two separate submarkets: (1) short-term operating coordination transactions and (2) long-term developmental coordination transactions. Applicants' two market analysis it is argued fully recognizes both economic and regulatory barriers to competition (Brief p. 95).

Applicants' argument in support of splitting the bulk power services market is based upon the effects of regulation which have been dealt with elsewhere in this brief and the argument that certain of the bulk power services are not reasonable substitutes.

Applicants lose sight of the fact that the antitrust issue is not whether Applicants' monopolize economy power exchanges or maintenance power sales,

but rather the antitrust issue is whether, Applicants have monopoly power over access to the market where those bulk power services are exchanged. A party gaining access to that market may purchase economy power today and make a long-term purchase of capacity tomorrow. These bulk power services are bought and sold as items used to put together a supply of firm bulk power for sale for resale. The sellers and purchasers are in the wholesale market. They look to the bulk power services market as the place where these items are bought and sold. The record supports the Licensing Board's definition.

City believes that the record would equally have supported a definition of a wholesale market for the product firm bulk power for sale for resale. Other bulk power services would then be grouped in the regional power exchange market which the Licensing Board also found relevant for antitrust purposes.

C. Regional Power Exchange Market.

The regional power exchange market found to exist by the Licensing Board is the market in which the bulk power services making up that bundle of services known as coordinated operations and development are exchanged. The issue is access to the market rather than monopolization of particular items. The discussion under the topic "bulk power services" is equally applicable to the regional power exchange market.

IV

APPLICANTS ALONE AND TOGETHER PCSSESS SUBSTANTIAL MARKET POWER AND HAVE MONOPOLIES IN THE RELEVANT MARKETS

A. Applicants Have Monopoly Power.

Market power is the ability of a firm to influence the market to achieve results other than those that would occur in a perfectly competitive market. Market power can be exercised in a variety of ways including excluding competitors, refusing to engage in economically efficient transactions, restricting output or engaging in discriminatory market practices. (Hughes dt. NRC 207 p. 8). In the electric power industry the basic factors affecting the market power of an entity are (1) size of the entity relative to other entities in the market, (2) the entity's coordination arrangements with other neighboring entities, (3) the entity's control over transmission, and (4) the entity's location in relation to other systems. (Hughes dt. NRC 207 p. 12).

For the purposes of antitrust analysis in this case, market shares for Applicants may be measured in terms of (1) pole miles of transmission lines, (2) megawatts of generating capacity and (3) megawatt hours generated. (Hughes dt. NRC 207 p. 25). The market shares of Applicants individually and as a group are as follows [7/] (Hughes dt. NRC 207 p. 26-27 (table)):

[See Next Page]

7/ Dr. Wein shows comparable market shares. (Wein dt. 587 pp. 65, 69, 73, 76).

CAPCO	Transmission	Net Generation	Generating Capacity
(In the CCCT)	99.3%	98.4%	97.1%
CEI (In its service area)	96.8%	96.6%	94.4%
Duquesne (Duquesne's service area)	100.0%	100.0%	100.0%
Ohio Edison-Penn Power (Total OE-PP service area)	99.8%	99.0%	98.2%
Toledo Edison (In Toledo Edison's service area)	99.2%	98.2%	96.1%

CEI has a verticle monopoly of generating capacity and retail sales in its service territory. (Wein dt. DJ 587 p. 65). Ohio Edison and Penn Power have a verticle monopoly of generation capacity and a monopoly of wholesale and retail sales of electricity in their service areas. (Wein dt. DJ 587 p. 68). Toledo Edison has a verticle monopoly of generation and of wholesale and retail sales of electricity in its service area. (Wein dt. DJ 587 p. 72). Within its service territory Duquesne is the only electric utility which generates, transmits and distributes power to ultimate consumers and within its service area has a monopoly. (Wein dt. 587 pp. 74-75)

The factors giving rise to the monopolistic powers of the Applicants in the firm power retail market include the effects of long-standing policies of acquisition and merger, the ability to take advantage of economies of economies of scale as a result of acquisitions and mergers, the further development of scale economies through membership in the CAPCO pool, the inability of existing self-generating municipal systems to attain comparable economies of scale because of their size and inability to join the CAPCO pool, and legal barriers to entry. (Wein dt. DJ 587 p. 131)

forms which would not have resulted in a single dominant electric utility within each service area (Wein DJ 587 pp. 53-58). In fact the present CAPCO Group represents an alternative arrangement to obtaining economies of scale which none of the Applicants could have achieved alone (Sullivan deposition DJ 578 p. 27; Keck deposition DJ 576 p. 32; Masters deposition DJ 567 pp. 32, 57-68; Mozer dt. NRC 205 pp. 11-12; Firestone Tr. 9228). The CAPCO alternative comes close to achieving the economies which a single entity operating in the CCCT would achieve (Hughes Tr. 3732). Dr. Hughes defined a natural monopoly as occuring when technology is such that the most economical form of business organization is a single supplier (Tr. 3729).

In this regard it is interesting to compare TECo., Ohio Edison and CEI who have a aggregate of 8596 mw to serve a territory of 11,663 square miles (5 NRC 151-52) with the single dominant entity Alabama Power Company having 6242 mw to serve all but the northern most 11 counties of Alabama (Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2,) Docket Nos. 50-348A and 50-364A, Initial Decision dated April 8, 1977 at pages 20-21). TECo., Ohio Edison and CEI are, in large measure, free to compete for customers.

Other economists have noted that bulk power supply is not a natural monopoly. It has been said:

> The bulk supply of electricity . . . is now technologically capable of effective competition in most areas. This is raising--in practical and theoretical form--the prospects for a major change in regulatory standing. Many utilities could compete, vigorously among themselves for at least their major customers. Each utility would gain by

> raiding its neighbors' main clients. And nearly all major urban centers have at least two or three alternative suppliers. Therefore the technical basis for competition--at least as open and complete as in many industrial oligopolies--now exists in bulk electricity. It will evolve away from the traditional tight verticle integration of the three levels within each geographic monopoly. This, too, simply restores normal economic behavior.
>
> The gains from this change could be large. Inefficiency would be under direct constraint, for the first time in decades. Service standards and cheapness would both be used to gain customers, as they should be; this would ease the probable present bias toward excessive service quality. Utilities would be induced to developed and use the technology of largescale supply more fully, in order to penetrate each others' markets for bulk electricity. (Emphasis in original.) 9/

Productivity increases in the electric utility industry have been at a declining rate since 1951. (See "Productivity In The Private Utility Industry 1951 To 1973" published by the Office of Economics, Federal Power Commission, October 1975).

Applicants argument that monopoly power is a theoretical concept with no practical application to this case is directly contrary to the teaching of Otter Tail. The court in Otter Tail held that Otter Tail served 465 of 615 towns in the relevant geographic retail market giving Otter Tail a 75.6 percent market share. Based upon Otter Tail's market share the court drew an inference of monopoly power. 331 FSupp. 59. The Supreme Court affirmed the district courts finding of monopoly power based upon an inference drawn from Otter Tail's market share.

9/ Wilcox and Shepherd, Public Policies Toward Business, p. 415. See also, Weis, "An Analysis Of Antitrust In The Electric Power Industry", Promoting Competition In Regulated Markets, Phillips, Editor.

Applicants also argue that as natural monopolists they ought not to be faulted for competing vigorously and fairly.[10/] Assuming, arguendo, that Applicants are natural monopolists the record and the Licensing Board's findings make it clear that they did not compete fairly. For example with regard to the demise of many small electric systems within the CCCT, the Licensing Board found (5 NRC 144 fn. 10):

> Some of these systems may have been too small to operate efficiently and economically. Other systems may have succumbed to the prolonged effects of management inefficiency or failure to maintain and service their electric plants. The problem raised by the antitrust laws, however, arises from evidence of several activities of Applicants which hastened or contributed in a substantial manner to the elimination of these electricity generating competitors.

And at page 190 fn. 88:

> Even if the demise of the Norwalk system had been inevitable because of the natural economic forces described by Dr. Gerber, App. 189, this does not save it from the reach of the antitrust laws. Whatever its natural economic fate might have been, Norwalk was entitled to it without being hurried along by the anticompetitive practices of Ohio Edison.

The Licensing Board correctly found that the Applicants have monopoly power.

10/ Professor Turner has suggested that the ALCOA case can be read to hold that retention of monopoly power over a long period of time is unlawful no matter that the power was lawfully acquired. Turner, p. 1219. It is not necessary to rely upon Turner's suggestion in this case because Applicants have used unlawful means to maintain their monopoly power.

C. Applicants Have Monopolized The Relevant Markets.

In determining whether monopoly exists, it is not material whether prices are raised or that competition actually is excluded but that the power exists to raise prices and exclude competition. American Tobacco v. United States, 328 U.S. 781 (1946).

The Court in United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) pointed out that:

> The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen or historic accident.

Possession of monopoly power in the relevant market can be inferred from a predominant share of the market, Grinnell, supra, or from control over a bottleneck facility which affords the controlling company the power to exclude competition or set prices. United States v. Otter Tail Power Company, 331 F. Supp. 54, aff'd in part, 410 U.S. 366 (1973).

While there is no fixed rule as to what constitutes a predominant share of the market the courts have provided some guidance. A 90 percent share of the aluminum market constitutes monopoly power. United States v. Aluminum Co. of America, 148 F. 2d 416 (1945). Control of 30 percent of commercial banking in the relevant market was unlwful dominance in Philadelphia National Bank, supra. A 65 percent market share with the

remainder of the market divided among 50 other companies was held to be monopoly power in United States v. Besser Manufacturing Co., 96 F. Supp. 304, aff'd., 343 U.S. 444 (1952). In United Banana Co. v. United Fruit Co., 245 F. Supp. 161, aff'd., 362 F.2d 149 (1966), a 70 percent share of the market constituted monopoly. The Supreme Court in Grinnell, supra, held that the same market criteria used in merger cases should be used in Section 2 monopolization cases.

Applicants' alone and together control over 90 percent of the relevant markets. Their market shares alone compel a finding of monopoly power. While Applicants' have argued that because this is a regulated industry market shares are not as significant as they are in other industries, there is no reason why this should be for as is demonstrated elsewhere in this brief regulation neither caused nor hindered Applicants' acquisition of market shares in excess of 90 percent. Neither are Applicants fully regulated in the use of their market power. See also United States v. Otter Tail, supra.

As dominant firms possessing monopoly power in the relevant markets, the limits of lawful business activities of Applicants are more narrowly circumscribed than are the acts of firms not possessing monopoly powers. United States v. Aluminum Co. of America, supra; The Peelers Co., 65 FTC 799 (1964), enforced in part sub nom., La Peyre v. FTC, 366 F.2d 117 (5th Cir. 1966).

The second element of the offense of monopolization, i.e., the willful acquisition or maintenance of that power, can be established by evidence of "transactions neutral on their face" that have an exclusionary effect on the

market without specific evidence of anticompetitive motivation. United States v. Aluminum Co. of America, supra; United States v. United Shoe Machinery Corp., 110 F. Supp. 295, aff'd per curiam, 347 U.S. 361 (1954).

It is not necessary to show that Applicants deliberately acted to create a monopoly. The Supreme Court said in United States v. Griffith, 334 U.S. 100, 92 L.Ed. 1236, 68 S.Ct. 441 (1948), at pages 105-06, that:

> It is, however, not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the antitrust laws have been violated; it is sufficient that a restraint of trade or monopoly results as a consequence of a defendant's conduct or business arrangements.

Applicants' monopoly is the consequence of a conscious, aggressive policy of acquiring competing public and private electric entities in Ohio and Pennsylvania and acquiring the generating capacity of various industrial firms. Dr. Wein's testimony demonstrates that Applicants' monopoly was not the inevitable result of natural monopoly forces or superior business acumen.

The economies of large scale generation and tramsission which are inherent in the electric utility industry could have been obtained by a variety of organizational forms which would not have resulted in the applicants acquiring monopoly power. (Wein dt. DJ 582 pp. 53-56). It was not inevitable that applicants should achieve dominance through acquisition and merger of the many small entities which once existed in the CCCT.

It was not inevitable that Applicants should anticipate increases in the demand for power and install new generating capacity to meet that demand. It was not inevitable that CEI, Toledo Edison and Ohio Edison should allocate

territories as among themselves and with Ohio Power and other investor owned utilities. It was not inevitable that Ohio Edison, Toledo Edison and Penn Power should impose territorial allocations on their wholesale municipal customers. It was not inevitable that Toledo Edison and Ohio Edison would join with other investor-owned utilities to place the 90-day provision in the Buckeye agreement. It was not inevitable that Toledo Edison would refuse to waive the 90-day rule when requested to do so by Napoleon. It was not inevitable that Duquesne and Toledo Edison would refuse to sell power at wholesale to municipal systems they wished to acquire. It was not inevitable that CEI would refuse to interconnect in parallel with the City of Cleveland without price fixing until ordered to do so by the FPC. It was not inevitable that no municipal electric systems be invited to join CAPCO. It was not inevitable that the requests of Pitcairn and Cleveland to join CAPCO were denied. It was not inevitable that CEI refused to wheel and continues to refuse to wheel power for the City. It was not inevitable that Ohio Edison refused to wheel for WCOE. It was not inevitable that Ohio Edison refused to wheel for Buckeye and delayed delivery of Buckeye power to cooperatives in its territory by two years. It was not inevitable that Duquesne refused to interconnect with Pitcairn. It was not inevitable that CEI refused to sell maintenance power to the City. It was not inevitable that Applicants refused to grant municipal systems in the CCCT access to nuclear generating units on reasonable terms and conditions. Nor were any of these things compelled by State or Federal law or policy or by any regulatory commission.

It is not necessary to show a use of monopoly power to demonstrate a violation of Section 2 of the Sherman Act. The Court in United States v. Griffith, supra, said at pages 106-07:

> So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised. For §2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control . . . . Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power . . . .

In Gamco, Inc. v. Providence Fruit and Produce Building, 194 F.2d 484 (CA 1, 1952), the Court said at pages 486-87 that:

> The Sherman Act condemns the power which makes pricing abuses possible as well as the abuse itself.

It is sufficient that monopoly results from a defendent's conduct to prove an intent to monopolize. United States v. Griffith, supra. Moreover, none of the transactions engaged in by Applicants need be illegal in and of themselves if they are part of a course of conduct to acquire or maintain a monopoly. American Tobacco v. United States, 328 U.S. 781 (1946). Accordingly individual elements of an anticompetitive situation may not be singled out for evaluation on an item by item basis; for as a group, they may comprise an unlawful monopolization although each might be lawful standing alone. United States v. International Business Machines, 1975 CCH Case ¶60,495.

Merely showing the exclusionary effect of the policies and practices engaged in by a company possessing monopoly power may prove the offense of monopolization. United States v. Aluminum Company of America, supra. As the Court pointed out in United States v. United Shoe Machinery Corp., 110 F. Supp. 295 at 346, "Defendant having willed the means, has willed the end."

One of the principle methods used by Applicants to maintain their monopoly power in the relevant markets is selective refusals to deal. If a firm possess monopoly power a selective refusal to deal by that firm can be exclusionary and violate Section 2 of the Sherman Act.

In Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), Kodak which at one time sold at wholesale to a number of independent firms decided to perform the wholesale function itself. Kodak was successful in acquiring all of the wholesalers in an area except Southern Photo Materials. Kodak then refused to sell to Southern at a wholesale discount offering instead to sell to Southern at the retail price. Although no direct evidence of Kodak's intent was presented at trial, it was held that Kodak's refusal to sell to Southern at a price which would permit Southern to compete for sales to retailers was illegal monopolization.

Selective refusals to deal utilized by a party having a monopoly in one market to extend its monopoly to another market have been held to constitute illegal monopolization. Packaged Programs, Inc. v. Westinghouse Broadcasting, 225 F.2d 708 (3rd Cir. 1958); Six Twenty-Nine Productions v.

Rollins Telecasting Inc., 365 F.2d 478 (5th Cir. 1966); Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

In Otter Tail Power Co. v. United States, 331 F. Supp. 54, aff'd. in part, 410 U.S. 366 (1973), the Court was concerned with monopolization and attempt to monopolize by an integrated generation, transmission and distribution electric utility. Otter Tail owned the only subtransmission system available for delivering electric power to distribution systems in the area. When a municipality served at retail by Otter Tail undertook to establish its own retail distribution system, Otter Tail refused to either sell power to the municipality at wholesale or to wheel power to the municipality from other bulk power suppliers. The municipality was left with the alternative of (1) establishing a high cost isolated generating system; or (2) abandoning its plan to become a municipal distributor of power. Otter Tail argued that its actions were necessary to maintain its business and that failure to so act would have caused the ultimate loss of all of its retail business. The Court found Otter Tail's defense unpersuasive and held that Otter Tail possessed monopoly power in the relevant market and its refusals to deal in order to maintain its monopoly power were unlawful.

CEI's refusal to wheel PASNY power for delivery to the City because doing so would be injurious to CEI's competitive position in the retail market is clearly an unlawful act of monopolization.

If a company controls a facility which cannot practicably be duplicated and access to which is a significant factor in an entities ability to compete, a unilateral refusal to deal may be violative of Section 2 of the Sherman Act

without any showing of monopoly power in the relevant market. Control of the "bottleneck" facility by itself constitutes monopoly power. Denying access to the bottleneck facility to destroy actual or potential competition is illegal. United States v. Terminal Railroad Association, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1 (1954); Silver v. New York Stock Exchange, 373 U.S. 341, reh. denied 375 U.S. 870 (1963); Gamco, Inc. v. Providence Fruit and Produce Building, Inc., 194 F.2d 484, cert. denied 344 U.S. 817 (1952); Otter Tail, supra. It is interesting to note that in Otter Tail the "bottleneck" facility was the subtransmission lines owned solely by Otter Tail. Thus, a "bottleneck" facility may be owned jointly or individually.

In this case both transmission lines and nuclear generating facilities are unique facilities which cannot practicably be reproduced. Applicants have offered evidence to show that City could have constructed its own transmission lines and therefore no bottleneck exists. Assuming the evidence did show that the City could construct its own transmission lines, an assumption City believes is contrary to the evidence, there is no evidence that the cost to the City of constructing its own transmission system would somehow be less than utilizing the existing transmission system of CEI.

It is not necessary under the "bottleneck" cases that the facility cannot be duplicated. It is enough that without access to the facility the excluded entity is at a competitive disadvantage. In Associated Press v. United States, supra, at 17-18 the Supreme Court quoted with approval Judge Learned Hand's statement:

> Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose . . . . And yet that advantage alone may make a monopoly unlawful.

In Gamco, Inc. v. Providence Fruit and Produce Building, Inc., supra, the Court said at page 486:

> . . . a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization . . . to impose upon plaintiff the additional expense of developing another site, attracting buyers and transshipping his fruit and produce by truck is clearly to extract a monopolist's advantage.

Applicants have argued that giving municipalities access to Applicants' transmission lines and nuclear generating facilities would permit the municipalities to exploit unfairly their tax advantages. It is by no means certain that Applicants do not enjoy tax advantages of equal or greater magnitude. The total Federal income taxes paid by the Applicants for the last couple of years has been in the range of 2 percent - 4 percent of revenues. (Kampmeier dt. DJ 450 p. 29) Applicants expect to realize a very substantial investment tax credit when Davis-Besse Unit #1 becomes operational (Williams Tr. 10,526). Even if it were true that access to the "bottleneck" facilities would permit municipalities to exploit their tax advantage, that fact is no defense to a charge of monopolization. The defense raised by Applicants was considered by the Court in American Federation of Tobacco Growers v. Neal, 183 F.2d 869 (1950), wherein the Court said at page 872:

> To say that a board of trade whose members have monopolistic control of a market may exclude an outsider who wishes to compete therein merely because he has an advantage in taxes or construction costs is to advance a proposition that has no support in any decision with which we are familiar, and none has been cited in support of it.
>
> A restraint of trade involving the elimination of a competitor is to be deemed reasonable or unreasonable on the basis of matters affecting the trade itself, not on the relative cost of doing business of the persons engaged in competition. One of the great values of competition is that it encourages those who compete to reduce costs and lower prices and thus pass on the saving to the public; and the bane of monopoly is that it perpetuates high costs and uneconomic practice at the expense of the public.
>
> As to the contention that the restraint of trade here involved was a reasonable one, it is a sufficient answer that the effect of the action of the defendants was to exclude a competitor from a substantial market in interstate commerce and it is well settled that such exclusion is unreasonable per se.

Applicants have engaged in other exclusionary practices which are unlawful. Applicants have engaged in territorial allocations which are per se violations of the Sherman Act. Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958). United States v. Topco Associates, 405 U.S. 596 (1972). Applicants have violated Section 1 of the Sherman Act by contracting with their wholesale customers to limit the areas or persons with which the wholesaler could sell the power purchased from Applicants. United States v. Arnold, Schwinn and Co., 388 U.S. 365 (1967). United States v. General Electric Co., 272 U.S. 476 (1926).

CEI engaged in a tying sale when it required the City to sign a contract for street lighting in order to be allowed to purchase emergency power

over the 69 kv line. Such tying arrangements are per se violations of the Sherman Act. Northern Pacific Railway Company v. United States, supra. Ohio Edison and Toledo Edison have imposed a price squeeze on their municipal wholesale customers in violation of the Sherman Act. United States v. Aluminum Company of America, supra.

V

SMALL ENTITIES IN THE CCCT CAN REASONABLY PARTICIPATE IN POOLING ACTIVITIES

Applicants argue that the small entities in the CCCT are too small to engage in power pooling activities (Brief p. 104). Applicants rely on the suggestion of Dr. Hughes in his article "Scale Frontiers In Electric Power" that only the largest 20 or so utilities achieve efficient performance by way of pool coordination and that the next 40 or so in size should participate only by way of "satellite dependency on a nearby large system or minority membership in a tightly organized multilateral pool . . . [giving them] a minor role in planning decisions made by the large neighbor or the pool"; systems not among the 60 largest should become involved "only as satellites or as weak dependent members of large pools."

It is curious that Applicants should rely on Dr. Hughes article to justify excluding small systems from the CAPCO pool. Among the Applicants only the combined Ohio Edison-Penn Power electric system ranks in the top 20 privately owned systems in terms of production capacity. Based upon Dr. Hughes article, CEI and Duquesne Light should participate in CAPCO only through a satellite dependency upon Ohio Edison or as minority members having only a minor role in planning decisions which would be made by Ohio Edison. TECo., which ranks only 88 among privately owned electric utilities in terms of production capacity,

should participate only as a satellite or as a weak dependent member of CAPCO. 11/

Applicants argue that the small electric systems in the CCCT could make no contribution to the CAPCO pool.

Applicants can point to no studies which would demonstrate that municipal systems cannot contribute benefits to the CAPCO pool. Mr. Slemmer, Applicants' expert witness on pooling made it quite clear that a study would have to be made before such a conclusion is reached. (Slemmer Tr. 9122). In fact, Mr. Slemmer testified that an arrangement could be made for coordination between Applicants and municipal systems operating in the CCCT which would provide each party with significant net benefits. (Slemmer Tr. 9121). Mr. Masters' testified on deposition that even if a small system could not provide emergency support to a large system there could be an incentive for the large system to enter into an interconnection arrangement with the small system. (Masters deposition DJ 567 pp. 168-69). Mr. Masters also recognized that if a party, such as the City, seeking to join CAPCO has no other alternatives for coordination that will be reflected in its bargaining position. (Masters deposition DJ 567 pp. 138-39).

The record is replete with examples of benefits to Applicants from having power available from small systems. For example, CEI's interconnection with Painesville might reduce CEI's CAPCO commitments. (Masters deposition DJ 567 p. 195). Napoleon's generation is being operated

11/ Federal Power Commission, Statistics Of Privately Owned Electric Utilities In The United States (For The Year Ending December 31, 1973).

to provide peaking power for Toledo Edison and Toledo Edison is considering a similar arrangement with respect to Bryan's generating capacity. (Keck deposition 576 pp. 231-33). Leasing Bryan's generating capacity to provide peaking capacity for Toledo Edison would produce the same results as a purchase of power from Bryan. (Bosch deposition DJ 580 pp. 13-14).

In 1974 the City of Orrville wrote to Ohio Edison asking to discuss a power pooling arrangement. Orrville at the time had 25 mw of load and 65 mw of generating capacity permitting Orrville to make 40 mw of capacity available to the pool. (Applicants 174). Thus Orville offered the pool 15 mw more than Duquesne obtains from its interconnection agreement with St. Joe Lead and for which Duquesne receives CAPCO credit. (Dempler Tr. 8710-11).

A system which could only contribute peaking units to the pool would be a benefit to the CAPCO pool. (Schaffer Tr. 8566). An entity which brought as much as 10 mw capacity to the pool would change the CAPCO members commitments for reserve capacity. (Dempler Tr. 8857).

The acquisition of the City's generation by CEI would reduce CEI's CAPCO requirements. (DJ 354).

Small utilities could have aided Applicants by contributing capital at a time when Applicants were deferring units because they were unable to raise capital for construction costs. (Mozer Tr. 3609). Small utilities could contribute benefits through peak diversity. (Mozer Tr. 3609). If the City of Cleveland had nuclear power it could sell economy power to Applicants. (Mozer Tr. 3609).

Small utilities could have contributed to economies of scale when the 900 mw Davis-Besse # 1 was planned by permitting an increase in size to 1100 mw. (Mozer Tr. 3608). The municipalities in the CCCT own approximately 350 mw of generation (NRC 157, Hughes dt NRC 207 pp. 24-27 (table)). At a seven percent growth rate the municipal systems with generation would contribute 24 mw of growth per year to the pool. That compares favorable with the 22 mw per year annual growth experienced by Penn Power for the 11 years 1963-1973. Adding the non-generating municipalities would approximately double the aggregate municipal load growth.

Mr. Firestone has argued that since CAPCO presently exhausts the economies of scale permitted by modern technology the additional load growth from the municipal systems will not add to economies of scale. (Firestone Tr. 9405). Based upon Mr. Firestone reasoning, absent some increase in the size of units technically feasible by the year 1989-1990, Toledo Edison will make no contribution to load growth. In that year Toledo Edison will contribute only 153 mw of load growth to a total CAPCO load growth of 1400 mw. Subtracting Toledo Edison's load growth still permits CAPCO to install the largest available unit. (NRC 152). Indeed even assuming that Penn Power's load growth doubles to 44 mw per year in 1989-1990, Ohio Edison, Duquesne and CEI could install the largest available units without the combined load growth of Penn Power and Toledo Edison.

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Mr. Firestone also admitted that load growth over that needed to make feasible installation of the largest available units increases the frequency of

installation of units thereby increasing the total savings resulting from taking advantage of economies of scale. (Firestone Tr. 9406).

Apparently mutuality was no problem in 1962 when Mr. Lindseth offered to interconnect with the City with schedules for emergency support, firm power, economy energy and wheeling to the City's public load. (DJ 293). Since then the City has added 125 mw of new generating capacity which presumably increases mutuality. Perhaps the price-fixing requirement attached to the 1962 offer provided the mutuality.

In 1967 CEI negotiated an interchange agreement over a 100 mw intertie with Union Carbide. (DJ 606). Either CEI believed a 100 mw intertie was large enough to provide mutuality or it was willing to forego mutuality in an effort to forestall installation of additional generation by Union Carbide.

During the summer of 1973 when CEI was admittedly having difficulty meeting its peak load and was curtailing sales to its interruptible customers, the City offered to sell peak load power to CEI. (Hinchee Tr. 2725).

In addition the City could provide beneficial support to the metropolitan transmission grid through a program of staggard construction of peaking units with CEI. (Mayben Tr. 7765-66).

A viable power pool may consist of a large number of systems of widely varying sizes with significant disparities in the nature and extent of their facilities. Such a pool would permit the parties to engage in coordinated operation and development providing significant benefits to all of the parties (DJ 634; DJ 635; DJ 636; DJ 637; Slemmer Tr. 8964, 8968. 8970-74, 8978-81,

9049, 9051, 9073-74, 9108, 9128-29, 9162; Gerber Tr. 11,508, 11,511-531; Kampmeier DJ 450, pp. 25-30, Tr. 5829-31).

Admission of City to CAPCO under the CAPCO reserve sharing formula would have reduced the reserve obligation of the existing CAPCO members (DJ 287).

VI

APPLICANTS CONSPIRED TO DENY SMALL ELECTRIC UTILITIES ACCESS TO THE BENEFITS OF COORDINATED OPERATIONS AND DEVELOPMENT, ECONOMIES OF SCALE AND ACCESS TO NUCLEAR GENERATION

Applicants attack the Licensing Board's findings that their refusals to approve requests by competing entities for membership in CAPCO continued Applicants maintenance of a situation inconsistent with the antitrust laws (Brief pp. 106-120). Applicants argue that their refusals to admit Pitcairn and City to membership in CAPCO were based upon good faith business judgments and that City's request for membership was a sham (Brief pp. 109, 141-145). Applicants also take issue with the Licensing Board's finding that the CAPCO system of reserve sharing was a "knowing errection of entry barriers . . . [which] violates the antitrust laws" (Brief pp. 113-120). Applicants' arguments are belied by the factual record and contrary to law.

A. Applicants Acted Jointly In Denying City and Pitcairn Membership In CAPCO.

As will be shown in subsequent portions of this brief and as appears in the Licensing Board's findings at 5 NRC 165-223 each of the Applicants desired to acquire municipal electric systems in their service territory; three of them -- Ohio Edison, Penn Power and Toledo Edison -- imposed restrictions on resale of power sold to municipal systems at wholesale, and a

fourth, CEI, suggested a territorial agreement. Duquesne refused to sell at wholesale or to interconnect with the only municipal system remaining in its territory; at least three of Applicants -- Ohio Edison, Toledo Edison and CEI -- have individually refused to wheel power; and several have engaged in other anticompetitive acts. Clearly a motive exists for each of them to enter into a conspiracy to deny small municipal systems the advantages of coordinated operations and development, economies of scale and access to nuclear power.

Mr. Lindseth, who, as CEI's chief executive officer, took part in all of the discussions leading to the formation of the present CAPCO, testified (Lindseth deposition DJ 568 pp. 26-28):

> Q. Was the possible inclusion of municipal systems discussed at any of the meetings?
>
> A. If you mean by the phrase of municipal systems broadly noncorporate type utilities, there was a discussion of, I believe, a group of cooperatively owned systems at one or even possibly more than one of these meetings.
>
> Q. Now what was the nature of these discussions?
>
> A. Whether the nature of the CAPCO arrangement was such that other than utility companies should be members.
>
> Q. And what was the conclusion?
>
> A. The conclusion was that that did not conform to the concept of CAPCO, and they were not invited as I recall to participate.
>
> Q. If you recall, on what basis was that decision reached?
>
> A. Well, I do not remember the details of the discussion or consideration, but CAPCO was an organization of utility companies, and hence should be an organization of utility companies.

Applicants attempt to explain away Mr. Lindseth's testimony by saying that it only states that municipals were not "invited" to join CAPCO and that the cooperatives were excluded because they were already involved in the Buckeye agreement. The defect in Applicants' argument is that Mr. Lindseth clearly said more than that. Mr. Lindseth testified that the reason cooperatives and municipal systems were not invited to join was because CAPCO was to be an organization limited to investor-owned utilities. Moreover, when specifically asked to state the reason for excluding the cooperatives, Mr. Lindseth made no mention of the cooperatives' participation in Buckeye but instead gave the reason that CAPCO was limited to investor-owned utilities. When the witness has specifically stated reasons for an action, there is no room for the fertile mind of counsel to offer other reasons.

Mr. Besse confirms that CEI had no desire to coordinate with municipal systems. Mr. Besse stated that CEI desired to avoid Federal intervention in coordinating activities which it was feared would permit small systems to coordinate, thus reducing the gap in costs between investor-owned utilities and small systems. (Besse deposition DJ 559 pp. 126, 132-33) Mr. Mansfield shared the belief that investor-owned utilities should not coordinate with public power groups (Mansfield deposition DJ 572 pp. 10-11).

On August 20, 1967, the CAPCO Chief Executives engaged in lengthy discussion regarding possible municipal intervention before the FPC to seek to join the pool (C-49 p. 7). On that occasion Mr. Besse of CEI noted that "his company was on notice that the City of Cleveland will ask us for an interconnection." At that same meeting, Mr. Mansfield of Ohio Edison and

Penn Power stated that the municipalities of Hiram, Oberlin and Cleveland might file objections to the CAPCO arrangement before the FPC and try to get into the pool (C-50 p. 4).

Applicants attempt to dismiss C-49 on the grounds that Applicants' concern was not that municipals should join but that they might delay FPC action approving the pool. Once again, Applicants' attempt to explain away the facts fails. Duquesne wanted the pool agreement signed or not signed prior to October 25, 1967, the last date upon which it could cancel the 800 mw nuclear unit it had ordered (see attachment to C-50). Duquesne did not insist upon FPC approval prior to October 25. In fact, the CAPCO companies did not even arrange to meet with the FPC until November 1, 1967 (C-52), after the critical date. Moreover, were it not for a desire to exclude municipal systems, intervention of those systems before the FPC would create no problem.

Further evidence of Applicants' interest in excluding municipal systems from participation in CAPCO is found in an internal memorandum from the files of Ohio Edison written to Mr. Dissmeyer by Mr. Travers. The memorandum, dated November 1, 1967, suggests the adoption of capacity rating criteria which would have the effect of derating much of the existing capacity of any municipality seeking to join CAPCO (C-54). The result of such a derating would be to assign greater capacity allocations to a municipal system thus providing an economic disincentive to CAPCO membership.

Furthermore, if it were not the intent of Applicants to exclude municipal systems from membership in CAPCO, why was it necessary for the Chief Executives of CAPCO to meet on October 22, 1967, to formulate a joint

explanation as to why public power bodies were excluded (C-52)? It would have been simple enough for Applicants to have said that time did not permit inviting others to join in the original pool negotiations (although such a statement would be contrary to Mr. Lindseth's statement of the reason for their exclusion) and that public power bodies were welcome to join at a later date. Instead Applicants agreed to advance rationale which looked towards future as well as present exclusion of municipal systems.

Applicants ignore the clear inferences to be drawn from C-55 in which Mr. Greenslade urges that the CAPCO member make efforts to avoid having become an "entity." Mr. Greenslade suggested (C-55, p. 3):

> Increasing attempts are being made by municipalities to become "pool" members and to participate in joint units. The FPC is seemingly sympathetic with these efforts, but its legal powers in the area are limited. Adoption of the "entity" concept by the municipalities in a Section 202(b) proceeding could be the answer for the Commission.

If further evidence of Applicants' intent to deny municipal systems the benefits of coordinated operations and development were needed, one need only look at Applicants' conduct as compared to their purported reason for excluding public power bodies. Applicants agr ·d to tell the FPC that the exclusion of public power bodies was premised on the idea that such groups could participate more appropriately through purchases of capacity and energy from Applicants (C-52).

That rationale is a sham. At that very time, Duquesne was refusing to sell power at wholesale to Pitcairn and did not intend to make such sales in the future (NRC-13, dated January 23, 1968). Indeed, Duquesne has argued

in this very proceeding that such sales would not only have been unlawful but would have been criminal violations of Pennsylvania law (Duquesne Motion To Dismiss, filed April 20, 1976, at p. 17).

Duquesne refused to make such sales until it recognized that it would probably be ordered to do so by the FPC.

At the same time that CEI was telling the FPC that municipals should participate through purchases from Applicants, it was refusing even to interconnect with the Cities of Cleveland and Painesville without price fixing (C-99, C-111, C-128, C-132, Tr. 2569, 3152-53).

Toledo Edison also refused to sell wholesale power to a municipal system which it hoped to acquire (DJ 504, 506).

If, indeed, Applicants had valid business reasons for excluding municipal systems, why did they only put forth transparently false reasons?

Applicants' conduct in refusing to admit Pitcairn and Cleveland to CAPCO further evidences their intent to exclude municipal systems from the benefits of coordinated operations. Despite Applicants' claims to the contrary, Mr. Fleger refused to permit Pitcairn to join CAPCO. (Fleger Tr. 8624). Nor can there by any doubt that the City was denied membership. Mr. Hauser's notes of a meeting with the City on December 13, 1973, following the December 7, 1973 special meeting of the CAPCO Executives to discuss the City's request for CAPCO membership, show that Mr. Goldberg, one of the attorneys for the City, "was advised that membership in CAPCO was definitely out" (DJ 291). The response given to the City at the

December 13, 1973 meeting was, according to Mr. Rudolph, Chief Officer of CEI, a position formulated by CAPCO (DJ 558, p. 245).

Moreover, the refusals to admit Pitcairn and Cleveland to CAPCO were clearly the result of joint consultation resulting in a unified position. CEI consulted with its CAPCO partners before responding to the City's request of August 3rd for CAPCO membership (Williams Tr. 10,436), although CEI was aware that under CAPCO rules requiring unanimous consent, CEI alone could have vetoed the City's request (Williams Tr. 10,437). The City was told by CEI "we have talked with the other members of the CAPCO group, all of whom feel that these discussions can best be initiated between the Illuminating Company and the City of Cleveland" (Applicants' 25). Earlier CEI had informed Painesville that eventually its request for participation in the Perry units would have to be discussed with its CAPCO partners (NRC 136B). The City's earlier request to join CAPCO was put on the agenda of a CAPCO Executive meeting by Mr. Arthur at CEI's request and was discussed at the meeting (DJ 97, 98).

Interestingly, five days before responding to the City's August request, CEI had unilaterally decided to deny the City's request to join CAPCO (DJ 291). Thus, CEI's offer of discussions (Applicants' 25), after conferring with its partners was either a sham demonstrating a bad faith negotiating position or evidence that a joint CAPCO position was to be taken with respect to the City's request.

The City's request was discussed at a meeting of the CAPCO Chief Executive Officers in December 1973. There was considerable discussion

about the size and nature of the City system, and each company agreed to communicate its views regarding the City's request for CAPCO membership to CEI. Mr. Mansfield stated that the City's request offered no advantage to Ohio Edison and suggested that CEI work out a separate agreement with the City. If such an agreement would result in an impairment of CEI's ability to meet its CAPCO obligation, Ohio Edison would be prepared to make an adjustment in CEI's obligation (White Tr. 9519-26; Williams Tr. 10,459-60). Exhibit C-61, written by Mr. Mansfield, states:

> Following the meeting of the CAPCO Executive Committee on December 7, 1973, I informed Mr. Rudolph that Ohio Edison and Penn Power were opposed to granting the request of the Cleveland Municipal Electric Light Plant (MELP) as stated in its letter dated August 3, 1973, to Mr. Rudolph from Mr. Whiting.

Toledo Edison also communicated its response to CEI (Williamson deposition DJ 581 p. 18). Duquesne Light responded directly to the City in terms reflecting the response agreed upon at the December 3, 1973, special meeting of the CAPCO Executives (DJ 105).

Contrary to Mr. Hauser's notes for August 8, 1973, Mr. Williams states that when CEI attended the special CAPCO meeting in December of 1973, it had not yet decided how it would respond to the City's request to join CAPCO (Williams Tr. 10,434). Mr. Arthur claimed that prior to the December 7, 1973 CAPCO Executives meeting, Duquesne had not formulated a position with respect to the City's request to join CAPCO (Arthur Tr. 8,392). This makes it all the more apparent that a joint CAPCO position was, in fact, established at the meeting of the Chief Executives of CAPCO on December 7, 1973.

Similarly, the record discloses that CEI's subsequent offers of access to the Cities of Cleveland and Painesville were made with knowledge of the other Applicants (C-62, C-64, C-65, C-66). Indeed, C-65 shows that the negotiations were conducted not merely with full knowledge of the other Applicants, but also in accordance with a course of action authorized by the CAPCO Chief Executives on December 7, 1973. Not only did the other Applicants know of and authorize the negotiations, but they actually had an input in the terms of the negotiations (C-66).

There is much evidence in the record to show that the CAPCO companies formulated a joint position regarding their response to Pitcairn just as they did in responding to Cleveland. Pitcairn's request to join CAPCO was discussed at meetings of both the CAPCO drafting respectatives on December 11, 1967, and the CAPCO Engineering and Operating Task Force meeting on December 15, 1967 (C-34). Toledo Edison and CEI circulated to Duquesne drafts of their responses to Pitcairn (DJ 237). Although Mr. White testified that he did not know the position taken by the other CAPCO members prior to formulation of his response (which was formulated just prior to sending it to Pitcairn), he obviously forgot that CEI had mailed to Mr. Mansfield many days previously a copy of its response to Pitcairn (DJ 218), as did Toledo Edison (DJ 232), and Duquesne (NRC-53, NRC-54, NRC-55). Moreover, when Mr. McCabe requested a meeting with each of the companies to discuss Pitcairn's request to join CAPCO, the CAPCO members formulated a joint position (NRC-12). The CAPCO company responses to Mr. McCabe's follow-up letter are so similar in format as to

demonstrate that a joint position was taken (NRC-12, DJ 221, DJ 228, DJ 234). Mr. McCabe then wrote to each CAPCO company requesting a copy of the CAPCO agreement. Again, each company responded in the same fashion (DJ 217, DJ 223, DJ 230, DJ 235). Although Applicants have offered some testimonial evidence to show that each company acted independently, they have not undertaken to rebut or explain the massive documentary evidence to the contrary even when the documents contradicted the offered testimony.

Applicants argue (Brief pp. 111-13) that there was nothing wrongful in the fact that Applicants jointly discussed the requests of City and Pitcairn for membership in CAPCO "especially where the fundamental underpinning of the joint endeavor is that there be a proportionate sharing of responsibilities and benefits among all pool members in order to maintain mutuality." Further it is argued that there exist a whole variety of non-conspiratorial motives involving the unattractiveness of accepting City or Pitcairn as members which precludes a finding of inconsistencey.

To support its argument Applicant cites several cases none of which are relevant to this case (Brief p. 113). In Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (CA 9, 1971), Dahl, Inc. had alleged that defendant and others had conspired to deny Dahl access to first run movies. The Court denied Dahl's claim stating that the record was wholly lacking in any evidence of conspiracy or any facts from an inference of conspiracy could rationally be drawn. The Court said the record demonstrated that Dahl failed to obtain first run films because (1) Dahl failed to request or bid for the film; (2) Dahl sought the film after it had been sold to a competitor; (3) Dahl was told by

the distributor that the film had already been sold; (4) Dahl's bid was inferior to that of a competitor; (5) Dahl's bid was inadequate and the distributor chose to sell the film by another method; and (6) Dahl sent his bid to the wrong distributor. It appears that Dahl's whole case was built upon its failure to secure first run films. The Court cited no evidence of discussions, agreements meetings or even parallel actions taken by defendants. The facts of Dahl make it totally dissimilar to this case.

Modern Home Institute, Inc. v. Hartford Acc. & Ind. Co., 513 F.2d 102 (CA 2, 1975) involved a Section 1 case brought against several insurance companies by a plaintiff who had been unable to interest any of them in purchasing a new service it had developed. Plaintiff had attempted to sell listings of automobile insureds along with the expiration dates of their existing policies. The service offered by plaintiff was new to the insurance business. No evidence was presented to show any communication between defendants before each individually rejected plaintiff's service. There was, however, evidence that the service was criticized in the trade press and ran counter to established methods of doing business in the insurance industry. Plaintiff failed to contradict by either fact or argument defendant's evidence that plaintiff's proposed service was rejected for independent business reasons. Once again the factual situation of the case cited by Applicants is totally dissimilar to the facts of this case.

Plaintiff in Independent Iron Works, Inc. v. United States Steel Corp. 322 F.2d 656, 661 (CA 9, 1963) alleged a conspiracy to restrain and monopolize trade on the pacific coast in the distribution, fabrication and errection

of structural steel. The Court noted that:

> Like business are generally conducted alike and, . . . similarity in operations lacks probative significance unless present "under circumstances which logically suggest joint agreement as distinguished from individual action".

The plaintiff made several allegations which, if supported, would have constituted a conspiracy but in each instance plaintiff failed to produce evidence to support its charge. In this case, City and the Department produce substantial probative evidence of joint consultation and other acts "which logically suggest joint agreement as distinguished from individual action".

Finally, the Supreme Court's decision in First Nat. Bank v. Cities Service Co., 391 U.S. 253, 277-78, 20 L.Ed. 2d 569, 585-86 (1968) is contrary to the argument advanced by Applicants for in that case the Court said:

> And undoubtedly, given no contrary evidence, a jury question might well be presented as to Cities' motives in not dealing with Waldron, . . . notwithstanding that such a failure to deal conceivably might also have resulted from a whole variety of non-conspiratorial motives involving the exercise of business judgment as to the attractiveness of the opportunity offered by petitioner.

The teaching of First Nat. Bank is that a conspiracy might be found even in the presence of a "whole variety of non-conspiratorial motives" not that a "whole variety of nonconspiratorial motives" precludes a finding of conspiracy.

In this case not only is there substantial evidence of consultation and joint action but the reliance upon business justification is not supported by the facts.

B. Applicants' Assertion Of Good Business Reasons For Denying CAPCO Membership To City And Pitcairn Is A Sham.

Applicants argue that good business judgment dictated that each of the Applicants would individually and independently conclude that City and Pitcarin should be denied membership in CAPCO. Applicants' argument fails on two grounds. First, as was shown at pages 65-70 of this brief, good business reasons do not compel that City and Pitcairn be denied membership in CAPCO; and second, Applicants did not in fact undertake to exercise reasonable business judgment prior to making the decision to deny requests for membership.

Mr. Slemmer, Applicants' expert witness on pooling, testified that he could not imagine Applicants turning down a request for pool membership without first studying the matter (Tr. 9122). Nonetheless, Duquesne said "no" to Cleveland's request for membership without making a study. Nor did Ohio Edison or Penn Power make any engineering economic study before responding to the City's request (White Tr. 9808). CEI made no engineering economic studies with respect to the City's request to participate in CAPCO (Williams Tr. 10,441). The record does not reflect that Toledo Edison made any such studies.

Mr. Williams testified that CEI was puzzled by the City's request which he stated asked for inconsistent things. The City, according to Mr. Williams, asked only for participation in the CAPCO nuclear fired units which was inconsistent with the CAPCO one-system plan. (Williams Tr. 10,373-74) However, (Williams Tr. 10,430-31) Mr. Williams was unable

to state that the City was ever informed that its proposal was inconsistent with CAPCO membership or that the City would have to participate in CAPCO coal fired units as well as nuclear units [12/] (Williams Tr. 10,439). Certainly Mr. Hauser's notes of CEI's meeting with the City on October 25, 1973, to discuss the City's request for membership do not reflect that the City was informed that its request was inconsistent with CAPCO membership or that the City would have to participate in CAPCO coal fired units as well as nuclear units. (DJ 291) Those problems were not raised by CEI's August 13, 1973, letter responding to the City's August 3, 1973, request. (App. 25) Interestingly, the participation agreement offered the City in February 1974 was specifically limited nuclear units precluding the City's participation in CAPCO coal fired units. (DJ 192) In addition, Mr. Williams admitted on cross-examination that the City's August 3, 1973, proposal should be read in the alternative. (Williams Tr. 10,485) Reading the City's request in the alternative would eliminate the alleged inconsistancies.

The response to Pitcairn's request was based, at least in part, upon totally false rationale. Pitcairn was informed by Duquesne that it would have to interconnect at 345 kv (Applicants repeat the false contention in their brief at page 109). Pitcairn's system was too small to justify interconnection on that basis. At the same time that Pitcairn was being told that it could not join CAPCO because it lacked interconnections at 345 kv, Duquesne itself had no

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12/ In September 1973, the City requested participation in all of the recently announced CAPCO units which included one coal-fired unit. (Applicants'61) Applicants always over look City's request to participate equally in CAPCO coal-fired units.

345 kv transmission lines. In fact, it was not until two years later that Duquesne had its first 345 kv line (Dempler Tr. 8785-86).

Another reason given for denying Pitcairn membership was that Pitcairn's generating units were too small. Pitcairn, it was said, could contribute no useful benefit to CAPCO because as a practical matter its contribution would not be measurable (Dempler Tr. 8805). To have any affect on the plans or commitment of the CAPCO members with respect to reserve capacity, a unit would have to be around 10 mw in size (Dempler Tr. 8857).

There is no engineering reasons for requesting Pitcairn to interconnect at 345 kv (Dempler Tr. 8787) and there is nothing in any CAPCO agreements which would require interconnection at 345 kv (Dempler Tr. 8793, 8794, 8796). A further indication of the unreality of the 345 kv justification for refusing to permit Pitcairn to join CAPCO is found in Mr. Dempler's testimony. Mr. Dempler testified that even today, Duquesne has no 345 kv step-up transformers (Tr. 8850). From its own generators located on Duquesne's system, Duquesne is not able to put any power into the CAPCO 345 kv network (Tr. 8851). With regard to these units Duquesne does not even plan to install 345 kv step-up transformers (Tr. 8853). Although Duquesne cannot put power from those units into the CAPCO transmission grid, Duquesne does get credit for those units in CAPCO (Tr. 8856).

Toledo Edison had no 345 kv lines until 1970 and no interconnection with its CAPCO partners at 345 kv until 1972. (Moran Tr. 10,061) Toledo Edison receives CAPCO credit of 7-8 mw for a unit the power from which is

never stepped up to more than 23 kv (Moran Tr. 10,063).

The power generated at CEI's entire Lakeshore plant for which it receives CAPCO credit is never stepped up to 345 kv. (Bingham Tr. 10,267) CEI receives CAPCO credit for a 4 mw diesel generating unit. (Bingham Tr. 10,299)

Ohio Edison presently receives CAPCO credit for a 2 mw generating (Firestone Tr. 11,318). If Ohio Edison elects to continue operation of its 1 mw unit at East Palestine, it will receive CAPCO credit for that unit. (Firestone Tr. 11,317) Power from Ohio Edison generating units at Mad River, West Lorain, Edgewater, Gorge, Berger, Toronto, Niles, New Castle, East Palestine, Norwalk and some Samis units is not stepped up to 345 kv (Firestone Tr. 11,329) Power from Ohio Edison's generating units at Mad River, Gorge, Norwalk and East Palestine is not stepped up to 138 kv. (Firestone Tr. 11,330)

C. The CAPCO Reserve Sharing Formula Was Adopted And Implemented To Discriminate Against Municipal Electric Systems And To Erect Barriers To The Entry Of Small Entities Into CAPCO.

The adoption of the CAPCO reserve sharing formula provides additional evidence of conspiracy and joint action. The formula which was devised for the CAPCO pool was not adopted until after the parties had studied its effect on a small system modeled after the City of Cleveland (C-46). The results of that study demonstrated that for a municipal system to join CAPCO, it would face an inordinately high reserve burden -- an economic disincentive to join the pool.

Once having adopted the P/N formula, the CAPCO members did not undertake to utilize that formula among themselves. Instead, the first CAPCO allocations were made arbitrarily (C-49, p. 10). The purpose of the arbitrary approach was to reduce the impact of the formula on the companies ((C-49), pp. 10-11). 13/ The first four units were not allocated on the basis of P/N because each company came into CAPCO with different amounts of capacity and different reserve levels. A period of time was needed for an equalization of the systems (Schaffer Tr. 8602-03). Although it was recognized that for the original CAPCO members to come into CAPCO a transition period was needed, it was also recognized that a formula should be adopted for the pool in dealings with municipal systems such as the City of Cleveland so that the companies could insist on applying a formula, i.e., not permit a transition period for municipalities (C-48, p. 7).

The formula devised, P/N, was adopted for use by CAPCO after a transition period with full knowledge of the burden it would place on small systems. Even when adopted the formula utilized the pro rata method of representing units, which permitted a company with large units to carry less reserves than it would without a pro rata approach (Schaffer Tr. 8590-92). In 1972, Duquesne Light Company circulated its Proposal #2 recommending a change in the method of representing units in the P/N calculations (C-57). Among the reasons assigned for changing the method of representing units

13/ Applicants argue (Brief p. 120) that it would be serious error to conclude that the first CAPCO applications were arbitrary. It was the CAPCO Executive Committee which first described the allocations as "arbitrary".

was that use of the pro rata method would be too favorable to new members joining CAPCO (C-57, p. 5). In July 1973, after the City had written to CEI requesting membership in CAPCO and after the other CAPCO members had been notified of that request, CAPCO adopted a modified form of Premise #2 which removed the benefits to new members of pro rata calculations (DJ-372). Again a transition period was allowed before discarding the pro rata method of representing units (Schaffer Tr. 8612). By the time pro rata was discarded, it was expected that the results for the existing members under Premise #2 would nearly match pro rata (Schaffer Tr. 8612).

Thus, pro rata was to be discarded since it was more favorable to new members and the investment method applied under circumstances in which it was expected that for the existing CAPCO members the results would be about the same.

Applicants attempt to justify the P/N formulation on the basis that it results in fundamental equity. Witness Firestone, who was presented as an expert on P/N, admitted that fundamental equity was whatever the parties agreed it was at the time (Firestone Tr. 9429-30). Thus, the results of the P/N formula may vary depending upon how the units are represented (Firestone Tr. 9428-29). Nevertheless, the results will produce fundamental equity if the parties agree that they do (Firestone Tr. 9429-30). Accordingly, if the parties agree that equal percent of peak load produces fundamental equity, that method, like the P/N method, produces fundamental equity. Obviously, the so-called fundamental equity theory provides no justification for the P/N method.

It should also be noted that Mr. Firestone admitted that, as the CAPCO members jointly install more units, the P/N method as applied to them will begin to yield results similar to equal percent of peak load (Firestone Tr. 9282-83).

Despite their unwillingness to apply P/N to themselves unless it is modified for a transition period or will, as among themselves, approach equal percent of peak load reserves, Applicants insist that it be rigidly applied to new members. Applicants are well aware that its rigid application is a disincentive to pool membership -- it was such a disincentive that they were unwilling to apply it to themselves.

D. CEI Was Aware That CAPCO Membership Would Be Of Great Value To City.

CEI was well aware that membership in CAPCO would provide the City with important advantages not available to the City through the participation and interconnection arrangements offered by CEI. Mr. Greenslade identified those advantages in a memorandum to Mr. Hauser in January of 1974, as follows (DJ 292):

> The first advantage that occurs to me is an intangible one, that is, "prestige". It may be that the Municipal Light Plant managers feel that membership in CAPCO would be to their advantage in securing new customers and capturing existing CEI customers.
>
> A second benefit of CAPCO membership would be arrangements for back-up power from the CAPCO Group under the terms and provisions of the CAPCO Operating Agreement, as contrasted with reliance only on a single CAPCO Company (CEI) for back-up power under terms

> and conditions which would be subject to FPC jurisdiction. The Municipal Light Plant officials may be distrustful of receiving a "fair shake" from the FPC, particularly in view of the recent FPC action involving our rates for load displacement service. MELP officials may feel more comfortable with back-up arrangements under which they will be paying the same rates and be subject to the same conditions as other utilities in the CAPCO Group.
>
> CAPCO membership by MELP would allow MELP to participate in economy interchange transactions, and allow them to participate in coordinated maintenance scheduling. Presumably there would be more opportunity to participate in the economy interchanges as a member of the CAPCO Group than simply under a two-party contract with CEI.
>
> Finally, membership in CAPCO by MELP would provide them with access to transmission to all of the CAPCO Companies, rather than simply transmission from the particular plants where they have an ownership interest or are buying unit power, to the city's load center. Access to this CAPCO transmission would, in turn, better provide access to alternative bulk power sources for the city, such as Niagara, Cardinal, or AEP. It could also, perhaps, better provide access to bulk power from new generation which might be planned by the municipal systems of Ohio, similar to the Cardinal generating facilities which have been constructed by the co-ops.

These advantages would make City a more vigorous competitor. Mr. Slemner testified that a party already in a power pool might want to ensure that it does not lose a competitive advantage by permitting a competitor to join the power pool (Tr. 9118). CEI had no desire to do anything which would permit City to remain competitive.

E. City's Request For CAPCO Membership Was Made In Good Faith.

Applicants argue that the City's request for membership in CAPCO was a sham request made as negotiating ploy (Brief pp. 109, 141-45).

Late in the proceedings, Applicants surfaced for the first time the argument that the City's request for participation in CAPCO nuclear units was not a bona fide good faith request. In support of its allegation CEI apparently relies upon (1) the testimony of Utilities Director Kudukis before the Public Utilities Committee of the City of Cleveland, (2) the fact that City Counsel has never authorized the City to enter into a contract for participation in nuclear units, and (3) the fact that the City had not yet signed a participation agreement.

Applicants have offered a recording of Mr. Kudukis testimony (Applicants 283), an incomplete and inaccurate transcript of that recording (Applicants 282), an erroneous and misleading affidavit of Mr. Gaul (Applicants 213) and the testimony of Mr. Gaul in support of its charges.

It is interesting to examine the background of the recorded statements. Prior to the City Council Committee meetings, Mr. Gaul had had numerous discussions with CEI's General Counsel, Mr. Howley, regarding the City's request for nuclear participation. (Gaul Tr. 12,432-33, 12,436, 12,456). As a result of those discussions Mr. Gaul determined to question Director Kudukis about the City's request. (Gaul Tr. 12,433). At the time, Mr. Gaul was a member of the Public Utilities Committee of City Council and had been taking gifts from CEI (Gaul Tr. 12,452-53) and had been assisted by CEI

employees in writing speeches. (Gaul Tr. 12,449-51). Mr. Gaul first questioned Director Kudukis at an unrecorded meeting of the Public Utilities Committee on March 4, 1974. The following day the same matter was discussed at a recorded meeting of the City Council Finance Committee. (Gaul Tr. 12,434). Mr. Gaul was uncertain whether he discussed the matter with Mr. Howley between the March 4 unrecorded meeting and the March 5 recorded meeting (Gaul Tr. 12,456) but did admit that committee meetings of City Council are rarely recorded. (Gaul Tr. 12,439). The tape was made available to CEI a day or two after the committee meeting. (Gaul Tr. 12,440). At this point it is interesting to note also that the last words heard on the tape submitted by Applicants -- obviously those of the person who made the recording -- words that do not appear in the transcript submitted by Applicants, are "that's it, that's where he lost him." (Applicants 283).

Applicants apparently contended that the statements made by Director Kudukis indicate that the City did not in fact want to participate in nuclear power generating units and that the City's request was merely a bargaining ploy. Mr. Kudukis has testified with respect to the position stated on the tape as follows (Tr. 1274):

> Well, as in the preceding question, Mr. Gaul was trying to determine of the two proposals, which way we were going. Are we going for an ownership participation or are we going for unit power?
>
> At that time I felt that unit power was the way to go and the other alternative would be ownership participation, and I felt that this was the quickest and the best way to achieve our goal, which was to obtain power, and I was advocating that position.

Director Kudukis' testimony in this regard is completely corroborated by Applicants 279 which is a copy of the affidavit drafted by Mr. Hauser which Mr. Hauser requested Mr. Gaul to execute (Hauser Tr. 12,468). As drafted by Mr. Hauser the affidavit stated that Director Kudukis had testified that the City did not want ownership or unit power participation. Mr. Gaul made changes in the draft prepared by Mr. Hauser to "make sure it was absolutely correct." (Gaul Tr. 1344). Among the changes made by Mr. Gaul was deletion of any assertion that Director Kudukis had said that the City did not want unit power participation.

One more thing that must be noted about the recorded testimony of Director Kudukis. Not included in the portion offered by CEI was the final exchange between Mr. Gaul and Director Kudukis in which the two agreed that there had not been a full statement of the City's position and that the subject would be discussed at greater length in subsequent committee meeting (C-168). One is left to speculate why CEI did not bring that portion of the tape to the Licensing Board's attention, or to the attention of this Board.

With respect to the argument that City Counsil has not specifically authorized the City to negotiate for participation, Mr. Kudukis has testified that City Counsel approval of such negotiations is not necessary (Kudukis Tr. 12,769). City's failure to obtain City Counsel approval prior to negotiating for participation in nuclear units is no different than CEI's failure to obtain the approval of its Board of Directors prior to offering to negotiate a joint ownership arrangement with the City. Mr. Lindseth testified on deposition that a joint ownership arrangement with the City was a matter which

would come before the Board of Directors. Although Mr. Lindseth was on the Board of Directors until sometime in 1974, no such joint ownership proposal came before CEI's Board of Directors (Lindseth deposition DJ 568 pp. 30-31).

Nor is the fact that no participation agreement has been executed by the City evidence of bad faith on the part of the City. Rather it is a reflection of the fact that CEI has thus far refused to agree to terms which would permit the City to make effective use of its participation in nuclear units. Mr. Mayben pointed out that parties normally make no commitment for nuclear power until all points have been negotiated (Mayben Tr. 7805).

If, as CEI would have the Board believe, the City's request for participation is a hoax, it has been a singularly involved and unsuccessful hoax. For example, the City told Mr. Mozer that it desired additional interconnection points with CEI to accomplish delivery of the City's nuclear power (Applicants 45). During negotiations for a firm power contract with CEI, Mr. Hart requested inclusion of language permitting the City to reduce the contract demand if the City was able to acquire nuclear participation (Applicants 82). The preliminary statement issued for sale of the $9.8 million rehabilitation bonds stated that the City had intervened in these proceedings to obtain access to nuclear power and that the City wished to obtain nuclear power (Applicants 102 p. 22, p. A-13). The City's Capital Improvements study proposes an expenditure of $100,000,000 to finance participation in nuclear units and assigns the expenditure a priority rating of "necessary." (Applicants 106). The City met with several underwriting

firms to discuss financing participation in nuclear generation (Hart Tr. pp. 4898-99).

According to Applicants, the City truely desired only a firm power contract from CEI. In June 1976, the City signed a firm power contract with CEI but the City has not withdrawn from these proceedings nor has it withdrawn its request for participation (Applicants 271). Indeed Applicants' thesis requires the Board to believe that the City's participation in these long and expensive proceedings was merely in furtherance of its negotiating strategy to obtain a firm power contract. To state proposition is to reveal its absurdity.

If further evidence of the City's desire to participate in nuclear units were necessary, which it clearly is not, Mr. Mayben, the City's consulting engineer, testified that he has been given reasons to believe that the City is interested in participating in nuclear units (Tr. 7825). Moreover, Mr. Kudukis testified that the City is still interested in participating in nuclear generation and that the reasons which led him to prefer unit participation when he testified in 1974 no longer exist (Kudukis Tr. 12,744).

Finally there is no evidence that CEI ever informed its CAPCO partners that it believed the City's request were not made in good faith. CEI itself admits that all of its responses to the City's requests were predicated on the belief that the City was in good faith.

F. The Law Of Antitrust Conspiracy.

The record developed in this case is more than ample to demonstrate a conspiracy to restrain trade and to monopolize. In order to prove a con-

spiracy under the Sherman Act, it is not necessary to prove an overt act, United States v. General Motors Corp., 121 F.2d 376 (1941), cert. denied 314 U.S. 618 (1941), but in this case, evidence of overt acts abounds. Nor is it necessary to find an express agreement to prove a conspiracy. "It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement." United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948). "[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." Ibid., 334 U.S. at 161.

In Moore v. Jas. H. Matthews & Co., 473 F.2d 328 (1973) the Court said at 330:

> Concerted action involves an agreement between the parties, but the agreement can be tacit as well as express . . . . [A]n agreement may be implied from conformity to a contemplated pattern of conduct.

It has been held that:

> Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) quoted in United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 182 (1970), cert. denied 401 U.S. 948.

Under Section 1 of the Sherman Act the key element of a violation is unity of purpose or a common design and understanding. TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co., 462 F.2d 1256, 1259 (1972).

The Acts of one of several co-cospirators are imputed to the others. United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).

The Court in TV Signal of Aberdeen, supra, said, at page 1259:

> Although knowledge is implicit in the requirement of unity of purpose, no case of which we are aware requires that each party to a conspiracy knows of each transaction encompassed by the conspiracy in order to be held accountable therefor.

The declarations of one conspirator are evidence against his comrades in crime. United States v. General Motors Corp., 121 F.2d 376, 408 (1941) cert. denied 314 U.S. 618 (1941).

All parties to a conspiracy are accountable for the results wrought thereby, including such results as are caused by the overt acts of other members of the conspiracy. Griffin v. Breckenridge, 403 U.S. 88 (1971); Braverman v. United States, 317 U.S. 49 (1942).

In Interstate Circuit v. United States, 306 U.S. 208 (1939), the Supreme Court said at 227:

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Schenck v. United States, 253 F. 212, 213 aff'd 249 U.S. 47; Levy v. United States, 92 F.2d 688, 691. Acceptance by competitors without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Acts entirely lawful in themselves violate the Sherman Act if they are "part of the sum of the acts which are relied upon to effectuate the conspiracy . . ." American Tobacco Company v. United States, 328 U.S. 781, 809 (1946).

In Associated Press v. United States, 326 U.S. 1 (1944) the Court said at page 15:

> The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete.

Nor is it proper to compartmentalize each item of proof and wipe the slate clean after scrutiny of each. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing the separate parts, but only by looking at it as a whole." American Motor Inns, Inc. v. Holiday Inns, Inc., 421 F.2d 1230 (1975).

The evidence clearly establishes that Applicants through the formation of CAPCO and their individual efforts to acquire all generation and transmission capacity in the CCCT have monopoly power in the regional power exchange market. They have conspired to use their monopoly power to deny other entities in the CCT access to coordinated operations and development which make possible access to nuclear generation and economies of scale.

Applicants argue that the Licensing Board's findings of a group boycott through the method chosen for the formation of CAPCO and its operation must be reversed because, according to Applicants, the Licensing Board applied an erroneous legal standard (Brief pp. 106-107). Applicants argument apparently is premised on the mistaken notion that the Licensing Board applied a per se test to the group boycott.

A per se application of the prohibition of group boycotts is correct when exclusionary intent or coercive conduct is present. It is instructive,

then, to examine the precise findings of the Licensing Board. First, the Licensing Board found that the formation of an area wide power pool on fair and nondiscriminatory terms is not anticompetitive. Second, the Licensing Board was concerned with "how it [CAPCO] was formed and managed" 5 NRC 227, fn. 123.

The Licensing Board found that in forming CAPCO, Applicants' consciously denied and intended to deny the benefits of CAPCO to their competitors in the CCCT. (5 NRC 226). The Licensing Board also found that these denials were not accidental or unintended but were the result of the consideration of the consequences of these actions. On these findings it would be proper to find a per se violation.

Applicants suggest that group boycotts are per se violations only when there is "a showing of exclusionary intent as the principal motivation for taking collective action" (Brief p. 107, fn. 126). The cases cited by Applicants do not so hold. In E.A. McQuade Tours, Inc. v. Consolidated Air Tour Man. Com., 467 F.2d 178 (CA 5, 1972) cert. denied 93 S.Ct. 912 (1973), the Court said at page 187:

> In all of these cases, the touchstone of per se illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as "naked restraints of trade" and have fallen victim to the per se rule. On the other hand, where these elements have been missing, the per se rule has not been applied to collective refusals to deal . . . . We conclude that resort to the per se rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a "naked restraint of trade."

Nothing in McQuade even suggests that the exclusionary intent must be the principal motivation for the collective action.

In De Filippo v. Ford Motor Company, 516 F.2d 1313 (CA 3, 1975) the Court said at 1318:

> From all this we are able to conclude that a concerted activity constitutes a "group boycott" and is considered per se "in restraint of trade" when "there [is] a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objection, or both." (Brackets in original, emphasis added.)

While De Filippo, supra, requires some exclusionary intent, it does not stand for the proposition that the exclusionary intent must be the principal motivation for the concerted activity.

In Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 78 (CA 9, 1969), the Court refused to apply a per se rule where "plaintiff presented no evidence whatever that Seagram or Barton had any anticompetitive motive for terminating plaintiff as their distributor" (emphasis added). And the Court found that "the exclusion of plaintiff was merely the incidental result of appellants' agreement to transfer their lines to Portside."

Some of the language in Seagrams, supra, can be read broadly to support the proposition that the exclusionary intent must be the primary motivation for the concerted activity. That language, however, is mere dicta in light of the finding of fact in Seagrams, supra.

Applicants do not, in this regard, refer to Klors v. Broadway-Hale Stores, 359 U.S. 207, 3 L.Ed. 2d 741 (1959), in which the Supreme Court said:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality" . . . . Even when they operated to lower prices or temporarily to stimulate competition they were banned. (Footnote omitted.)

In United States v. General Motors Corp., 384 U.S. 127, 16 L.Ed. 2d 415 (1966), the Court said at 142-43:

> It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether the "location clause" and franchise system are lawful or economically desirable. And . . . it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy--certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan.

And at 146-47:

> The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct . . . . Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed--as in Fashion Originators' Guild of America, Inc. Federal Trade Comm'n. . . . .

In a recent case, Hatley v. American Quarter Horse Ass'n., 552 F.2d 646, 653 (1977), the Court held that a per se theory should not be invoked "without at least minimal indicia of the anticompetitive purpose or effect." In this case there is much more than a "minimal indicia of anticompetitive purpose or effect of Applicants' actions."

On the facts of this case, and upon the findings of the Licensing Board, application of a per se test to the CAPCO group boycott is proper. However, the Licensing Board did not rely upon a per se application of the prohibition of group boycotts. The Licensing Board said that in some of its findings it found per se violations while in other instances it found that the anticompetitive purpose and result of particular activities was unreasonable and therefore violated the Sherman Act. (5 NRC 147, fn. 15). The Licensing Board has responded to Applicants' allegation that it failed to consider whether the conduct complained of was "reasonable" by stating: 14/

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

Since the Licensing Board did not state that it found the group boycott to be a per se violation, it is clear that it found Applicants' conduct unreasonable. What is most certain, however, is that the Licensing Board's decision is correct whether one applies a per se rule or a rule of reason.

14/ Memorandum and Order On Applicant's Motion For An Order Staying, Pendente Lite, The Attachment Of Antitrust Conditions, issued February 4, 1977 at page 12.

VII

THE FINDINGS OF THE LICENSING BOARD ARE FULLY SUPPORTED BY THE RECORD

Applicants argue that the Initial Decision contains many findings of fact which are without record support. (Brief pp. 137-282). Contrary to Applicants' contentions, the record not only supports the Licensing Board's findings but does so overwhelmingly.

A. The Record Supports The Licensing Board's Findings With Respect To CEI.

The municipal electric systems of the Cities of Cleveland and Painesville are the only remaining municipal systems in the 1700 square mile territory served by CEI. (Wein dt. DJ 587 p. 64). In the past, CEI has acquired a number of municipal electric systems. (Rudolph deposition DJ 558 p. 31). Acquisitions of such systems was a way of life for CEI. (Besse deposition DJ 559 p. 64). (IDFF)[15/]

CEI has desired to acquire the Cleveland electric system since 1960. (Besse deposition DJ 559 pp. 55, 65). Acquisition of the Cleveland system has been considered by each President of CEI at least since 1960. (Lindseth deposition DJ 568 pp. 16-17; Besse deposition DJ 559 pp. 55, 65; Rudolph deposition DJ 558 p. 31 (C-121)). The reduction and elimination of the municipal electric systems was listed among CEI's written corporate objectives from 1964 to 1970. (DJ 509, 510; NRC 143). (IDFF 27)

15/ Initial Decision Findings Of Fact are designated herein as IDFF.

CEI has made repeated studies relating to the acquisition of the Cleveland electric system. CEI has studied, discussed, and considered acquisition or lease of the Cleveland electric system in at least each of the following years:

1963 - (C-92)
1965 - (C-102, C-101, C-93, C-99, (offer to buy); DJ-603)
1966 - (C-104, C-107, DJ-360)
1967 - (C-114, C-115, C-116)
1968 - (C-117, C-118, C-121, C-129, DJ-355, DJ-601)
1969 - (C-128, C-130, DJ-331, DJ-353, DJ-357)
1970 - (DJ-354; C-74; NRC-143)
1971 - (C-76)
1972 - (C-142, DJ-361)

There is evidence of record which would indicate that CEI has not abandoned its desire to acquire the Cleveland municipal electric system. (IDFF 27)

CEI in the past faced stiff competition from the Cleveland municipal electric system. (Rudolph deposition DJ 558 p. 58). CEI provides promotional considerations such as free internal wiring or free upgrading of electric facilities in areas in which it competes with the municipal systems in Cleveland and Painesville which it does not provide in noncompetitive areas. (Rudolph deposition DJ 558 pp. 16-17; Bingham Tr. 10,323-25). Such a practice is a form of cutthroat competition. (Wein Tr. 6622-23). (IDFF 32)

Until approximately five years ago, the Cleveland system had a competitive advantage over CEI in that it offered lower retail rates. During that same period and continuing at least until 1975, CEI had a competitive advantage in its greater reliability. (Rudolph deposition DJ 558 pp. 121-24;

Besse deposition DJ 559 pp. 57-60; Loshing deposition DJ 565 pp. 21-23; Wyman deposition DJ 566 p. 62). (IDFF 31, 32)

CEI increased its reliability and achieved economies of scale from parallel interconnections with other utilities and through participation in CAPCO (Williams Tr. 10,369-70). CEI has stressed reliability and economies from interconnections and CAPCO participation in nuclear units made possible through its membership in CAPCO in competing with the City for retail customers (Wyman deposition DJ 566 pp. 151-52; C-13, C-14, C-15, C-154, C-155, C-158). (IDFF 33)

CEI was aware that a parallel interconnection between CEI and the Cleveland system would improve the reliability of the Cleveland system and reduce the flow of customers from Cleveland to CEI (Rudolph deposition DJ 558 p. 177; Besse deposition DJ 568 p. 62; Gould deposition DJ 569 p. 24). (IDFF 35)

CEI made frequent study of customer attitudes in Cleveland. Thus, CEI knew in 1970 that more customers wanted CEI service because of the City's growing reliability problems (DJ 346). By 1972 CEI's study of customer attitudes demonstrated that lack of reliability of the City system had caused customer dissatisfaction with the City system to increase dramatically (DJ 349). When the City began to have reliability problems, CEI adopted a marketing objective of converting to CEI service customers producing 10 times as much estimated annual revenue as the customers of CEI converted to City service (Farling deposition DJ 563 p. 37). When CEI was finally forced to perfect a parallel interconnection it reduced the conversion

ratio targeted from 10:1 to 1:1 (Gould deposition DJ 569 p. 95; DJ 378). CEI considered the effect a 69 kv intertie would have on the City's ability to compete for the new electric load of the Justice Center (Gould deposition DJ 569 p. 52). CEI wanted to prevent the City from serving the Justice Center load because serving the load would improve the City's financial position (Gould deposition DJ 569 p. 18).

CEI set forth a program to realize its objective to acquire and eliminate the City. In formulating its program, CEI recognized: (1) an interconnection was the best solution to the City's problems; (2) chances of acquiring the City would be reduced if an interconnection were perfected; and (3) the FPC probably would not have jurisdiction over an acquisition of the City system by CEI. Accordingly, it was recommended that CEI try to bring about an increase in the City's rates. An increase in the rates charged by the City was considered essential to successful acquisition (DJ 599).

In 1962 and 1963, CEI offered to interconnect in parallel with the Cleveland system contingent upon the Cleveland system's fixing its rates at the level of rates set by CEI and upon the Cleveland system reducing its charges to the City for street lighting service (Lindseth deposition DJ 568 p. 14; DJ 293, 294, 295). Subsequent offers to interconnect with the Cleveland system were subject to the same price fixing terms (Lindseth deposition DJ 568 pp. 54-55; DJ 296, 298, 299). At least until 1968 it remained CEI's official policy to interconnect with the Cleveland electric system only if the City agreed to fix prices (Hauser Tr. 10,660; DJ 330). (IDFF 36)

At the time that CEI offered to interconnect only upon Cleveland's agreement to fix rates, CEI knew that fixing rates at the same level would eliminate the major reason for customers leaving CEI to take service from Cleveland (Rudolph deposition, DJ 558 pp. 128-30; Loshing deposition DJ 560 p. 132; Wyman deposition DJ 565 p. 67; Gould deposition DJ 569 p. 97 (C-110)). In 1968 CEI believed that an 8 percent increase in Cleveland's rates would enable CEI to take all of Cleveland's top industrial customers (DJ 330). CEI believed that fixing rates at the same level would result in a movement of customers from Cleveland towards CEI (Loshing deposition DJ 560 p. 22). (IDFF 36, 37)

CEI was also aware that if the Cleveland system provided street lighting services to the City at no cost or at low cost, the Cleveland system would be forced to raise its rates to other customers to make up the revenue loss. The effect would be the same as the price fixing upon which the offered interconnection was conditioned (Loshing deposition DJ 560 pp. 101-02 (C-112)), or in a period of declining costs, to the extent that Cleveland reduced street lighting rates it could not reduce its other rates (Loshing deposition DJ 560 p. 168). Since the rates charged by CEI and the City became comparable, CEI has not advocated that the City provide free street lighting (Loshing deposition DJ 560 p. 104). (IDFF 36, 37)

Imposition of price fixing as a condition in exchange for an interconnection is a form of cutthroat competition (Wein dt DJ 687 pp. 30-31). (IDFF 37)

In 1962, Cleveland proposed a twelve million dollar electric plant expansion including construction of a 75 mw boiler and an 85 mw steam

turbine generating unit. CEI attempted to forestall the construction of competing generation by Cleveland by offering to interconnect and sell firm power to the City (DJ 293). CEI appeared before the Cleveland City Council to argue that Cleveland should interconnect with CEI and should not install additional generation (Hauser Tr. 10,863). CEI repeated its offer in 1968, when the City proposed to install three dual-fired turbine generating units (Hauser Tr. 10,659). Forestalling, attempted by CEI, with regard to the expansion of Cleveland's generating plant, is a form of destructive competition (Wein dt. DJ 587 pp. 32-34). (IDFF 39, 40)

In 1963, Cleveland proposed an interconnection between the Cleveland electric system and the municipal electric systems of Painesville and Orrville at a cost of $5 million. Chairman of the Board of CEI wrote to the Mayor of Cleveland renewing his offer to interconnect with the City making both the proposed three-city interconnections and expansion of the municipal system unnecessary (DJ 295). This offer was made to forestall construction of competing transmission lines by Cleveland (Hauser Tr. 10,864; Lindseth deposition DJ 568 pp. 58-60; C-94. The 1963 interconnection offer is another example of destructive competition (Wein Dt. DJ 587 pp. 32-34). (IDFF 40)

In 1969, Cleveland requested a parallel interconnection with CEI (Titus Tr. 75-5 (C-127)). CEI responded with an offer of load transfer service which would not provide the City with an interconnection (Titus Tr. 7506; Lester deposition DJ 561 pp. 25-26). CEI recognized that what the

City needed was a permanent parallel interconnection (Lester deposition DJ 561 p. 27). (IDFF 36, 37, 39, 42)

At the time the load transfer arrangement was proposed CEI was concerned that if some form of assistance were not offered to the City, the FPC might force CEI to interconnect in parallel with the City (Loshing deposition DJ 560 p. 137; Besse deposition DJ 559 p. 167). CEI was also concerned that a permanent parallel interconnection would increase Cleveland's ability to compete (Rudolph deposition DJ 558 p. 70). (IDFF 42)

CEI was well aware that Cleveland wanted a permanent parallel interconnection not a load transfer arrangement. In June of 1969, CEI noted that it had thus far been successful in avoiding parallel interconnection with Cleveland. CEI studied the effect of a parallel interconnection on the City's operating costs and concluded that the City was in a price squeeze from increasing costs and little growth. An interconnection which would backup the City's large 80 mw unit could save the City $500-$600 thousand each year in fuel costs. If a standby charge could be imposed for the services provided over the interconnection, CEI could charge the City $1,200,000 a year adding to the City's financial problems. It was concluded that CEI had three choices: (1) avoid an interconnection and risk FPC action; (2) interconnect and attempt to impose a standby charge; or (3) try to purchase the municipal system while reliability and financial pressures continue (DJ 331). This study was circulated among CEI's top management (Rudolph deposition DJ 558 p. 77). CEI was also aware that the loss of customers to

CEI was contributing to the need for the City to increase its rates to make up for lost revenues (C-72). (IDFF 42)

Since the City sought a parallel interconnection and CEI offered load transfer service very little progress was made until Christmas of 1969 (Hauser Tr. 10,538-39). Then the City experienced a major outage and the load transfer scheme was activated as a means of providing emergency service in the shortest possible time (Hauser Tr. 10,537). A three-phase program was agreed to in which the first two phases related to load transfer service and the third phase was an undertaking by CEI to negotiate in good faith for a permanent parallel interconnection (Hauser Tr. 10,540-41, Applicants' 198). (IDFF 43)

The principle advantage to CEI from offering load transfer service was that it avoided parallel operation with the City (DJ 334, DJ 335 (C-133)). Although load transfers can be accomplished without dropping load with a brief period of synchronous (parallel) operation and then a transfer (Firestone deposition DJ 575 p. 54; Hinchee Tr. 2762), CEI operations personnel were carefully instructed to avoid parallel operation of the load transfer points (C-82). (IDFF 44)

At the time that CEI was offering the City only load transfer services, its own studies indicated that it could effect a 69 kv parallel interconnection with Cleveland that could supply 60-80 mva of power by the summer of 1970. (C-125). In December of 1969, Mr. Bingham pointed out that while from CEI's standpoint the most important factor was to avoid a parallel interconnection "like the plague", if CEI offered too little, the FPC might order a

parallel interconnection. Accordingly, Mr. Bingham suggested that CEI offer a 69 kv non-synchronous interconnection limited to 40 mva which would preclude the City from fully loading its 80 mw generating unit (DJ 334). (IDFF 43, 44)

The City persisted in its attempts to procure a permanent parallel interconnection with CEI. In July of 1970, the City requested a meeting with CEI to discuss a permanent parallel interconnection. On Mr. Hauser's advice CEI declined to set a date for the meeting. (DJ 337) Little progress was made towards negotiating a permanent parallel interconnection in 1969 and 1970 (Hauser Tr. 10,856). (IDFF 45)

In 1971, Mr. Hinchee, City's Commissioner of Light & Power, pushed CEI for a meeting to discuss the permanent parallel interconnection. CEI recognized that it might be saddled with an interconnection against its wishes. (DJ 338) Mr. Hinchee finally arranged a meeting with CEI's engineers only to learn that CEI had done no engineering planning for an interconnection with the City. At a meeting in July of 1971, CEI finally agreed to begin a study of a permanent synchronous interconnection (DJ 6; Hinchee Tr. 2567). Little progress was made toward negotiating a parallel interconnection in 1971 (Hauser Tr. 10,856). (IDFF 45, 46)

After failing to interest CEI in negotiating for an interconnection, Cleveland filed a complaint with the FPC seeking an order compelling a permanent synchronous 138 kv interconnection (Hinchee Tr. 2569; Applicants' 18). CEI immediately responded by filing a notice of termination of the load transfer service. While the FPC proceeding was pending, a CEI "brain-

storming" session concluded that if a two-step appraoch to a permanent synchronous interconnection were imposed, i.e., first a 69 kv, 40 mva temporary tie such as that suggested by Mr. Bingham, followed by a 138 kv permanent interconnection, the economic burden on the City would be maximized (C-138). CEI proposed just such a two-step burden-maximizing interconnection at a conference conducted by FPC General Counsel Gooch in February of 1972 (Hauser Tr. 10,865). One consideration leading CEI to propose the 69 kv non-synchronous interconnection was to maximize the burden on the City (Rudolph deposition 558 pp. 92-93).[16/] Ultimately, the FPC did, in fact, order a 69 kv non-synchronous interconnection (Applicants' 21, 22). (IDFF 45, 46)

CEI has argued that over the years it was CEI that sought an interconnection with the City and the City that sought to avoid a permanent synchronous interconnection. The facts do not support CEI's contention. From at least 1962 through 1968, it was CEI's corporate policy that an interconnection was available to the City only if the City would agree to fix prices with CEI. Since 1969, the record is clear that CEI wished to avoid a permanent synchronous interconnection "like the plague." On the other hand, CEI was well aware that Cleveland desired a permanent synchronous interconnection. (IDFF 41)

In his letter of September 17, 1962, to the Mayor of Cleveland, CEI's Board Chairman, Mr. Lindseth, noted the Mayor's statement of willingness to discuss an interconnection (DJ 293). By letter of June 1963, Mr. Lindseth noted that the City sought to interconnect with Painesville and Orrville --

16/ The claim that Mr. Rudolph was badgered raised for the very first time on appeal (Brief p. 171) is absurd as the Appeal Board will find upon examination of the record. Neither Mr. Reynolds or Mr. Hauser objected to "badgering" during Mr. Rudolph's deposition.

unless the City would agree to price fixing it could not interconnect with CEI (DJ 295). On February 17, 1965, Cleveland's Mayor Locher wrote to Mr. Besse, President of CEI, stating that the City "has long desired an interconnection between MELP and CEI" but could not consider an interconnection predicated upon price fixing (DJ 297). Mr. Besse replied by letter of February 25, 1965, referring to Mayor Locher's "expressed interest in an interconnection" (DJ 298). In February of 1966, Mr. Loshing wrote to Florida Power Corp. indicating that CEI was concerned that the FPC might order CEI to give the City an interconnection not conditioned upon price fixing (C-109). On July 14, 1966, Mr. Besse wrote to Mayor Locher referring to a newspaper account in which the Mayor "expressed keen interest" in establishing an interconnection between the Municipal Electric Light Plant and the Illuminating Company (DJ 299). Five days later, Mr. Besse met with Mr. DeMelto, the City's Director of Public Utilities. At that meeting Mr. DeMelto requested an interconnection and was told that first the City must agree to price fixing (DJ 621). On August 20, 1967, Mr. Besse informed the Chief Executive Officers of Duquesne Light, Toledo Edison, Ohio Edison and Penn Power that "his company was on notice that the City of Cleveland will ask us for an interconnection" (C-50 p. 4). In fact, CEI anticipated that the City would file a complaint with the FPC to force an interconnection in 1967 (C-108). CEI ignored all of these indications of the City's desire for a permanent interconnection. (IDFF 41)

CEI also ignores the facts that it was the City that sought to obtain a permanent interconnection in 1969, 1970 and 1971, and finally was forced to obtain an FPC order compelling an interconnection.

The load transfer service was actuated by connecting a CEI distributing cable to a City distribution cable at a city distribution substation. Each load transfer resulted in an outage to a customer (Hauser Tr. 2660-61). Operating problems with the load transfer service were very severe and imposed customer outages from 5 minutes to 30 minutes which were not necessary for load switching (Hinchee Tr. 2626). The load transfer could have been operated more efficiently with only a 3-5 second outage caused by switching. The longer delays were administrative delays caused by CEI's internal requirements. Outages caused by the load transfers damaged the City's relations with its customers. (Hinchee Tr. 2665-67). The method of operating the load transfer points was tied directly to CEI's use of its superior reliability to obtain the City's customers (Hinchee Tr. 2697). The City, through Mr. Titus, suggested that protable radios be used for communications during the switching process to reduce the delays experienced in operating the transfers. CEI refused to permit the use of portable radios. (Hinchee Tr. 2761-62). (IDFF 47)

In part the delay was occasioned by the requirement that CEI's load dispatch personnel obtain Mr. Hauser's approval prior to agreeing to transfer load (Titas deposition DJ 564 pp. 50-55). Mr. Hauser has no experience in operating an electric system and CEI does not look to him for advice on operational problems (Hauser Tr. 10,865). (IDFF 47)

Mr. Hauser testified that his approval was required because (1) of existing litigation with the City; (2) he was in charge of day-to-day relations with the City; and (3) the FPC had established standards and criteria for the

load transfers (Hauser Tr. 10,544). CEI wanted to insure that the City could not supply its own load before activating the transfers (Hauser Tr. 10,544). Further, it was CEI's policy to provide load transfer service to the City only when required by the terms of the FPC order (Rudolph deposition DJ 558 p. 118). CEI regularly makes transactions under other FPC filed tariffs without first consulting Mr. Hauser (Hauser Tr. 10,866). Mr. Hauser obtained the information on which he made his decision from the CEI dispatcher (Titas deposition DJ 564 pp. 60-65). Mr. Hauser also claimed to have considered whether the City was paying its power bills in deciding whether to approve a load transfer but later admitted that CEI had never refused a load transfer request for that reason (Hauser Tr. 10,688) (IDFF 47)

Mr. Hauser admitted that on occasions CEI declined to provide power to the City through the load transfer because CEI lacked sufficient generation (Hauser Tr. 10,698, Applicants' 134). CEI never approached any other bulk power supplies in an attempt to obtain power for the City nor did CEI ever offer to transport power to the City located elsewhere when CEI had no power to sell (Hauser Tr. 10,703-04). (IDFF 48)

On at least one occasion, Mr. Hauser requested the Company's operating people to come up with justification for terminating service at a load transfer point (C-79). (IDFF 47).

The load transfer arrangement required that a block of load be transferred at one time. This imposed an economic penalty on the City. If prudent operation required additional generation, the City would be forced to transfer a block of load even when its own capacity might have supplied a portion of the load transferred (Hinchee Tr. 2763). (IDFF 49)

Even after the FPC had ordered an interconnection the City experienced delays and difficulties in constructing the interconnection. The City was unable to obtain a set of plans for CEI's substation. The City needed, but did not receive from CEI, a designated right-of-way and assistance in staking poles to avoid underground facilities of CEI. As a result the City had to design and submit by trial and error three sets of plans for entry into CEI's substation before obtaining CEI approval (Hinchee Tr. 2773-75). This is additional evidence that it was the City and not CEI that truely desired an interconnection.

Although the 69 kv line was built for operation as a synchronous interconnection, CEI required that it be operated as an additional load transfer point. Much worse delays were occasioned in obtaining permission to operate the 69 kv tie than to operate the 11 kv transfer points. On occasion it took as much as 1/2 day to energize the 69 kv line. The City system would experience brownouts, blackouts or voltage reductions while awaiting CEI approval of a request for power over the 69 kv tie (Hinchee Tr. 2669-71). (IDFF 51)

CEI required that the City utilize all of the 11 kv load transfer points before the 69 kv tie would be energized (Hinchee Tr. 2670). This requirement reduced the operational flexibility of the City electric system (Hinchee Tr. 2803-04). (IDFF 51)

Mr. Hauser admitted that in December of 1972, CEI refused to sell emergency power to the City over the 69 kv tie unless the City also agreed to a tie-in sale by executing a contract for the purchase of street lighting service as well (Hauser Tr. 10,572-73). The City was experiencing a major

outage which had lasted several hours and had no choice but to accede to the tie-in sale (Kudukis Tr. 7496-98). (IDFF 52)

The City system requires emergency assistance to a greater degree than that normally found in the industry. The fundamental reason is the poor condition of the generating facilities of the City caused by inadequate routine maintenance and repair of equipment. Prior to completion of the temporary 138 kv interconnection, the city was reluctant to remove generating units from service for maintenance or repair during off-peak periods because the lack of a synchronous interconnection would have increased the risk of outages. Had an interconnection been perfected when it was first discussed in 1962, this situation could have been avoided. (Mayben dt. C-161 pp. 12-13; Hinchee Tr. 2797-98). Before operating load transfers, CEI insisted that the City serve its own load to extent possible (Hauser Tr. 10,544; (C-145)). The City was unable to purchase maintenance power from CEI over the 11 kv or 69 kv ties (Hinchee Tr. 2798, 27,801). Although Mr. Hauser claimed that CEI sold maintenance power over the 69 kv tie that testimony is contradicted by CEI's refusal to even activate the 69 kv line unless the City was utilizing all of its generation (C-145) and Mr. Rudolph's testimony that CEI did only what was required by the FPC (DJ 558 p. 118). The FPC order provided only for the sale of emergency power (Applicants' 21, 22). CEI never filed with the FPC a rate schedule for the sale of maintenance power to City. (IDFF 54)

The City also had difficulty in financing rehabilitation of its generating plant (Mayben Tr. 7706). In part, this resulted from the loss of cus-

tomers due to poor system reliability which, in turn, resulted in a loss of revenues preventing the expenditure of funds necessary for preservation of the integrity of the system (Hinchee Tr. 2805). Further, the City was unable to pass on fully to consumers the high cost of purchase power received from CEI under the emergency rate schedule because to do so would have rendered the City's rates non-competitive and caused a further loss of customers and reduction in revenues (Mayben Tr. 7715-16).

The City did attempt to sell bonds to finance rehabilitation of its electric plant (Hinchee Tr. 2623; Kudukis Tr. 7472; Hart Tr. 4665 et seq.; Applicants' 102). In 1972 the City retained Mr. John Brueckle of the firm Squire, Sanders & Dempsey to draft an ordinance for the sale of $9.8 million of bonds for rehabilitation of the municipal light plant (Hart Tr. 4667). The ordinance was considered by the City Council in July of 1973 (Kudukis Tr. 7472; Hart Tr. 4668). As originally drafted, the ordinance provided for sale of the bonds to the sinking fund of the City. At the hearing, the bonds were amended to preclude sale to the sinking fund and to require sale on the public market (Kudukis Tr. 7481; Hart Tr. 4649). The requirement that the bonds be sold to the public necessitated retention of engineering consultants and the preparation of a preliminary financing statement which delayed an offering of the bonds for sale until 1974 (Hart Tr. 4674). As required by the amended bond ordinance the bonds were registered bonds not coupon bonds. It also provided that any lawsuit against the Division of Light and Power would constitute a default, and the bonds were mortgage revenue bonds rather than general obligation bonds (Hart Tr. 4673). These requirements were con-

sidered problem areas by New York underwirters (Hart Tr. 4671-73). The City was unable to sell the bonds on the public market 17/ (Hart Tr. 4849).

17/ Although the Licensing Board recognized that among the charges made in these proceedings was the charge that CEI had subverted the City's bond counsel to acceed to detrimental amendments and that such activity by CEI is not shielded by Noerr-Pennington (Tr. 4683), when the City offered evidence on those subjects it was rejected. The City also charged CEI itself with acting to prevent or hinder the City from selling bonds to finance rehabilitation of its electric system (Prehearing Brief of the City of Cleveland p. 35). The Licensing Board was well aware that there is pending the motion of the City to disqualify the firm of Squire, Sanders and Dempsey (SS&D) from representing CEI in these proceedings. Indeed, the Licensing Board considered those proceedings a part of the record of this hearing. The Licensing Board was also aware that over the City's objection, SS&D did, in fact actively participate in these proceedings on behalf of CEI. Evidence filed in the disqualification proceeding shows that at the time Mr. Brueckel was acting as bond counsel for the City, his firm was General Counsel of CEI and that Mr. Lansdale was participating in decisions by CEI regarding the wheeling of PASNY power to the City and the City's request to join CAPCO which would clearly impact on the marketability of the City's bonds if offered to the public.

City offered as Exhibit C-2 an excerpt from the deposition of Don Hauser in which Mr. Hauser testified that he prepared a proposed amendment to the $9.8 million bond ordinance which would require sale of the bonds to the public rather than on the open market. Mr. Hauser gave his proposed amendment to several City council members. Mr. Hauser also attended meetings of the council's public utility committee which considered the ordinance.

The Licensing Board itself has recognized that CEI's position with respect to the bond ordinance was "open and notorious" and "openly espoused" (Tr. 7478). Clearly, then, Mr. Brueckel was well aware that his firm's "primary client" wanted the amendments passed.

The City has also proffered the testimony of Mr. Kudukis, unrebutted by any evidence, that when the amendments desired by CEI were offered in committee, Mr. Brueckel, when asked by the committee, responded that the amendments would not substantially affect the ability of the City to sell bonds (Kudukis Tr. 7485-86).

City is at a loss to understand why it was precluded from presenting testimony on an issue the Licensing Board admitted was raised by the City and which the Board said the City would not be estopped from trying to support (Tr. 4688). Had the evidence been admitted it would have supported a finding of fact that CEI in conjunction with SS&D, bond counsel for the City had acted to prevent the City from obtaining capital funds necessary to rehabilitate its electric system.

Eventually, the ordinance was again amended permitting sale of a portion of the bonds to the City sinking fund in 1975 (Hart Tr. 4849-50). The City was delayed at least two years in obtaining capital needed to rehabilitate its plant.

In 1972, AMP-O wrote to CEI asking whether CEI would wheel power from third party sources to AMP-O members (DJ 508 Exhibit P; Hauser Tr. 10,764). AMP-O wanted CEI to agree to a transmission schedule similar to one AMP-O had negotiated with Ohio Power (Hauser Tr. 10,589-90). (IDFF 58)

In 1973, AMP-O received indications from the Power Authority of the State of New York (PASNY) that if AMP-O could arrange wheeling it would receive an aliotment of 30 mw of hydro-generated power from PASNY for delivery to the Cleveland municipal system (Hinchee Tr. 2677-78). PASNY would wheel power to the New York boarder and AMP-O would arrange wheeling over the lines of Pennsylvania Electric Company (Pennelec) and CEI. Pennelec agreed to wheel the power for AMP-O (Hinchee Tr. 2679). CEI was aware that Pennelec had agreed to wheel (DJ 393-97). PASNY power could have been purchased and delivered to Cleveland for less than the cost of the City's own generation (DJ 8). (IDFF 58)

On behalf of the City of Cleveland, Mr. Hinchee asked CEI to wheel PASNY power without success (Hinchee Tr. 2679). AMP-O also requested CEI to wheel PASNY power to Cleveland (Hinchee Tr. 2681-83; DJ 10). CEI responded to AMP-O's request (NRC-70) by stating that CEI would not wheel

for AMP-O,[18] adding: (IDFF 58)

> As you may know, the Illuminating Company competes with the Cleveland Municipal Electric Light Plant on a customer-to-customer and street-to-street basis in a sizeable portion of the City. This competitive situation is clearly unique. Economic studies indicate an arrangement to transmit the PASNY power would provide the Municipal system electric energy at a cost which would be injurious to the Illuminating Company's competitive position.

At a meeting of top corporate officials, including Messrs. Rudolph and Lansdale (a Director of the Company), on August 8, 1973, CEI decided to pursue a policy of refusing any request for third party wheeling (DJ 291). AMP-O unsuccessfully renewed its request that CEI wheel PASNY power to Cleveland in August of 1974 (DJ 399). CEI's position with respect to wheeling PASNY power for the City has never changed (Hauser Tr. 10,780-81). (IDFF 58)

Mr. Hauser admits that the City requested third party wheeling in August of 1973 (Hauser Tr. 10,720). CEI reiterated its refusal to wheel third party power for the City at a meeting held on December 13, 1973 (DJ 291). On repeated occasions the City, through Mayor Perk, Director Kudukis or Mr. Hart has renewed its request that CEI wheel PASNY power to the City. Each of those requests has been refused by one or more of President of CEI, Rudolph; General Counsel, Howley; or the then Solicitor Hauser. CEI's refusals were never based upon lack of transmission capacity and, in fact, CEI does not dispute that sufficient transmission capacity is

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18/ Some years earlier CEI had offered to wheel for the City under the Detroit plan which would admit no retail competition (Loshing deposition DJ 560 pp. 33-35).

available for the proposed wheeling transaction (Hart Tr. 4700-02; Buchman Tr. 4702-03). (IDFF 58)

During the spring of 1975, the City ascertained that seasonal power was available for sale by Buckeye (Hart Tr. 4703-04). The City also located bulk power supplies from the Cities of Orrville, Ohio, and Richmond, Indiana (Hart Tr. 490-91). Richmond, Indiana had available 50 mw of capacity and associated energy which it was willing to sell to Cleveland. Ohio Power Company agreed to wheel the power through its territory and Indiana and Michigan Power Company agreed to wheel the power through its territory if CEI would agree to wheel the power (Hart Tr. 4709-11 DJ 193). The City of Orrville had power which it was willing to sell to the City as soon as it perfected its interconnection with Ohio Power Company (Hart Tr. 4712). (IDFF 59)

Having located at least three power supply alternatives to the high cost emergency power it was purchasing from CEI, the City again requested CEI to provide transmission services to wheel the power (Hart Tr. 4704-05). In response to a request that CEI wheel Buckeye power, Mr. Rudolph wrote to Mayor Perk on July 22, 1975, stating that CEI would wheel any power for the City "as to which there is no legal or conspiratorial impediment which would prevent this company making a like purchase at a like price" (Applicants' 75). The City considered Mr. Rudolph's response to be a restatement of its earlier refusals to wheel and so informed CEI (Applicants' 76). CEI responded by repeating the same conditions placed upon wheeling, i.e., no legal or conspiratorial impendiment and refusing to explain what was meant (Applicants' 78). (IDFF 59)

At a meeting at City Hall in August of 1975 in which Messrs. Hart, Perk, Hauser and Rudolph participated, Mayor Perk requested that CEI agree to wheel third party power generally and made specific reference also to Richmond and Buckeye as power sources (Hart Tr. 4713-14). Messrs. Rudolph and Hauser reiterated CEI's "no legal or conspiratorial impediment" litnay (Hart Tr. 47-7-09). (IDFF 59)

On August 25, 1975, the City mailed to CEI a copy of the AMP-O - Ohio Power transmission agreement as a proposed form of agreement between the City and CEI (Applicants' 79). By letter of September 15, 1975, CEI again noted its unwillingness to agree to wheel Buckeye power (Applicants' 80). By letter of October 14, 1975, CEI again refused to agree to wheel Buckeye power and undertook to show by way of example rather than definition what it meant by the phrase "no legal or conspiratorial impediment." The examples given were power transactions with Ohio Edison, Pennelec and Ohio Power. Interestingly, CEI did not mention either Orrville or Richmond as power supplies that it would agree to wheel (Applicants' 84). (IDFF 59)

On October 21, 1975, Mr. Hart wrote to Mr. Hauser reminding Mr. Hauser that in August of 1975 the City had transmitted to CEI a proposed transmission schedule and noting that CEI had neither agreed to the City's proposal nor offered a counter-proposal (Applicants' 86). By letter of October 30, 1975, CEI reaffirmed its position regarding wheeling of Buckeye power but made no counter-proposal to the City's outstanding request for a transmission services schedule (Applicants' 94). By letter of December 3, 1975, Mr. Lansdale, an SS&D partner of the City's bond counsel and counsel to CEI, wrote to the Law

Director of the City of Cleveland reaffirming CEI's unwillingness to wheel Buckeye power and promising finally to respond to the City's request for a transmission services schedule (Applicants' 96). At last, on December 29, 1975, CEI offered its counter-proposal to the City's proposed transmission schedule incorporating a new condition: "provided such power and energy would have been available to CEI on equal terms and conditions". No explanation is given with regard to the meaning of this language or whether it is intended to mean the same as "no legal or conspiratorial impediments" (Applicants' 97). As late as February 23, 1976, no transmission schedule had been signed by CEI (Hart Tr. 5345), and none has been signed as of this day. The wheeling agreement proposed by CEI is further limited in that it provides wheeling only from third parties to the City and not from the City to third parties (Hart Tr. 5424). (IDFF 59)

Mr. Hauser has testified that in the summer of 1975, CEI altered its previous policy of no third party wheeling (Hauser Tr. 10,768). Mr. Hauser stated that new policy to be "that CEI will wheel for Cleveland or Painesville any power to which it would have equal access" (Hauser Tr. 10,768). Although Mr. Hauser's statement of the policy implies a willingness to wheel from, as well as to, CEI has yet to offer the City a transmission schedule providing for wheeling power from the City (Hart Tr. 5424). Mr. Williams, CEI Executive Vice President, confirms that CEI's present policy on wheeling does not admit of wheeling from the City (Williams Tr. 11,418-19). (IDFF 59)

Mr. Williams also explained how the policy would work to give CEI a right of first refusal on power the City wanted to buy. That policy, Mr. Williams admitted, could hinder the City's ability to coordinate with some third party (Williams Tr. 10,419-22). (IDFF 59)

The City's proposed transmission schedule provided for wheeling from, as well as to, the City (Hauser Tr. 10,773-74). Mr. Hauser admits that CEI's proposal provides only for wheeling from the City. He contends that CEI's proposal is intended to implement CEI's claimed new wheeling policy and, inconsistently, Mr. Hauser contends that CEI's new policy is to wheel from, as well as to, the City (Hauser Tr. 10,775-76). Then, later in his testimony, Mr. Hauser said the wheeling agreement offered the City does not accurately reflect CEI's wheeling policy (Hauser Tr. 10,780). (IDFF 59)

During the period in which CEI was purportedly operating under its new transmission schedule, it also had discussions regarding wheeling with Painesville (Hauser Tr. 10,776). By letter of April 13, 1976, Mr. Hauser sent Painesville a copy of a proposed participation agreement with the City of Cleveland which reflected CEI's old wheeling policy as an example of what CEI was willing to do and made no reference at all to the new policy (Hauser Tr. 10,778-79). CEI had also informed Painesville that it was working on a new transmission agreement with the City of Cleveland but the new agreement offered Cleveland apparently does not reflect CEI's new philosophical wheeling policy either (Hauser Tr. 10,779-80). Also during the period in which CEI's new wheeling policy has existed, CEI has subscribed to certain policy commitments which would offer wheeling only to

the cities, not from the cities, and only for the purposes of supplying supplemental power to the extent nuclear capacity owned by the cities is unavailable (Applicants' 44). (IDFF 73)

Whatever CEI's wheeling policy may now be it has not resulted in CEI's agreement to wheel power from any source from which it has been requested to wheel power. Moreover, CEI has yet to offer to any municipality a transmission schedule implementing its new wheeling policy, whatever it may be. On the record it appears that CEI's new wheeling policy is a reformulation of its earlier refusals to wheel.

Until the execution of a firm power schedule with CEI in June of 1976 (Applicants' 271), the City was for several years taking virtually its total requirements as emergency service at rates reflecting CEI's highest incremental cost incurred each hour to produce electric energy plus 10 percent. The result was that the City was incurring a total cost of service far in excess of CEI's average costs. The City's costs were in excess of the revenues derived by the City's electric rates which had to be maintained at competitive levels (Mayben dt. C-161 p. 14). It is essential that the City obtain access to lower cost replacement energy until it can rehabilitate its own generating resources and obtain access to the largest, most modern generating resources identified by the City, i.e., PASNY, Buckeye and Richmond, appeared to offer power at a cost below that sometimes paid to CEI for emergency power (Mayben dt. C-161 p. 21). (IDFF 59)

The City is completely surrounded by CEI. Until the perfection of a temporary 138 kv interconnection with CEI in May of 1975, the City was

electrically isolated. Even today, with a temporary interconnection with CEI, it is not possible for the City to obtain power supplies from an entity other than CEI without the wheeling services of CEI (Hinchee Tr. 2726).

When Ohio Power offered to sell power to the City, the City considered constructing a transmission line to Ohio Power (Hinchee Tr. 2695). Ohio Power was unwilling to build a transmission line across CEI's territory to serve the City (Hinchee Tr. 2780). The plan was rejected. The City is surrounded by high density commercial and residential areas which made it infeasible for the City to construct transmission lines to other power suppliers (Hinchee Tr. 2695; Mayben dt. C-16 p. 20). (IDFF 60)

It would be impractical for the City to construct transmission lines across CEI territory because of (1) cost; (2) environmental problems, and (3) obtaining siting approval for what would likely be duplicating transmission facilities (Mozer dt. NRC 205 pp. 57-58). At least since the mid-60's, CEI has, itself, been concerned with the increasing difficulty experienced in obtaining transmission right-of-way (DJ 509, DJ 510). CEI's "Company-Wide Basic Premises and Assumptions 1968-72 noted that '. . . right of way will become increasingly difficult to obtain'." (C-69). CEI's Basic Premises and Assumptions 1973-77 noted at p. 10 that "Land sites and rights of way will become increasingly difficult to obtain and more costly" (C-90). The same language is repeated in CEI's Basic Premises and Assumptions 1974-78 (C-91). During a meeting between CEI and the City in October 25, 1973, CEI noted problems with constructing transmission lines in the Cleveland area (DJ 291 p. 13). Frequently, CEI is forced to litigate to obtain right-of-

way (Caruso Tr. 10,941). The availability of transfer capacity on the CEI system would definitely be an issue in litigation arising from the City's attempting to build transmission lines (Caruso Tr. 10,943). In the early 1960's CEI itself took the position that it would be economically unsound for the City to construct a transmission line to Orrville and Painesville (Lindseth deposition DJ 568 pp. 58-60). The only alternative available to the City is interconnection with CEI (Applicants' 19). (IDFF 60)

Applicants' extensive transmission grid built in conjunction with large generating units might make it difficult for small systems to build transmission lines in the same area (Mozer Tr. 3271). The addition of the proposed nuclear units will strenghten the transmission grid and make it more difficult for other to construct transmission lines in the area (Mozer Tr. 3357). An alternative to constructing a duplicating transmission line might be a wheeling arrangement (Mozer Tr. 3358). (IDFF 60)

Applicants have offered the testimony of Mr. Caruso to buttress their argument that the City could construct its own transmission lines and thus did not require access to CEI's transmission facilities (Applicants' 162). Mr. Caruso studied four alternative 138 kv transmission lines to be constructed by the City. Two of these alternatives involved construction of lines to interconnect with Ohio Edison Company (Caruso dt. Applicants' 162 p. 13). Mr. Caruso did not consult with Ohio Edison (Caruso Tr. 10,945), and directly contrary to the assertion made in Applicants brief (page 171) was unable to reach any conclusion regarding the feasibility of the two alternatives involving Ohio Edison (Caruso Tr. 10,983-84). A third alternative studied involved construction of a single 70-mile 138 kv transmission line to Ohio

Power predicated upon purchase of 50 mw of base load power from Richmond, Indiana (Caruso Tr. 10,986). Mr. Caruso assumed that the cost of power from Richmond would be constant during the entire period studied (Caruso Tr. 10,988). He admitted that if the Richmond power were available for only five years it would alter the feasibility of the line (Caruso Tr. 10,933). Limited term of availability of the power would be magnified by the minimum of two years for engineering and construction of the lines studied (Caruso Tr. 10,954). An additional year must be added for obtaining approval of the Ohio Power Siting Commission (Kekela deposition DJ 574 p. 119). Still more time may be taken by litigation to acquire right-of-way. Mr. Caruso's study thus is predicated on the highly speculative proposition that the cost of the power would remain constant over the entire 25-30 year period of the study and that the City of Richmond somehow had constructed 50 mw of excess capacity which it could make available to the City at a 100 percent load factor for the entire duration of the period studied. (IDFF 60)

Purchases of 50 mw power from Richmond at 100 percent load factor would amount to approximately 60 percent of the City's load (Caruso Tr. 10,948). If CEI had to purchase 60 percent of its load over a 70-mile single circuit line, Mr. Caruso admits he would have to seriously consider alternatives which would provide more reliability (Caruso Tr. 10,949). Transmission over the CAPCO transmission system would be more reliable than transmission over a 138 kv radial line constructed by the City (Mozer Tr. 3610-11). In fact, without the existing temporary 138 kv interconnection with CEI, none of the alternatives studied by Mr. Caruso would have sufficient

reliability to be considered feasible (Caruso Tr. 10,960-61). (IDFF 60)

The fourth alternative studied by Mr. Caruso was a 75-mile single-circuit 138 kv transmission line to Pennelec to obtain PASNY power. This line would parallel CEI's existing 345 kv line to Pennelec (Caruso dt. Applicants' 162 pp. 13-14). Once again, Mr. Caruso's study is predicated upon the cost of PASNY power remaining constant for the entire 25-30 year period studied (Caruso Tr. 10,988). The study is also predicated upon the unsupported assumption that the power purchased from PASNY would be available around the clock at 100 percent load factor. CEI has adequate existing transfer capacity to accommodate the City's purchase of power from PASNY (DJ 358).

Mr. Caruso stated that the factor of greatest uncertainty in his study was the cost of right-of-way (Caruso Tr. 10,929-30). Nevertheless, Mr. Caruso made no inquiry as to the availability of right-of-way from the railroad companies along which he partially routed the lines (Caruso Tr. 10,978). No field study of the proposed right-of-way was made (Caruso Tr. 10,978-79). In fact, Mr. Caruso's study makes no provision for the expense of purchasing buildings or for crop damage claims or residue damages (Caruso Tr. 10,979-80). (IDFF 60)

Mr. Caruso's study was predicated upon construction using wood poles (Caruso dt. Applicants' 162 pp. 12, 13). Wood pole construction is less expensive than steel pole (Caruso Tr. 10.947). CEI itself has very little wood pole construction. Approximately 15 percent of CEI's 138 kv line is on steel poles and 85 percent is on steel towers (Caruso Tr. 10,976). All of the 138 kv

transmission lines described by Mr. Caruso which were constructed in urban areas covering a time period from 1965 to the present were constructed on steel poles or steel towers (Caruso dt. Applicants' 162 pp. 5-7). (IDFF 60)

Mr. Caruso pointed out that his study was limited to the feasibility of constructing a line compared to the purchase of emergency power from CEI. He made no attempt to compare the feasibility of alternative plans (Caruso Tr. 10,939). He did not consider wheeling as an alternative to the construction of transmission lines (Caruso Tr. 10,941). More importantly, Mr. Caruso made no recommendation that the City construct any of the lines studied (Caruso Tr. 10,945). Mr. Caruso made no mention of CEI's past opposition to construction of transmission lines by the City on the grounds that such lines would be uneconomical (C-94; Lindseth deposition DJ 568 pp. 58-61). (IDFF 60)

Mr. Caruso admitted that if the lines studied were built only part of the power purchased would flow over the line constructed by the City. The remainder of the power would flow over the existing CAPCO-CEI transmission system (Caruso Tr. 10,987). One factor not considered by Mr. Caruso is that where parallel transmission exists, under prudent operation, the capacity of the smaller line becomes the upper limit on the usable capacity of the larger line. Otherwise an outage on the higher capacity line would immediately cause an overload on the smaller parallel transmission line with possible destruction of that line (Bingham Tr. 8219-20). CEI presently utilizes a 345 kv line to receive 300 mw of power from its Seneca plant in Pennsylvania (Bingham Tr. 8232-33). Construction of a parallel 138 kv

line by the City would immediately reduce the usable capacity of CEI's 345 kv line below the 300 mw entitlement from Seneca. (IDFF 60)

Shortly after becoming Commissioner of Light and Power of the City in March of 1971, Mr. Hinchee orally requested an opportunity to participate in nuclear generation with CEI in the amount of 200 mw. CEI denied the City's request. (Hinchee Tr. 2702-06) On July 6, 1971, the City filed its petition to intervene in these proceedings and renewed its request for participation in Davis-Besse Unit #1. The City reiterated its request for participation in Davis-Besse #1 in pleadings filed with this Commission on July 27, 1971 and October 19, 1971, among others. (IDFF 61)

Applicants argue that City was rebuffed in its effort to intervene in Davis-Besse (Brief p. 142). That is not true. As noted by Applicants (Brief p. 141) action on City's petition was delayed pending a decision in the FPC case. After CAPCO announced construction of the Perry units, the City reviewed its request for participation in the CAPCO nuclear units including Davis-Besse #1, Beaver Valley #2 and the Perry units (Hinchee Tr. 2706, DJ 182). A more formal request for participation in CAPCO nuclear units as well as for membership in CAPCO was sent by the City to the Chief Executive Officer of each CAPCO company on August 3, 1973 (DJ 185). At a meeting of top management of CEI on August 8, 1973, it was decided that CEI would deny the City's request for participation in the Davis-Besse and Beaver Valley units and to offer the City participation in the Perry units. Subsequently CEI obtained the approval of the other CAPCO Chief Executives to offer the City participation in the Perry units (DJ 291). CEI did not inform the City

of its decision and on September 10, 1973, the City wrote to CEI and the other CAPCO companies renewing its request to participate in the nuclear units and also requesting participation in future units, whether nuclear or fossil fired, being planned by CEI (Applicants' 61). (IDFF 61, 62, 63)

CEI finally agreed to meet with the City on October 25, 1973, to discuss the City's request for membership in CAPCO and for participation in CAPCO generating units. Although CEI had already decided to offer participation in the Perry units and had received approval from its CAPCO partners, it did not extend the offer to the City. Neither did CEI inform the City that it would not be permitted to participate in Davis-Besse #1 and Beaver Valley #2 (DJ 291). (IDFF 61, 62, 63)

CEI and the City next met to discuss the City's request for participation on December 13, 1973, at which time CEI informed the City that it would not be permitted to join CAPCO but that CEI would extend an offer of participation. The City was informed that CEI believed the emergency service over the 138 kv intertie ordered by the FPC provided most of the backup the City would need for its participation. (DJ 291) CEI offered to negotiate with the City for participation in Davis-Besse #1, Beaver Valley #2 and Perry #1 and #2 and to negotiate for "some type of back up." Participation was to be from CEI's share of the plants. One provision of the agreement was that CEI would have the right of first refusal to purchase any power from the City's participation not required for use by the City or its retail customers. (It has been shown previously that such a right of first refusal could be used to prevent the City from coordinating development with a

third party.) Another provision was that the City agree that it would not sell power below cost. Moreover, CEI insisted as a precondition to entering such negotiations that the City withdraw its petitions to intervene in these proceedings. (DJ 188) Thus, nine months after the City's written request to participate in the Perry units and two and one half years after the City first requested participation in Davis-Besse #1, CEI came forward with an offer to negotiate subject to an obviously unacceptable precondition. (IDFF 61, 62, 63)

On January 2, 1974, the City rejected the conditions attached to CEI's proposal for entering into negotiations and the City renewed its request of August 3, 1973 (DJ 189). On February 7, 1974, CEI wrote to counsel for the City agreeing to negotiate participation "not to exceed the direct requirements of the City" and, in effect, withdrawing the precondition to negotiations but standing on its other conditions. At the same time, CEI offered a draft of a proposed interconnection agreement intended to comply with the FPC Order for emergency service and which, CEI said, "may or may not provide back up for the City's participation in nuclear unit." (DJ 191) (IDFF 61, 62, 63)

On February 27, 1974, nearly a year after the City requested participation in the Perry units and three years after the City first requested participation in Davis-Besse Unit #1, CEI offered the City a draft participation agreement. Backup for the City's participation was to be found partially in the participation agreement and partically in the interconnection agreement. (DJ 192) Because CEI made the interconnection agreement an integral part

of the participation agreement, it was necessary to work on both agreements simultaneously (Applicants' 66). (IDFF 61, 62, 63)

By letter of March 28, 1974, the City responded to CEI's proposed participation and interconnection agreements pointing out that they failed to provide for coordinated operations and development including such matters as reserve sharing and third party wheeling. The City also requested CEI's response to the City's proposed license conditions. (Applicants' 63) (IDFF 61, 62, 63)

By letter of August 22, 1974, the City wrote to CEI noting the skeletal nature of the draft participation agreement and that the City had yet to receive any suggestions from CEI regarding the defects noted previously by the City. The City also noted that final agreement on the interconnection agreement was also delayed because under CEI's proposal the agreement had to be reformulated to provide backup for the City's participation in nuclear units. Among other defects, the proposed interconnection agreement did not provide adequate transmission services. (Applicants' 66) (IDFF 61, 62, 63)

On December 13, 1974, the City sent to CEI its counter-proposal for participation in the form of draft participation agreement, draft facilities agreement and draft operating agreement (DJ 315). Between the date of CEI's first offer of a participation agreement and the counter-proposal put forth by the City, CEI and the City met to discuss an operating and facilities agreement as a first step towards negotiating participation (Hart Tr. 5,427-28). (IDFF 61, 62, 63)

On January 3, 1975, Mr. Hauser responded to the City's proposed

participation agreement, operating agreement and facilities agreement, stating, "Service Schedule F - Transmission Services has been changed to provide only transmission services from City owned or Unit Purchased Power from the four CAPCO units." (Applicants' 143) To date no participation agreement has been executed (Hart Tr. 4,824). (IDFF 61, 62, 63)

CEI has not withdrawn its insistence on a right of first refusal to buy any participation power excess to the needs of the City (Hart Tr. 4,825). The right of first refusal would be priced at the City's cost, thus preventing the City from marketing its excess power at the most advantageous price (Mayben Tr. 7,612, DJ 192). The right of first refusal insisted upon by CEI could preclude the City from coordinating its power supply with third parties (Mayben Tr. 7,618). (IDFF 61, 62, 63)

The participation agreement offered to the City provided only for the wheeling of nuclear power from the power plants of the City (Hauser Tr. 10,712). A small electric entity with access to nuclear participation needs transmission services to obtain access to other power supply alternatives if it is to make practical and economical use of the nuclear power (Mozer dt. NRC 205 pp. 69-70). Even with access to nuclear power, a small system must have wheeling to put together a proper blend of power supply resources (Kampmeier Tr. 6,142-48). (IDFF 61, 62, 63)

An agreement permitting the City to wheel excess nuclear power from the City to a purchaser would be desirable for economic utilization of the City's participation (Mayben Tr. 7,598). The City in its proposed participation agreement did request "wheeling out" (Mayben Tr. 7,599).

The transmission services offered by CEI providing only for the transmission of power from the participation units to the City's load centers would not enable the City to get meaningful access to the nuclear units in which it was participating (Mayben Tr. 7611). During the spring and summer of 1975, CEI refused to negotiate with respect to requests for wheeling other than the limited transmission service offered in its February 1974 participation and interconnection proposals (Mayben Tr. 7755-56). (IDFF 61, 62, 63)

A party must have a full array of power supply alternatives in putting together a bulk power supply (Hughes Tr. 3,687). A party having access to nuclear power must put together a blend of resources. The more alternatives available to the party, the more economical the resource blend. (Hughes Tr. 3,696) To achieve the maximum benefits of coordination through access to nuclear generation, wheeling services must be available (Hughes Tr. 3,851). If a party is to make effective economical use of access to nuclear generation, it must have access to other power supply options in an unbundled fashion (Hughes Tr. 3,858). Coordination is needed to make efficient use of nuclear generation (Hughes Tr. 4,092). In order to remain a viable entity, the City must have both access to nuclear power and third party wheeling (Hinchee Tr. 2,708-11, Applicants' 207). The availability to the City of alternate power supply sources would permit the City to compete for additional customers (Hinchee Tr. 2,787). CEI has not offered the City a participation agreement with terms which would permit the City to make effective use of its power. (IDFF 61, 62, 63)

The Painesville municipal electric system has 38 mw of coal-fired generation to serve a peak load of 25 mw. The system is electrically iso-

lated. (Pandy Tr. 3,097-98) The system could not engage in transactions with other electric entities without use of CEI's transmission network (Pandy Tr. 3,099-3,100). Alone, the Painesville system cannot take advantage of generation economies of scale (Pandy Tr. 3,101). Painesville must have an interconnection with CEI if it is to remain competitive (Applicants' 272). (IDFF 64)

Painesville cannot construct or finance a nuclear generating unit by itself. It must have the cooperation of CEI if it is to participate in nuclear generation. (Pandy Tr. 3,120) Painesville cannot build its own transmission lines to other utilities because it is in a highly urbanized area and the cost would be prohibitive. Moreover, it may be difficult to obtain approval of the Ohio Power Siting Commission because such lines would duplicate CEI's existing transmission facilities. (Pandy Tr. 3,174) (IDFF 66, 74)

By letter of April 11, 1973, Painesville wrote to CEI expressing its interest in participating in the recently announced Perry nuclear units (NRC 136-A). CEI responded on April 24, 1973 with an offer to discuss Painesville's request (NRC 136-B). Subsequently CEI's representative advised Painesville that a simple interconnection agreement would provide Painesville with the same things it would get through participation (NRC-138, Pandy Tr. 3,116, Milburn deposition, Applicants' 195 pp. 22, 24). At the time of Mr. Pandy's testimony in these proceedings, CEI had not made available to Painesville any terms or conditions for access to the Perry units including Applicants' policy commitments (Pandy Tr. 3,162, Hauser

Tr. 10,869). In the spring of 1976, Painesville renewed its request for participation and in return received from CEI a copy of the obviously insufficient participation agreement offered to the City of Cleveland over two years earlier which admittedly did not even reflect CEI's current wheeling policy (whatever it might be) (Hauser Tr. 10,718). Painesville is still interested in participating in the Perry nuclear units (Pandy Tr. 3,158). (IDFF 74)

For many years Painesville has been attempting to negotiate an interconnection agreement with CEI. In 1966, Painesville was informed that negotiating an interconnection agreement was probably impossible because some CEI directors thought Painesville would fall like a plum into CEI's lap. (Milburn deposition, Applicants' 195 p. 11) These discussions continued into 1976. During the negotiations between 1971 and 1975, Mr. Howley of CEI informed Painesville that CEI was not interested in an interconnection with Painesville that did not require Painesville to engage in price fixing with CEI. (Pandy Tr. 3,152-53; DJ 369) Painesville also requested that the interconnection agreement provide for third party wheeling. By letter of June 27, 1974, Mr. Howley informed Painesville that "we could not agree to the transmission service schedule which is third party wheeling." (NRC 141; Pandy Tr. 3,127-29) (IDFF 69, 70)

During discussions of a possible interconnection in 1962, Mr. Rudolph of CEI suggested that Painesville and CEI exchange approximately 600 customers and enter into a territorial division of markets providing for exclusive service areas (Helsell Tr. 3,622-24A; NRC 144). Mr. Howley renewed

the proposal around 1964 or 1965 (Helsell Tr. 3,625-26). (IDFF 69, 70)

Reliability of service is a factor in competition between Painesville and CEI. After each outage, Painesville loses customers to CEI (Pandy Tr. 3,179-80). Since 1971, Painesville has experienced one or two serious outages each year and has experienced voltage reductions one or two times each year (Pandy Tr. 3,099). Lack of an interconnection reduces Painesville's reliability (Pandy Tr. 3,181). Under an agreement with the Ohio Environmental Protection Agency limiting operation of certain of Painesville's generating units, Painesville will have no firm power without an interconnection (Pandy Tr. 3,180). Painesville does not carry generating reserves typical of industry practice because the cost would be too great. An interconnection would provide adequate reserves. (Pandy Tr. 3,181) The interconnection agreement negotiated with CEI does not provide for third party wheeling nor does it provide for the sale of power by Painesville to third parties (Pandy Tr. 3,176-77). Painesville agreed to the offered interconnection because it was desperate for an interconnection (Pandy Tr. 3,179, 3,124). (IDFF 68)

The Cities of Cleveland and Orrville had at times indicated a willingness to purchase excess capacity from Painesville (Pandy Tr. 3,103, 3,118). Such sales cannot be made without access to CEI transmission lines (Pandy Tr. 3,099-100). The present interconnection agreement does not provide for such sales (Pandy Tr. 3,177). (IDFF 66)

CEI has long desired to acquire or reduce and eliminate the Painesville electric system (DJ 509, DJ 510; NRC 143). In 1964 or 1965, Mr.

Howley suggested purchase of the Painesville system by CEI (Helsell Tr. 3,625-27). At various times over the years, CEI has given consideration to the possible acquisition of Painesville's electric system (DJ 363, DJ 364, DJ 366, DJ 367, DJ 368, DJ 371). (IDFF 28)

B. The Record Supports The Licensing Board's Findings With Respect To Toledo Edison.

Toledo Edison has an informal corporate policy favoring the acquisition of municipal electric systems in its territory. (Keck deposition DJ 576 p. 233; Schwalbert deposition DJ 577 pp. 7, 17-19; Kozak deposition DJ 579 p. 26; Cloer deposition DJ 582 pp. 13-14; DJ 166). As recently as July 1974, Mr. Schwalbert, a Toledo Edison vice president, advised a new Toledo Edison district manager that "acquisition of municipals is an objective high on our list." (DJ 541). In keeping with that policy, Toledo Edison has acquired some municipal systems and taken steps toward the acquisition of others. (City of Elmore, DJ 552-56; City of Bryan, DJ 154, DJ 155, DJ 156, DJ 158, DJ 557; Pioneer, DJ 544; City of Waterville, DJ 505; Liberty Center, DJ 139; City of Napoleon, DJ 142-44). (IDFF 159, 161)

Toledo Edison is an amalgamation of at least 190 companies acquired by acquisition and merger. Toledo Edison "has made other offers to make system surveys which might lead to the purchase of . . . other municipal electric systems . . ." which include Bradner, Custar, Elmore, Genva, Haskins, Montpelier, Oak Harbor, Pemberville and Woodville. (Wein dt. DJ 587 pp. 70-71). (IDFF 158, 159)

By November 4, 1966, Toledo Edison had become aware that Waterville's need for firm power from Toledo Edison to serve industrial customers had become critical. (DJ 615). On November 9, 1966, during a meeting with the President of the Waterville Board of Public Affairs, Mr. Cloer stated that Toledo Edison did not wish to sell power at wholesale to Waterville because Toledo Edison wished to purchase the Waterville electric system. Mr. Cloer also informed the President of the Board of Public Affairs that the public reason why Toledo Edison would not sell wholesale power was that Toledo Edison was not interested in supplying "standby power." (DJ 505). In June of 1967, a consulting engineer for Waterville asked Toledo Edison whether it would sell either partial or all requirements wholesale power to Waterville. (DJ 504). In keeping with the strategy outlined by Mr. Cloer, Toledo Edison refused to sell to Waterville power for resale. (DJ 506). Eventually Waterville decided to sell its electric system to obtain more reliable electric service. At the time the system was sold, Waterville, was an isolated electric system. (Cloer deposition DJ 582 p. 12). An interconnection between Waterville and Toledo Edison would have improved Waterville's reliability (Cloer deposition DJ 582 p. 13) reducing chances of acquisition by Toledo Edison. (IDFF 179)

During the negotiations leading to the signing of the Buckeye Power Delivery Agreement, Toledo Edison was concerned, as were other investor-owned utilities, that it might lose municipal wholesale customers to the REA distribution cooperatives. (Schwalbert deposition DJ 577 p. 44). To eliminate the threat of wholesale competition by the REA cooperatives, Toledo Edison and the other investor-owned utilities inserted in the Power Delivery Agreement a condition prohibiting an REA cooperative from undertaking to

serve a municipal wholesale customer of an investor-owned utility until that customer had been disconnected from the investor-owned utility for a period of 90 days (Schwalbert deposition DJ 577 p. 45; DJ 77; 81). Toledo Edison did not want to sign the Buckeye Power Delivery Agreement; however, the Buckeye agreement would eliminate the need for the REA distribution cooperatives to build a statewide transmission system. Toledo Edison feared that a Buckeye transmission system could cause Toledo Edison to lose customers. The fear of losing customers was an important reason for Toledo Edison to sign the Power Delivery Agreement (Keck deposition DJ 576 pp. 182-84). (IDFF 173, 178)

Toledo Edison opposed construction of a 10-mile transmission line by the City of Napoleon to the Liberty substation of Tricounty REC out of concern that Napoleon would use the line to compete with Toledo Edison for customers along that line (Moran Tr. 10,666; NRC 127 p. 3). (IDFF 172)

In September of 1971, Mr. Bill Lewis, a consultant for the City of Napoleon, met with Messrs. Moran and Cloer of Toledo Edison to request that Toledo Edison establish a delivery point for Tricounty REC to provide electric service to Napoleon at the existing delivery point from Toledo Edison to Napoleon. Mr. Lewis was told that Toledo Edison would do everything in its power to prevent Napoleon from receiving Buckeye power from Tricounty REC. He was told that the proposal would in effect cause Toledo Edison to wheel power from Ohio Power to Napoleon and it was not Toledo Edison's policy to wheel power for municipalities. (NRC 127 pp. 3-4). (IDFF 172)

At the time of the discussions between Mr. Lewis and Messrs. Moran and Cloer, Toledo Edison was considering purchasing the Napoleon electric system and submitted a bid for purchase of the system. (Moran Tr. 9,923, 10,074; DJ 142). In February of 1972, Toledo Edison withdrew its bid. (DJ 144).

In 1972 Napoleon sought bids for its bulk power supply. Tricounty REC offered a proposal to sell Buckeye seasonal diversity power to Napoleon during Buckeye off-peak months. Napoleon would generate its own power during the months of Buckeye's peak demand. (Dorsey Tr. 5,256-57). In January of 1973, Toledo Edison told Tricounty that the Buckeye agreement precluded Tricounty from serving Napoleon. (DJ 146). By letter of May 2, 1973, Buckeye formally requested Toledo Edison to provide a delivery point for Tricounty to serve Napoleon. (NRC 128; DJ 148). By letter of May 23, 1973, Toledo Edison agreed to estalbish the requested delivery point assuming that Napoleon first operated in isolation for 90 days. (NRC 129). On June 6, 1973, Napoleon formally notified Toledo Edison that it would purchase power from Tricounty. (DJ 149). Mr. Cloer told Mr. Dorsey of Napoleon that Toledo Edison would insist that Napoleon operate for 90 days in isolation. (DJ 150). On July 18, 1973, Mr. Dorsey requested a waiver of the 90 day provision by Toledo Edison. (NRC 130). On July 19, 1973, Toledo Edison refused to waive the 90-day provision. (NRC 131; Dorsey Tr. 5,629). (IDFF 173)

Mr. Dorsey was uncertain as to whether Napoleon could generate enough power to operate successfully in isolation for 90 days. Napoleon's

reliability would have been reduced during the isolation period (Dorsey Tr. 5,265-66). Napoleon was unable to find a means of backing up its system. (Dorsey Tr. 5,268). Accordingly, Mr. Dorsey requested that the disconnection with Toledo Edison be accomplished by using air breakers which would permit emergency reconnection in 15 minutes. Toledo Edison insisted upon method of disconnection which would require 4 to 5 hours to reconnect. (Dorsey Tr. 5,272-73). Napoleon's industrial customers protested the reduced reliability of electric supply which would be occasioned by the 90 days of isolated operation. (DJ 303-07). (IDFF 173)

Shortly before the proposed date for commencement of isolated service, Toledo Edison offered Napoleon a wholesale rate with a demand charge rachet reduction from 75% to 60% and Napoleon elected to accept the reduced rate for wholesale service and remain a customer of Toledo Edison (Dorsey Tr. 5,294), rather than risk a period of isolated generation. (IDFF 174)

At meetings on September 2, 1971, and March 6, 1972, Mr. Lewis acting on behalf of Napoleon and Messrs. Moran and Cloer representing Toledo Edison discussed the possibility of joint ownership of large generating units through coordinated development. On each occasion Toledo Edison refused to consider coordinated development. (NRC 127 pp. 6-7). Toledo Edison has never informed Napoleon that Toledo Edison has a policy of permitting small untilities to participate in nuclear generating units owned in part by Toledo Edison. (Moran Tr. 10,666) (IDFF 181)

Since commencement of these proceedings Toledo Edison has agreed to consider coordinated development with Napoleon, Bryan and Bowling Green

of a refuse burning generating unit. (Moran Tr. 9,858-59). However, Toledo Edison's witness was unaware of any notification by Toledo Edison to its CAPCO partners of its proposal to engage in coordinated development with non-CAPCO entities. (Moran Tr. 10,666-67) Toledo Edison is aware that such an arrangement would be inconsistent with CAPCO. (Sullivan deposition DJ 578 p. 117). Indeed approval by Toledo Edison's CAPCO partners would be required before Toledo Edison would be free to engage in coordinated development with non-CAPCO entities (Schaffer Tr. 8,557). (IDFF 182)

For many years Toledo Edison's contracts with its wholesale customers have included territorial restrictions. (NRC 112-25). The territorial restrictions in Bowling Green's wholesale power supply contract restricted growth of the Bowling Green electric system (Hillwig Tr. 2,375). Bowling Green did not request that the territorial restrictions be included in its contract (McKnight Tr. 11,995-96). In fact, Bowling Green attempted to obtain a contract without any territorial restrictions (Hillwig Tr. 2,377-80; Moran Tr. 9,882). Toledo Edison understood that one result of the territorial restraints on resale of power sold by Toledo Edison at reatil would be reduced retail competition (Moran Tr. 9,978). (IDFF 166)

Toledo Edison has entered into territorial market allocations with the two Ohio investor-owned utilities which have territory contiguous to the territory served by Toledo Edison (C-1; DJ 513, DJ 516, DJ 517, DJ 519, DJ 546, DJ 548, DJ 549, DJ 550). In late 1970 or early 1971, Mr. Schwalbert, a Toledo Edison vice president, orally ordered the destruction of documents

regarding territorial agreements (DJ 617). (IDFF 164)

Toledo Edison has refused to wheel power for Bowling Green and American Municipal Power-Ohio (Hillwig Tr. 2386-88, 2402, 2445, 2453). Toledo Edison refused to file a transmission services rate schedule providing for the wheeling of power to municipalities although requested to do so by municipalities (Smart Tr. 10,131-32). In responding to Bowling Green's request for wheeling services, Toledo Edison considered the effect wheeling would have on competition for customers (Moran Tr. 10,029). (IDFF 69, 170, 171)

C. The Record Supports The Licensing Board's Findings With Respect To Ohio Edison And Penn Power.

1. Ohio Edison

Like its subsidiary Penn Power, Ohio Edison has for many years placed restrictions on the resale of power sold to municipalities under wholesale power contracts (DJ 24-65). For example, Ohio Edison's contract with the Village of Grafton provided that without written consent of the Company, Grafton could not resell the power purchased from Ohio Edison for use at any premises served directly by the Company or capable of being served by the Company without an extension of the Company's primary lines or to any new customers outside the municipality which could not be served without extension of the municipality's primary distribution lines (DJ 50). (IDFF 134, 135)

The prohibition on extending primary distribution lines outside the corporate limits contained in Ohio Edison's contract with the City of Wadsworth has restricted the growth of the Wadsworth municipal electric system

(Lyren Tr. 1920-21, 1925-26). On occasions when Wadsworth was granted permission to extend its primaries, typically such permission was conditioned upon paying Ohio Edison back by permitting Ohio Edison to serve customers which would ordinarily be served by Wadsworth (Lyren Tr. 1926-27; NRC 36-40, 58-60, 62-66). (IDFF 134-137)

Ohio Edison has enforced the territorial restrictions in its wholesale power contract to prevent Niles, Ohio from serving customers outside Niles' allocated service territory (DJ 408) and to prevent Niles from selling electric power to Jones & Laughlin Steel Corporation (DJ 413). Ohio Edison has required Niles to give up customers in exchange for permission to extend its lines beyond its allocated service territory (DJ 412). Ohio Edison has considered construction of pre-emptive distribution lines to restrict the growth of the Niles municipal electric system (DJ 410). (IDFF 137)

Ohio Edison required an exchange of customers and "banking" of customers as the price of permitting Hudson, Ohio to serve customers reserved to Ohio Edison by Ohio Edison's wholesale power supply contract with Hudson (DJ 467-74). (IDFF 137, 138)

Mr. White, President of Ohio Edison, recognized that restrictions on resale of power sold by Ohio Edison at wholesale to municipal electric distribution systems could artifically restrict the growth of those systems (White Tr. 9,719). (IDFF 134-139)

Ohio Edison's contracts with its wholesale customers consisted of a written contract for ten years not subject to unilateral change and a rate

of transmission and as to amounts of power to be transmitted. (White Tr. 9725-26; DJ 481). Other than Ohio Edison, all investor-owned utilities in Ohio which sold power to rural electric cooperatives signed the Buckeye Power Delivery Agreement which provided for wheeling of Buckeye power by the investor-owned utility (Shite Tr. 9554). Mr. White testified that Ohio Edison refused to sign the wheeling agreement because it would not be properly compensated for the use of its transmission facilities (White Tr. 9555-56). Nevertheless, Ohio Edison informed the cooperatives in its service area that a buy-sell arrangement would be less expensive than the wheeling arrangement (White Tr. 9727). Ohio Edison also informed Buckeye that Ohio Edison might receive less revenue under the buy-sell arrangement than under a wheeling arrangement (DJ 532). (IDFF 117, 118, 119)

Mr. Mansfield, former President of Ohio Edison, testified in proceedings before the SEC that Ohio Edison was vociferously opposed to the Buckeye arrangement and refused to wheel Buckeye power. Ohio Edison finally agreed to deliver the power pursuant to a buy-sell arrangement to forestall the cooperatives from building transmission lines. (DJ 479) It was Ohio Edison's preference that the REA distribution cooperatives not own transmission lines (Mansfield deposition DJ 572 p. 118). From a business standpoint, wheeling would have been as effective as a buy-sell arrangement. Ohio Edison does not want to wheel and the buy-sell arrangement was a means of avoiding wheeling. (Mansfield deposition DJ 572 pp. 119-120). (IDFF 117, 118, 119, 120)

Lack of a wheeling agreement may have prevented Newton Falls from purchasing wholesale power from Buckeye in 1973. (Craig Tr. 2927-28). (IDFF 121)

In 1972 the twenty-one wholesale customers of Ohio Edison formed an organization called WCOE to oppose a wholesale rate increase filed at the FPC by Ohio Edison. (Lyren Tr. 1883-85). As a part of the settlement of the 1972 wholesale rate case Ohio Edison agreed to study a new form of power supply arrangement for the municipalities (Lyren Tr. 1886). The inducement for Ohio Edison to settle was settlement of the rate case on favorable terms and the prospect of avoiding future rate cases before the FPC. The inducement for WCOE to settle was the possibility of negotiating a new power supply arrangement (Mayben Tr. 12,558-59; Applicants' 227). (IDFF 126)

Attorneys and consultants for WCOE drafted a set of criteria for a study of the proposed new power supply arrangements (Mayben Tr. 12,524). On June 18, 1974, these criteria were forwarded to Ohio Edison (NRC 31). On October 7, 1974, representatives of WCOE met with representatives of Ohio Edison to establish the parameters of the proposed study. (Lyren Tr. 1907-08). At the October meeting, Ohio Edison placed limits on the study which pre-determined the outcome of the study (Mayben Tr. 12,575-76). Among the limitations placed upon the parameters of the study was a refus by Ohio Edison to consider third party wheeling (Chessman Tr. 12, 12,162; Lyren Tr. 1905; Mayben Tr. 12,547). Mr. Mansfield who was President of Ohio Edison until 1975, was of the opinion that investor-owned utilities should not engage in coordination with public power entities. (Mansfield

deposition DJ 572 pp. 10-11). (IDFF 127, 128, 129)

Among other limitations placed upon WCOE's power supply study by Ohio Edison were requirements that (1) WCOE could not choose the generating plants in which it wished to participate, (2) that WCOE could participate in each unit only up to an amount equal to ten percent of WCOE's annual load, (3) that any surplus power owned by WCOE could only be sold to Ohio Edison, and (4) that the P/N formula would be the measure of reserves to be maintained by WCOE (Cheesman Tr. 12, 151-53). Application of the P/N formula would have caused WCOE to maintain approximately 280 percent reserves (Cheesman Tr. 12,158). Under the ten percent limitation on participation, it would have taken 30 years for WCOE to have acquired enough capacity to serve its own load (Cheesman Tr. 12,218). (IDFF 127, 128, 129)

WCOE requests for wheeling services were renewed at a meeting with Ohio Edison on August 1, 1975, and Ohio Edison refused to discuss the matter (Lyren Tr. 1915). (IDFF 127, 128, 129)

2. Pennsylvania Power

From 1965 until 1976, Pennsylvania Power Company's wholesale power supply contracts with municipalities in its service territory contained restrictions on the resale of the power sold (DJ 67-76). Penn Power's wholesale contract with Grove City provided that (DJ 76):

> 5. Except with the written consent of the Company, service furnished hereunder shall not be resold for use at any premise now or hereafter being furnished electric service directly by Company.

Elsewhere the agreement provided that the power be resold only at retail. (IDFF 140)

The terms of Grove City's contract with Penn Power precluded Grove City from competing for industrial customers in the City (Allen Tr. 4766). Grove City has sufficient capacity available in its distribution system to serve industrial customers (Allen Tr. 4799). (IDFF 140)

Penn Power has offered to lease or purchase the Grove City electric system (Allen Tr. 4777-78; DJ 501). (IDFF 140)

Ellwood City is a wholesale all-requirements customer of Penn Power (Urian Tr. 4966-67). Penn Power serves all industrial customers within Ellwood City (Urian Tr. 4967). Ellwood City wants to compete for existing industrial loads and new industrial loads but has been precluded from doing so by its contract with Penn Power (Urian Tr. 4971-73). Ellwood City has requested Penn Power to permit it to serve the existing industrial customers in the City and those requests have been denied (Urian Tr. 4986). (IDFF 141)

Ellwood City has been hindered in its desire to compete for industrial customers by Penn Power's refusal to offer a high voltage discount rate. (Urian Tr. 4976-78). Penn Power does have a high voltage rate for its retail industrial customers in Ellwood City (Urian Tr. 4978).

The Federal Power Commission (FPC) has recognized Ellwood City's need for a high voltage discount rate stating (DJ 626 p. 9; DJ 627):

> However, to determine the economic feasibility of the contemplated service and to guide its action, the municipality has an immediate need to know the rates which are to be charged by Applicant for the high voltage service. Ellwood City's needs and expectations are not theoretical and abstract, but real and reasonable.

3. The Licensing Board's Determination That Ohio Edison And Penn Power Imposed A Price Squeeze Upon Their Municipal Customers Is Correct And Is Supported By Substantial Evidence.

When monopolists, such as Applicants, control the sources of supply in a wholesale market and compete with their wholesale customers for retail sales, the monopolists have the ability to limit the profitability of those competitors through a "price squeeze". A "price squeeze" occurs when a monopolist's wholesale price is so close to its own retail price that a competitor cannot obtain a profit by purchasing from the monopolist at wholesale and meeting the monopolist's price at retail. The imposition of a price squeeze by a monopolist is a violation of the antitrust laws. United States v. Aluminum Company of America, 148 F.2d 416 (CA 2, 1945), (Alcoa).

The initial decision of the Licensing Board held that the pricing scheme of Ohio Edison and Penn Power is such an unlawful price squeeze (5 NRC 210). That decision is correct and supported by the record.

a. The Evidence Reveals A Price Squeeze

Retail competition for industrial customers between the municipalities and their respective wholesale suppliers is within the relevant markets in this antitrust review. (5 NRC 160). The Licensing Board held that the ability of the municipalities to compete in that market was limited by the imposition of a price squeeze by Ohio Edison and Penn Power. (5 NRC 208; Lyren Tr. 2047; Wein Tr. 6974; DJ 587, p. 158). The Licensing Board based its holding on the comparison of the wholesale rates with the retail rates charged by both Ohio Edison and Penn Power presented by Mr. Kampmeier, a witness for

the Department of Justice. The comparison revealed that Ohio Edison limited competition by charging its wholesale municipal customers significantly higher rates than were charged its retail industrial customers and Penn Power's rates limited its competitors even more. (5 NRC, DJ 450 pp. 34-35).

The challenges to the Board's holding by Applicants are without merit.

Applicants challenge the expertise of the Board on rate matters and question the Board's ability to make a determination of price squeeze without "price or rate analysis" (App. Br. p. 251).[20/] The challenge reveals Applicants' misunderstanding of the price squeeze issue.

The Board correctly held that a price squeeze allegation involves a consideration of the spread between wholesale and retail rates and its effect upon competition. 5 NRC 209, citing Mishawaka v. Indiana and Michigan Power Company, 1975 CCH Trade Cases No. 60,318 (N.D. Ind. 1975); United States v. Aluminum Company of America, 148 F.2d at 436-38.

A price or rate analysis of the individual rates is not necessary because the Supreme Court had held that the retail and wholesale rates may create an illegal price squeeze between themselves without considering the basis upon which the rates were set. FPC v. Conway Corporation, 426 U.S. 271, 48 L. Ed. 2d 626, 634 (1976).

In Alcoa, supra, a case in which Alcoa competed at retail with its wholesale customers, Judge Learned Hand held that a prima facie illegal

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20/ City's objection to the oral testimony of Applicants' witness on price squeeze on the grounds that it was expert testimony which under the Licensing Board's rules had to be prefiled was overruled (Tr. 11,058). Moreover, Applicants' objections to City's discovery requests for the cost data necessary to perform a cost analysis was sustained. Order on Objections to Interrogatories and Discovery Requests, October 15, 1974.

price squeeze was established by a showing that Alcoa's wholesale price for raw aluminum ingot plus its cost of fabrication either exceeded its retail price for fabricated aluminum or was so close that it limited Alcoa's wholesale customers' ability to compete with Alcoa at retail and therefore induced those customers to discontinue their business. 148 F.2d 437. The Court did not require an analysis of either the wholesale or retail price.

The evidence presented in this case that the municipal wholesale rates are several percent higher than the industrial retail rates for similar voltages meets the prima facie test for price squeeze as established in Alcoa, (DJ 450, p. 34).

Applicants have argued that their exhibits demonstrate the absence of a price squeeze (App. Br. p. 252; A-166; A-167; A-168), but the Board rejected this allegation and discredited Applicants' exhibits by noting that certain variables were not uniformly applied and certain cost factors were omitted (5 NRC 209; Cities ff. 17.01; DJ ff. 8.26, 8.27).

For instance, Applicants' exhibits show a spread between the wholesale and retail rates but fail to account for the monthly variations in the spread between the wholesale and retail fuel adjustment charges which affect the ultimate prices. By use of a single one-month comparison rather than a full year average of the spread between the fuel adjustment charges (Wilson Tr. 11,128-29), Applicants' exhibits ignored the impact upon the price squeeze situation from the monthly variations in the spread between the fuel adjustment clauses which are different for the retail and wholesale rates.

Applicants' exhibits have various other deficiencies.

Applicants' Exhibit 167 reflects industrial customers with demands of 3,500 kva or 5,000 kva, but typical industrial customers have only a demand of 1,000 kva (Wilson Tr. 11,129).

Changing the load factor's used for making the calculations in Applicants' Exhibit 167 would alter the results shown on the exhibit. (Wilson Tr. 11, 129). Moreover, it compares an existing rate to a proposed rate (Wilson Tr. 11,127). Exhibit 167 includes Ohio Edison's costs to distribute power at retail but does not reflect the same costs which would necessarily be incurred by its wholesale customers (Wilson Tr. 11,130-31).

Throughout his testimony Mr. Wilson assumed that the additional power purchased to serve an industrial customer would be paid for by the municipality at the lowest energy blocks. (Wilson Tr. 11,065-66, 11,068-69). Mr. Wilson states that this is the primary reason that the municipality could sell power to the industrial customer at a profit. But under Ohio Edison's tariffs, there is no conjunctive billing (Firestone Tr. 11,319-20); therefore, if the municipality had to establish a new delivery point to serve an industrial customer, the additional power would be purchased at the highest block rate not the lowest and the primary reason relied upon by Mr. Wilson to disprove price squeeze would not exist.

Moreover, Ohio Edison's evidence ignores the fact that it is not necessary to show a negative revenue margin to demonstrate price squeeze. Price squeeze consists of imposing an unacceptable level of profit or actual loss on a competitor by narrowing or eliminating the difference between revenues derived from final product sales and costs. (Wein dt. DJ 587 p. 158).

Applicants' Exhibit 168 purports to show the ability of a municip 'ity to serve an industrial customer at a probit, but they have picked a time period which minimizes the costs to the municipalities. Exhibit 168 reflects power charges for the period from October to April, the period when an industrial customer would make their smallest contribution to the municipal peak demand and consequently smallest additional cost to the municipality to serve that load. In the summer months the industrial customer and the municipalities would peak at about the same time, and, therefore, the cost to a municipality to serve that industrial customer would be greater than that reflected on Applicants' Exhibit (Wilson Tr. 11,158-60).

The Licensing Board correctly noted that even if exhibits revealed that under certain circumstances a municipality might be able to sell to a retail industrial customer at a price less than that charged by, Ohio Edison, the antitrust analysis must not end there because the price squeeze may still result in an unacceptable rate of return forcing the competitor out of the market. (5 NRC 210; DJ 587, p. 158; see also Kampmeier Tr. 6021-22). In Alcoa, a price squeeze was found to exist even though in 81 of 112 cases the wholesale price of raw materials plus the cost of fabrication did not exceed the retail price for the finished goods. (148 F.2d at 437).

b. Applicants Failed To Justify The Rate Differential

The Licensing Board correctly recognized that a cost justification for the difference between the wholesale and retail rates would negate a price squeeze allegation. (5 NRC 210; 211; Wein, DJ 587, p. 158; Kampmeier Tr. 6021-22). However, it held that Applicants had presented a "totally inadequate

showing that the differences are cost justified." (5 NRC 211). The Board's holding was correct.

Applicants assert in their brief that a study was conducted under the supervision of their witness, Mr. Wilson, which demonstrated that the municipal systems make a greater contribution to Ohio Edison's peak load than do the industrial customers and that as a result Ohio Edison incurs a greater cost to serve the municipal systems (Br. p. 253). Therefore, Applicants contend, if either the FPC or the Ohio Commission were to fix the municipal wholesale rate and the industrial retail rate, the wholesale rate would be higher for the same level of service (Id.).

The study was never identified for the record or offered in evidence. Mr. Wilson purported to quote figures from the "study" which later turned out to be erroneous (Tr. 11,969-72). Applicant seeks to use substitute figures which have no evidentiary support in the record (Id.). Thus, there is no evidentiary support for Ohio Edison's rate differential and there certainly is none for Penn Power's rate differential which was not even addressed by the "study."

Moreover, as the Board correctly found, the premise of Mr. Wilson the municipal systems make a greater contribution to Ohio Edison's peak demand than its industrial customers was out of date (5 NRC 210). There was a time when the peaks of most electric systems and their municipal system customers coincided in the evening hours. But today most large electric systems have their highest loads on summer afternoons (due to air conditioning) which coincides with the hours of heavy industrial demands while the

small, municipal distribution system still have evening peaks. Therefore, instead of justifying higher rates for the municipal systems, the diversity they provide is an added reason for lower rates to distribution system rather than to industries (Kampmeier, DJ 450, pp. 35-36)

Applicants' conclusion that the wholesale municipal rates would be established at a higher level than the retail industrial rates, if either the FPC or the Public Utilities Commission of Ohio (PUCO) had jurisdiction over both rates is pure speculation, without any basis in fact and without record support.

Applicants' speculation assumes erroneously that the allocation of costs associated with the investment in capacity would be based on the situation prevailing at the time of a single system peak. As Applicants must know, the FPC has repeatedly refused to assess cost responsibility on the basis of a single system peak. Wisconsin Michigan Power Co., 31 FPC 1445, 1455 (1964); Nevada Power Company, Opinion No. 768, 16 PUR 4th 92 (1976). The FPC has usually utilized the average of 12-monthly coincidential peaks to give recognition to the demands placed on the system throughout the year. Considering that industrial demands put on an electric system is at a high and fairly uniform rate throughout the year and at substantially higher levels than the demands of the municipal systems because of their low load factor residential loads, the FPC's usual methodology would not, as speculated by Applicants, result in wholesale rates that are at a higher level than the industrial rates.

Applicants' speculation also preceeds on the assumption that rate design must follow cost allocation. The fact is, however, that rate design often departs from cost allocation; though related, they are separate and distinct aspects of ratemaking. Other factors may dictate departure in rate design from cost allocation results. For example, to eliminate anti-competitive effects.

When natural gas was in abundant supply the FPC departed from cost allocation results in order to make the commodity cost of gas competitive with other fuels. United Fuel Gas, Opinion No. 430, 31 FPC 1342 (1964). Now that natural gas is in short supply, the FPC has again departed from cost allocation results in designing rates to increase the commodity cost of gas, the purpose being, among other things, to discourage sales of gas for certain industrial uses. United Gas Pipe Line Company, FPC Docket No. RP72-75, Opinion No. 671, issued October 31, 1973, aff'd. sub. nom.; Consolidated Gas Supply Corporation v. FPC, 520 F.2d 1176 (CADC 1975); Texas Gas Transmission Corporation, Opinion No. 792, issued April 11, 1977 and Opinion No. 792-A, issued June 7, 1977.

Even if the testimony of Wilson revealed that cost were properly allocated on the basis of a customer's contribution to a company's peak load, this alone is not sufficient to qualify as a cost justification defense. The antitrust laws require that the differential in rates "makes only due allowance for differences in the cost of manufacturing . . ." (Clayton Act as amended 15 USC §13(a) & (b)). Applicants have not shown that the difference in rates makes only due allowances for the peak responsibility of Ohio Edison's cus-

tomers, in fact, there has not been any showing of any correlation.

The Board's determination that Applicants have failed to justify the differences in rates is correct.

c. Applicants Are Not Immune From The Antitrust Laws

Applicants' final challenge to the Board's determination rests on an allegation of immunity due to state and federal regulation of their respective retail and wholesale rates. The Board's rejection of this claimed regulatory immunity is proper.

The Supreme Court has specifically rejected this defense in the recent cases of FPC v. Conway Corporation, supra, and Cantor v. Detroit Edison, ___ U.S. ___, 49 L.Ed. 2d 1141, 96 S.Ct. 3110 (1976). In Conway, a case dealing with the price squeeze issue before the FPC, the Court held that even if the retail and wholesale rates are set by the respective state and federal agency, and costs are fully allocated, the rates may "yet create a price squeeze between themselves." (48 L.Ed. 634). In Cantor, an electric utility's tariff provided for free light bulbs for residential customers. It was alleged that this practice unreasonably restrained trade in the light bulb market. The Court held that even though the Michigan Public Service Commission had approved the tariff provision, this did not protect the practice from antitrust scrutiny. The Court held that the utility had initiated the program and, therefore, its participation was sufficiently significant to require that its conduct conform to applicable federal law. The approval of the tariff by the Commission was not so dominant as to make it unfair to hold the utility responsible for its own conduct. (49 L.Ed.2d 1152).

D. The Record Supports The Licensing Board's Findings With Respect To Duquesne Light.

In October of 1965, the Borough of Aspinwall, which then operated a municipal electric generation and distribution system, requested that Duquesne sell bulk power at wholesale (sale for resale) to the Borough (DJ 168). During the ensuing months Aspinwall repeatedly sought to buy power at wholesale from Duquesne and Duquesne continually refused to sell power to Aspinwall at wholesale (DJ 169-173, DJ 321). It was Duquesne's philosophy to purchase municipal electric systems whenever possible (DJ 320). In accordance with that philosophy, Mr. Fleger, the Chief Executive Officer of Duquesne, instructed Mr. Gilfillan on April 29, 1966, to inform Aspinwall that Duquesne would not sell power at wholesale. It was recognized that a refusal to sell at wholesale would mean that Aspinwall would have to resort to litigation in an attempt to obtain wholesale power from Duquesne and that probably Aspinwall could not survive the time required to litigate (DJ 171). At about the same time, Mr. Munsch, Duquesne's General Counsel, "informed counsel for Aspinwall" that "we will fight them tooth and nail" if Aspinwall made any effort to force Duquesne to sell at wholesale (DJ 173). (IDFF 81)

At the same time that Duquesne was refusing to sell power at wholesale to Aspinwall and in furtherance of its philosophy of acquiring municipal electric systems, Duquesne arranged for Aspinwall to request that a study of its electric system be made by the Pennsylvania Economy League (DJ 321).

The Pennsylvania Economy League (PEL) is a private non-profit organization which performs analysis of various phases of operation of

municipal governments (Sedlak & Flynn Tr. 12,297). Since 1960, PEL has performed 500 studies for municipalities only four to six of which have involved municipal electric systems (Sedlak & Flynn Tr. 13,303). In each study of a municipal electric system, one recommendation made was that the system be sold (Sedlak & Flynn Tr. 12,355). PEL maintains no engineering staff (Sedlak & Flynn Tr. 12,361-62). PEL's study of the Aspinwall system recommended sale of the system (Applicants' 120), although PEL made no effort to determine a proper plan for the future of the Aspinwall electric system (Sedlak & Flynn Tr. 12,395). The Aspinwall system had in the past been a profitable operation (Applicants' 120).

No representatives of municipalities or rural electric cooperatives serve on PEL's Western Division Executive Committee (Sedlak & Flynn Tr. 12,354-55). The Western Division Executive Committee does include the President of West Penn Power Company and the Chairman of the Board of Directors of Duquesne Light Company (DJ 631). In addition, Mr. Hanley, another Director of Duquesne, was also on the Executive Committee (Compare DJ 631 and NRC 157). Duquesne is among the top seven industrial contributors to PEL. From 1971-1974 those seven industrial contributors provided 1/3 of PEL's operating budget (Sedlak & Flynn Tr. 12,347-48). Aspinwall was never informed that Duquesne was a contributor to PEL (Sedlak & Flynn Tr. 12,392).

PEL studied no power supply alternatives for Aspinwall other than continued isolated generation and sale of the electric system (Sedlak & Flynn Tr. 12,353, 12,393, 12,394, Applicants' 120).

After deciding that Duquesne should attempt to purchase the Aspinwall ssytem, Mr. Fleger stated that he would contact Mr. Howard Steward, the Western Division President of PEL. Mr. Gilfillan was instructed in March of 1966 to make no offer to purchase Aspinwall until after Mr. Fleger had talked to Mr. Stewart (DJ 169). On April 29, 1966, Mr. Fleger informed Mr. Gilfillan that he had indeed talked to Mr. Stewart of PEL regarding the Aspinwall situation (DJ 170). Mr. Fleger's discussions with Mr. Stewart occurred prior to the study of the Aspinwall system by PEL (Applicants' 120). Duquesne subsequently acquired Aspinwall.

In March of 1966, when it became known that the Solicitor of the Borough of Pitcairn was concerned with the economies of Pitcairn's municipal electric generation and distribution systems, Duquesne suggested that Pitcairn request PEL to study the Pitcairn electric system (DJ 238). In July of 1966, Pitcairn wrote to Duquesne requesting discussions regarding interconnection and pooling (DJ 239). A meeting was held in August of 1966 at which Duquesne informed Pitcairn that Duquesne would not sell power at wholesale. Instead, Duquesne suggested that it would be to Pitcairn's advantage to sell its system to Duquesne (DJ 242). It was Duquesne's intent to advocate that Pitcairn request PEL to make a study (DJ 242-43). In October of 1966, after Duquesne had refused to sell wholesale power, Pitcairn consulted with the staff of the FPC and was told that the FPC could order an emergency interconnection but could not order Duquesne to make firm power sales (DJ 244). In December of 1966, Mr. Fleger agreed with Mr. Gilfillan's suggestion that Duquesne attempt to acquire Pitcairn, the last remaining munic-

ipal system in its territory, by using the same methods used to acquire Aspinwall (DJ 245-46). (IDFF 83)

On November 20, 1967, Pitcairn wrote to Duquesne requesting an interconnection to provide emergency backup for Pitcairn's then isolated generation (McCabe Tr. 1730, DJ 1). Duquesne responded with an offer to sell power to Pitcairn under Duquesne's rate M (DJ 203) although Pitcairn had requested a rate other than rate M. The average cost of power under rate M would have been 30 mills (Gilfillan Tr. 8,464). The wholesale rate to Pitcairn under a wholesale rate for the past two years has averaged 20 mills (Gilfillan Tr. 8459-60). (IDFF 85)

Pitcairn refused to purchase power under rate M because it was too expensive and not available for base load. Other municipalities which had purchased power under rate M had been unable to pay for the power and eventually sold their systems to Duquesne (McCabe Tr. 1827). (IDFF 86)

In January of 1968, Mr. Merriman of Duquesne contacted a newly elected councilman in Pitcairn to promote sale of the Pitcairn system to Duquesne. On January 22, 1968, Mr. Merriman met with Pitcairn officials. In response to questions regarding Duquesne's willingness to make wholesale sales, Mr. Merriman replied that Duquesne would not make such sales (NRC 13). (IDFF 85, 86)

In March of 1968, Mr. Gilfillan met with Mr. McCabe, Solicitor for Pitcairn. Mr. McCabe asked whether Duquesne would provide emergency power under a rate other than rate M, partial requirements power or an interchange agreement (Gilfillan Tr. 8416). Duquesne's oral response at

the March 6, 1968 meeting was confirmed by letter of March 19, 1968, in which Duquesne declined to sell base load power for resale and refused to enter into an interchange agreement with Pitcairn (NRC 16). The March 19, 1968 letter to McCabe (NRC 16) was approved by Mr. Fleger before mailing (DJ 249). (IDFF 86)

In July of 1968, Pitcairn filed an antitrust suit against Duquesne (Gilfillan Tr. 8431). In 1970, Pitcairn filed a complaint with the FPC and, finally, in 1971 Duquesne agreed to make wholesale sales of bulk power to Pitcairn (Gilfillan Tr. 8432). (IDFF 90)

Rule 18 of the general terms and conditions of Duquesne's tariff on file with the Pennsylvania Public Utilities Commission prohibits the resale of power sold by Duquesne (Gilfillan Tr. 8422, 8435-36). Rule 18 is not required by any order of the Public Utilities Commission (Gilfillan Tr. 8476-77). During the period 1965-1971 other Pennsylvania public utilities made sales for resale to municipalities (Gilfillan Tr. 8445). Duquesne sold power to Penn Power which Penn Power later resold (Gilfillan Tr. 8438-39). Although sales to Penn Power under an interchange contract differ somewhat in that the element of mutuality may be present, power sold under rate M could be resold, yet no mutuality exists with respect to such sales (Gilfillan Tr. 8475). (IDFF 87)

VIII

NEXUS

The Licensing Board's finding of nexus between the situation inconsistent with the antitrust laws and the licensing of the Perry and Davis-Besse nuclear units is strongly supported by the record and fully in keeping with the Commission's Waterford decision. The Licensing Board found nexus resulting from both the structure of the industry in the relevant markets and in restraints placed upon the use of power from those units by Applicants.

A. Structure

Applicants argue that the Licensing Board's finding of nexus based upon market structure uses logic which "effectively reads the nexus requirement out of the statute, and on the very reasoning which the Commission faulted in Waterford II" (Brief p. 125). Applicants' select one quote from the initial decision which they characterize as the conclusion upon which the Licensing Board predicated its decision. In fact, the Licensing Board did not rely solely upon the language quoted by Applicants but considered many additional factors as well. See 5 NRC 238-241.

Applicants argue that nuclear power may no longer be so attractive from an economic standpoint (Brief p. 127). For this proposition Applicants rely upon testimony of Mr. Gerber. Mr. Gerber's testimony does not stand for the proposition cited. What Mr. Gerber did admit was that (Tr. 11,579): 21/

21/ Mr. Gerber's testimony comparing costs involved comparison of a 100 mw coal-fired unit at municipal capital costs compared with a 1,000 mw nuclear unit at CAPCO capital costs. Even then the coal-fired unit was more economical only if one assumes no inflation, an assumption Mr. Gerber was unwilling to make (Tr. 11,582-83). CAPCO last committed to building a coal plant in 1970 (Williams Tr. 10,446).

> I was going to give you the benefit of the doubt and say even with 3 percent inflation, the price of coal would fairly quickly bring the price of fossil units' costs significantly beyond the nuclear, so that the nuclear would be be beneficial, would have an advantage.

Applicants argue that any economies which do result from nuclear power will be shared by all through wholesale power purchases (Brief p. 127). The Licensing Board's statement at 5 NRC 249 quickly disposes of this argument:

> 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.

Contrary to Applicants' assertions municipal electric systems cannot obtain all the benefits of coordinated operation and development and participation in nuclear power through purchased wholesale power from Applicants. At the very least, Applicants' argument presupposes a complete willingness to make such sales on the part of Applicants. This assumption is of doubtful validity in light of Applicants' prior refusals to make such sales.

Further, such a proposal would require a perfect cost pass through from Applicants to the municipalities. (Hughes Tr. 4128; Kampmeier Tr. 5877). That a perfect cost pass through would in fact occur would be a mere happenstance. Rate making is not a precise process. (Hughes Tr. 4128). For example, there may be as many as 50 different cost allocation methods employed in rate making each of which would produce a different result. (Wilson Tr. 11,102). Calculating the cost of common equity in rate making is not a precise matter. Experts may arrive at different conclusions with

respect to an appropriate cost of equity. (Wilson Tr. 11,122). Delays are the rule in rate changes made to reflect changes in costs. (Hughes Tr. 4129). Rates resulting from a settlement of a wholesale rate proceeding would not necessarily reflect the full benefits of coordination achieved by the selling party. (Hughes Tr. 4130). Calculation of incremental costs is so subject to error that a ten percent surcharge is added to protect against error. (Bingham Tr. 10,275).

The Federal Power Commission recognizes that rates established do not precisely reflect costs. It said in Opinion No. 768 (Nevada Power Company, Docket No. E-8721, p. 11):

> It has often been repeated that a fair rate of return for a public utility is not a matter which is to be determined by the mechanical application of a mathematical formula, but rather such a determination requires the exercise of informed judgment based upon an evaluation of the particular facts presented in each proceeding. There is no one precise answer to the question of what constitutes a proper rate of return. Rather, there is a zone of reasonableness within which the Commission is free to fix a rate of return.

As the Court of Appeals for the District of Columbia Circuit has observed (Pacific Gas Transmission Co. v. FPC, April 9, 1976, Slip Op. p. 9) "The Federal Power Commission is not known for its niggardliness."

Moreover, a certain blend of power resources considered optimum for a blend of resources for a particular wholesale customer of Applicants' would not necessarily be the same as the blend chosen by Applicants (Hughes Tr. 4136-67). Further, a small system might obtain power more cheaply by participating in a generating unit than purchasing at wholesale (Kampmeier Tr.

5842), or might develop a more economical blend of power supply resources (Kampmeier Tr. 5843).

Relegating municipal systems to wholesale purchases protected only by the vagaries of rate regulation would leave untouched the monopoly power acquired by Applicants.

Applicants have also argued that the purported offer of access set forth in their policy commitments (App. 44) destroys structural nexus. Yet Applicants' policy commitments would leave Applicants free to insist upon a right of first refusal with respect to any power sold in the regional power exchange by a participating entity. Such right of first refusal would permit Applicants to thwart any attempt by participating entities to engage in coordinated development with a non-applicant entity.

The policy commitments upon which Applicants rely also contain onerous reserve requirements. Witness Mozer pointed out that Applicants' policy commitments could require a party participating in nuclear generation to carry 100 percent reserves (Mozer Tr. 3327-28) and suggests this provision is unreasonable. Dr. Hughes pointed out that the imposition of 100 percent reserves under Applicants' 44 could provide a prohibitive cost on participating in nuclear facilities and impose a disporportionate share of reserves on a small entity acquiring nuclear capacity. (Hughes Tr. 4095-97). Mr. Kampmeier joined in the criticism of Applicants' reserve formula voiced by witnesses Mozer and Hughes. (Kampmeier Tr. 6142-48). Mr. Mayben noted that the reserve method proposed by Applicants was not common in the industry and was unreasonable. (Mayben Tr. 7601-02). Application of the Applicants'

proposal to the City if it acquires the 55 mw of capacity in Davis-Besse #1 which it has requested would require City to carry 45 percent reserves at a time when CAPCO reserves were only 25 percent (Mayben Tr. 7609-10).

The transmission services offered by Applicants' policy commitments does not provide full access to coordinated operations and development (Mayben Tr. 7600). The policy commitments would not permit small systems to put together a proper blend of power supply resources (Kampmeier Tr. 6142-48). The policy commitments do not provide for wheeling power from participating entities to third parties, i.e., wheeling out. In fact, CEI has never even considered wheeling out (Williams Tr. 10,418-19).

Applicants made no effort to advise entities in the CCCT that they had adopted any policy commitments (McCabe Tr. 1718-19; Hauser Tr. 10,869; Hillwig Tr. 2409).

Applicants try to minimize the burden placed on the small systems under the policy commitments by arguing that "even if an entity were to satisfy 100 percent of its baseload needs out of a single unit, its reserve obligation under A-44 would not exceed 33 percent of its peakload" (Brief p. 131). What Applicants fail to recognize is that these same entities would have to purchase firm power to make up the rest of their power needs. The firm power would of necessity be priced to include the cost of reserves used to firm the 67 percent of peak load made up of purchased power. Thus the entities would, in fact, be paying for reserves equivalent to much more than 33 percent of peak load.

At page 132 of their brief Applicants again argue in footnote 55 that a single or small group of municipal systems could build a small coal-fired plant in Ohio or Pennsylvania and get power at a cost equal to or closely approximating, the cost of power to Applicants from the large nuclear facilities being licensed. The transcript citations upon which Applicants rely, i.e., Kampmeier Tr. 5894-921 and Gerber Tr. 11,151-70, simply do not support Applicants' position. Mr. Kampmeier throughout stated that the hypothetical figures being used during his cross-examination were only hypothetical and without refinement and more study could not form the predicate of any conclusion. Even if one were to accept the hypothetical as a bais for reaching a conclusion, the conclusion reached is that Applicants' cost of power would be less than the municipals cost of power. That cost advantage to Applicants would spread during the years the plant operated as a result of the impact of inflation (Gerber Tr. 11,579).

Applicants' statement at page 133 of their brief that "Congress has long taken the view that no legitimate public interest will be served by imposing a general wheeling requirement on the electric industry" is the naked assertion of counsel with no legal authority to support it.

B. Particularized Nexus

Applicants argument with respect to particularized nexus is primarily that nexus must be determined for each particular unlawful act rather than for the situation. Applicants' argument is contrary to the Commission's holding in Waterford II, 6 AEC at 621, that a petitioner must plead a nexus between the activities under the nuclear license and the situations alleged to be incon-

sistent with the antitrust laws. Moreover, this Appeal Board stated in Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1), Docket No. 50-482A (slip op. p. 21):

> . . . the Commission's antitrust responsibilities are linked to license applications, the Commission's antitrust mandate extends only to anticompetitive situations intertwined with or exacerbated by the award of a license to construct or operate a nuclear facility. (Emphasis added.)

And at page 27:

> On the contrary, the Commission's statutory obligation is to weigh the anticompetitive situation -- which means to us that operations in an "air tight chamber" were not intended. (Emphasis in original footnote omitted.)

The Licensing Board's findings of nexus are in accordance with prior Commission rulings, are correct as to the law and are compelled by the record.

IX

RELIEF

Applicants charge that the Licensing Board performed irresponsibly in formulating remedies for the situation inconsistent with the antitrust laws. Applicants argue that the license conditions formulated by the Licensing Board suffer three major defects: (1) the license conditions are not in the public interest; (2) no effort was made to tailor relief to the separate situation(s) found to exist as to each individual applicant; and (3) the license conditions exceed the jurisdictional authority of the Commission. Subject only to the exceptions taken by City to the remedial portions of the initial decision, City supports the license conditions set forth in the initial decision.[22/]

In fashioning license conditions, it was necessary for the Licensing Board to focus upon removing existing roadblocks to competition and foreclosing Applicants' from using their power to erect new roadblocks in the future. As was pointed out by the Supreme Court in United States v. International Salt Co., 332 U.S. 392, 400, 92 L.Ed. 20, 28 (1947):

> A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a case.

And in United States v. U.S. Gypsum Co., 340 U.S. 76, 90, 95 L.Ed. 89, 101 (1950), it was said:

22/ City has taken exception to (1) the Licensing Board's failure to require Applicants to make available to non-applicant entities in the CCCT wholesale all requirements firm power; (2) license condition 4(d) which provides that new CAPCO members do not become voting members of CAPCO until such time as that system's capacity becomes equal to or exceeds the capacity of the smallest voting member of CAPCO; and (3) the Licensing Board's failure to apply the license conditions to Beaver Valley, Unit #2.

> A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited. The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct.

The remedy must be sufficiently broad to open up the doors to competition which have been closed by Applicants' past conduct and must prevent Applicants from shutting those doors in the future. That broad license conditions might restrict Applicants' future acts and result in some restructuring of relationships in the electric utility industry in the CCCT, is not only to be expected, but, is mandated by the finding of an abuse of monopoly power. The Supreme Court said in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) "those caught violating the [Sherman] Act must expect some fencing in."

In fashioning license conditions, the Licensing Board is not confined "to the narrow lane the transgressor has traveled" but is authorized to "effectively close all roads to the prohibited goal, so that its order may not be by-passed with impunity." Doherty, Clifford, Steers and Shenfield, Inc. v. FTC, 392 F.2d 921, 926 (CA 6, 1968).

Relief should be fashioned "to insure that competition . . . would be on a full, fair and non-discriminatory basis." Bell Telephone Co. of Pa. v. F.C.C., 503 F.2d 1250, 1273 (CA 3, 1974) cert. denied 95 S.Ct. 2620 (1975).

Once the Government has successfully borne the burden of establishing that the activities under the unconditioned license would create or maintain a situation inconsistent with the antitrust laws, all doubts as to remedy should be resolved in its favor. United States v. E.I. duPont de Nemours & Co., 366 U.S. 316, 344 (1961). The Licensing Board must adequately protect the public interest embodied in the antitrust laws in general and the Sherman Act in particular which the Supreme Court has called the Magna Carta of free enterprise. "They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

The Atomic Safety and Licensing Appeal Board has recently stated in ALAB, 385 (Slip Op. pp. 16-17) that the congressional intent in the 1970 amendments to the antitrust laws was that a license for a nuclear power plant should be laden "with any conditions found necessary to obviate or rectify a situation inconsistent with the antitrust laws." In that same opinion the Appeal Board stated that "the fundamental purposes of the Sherman and Clayton Acts is the promotion and preservation of competition" (Slip Op. p. 24).

Applicants' argument that the license conditions are not in the public interest is not supported by the record and misconceives the law. The Courts have rejected the notion that antitrust laws should not be applied where the result may be to increase costs to consumers. Pennsylvania Water & Power Co. v. Consolidated G.E.L. & P. Co., F.2d 552 (CA 4, 1950) cert. denied 71 S.Ct. 282 (1950); Northern Natural Gas Co. v. FPC, 399 F.2d 953, 970

(CADC, 1968). In Brown Shoe Co. v. United States, 370 U.S. 294, 344, 8 L.Ed. 2d 510 (1962), the Court said:

> But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Section 105c(6) of the Atomic Energy Act which controls Phase II provides that in the event a situation inconsistent with the antitrust laws is found:

> . . . the Commission shall also consider, in determing 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.

There is no issue raised by any party to this proceeding that a license should not issue or continue. Therefore there is no occasion for the Licensing Board to consider factors, such as public interest, other than it addressed in its findings in Phase I, regarding the situation inconsistent. Since no party has urged that a license not issue, there is simply no occasion to balance other public interest factors against the strong public interest in obviating or rectifying the situation inconsistent with the antitrust laws. Even if public interest considerations generally were applicable at this stage the Appeal Board has noted (ALAB-385 Slip Op. p. 24) that the Supreme Court in Cantor v. Detroit Edison Co., ___ U.S. ___, 49 L.Ed. 2d 1141, 1152 (1976), rejected the contention that:

> . . . the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the "public interest" standard widely enforced by regulatory agencies.

Moreover, the Joint Committee Report on the 1970 amendments states that "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)."[23/]

During the Senate debate on the 1970 amendments one concern expressed was whether Section 105(c)(6) created an exemption from the antitrust laws.[24/] To rebut any such implication Senator Metcalf introduced a letter from Richard W. McLaren of the Department of Justice which stated:

> We would not think the AEC could "avoid the conditioning of licenses to cure adverse antitrust findings" simply upon a finding that there was a need for power in the affected area. Rather, we expect, and we believe the Commission expects, that the Commission's conditioning authority could be used to cure competitive problems while allowing construction and utilization of the facilities.

Based upon the McLaren letter, Senator Metcalf stated that he was "satisfied that no exemption from the antitrust provisions of the Atomic Energy Act can be inferred from the language of subsection 105(c)(6)." Senator Hart concurred.[25/]

In this case the Licensing Board in determining a remedy is governed not by other public interest standards which come into play if an issue is raised as to whether a license should issue but by the final sentence of Section 105c(6) which states:

23/ H. R. Report No. 91-1470, 91st Cong., 2d Session (1970) p. 31.

24/ See generally, Brebbia, "Antitrust Problems In The Licensing And Permit Authority Of The United States Nuclear Regulatory Commission," 26 Mercer Law Review, 766-67.

25/ 116 Cong. Rec. 39621-22 (1970).

> On the basis of its findings, the Commission shall have authority to issue or continue a license applied for, to refuse to issue a license, to rescind a license or amend it, and tc issue a license with such conditions as it deems appropriate.

These conditions must obviate or rectify the situation inconsistent with the antitrust laws.

Applicants' numerous antitrust violations and their impenitent obduracy require license conditions which will prevent a reoccurance of the abuse of Applicants' market power.

"The relief ordered should cure the ill effects of the illegal conduct and assure the public freedom from its continuance." Ford Motor Co. v. U.S., 405 U.S. 573, 31 L.Ed. 2d 492 (1972); "But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." United States v. E.I. duPont de Nemours & Co., 366 U.S. 316, 326, 6 L.Ed. 2d 318, 325 (1961). Adequate relief should deprive the defendant of any of the benefits of the illegal conduct and break up or render impotent the monopoly power found to be in violation of the antitrust laws, U.S. v. Grinnel Corp., 384 U.S. 563, 596, 16 L. Ed. 2d 778, 790 (1966). If all that is done is to forbid a repetition of the forbidden conduct, Applicant which has unlawfully built its empire can preserve it intact. It will retain the full dividends of its monopolistic practices and profit from the unlawful restraints of trade which it has inflicted, Schine Chain Theaters, Inc. v. U.S., 334 U.S. 110, 128, 9 L. Ed. 1245 (1948).

The Licensing Board has the power to require Applicants to offer to sell a portion of the nuclear plants to other entities in the CCCT in order to

remedy a situation inconsistent with the antitrust laws. Impairment of property rights is no barrier to the ordering of license conditions necessary to grant effective relief. U.S. v. Union P.R. Co., 226 U.S. 470, 57 L. Ed. 306 (1913). Courts in other cases have not hesitated to order divestitures, U. S. v. Grinnell Corp., supra, or cross licensing of patents, Besser Mfg. Co. v. U.S., 343, 444, 96 L. Ed. 1063 (1952). No new trails will be blazed if the Licensing Board requires Applicants to "divest itself" of a portion of the Davis-Besse and Perry units.

Moreover, it is appropriate that relief be accorded to all entities within the target area of injury stemming from Applicants' illegal activities whether they compete with Applicants or not.

It is fundamental that the thrust of the antitrust laws is the protection of competition not competitors. Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958). Accordingly, it is inappropriate to narrow the focus of relief to competitors.

The Courts have held that non-competitors within the area reasonably foreseen to be affected by antitrust violations are entitled to bring private antitrust actions to recover for injuries they have sustained. Manderville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328 (1948); Hoopes v. Union Oil Company, 374 F.2d 480 (CA 9, 1967); Congress Building Corp. v. Lowe's Inc., 246 F.2d 587 (CA 7, 1957).

In Manderville Island Farms, supra, growers of sugar beets brought an action under Sections 1 and 2 of the Sherman Act against three sugar refiners

who had conspired to fix the price at which they would purchase sugar beets from the growers. The growers did not compete with the refiners in any market. The Supreme Court held that the growers were entitled to maintain their action saying at 336 U.S. 236:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Neither does it immunize the outlawed acts because they are done by any of these . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Hoopes was an action brought by owners and conditional vendors of a service station against an oil company. The complaint was that Union Oil Company sought to restrain competition by restricting a substantial number of retail outlets, including one owned by plaintiffs, to the sale of Union gasoline. The Court found that plaintiffs were within the "target area of the unlawful conduct and were entitled to maintain the action. The Court said at 374 F.2d 480, 486:

> It is no bar to recovery that appellants were not competitors of Union, or that appellants' injuries did not result from the allegedly illegal restraint upon the marketing of petroleum products but rather from the means which union used to accomplish that restraint. Radovich v. Nat'l Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed. 456 (1957); United Copper Co. v. Amalgamated Copper Co., 232 F. 574 (2d Cir. 1916).

Interestingly, in United States v. National Lead Company, 332 U.S. 319, 91 L. Ed. 2077 (1947), the Supreme Court affirmed a lower court decree directing each of the defendants to grant to "any applicant therefor" a non-exclusive license under all or all patents at a uniform, reasonable royalty. Clearly,

the decree in National Lead, supra, was not limited to the protection of those who had been shown to be competitors of defendants. By its terms, the decree extended to entities not even in being at the time of the antitrust violations.

It has been noted by the commentators that the trend of the law has been to permit plaintiffs who did not have a full fledged business to seek damages under Section 4 of the Clayton Act. The rationale behind this trend is that there should be no difference in treatment between an individual who had a business and was forced to abandon it and one who was prevented from going into business by acts unlawful under the antitrust laws.[26/]

Applicants argue that the licensing conditions would permit an entity to purchase a portion of a nuclear plant excess to its needs creating a possibility that the excess power would be resold outside the CCCT. While it may occur that an entity would purchase an amount of capacity sized to provide for load growth and that short term excess capacity might be sold outside the CCCT pursuant to a staggard generation addition program, by the same token power may be brought into the CCCT while an entity's load grows to sufficient size to merit purchase of additional generation. The purely speculative assumption that a municipal electric system would rush to purchase huge amounts of excess capacity to "broker" outside the CCCT presumes a financing capability far beyond that usually found in municipalities. Further to the extent that a municipal system has excess capacity to sell, competition in the wholsale and

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26/ Blackford, " 'Business Or Property' Entitled To Protection Under Section 4 Of The Clayton Act" 26 Mercer Law Review, p. 739; Collen, "Procedural Directions In Antitrust Treble Damage Litigation: An Overview Of Changing Judicial Attitudes," 17 The Antitrust Bulletin, 997, 1023-25; See also, Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440 (1960), aff'd. 297 F.2d 199 (CA 3, 1961), cert. denied, 369 U.S. 839 (1962).

regional power exchange markets will be increased.

Applicants' arguments also assumes that overpurchase of capacity would create a capacity shortage in the CCCT. The Wall Street Journal for January 19, 1977 carried an article stating that CAPCO is stretching out the construction of five generating units by one or two years to reflect revised load growth forecasts and financing difficulties. This Appeal Board has itself observed in ALAB-385 at pages 10-11:

> We have observed before that load forecasting involves "at least as much art as science." Prior cases have taught us that a margin of error in planning is unavoidable and that the need to readjust, on a regular basis, planned operations and power plant construction schedules is virtually endemic in the electric utility industry. (Footnote omitted.)

Applicants' also complain of the two-year period allowed for non-applicant entities to make a firm commitment for participation in future units (Brief p. 289). It is argued that the existence of new nuclear projects is usually known well in advance of the date on which an application is submitted. No record citations are given for that fact allegation. Contrary to the implications of Applicants' argument, municipal systems are not consulted during the early planning states and are not notified that CAPCO is planning to install particular units well in advance of filing a license application. Once municipalities are advised of the proposed units, they must have time to obtain technical data regarding the proposed units and evaluate possible participation in the proposed units. Two years is not an unreasonable time period.

In order to prevent anticompetitive effects and to increase competition, the small electric systems in the CCCT must have available all of the benefits

of coordination which the CAPCO pool affords, including joint ownership of nuclear plants, and the rates and conditions of various transactions should be on a plane of equality with the terms and conditions available to Applicants. (Wein dt. DJ 587 p. 144)

If self-generating municipal systems are refused coordination on equitable terms, they must either build their own generation or become full requirements customers of large suppliers. The permanent acquisition of final markets formerly accomplished by merger and acquisition, can now be accomplished by refusals to coordinate including refusals to offer ownership participation in nuclear units to small utilities on terms comparable to those available to large utilities. (Wein dt. DJ 587 p. 147)

Antitrust policy seeks to encourage the competitive process and promote the market results ordinarily achieved in competitive markets. One way antitrust policy acts is to limit the exercise of market power to make a powerful firm behave more nearly like a firm in a truly competitive market. One of the features of competitive markets is the rich array of options that they provide. If other power systems in the CCCT area could transact with the Applicants for a full array of power supply options, each could choose the mix of options it considered best. (Hughes dt. NRC 207 pp. 41-42)

Only the City offered proposed license conditions (C-162). The City's proposed license conditions provide for access to nuclear units either by ownership or unit power participation. Applicants apparently do not oppose this provision. (Applicants' 44, Mayben Tr. 7782, et seq.)

The license conditions would extend the right to participate in CAPCO units to include future CAPCO units. Applicants' policy commitments do not extend to future units. For the foreseeable future, all of the public power entities in the CCCT in the aggregate and with full coordination among them could not install a 900 mw nuclear unit without participating with the Applicants. (Wein dt. DJ 587 pp. 154-55) Accordingly, if the situation inconsistent with the antitrust laws is to be remedied, the non-applicant entities in the CCCT must have access to future CAPCO units and this proposed license condition is reasonable.

Under the license conditions Applicants are required to enter into an arrangement for sharing reserves on an equalized basis. (C-162 p. 3) Applicants have opposed equalized reserve sharing -- at least with non-applicant entities. Applicants presently share operating and spinning reserves on an equalized reserve basis. (Shaffer Tr. 8543; Dempler Tr. 8863-64; Williams Tr. 10,368, 10,487). Over time the P/N formula adopted by Applicants will provide a result approximating equal percent reserves. (Firestone Tr. 9280-83) Mr. Mansfield admitted that no harm would come to the pool from admitting members on an equalized reserve basis. (Mansfield deposition DJ 572 p. 92) ECAR has considered the P/N method for reserve sharing but failed to adopt it. (Schaffer Tr. 8568) The record does not reflect that any other pools have adopted the P/N method. (Schaffer Tr. 8568, Kampmeier Tr. 5706) There are pools which use equalized reserves (Slemmer Tr. 9106-07, Williams Tr. 10,431).

Application of the P/N reserve formula would require Cleveland to carry 40 percent-60 percent reserves. (C-46). Under P/N, WCOE would 283 percent reserves. (Cheesman Tr. 12,236). A high economic penalty would be imposed upon a small utility by the P/N formula. (Firestone Tr. 9325-26).

Applicants themselves did not use the P/N method to allocate reserves with respect to the first four units because each company started differently and a transition period was needed. (Schaffer Tr. 8602-03, Firestone Tr. 9426-27; Mansfield deposition DJ 572 pp. 48-49)

Applicants argue (Brief p. 296) that membership in CAPCO should not be made available to an entity or group of entities with a system capability of 10 mw or greater. It is argued that the full benefits of coordination can be passed through to smaller entities in a more efficient manner than by power pooling. Applicants' arguments in this regard have been dealt with at length elsewhare in this brief. However, it is important to note that the FPC has recently rejected similar arguments in Mid-Continent Area Power Pool Agreement, FPC Docket No. E-7734, Opinion No. 806, issued June 15, 1977.

In Opinion No. 806, the FPC rejected arguments made to justify the exclusion of small systems from the MAPP pool because the small systems could not provide "mutuality." The FPC recognized that the objectives of the MAPP pool are "the effectuation of reserve sharing so as to best develop through coordination reliable and economic generation capacity" (Slip Op. p. 15). The membership criteria employed by MAPP "all distill down to

size of the system" (Id. emphasis in the original). The FPC said (Slip Op. pp. 15-16):

> While the smaller systems could conceivably benefit from MAPP membership, they do not have the transmission facilities to reciprocate in kind for the short-term transmission services included in the MAPP services schedules. Because of the significant advantages flowing from MAPP membership and the corresponding impact of denied access, we do not feel that this size criterion is reasonable. So long as the small utility can provide compensation for the true value of this transmission service, whether in kind or money, the pool should not be injured. (Emphasis in the original.)
>
> * * *
>
> In making this decision that the membership criteria must be modified, we do not deny the benefits which any utility, including those too small to presently become MAPP Participants, can glean from purely bilateral, non-pool reserves sharing arrangements; however, that fact does not mollify the discrimination inherent in Article IV which we must, under Sections 205 and 206 of the Federal Power Act, remedy. While there is no obligation for utilities in the first instance to have a pooling agreement, if one does exist it must be non-discriminatory. Within the dynamics of the electric utility industry, the oftentimes subtle yet significant long-term impact of power pooling demands our close scrutiny of provisions which deny access to the benefits of the pool. Thus the presence of such bilateral arrangements and the absence of denials of membership do not vindicate discrimination inherent in the membership provisions.

Not only are Applicants in error in asserting that license conditions 4(a) and (b) are too liberal but the contrary is true. The limitations on CAPCO membership imposed by license conditions 4(a) and (b) are too restrictive.

The licensing conditions ordered in the initial decision are not vulnerable to the attacks levied by Applicants.

CONCLUSION

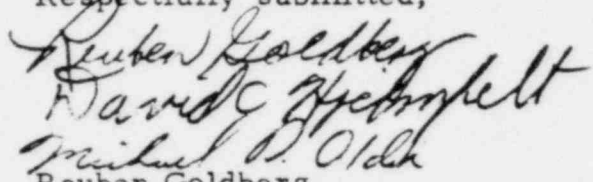
Applicants have launched a broadside attack against nearly every finding and legal conclusion contained in the Licensing Board's initial decision. As a result there has been no narrowing of issues and this Appeal Board is being asked to re-examine the entire factual record. City believes that such examination of the record can only lead the Appeal Board to conclude, as did the Licensing Board, that Applicants have been guilty of numerous anticompetitive acts violative of the antitrust laws necessitating imposition of license conditions. Should Applicants emerge victorious in this case, one must wonder whether any situation could be found which would constitute a situation inconsistent with the antitrust laws.

The legal arguments made by Applicants are for the most part simply expansions of the legal arguments previously made and rejected by the Appeal Board. Their factual arguments crumble when one goes beyond Applicants' record citations to consider the record as a whole.

The Licensing Board having an opportunity to observe the witnesses, sift the record and consider Applicants' voluminous pleadings has rendered a careful decision strongly based on the record. Applicants claim of bias on the part of the Licensing Board is no more than a fit of pique totally lacking in record support.

WHEREFORE, for the foregoing reasons Applicants' exceptions should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing "Brief Of The City Of Cleveland In Opposition To The Exceptions Filed By Applicants" on the parties listed on the attachment this 30th day of June, 1977, by depositing copies in the United States mail, first class postage prepaid.

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APPLICANTS MOTION TO DISMISS WAS PROPERLY DENIED

The basis of CEI's motion (Motion pp. 1-2) is that "the fact issues raised in said allegations, and to which the evidence subject to the present motion relates, were fully litigated before the Federal Power Commission ("FPC") by the parties to this proceeding, or their privies, and were finally adjudicated by that agency, as affirmed by the United States Court of the District of Columbia Circuit." It is argued that collateral estoppel precludes consideration of those issued by this Commission.

It is rather amazing to find CEI asserting that the Commission is precluded from considering issues previously considered by the FPC. This argument represents a complete reversal of the position previously taken by CEI in these proceedings. At the very first prehearing conference held in these proceedings, CEI's position was that no collateral estoppel effect could be attached to the FPC proceedings. Thus, the transcript reveals the following colloquy (Tr. 63, 64):

> Chairman Farmakides: Is this Board then bound by the decisions of the Federal Power Commission?
>
> Mr. Charnoff: No, I don't think I can argue that, sir. I don't think I can argue that at all.
>
> I think that the Federal Power Commission proceedings simply puts the agency on notice that the agency ought to require a showing at the outset, before it embarks on another proceeding to hear the same type of allegations. That this Intervenor be dealt with strictly in the sense that it ought to, as I said earlier, ought to make a showing of nexus, strictly and specifically as required by Waterford. And it ought to make a showing at the outset that it has something to offer in connection with each of those anticompetitive practices that it alleges.

> I don't think I could argue that the Federal Power Commission in any way is res judicata or in any way binds this particular proceeding.

The City is in complete agreement with counsel for CEI that this Commission is not bound by the decisions of the FPC in this regard. Under the circumstances it is not surprising that CEI's motion makes no reference to its counsel's previous denials of any collateral estoppel effect of the FPC decision. Despite CEI's prior recognition that the FPC cannot "in any way bind" this Commission, CEI now puts the City to the task of demonstrating that which it previously admitted.

A. The Facts

Most of the relevant facts regarding the FPC ruling on which CEI relies on this motion are set forth in the documents that CEI has submitted as its Exhibit Nos. 18-23. The relevant facts are as follows:

On May 13, 1971, the City of Cleveland instituted before the FPC a proceeding under Section 202(b) of the Federal Power Act, 16 U.S.C. §824a, for an order requiring CEI to establish an electrical interconnection with the City for the sale to the City of electric power and energy (Applicants' Ex. 18, p. 2). That statute empowers the FPC to order one electric system to sell electricity to another system under certain conditions. The existence or absence of anticompetitive practices is not made an element of proof under the statute, [1/] and the City alleged no such practices in its initial pleading.

1/ Otter Tail, 410 U.S. 366, 35 L.Ed. 2d 359 (1973); cf. New England Power Co. v. Federal Power Commission, 349 F.2d 258 (CA 1, 1965). Of course, the FPC has the right and the obligation to consider national antitrust policies to insure, for example, that parties to a power agreement do not foreclose either of them from dealing with a competitor of one of them. City of Huntingburn v. Federal Power Commission, 498 F.2d 778 (CADC 1974).

On May 21, 1971, CEI tendered with the FPC for filing a "notice of termination and cancellation" of the load transfer service then being provided to the City (Applicants' Ex. 18, p. 2).

On December 6, 1971, the City filed a motion that would, among other things, consolidate the proceedings on the two filings and cause the commencement of an FPC investigation of "the anticompetitive aspects of CEI's conduct in relation to Cleveland" (Applicants' Ex. 18, p. 6).

The City did not, either in the December 6, 1971, motion, or in any statement made to the FPC, define its intention in the use of the word "anticompetitive." More specifically, the City at no time equated the alleged anticompetitive practices with conduct violative of the antitrust laws. In the December 6, 1971, motion the City charged CEI with having violated "the antitrust aspects of the Federal Power Act" (Applicants' Ex. 18, p. 5). In its brief to the FPC administrative law judge, the City appeared to treat as anticompetitive any conduct that would be "discriminatory" under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§824d and 824e (Appendix B, pp. 18-19). In its brief to the FPC on exceptions to the initial decision of the administrative law judge, the City referred to the policy of the Federal Power Act "against anticompetitive practices" (Appendix C, p. 15).

Nor did the City, either in the December 6, 1971, motion, or any other statement, request any specific relief in the proceeding on the ground of anticompetitive practices. (Indeed, there does not seem to be any relief that the FPC is able to grant in a Section 202(b) case even in the face of proof of conduct violative of the policies of the antitrust laws.) In its brief to the

administrative law judge, the City requested merely that anticompetitive acts be "considered" (Appendix B, pp. 21, 25). In its reply brief the City again sought nothing more specific than "consideration" of these alleged acts (Appendix D, p. 12). In its brief to the FPC on exceptions to the initial decision of the administrative law judge, the City suggested that the anticompetitive acts "be borne in mind" in the FPC's ratemaking function (Appendix C, p. 5), but the FPC had consistently held the view that rates cannot be fixed in consideration of anticompetitive practices.[2/] In the Conclusion of its brief to the FPC, the City requested no more than the FPC issue an order "recognizing" and "condemning" anticompetitive acts and that "the Commission will monitor these practices in the future" (Appendix C, p. 16).

Significantly, in its requested findings in the proceeding, the City made no mention whatever of anticompetitive practices (Appendix B, pp. 32-35.

The FPC consolidated the two filings, and a hearing thereon was held on March 21 through 24, and April 6, 1972 (Applicants' Ex. 20, p. 4). As the administrative law judge later noted (Applicants' Ex. 20, p. 14):

> The City did not present any testimony at the hearing on CEI's alleged anticompetitive practices nor did it cross examine CEI's witnesses on this issue (Tr. 453).

The administrative law judge issued his initial decision on January 12, 1972 (Applicants' Ex. 20). He referred to the totality of the City's charges of anticompetitive practices on the part of CEI as consisting of "the so-called Bridges memorandum, CEI's effort to collect the Ohio excise tax, and CEI's

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2/ Conway Corp. v. Federal Power Commission, 510 F.2d 1264 (CADC 1975).

alleged refusal to build a parallel interconnection" (Applicants' Ex. 20, p. 14). Inasmuch as the "Bridges memorandum" cannot be viewed as an act in itself, anticompetitive or otherwise, but, at most a statement of intention to act, the only two acts that the judge found to be involved in the proceeding related to (i) CEI's collection of the excise tax and (ii) its refusel to build a parallel interconnection.

The administrative Law judge made the following rulings on the City's claims of anticompetitive acts by CEI (Applicants' Ex. 20, p. 15):

> The Bridges memorandum does not support a finding of anticompetitive practices or anit-trust violations.
>
> The charge of CEI refusal to build a parallel line as an anticompetitive practice is ironic in the light of this record which shows clearly that the City repeatedly turned down such proposals in an effort to remain self sufficient and independent of the CEI system.
>
> * * *
>
> CEI's effort to collect the Ohio excise tax does not constitute an anticompetitive practice.

The administrative law judge also noted that although the City had not included refusal to wheel as an alleged anticompetitive practice, a document appended to the City's brief contained "vague proposals for wheeling power through CEI's facilities." The judge noted that there was nothing in record on that matter and that, in any event, wheeling was "outside the scope of this proceeding" (Applicants' Ex. 20, p. 15). The FPC clearly has no power to order one electric system to transport ("wheel") electricity for another. 3/

3/ Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L.Ed. 26, 359 (1973).

On January 11, 1973, the FPC issued its opinion and order in which the initial decision of the administrative law judge was modified (Applicants' Ex. 21). Except for the FPC's single reference to the rulings of the judge on the matter of allegations of anticompetitive practices (Applicants' Ex. 21, p. 3), the following is the only treatment accorded in the FPC order on that matter (Applicants' Ex. 21, pp. 4, 10):

> Finally, City urges that it has shown anticompetitive practices on the part of CEI and that such practices should be considered in regulating the relationship between City and CEI.
>
> * * *
>
> Exceptions to the Administrative Law Judge's decision not granted herein are denied.

The FPC did not indicate whether its denial of the City's above quoted exception was based on the City's failure to prove its case or on the FPC's view that the issue did not require resolution by virtue of the absence of any cognizable request for relief based thereon. There is no gainsaying that either view would be a correct one on the basis of the record made in the proceeding and the pleadings filed therein by the City.

There can be no doubt as to the propriety of the FPC ruling on the City's anticompetitive allegations, if it be assumed that any ruling were called for. The two alleged acts were not shown by the City to have anticompetitive import. The City did not request any specific relief on these allegations except, perhaps, a vague call for remedies that were not within the ambit of the FPC's authority in the proceeding at hand. Therefore, the City's present counsel did not raise any charges of anticompetitive practices

in the judicial review proceedings determined in Cleveland v. Federal Power Commission, 525 F.2d 846 (CADC 1976).

B. No Res Judicata Or Collateral Estoppel Effect Can Be Accorded The FPC Ruling In This Action Because Of The Great Dissimilarity Of Factual And Legal Issues.

Inherent in the concept of law as a mechanism for settling disputes is the requirement that properly rendered judgments must effectively bind the parties thereto. In Southern Pacific R. Co. v. United States, 168 U.S. 1, 49, 42 L. Ed. 355, 377 (1897), the Supreme Court said:

> This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order: for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

This essential principle is formally recognized in the broad, judicially-created doctrine of res judicata.

One of the doctrine's two basic applications, to which use of the term res judicata is often restricted, prevents relitigation of any facet of a once tried cause of action. The other -- the doctrine of collateral estoppel -- prevents relitigation of particular issues which have been previously resolved as part of a different cause of action. The difference between these two branches of doctrine has been described by the Supreme Court in Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 99 L. Ed. 1122, 1126 (1955), as follows:

> The basic distinction between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

It is clear in the first instance that CEI's motion for dismissal must be denied if it is predicated upon the first branch of the doctrine of res judicata. Claims arising under the antitrust laws are within the exclusive jurisdiction of the federal courts. See General Investment Co. v. Lake Shore & Michigan So. R. Co., 260 U.S. 261, 287, 67 L. Ed. 244 (1922); Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 441, 64 L. Ed. 619 (1920); Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 658 (CA 9, 1972); Cream Top Creamery v. Dean Milk Co., 383 F. 2d 358, 363 (CA 6, 1967). Similarly, and as a corollary, the FPC "has no power to enforce the Sherman Act as such, . . . [and] cannot decide definitely whether the transaction contemplated constitutes . . . an attempt to monopolize which is forbidden by the Act." See Pittsburgh v. Federal Power Commission, 237 F. 2d 741, 754 (CADC 1956); see also McLean Trucking Co. v. United States, 321 U.S. 67, 79-80, 88 L. Ed. 544 (1944); National Broadcasting Co. v. United States, 319 U.S. 190, 87 L. Ed. 1344 (1943); FPC Opinion No. 759, April 12, 1976, Gulf States Utilities Company v. FPC, Docket Nos. E-8600, et al. (Appendix E).

Accordingly, the proceedings before the FPC and this Commission involve such different causes of action that res judicata as to the instant case could not be applied on the basis of the earlier adjudication before the FPC. The decision of the Supreme Court in United States v. Radio Corp. of America, 358 U.S. 334, 3 L. Ed. 2d 354 (1959), is dispositive as to this branch of the doctrine. In that case, an application by broadcasting companies to exchange television stations was granted by the Federal Communication Commission upon the completion of proceedings wherein antitrust issues were reviewed by the FCC. The action by the FCC was held not to foreclose a subsequent cause of action before the federal district court attacking the exchange as being in the furtherance of conspiracy to violate the antitrust laws. Justice Harlan's concurring opinion states the holding succinctly, 358 U.S. at 353, 3 L.Ed. 2d at 366:

> [A] Commission determination of "public interest, convenience, and necessity" cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee pro tanto from the antitrust laws . . . .

This holding was not affected by the rule of law that the regulatory body had the duty to give consideration to federal antitrust policy in determining the nature of the public interest in issue. 358 U.S. at 351, 3 L. Ed. 2d at 366.

The second branch of the res judicata doctrine, collateral estoppel, also requires as a prerequisite for its application that the issues in the first case be essentially the same as those in the second. The determination of a fact in the context of one set of legal issues will not foreclose a later inquiry

in regard to the same fact on litigation involving an entirely different bundle of legal issues.

In order that the doctrine of collateral estoppel be applicable, it is necessary that the factual or legal issues to be concluded be the same as that involved in the prior action. Peterson v. Clark Leasing Corp., 451 F. 2d 1291 (CA 9, 1971); Embry v. Equitable Life Assurance Society, 451 F. 2d 472 (CA 10, 1971). As the court said in Overseas Motors, Inc. v. Import Motors Limited, Inc., 375 FSupp 499, 519 (DC Mich, 1974), affirmed 519 F.2d 119 (CA 6, 1975), "[i]dentity of issues is absolutely essential for the invocation of collateral estoppel." In this same connection, the Supreme Court has made clear that the party asserting collateral estoppel has the burden of showing identity of issues and determination of issues on the merits. See United States v. International Building Co., 345 U.S. 502, 97 L. Ed. 1182 (1953).

In determining whether there exists an identity of issues the courts have consistently held that a lack of identity results from address of the same factual issues upon different standards of review. This is to say that issues are substantially different even as to identical factual circumstances where the standard of review is different. The proposition was clearly enunciated in Neaderland v. Commissioner of Internal Revenue, 424 F. 2d 639, 642 (CA 2, 1970), cert. denied 400 U.S. 827, 27 L. Ed. 2d 56 (1970), as follows:

> Collateral estoppel is confined, however, to "situations where the matter raised in the second suit is identical in all respects with

> that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged" [cites omitted]. Even if the issue is identical and the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially "the same bundle of legal principles that contributed to the rendering of the first judgment" [cites omitted].

The public interest standard on which the FPC basis its determinations is totally different from the standards involved in the instant action. Hence, although it is by no means clear from the record in the FPC proceeding, that the City's charges of "anticompetitive" practices encompassed the same types of practices as thos envisioned by the Sherman Act, 4/ it is perfectly clear that the FPC could not, and did not, use antitrust standards in the resolution of the charges.

Where the statutes underlying two different factual investigations are dissimilar, a factual determination in the first such investigation does not bar litigation of that same factual issue in the second. Thus, it was said in Brandenfels v. Day, 316 F.2d 375, 378 (CADC 1963), that the Federal Trade Commission was not precluded from making a factual determination wholly different from one made earlier by the postal authorities "since the agencies act under different statutes employing different standards."

In Jason v. Summerfield, 214 F. 2d 273 (CADC 1954), cert. denied 348 U.S. 840, 99 L. Ed 662 (1954), a finding of disloyalty to justify removal

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4/ As noted, the City alleged to the FPC that CEI violated "the antitrust aspects of the Federal Power Act" and may very well have had in mind the prohibitions against discrimination found in Sections 205 and 206 of that statute.

from federal employment made under one executive order would not bar a new fact finding on the issue of loyalty under the slightly differently worded standard of a later executive order.

In Thompson v. Fleming, 188 FSupp 123 (DC Ore, 1960), a finding of fact by the Veterans Administration did not bar a contrary finding by the Social Security Administration. The factual issue was held to be "identical" in the two proceedings, but conclusiveness of the earlier finding was ruled out because the issue was presented in the two proceedings under different statutes.

Because of the absence of totally similar statutes governing determinations by the two administrative bodies involved, in National Labor Relations Board v. Pacific Intermountain Express Co., 228 F. 2d 170 (CA 8, 1955), cert. denied 351 U.S. 952, 100 L. Ed. 1476 (1956), it was held that a factual finding by a state agency on workmans compensation was not binding on a federal agency looking into essentially the same matter.

In United Brick & Clay Workers v. Deena Artware, Inc., 198 F. 2d 637 (CA 6, 1952), a judicial finding of secondary boycott was not precluded by a prior inconsistent finding by the NLRB. "The two proceedings, even though arising out of the same labor dispute, were heard by separate fact finding agencies. The witnesses in the two proceedings were not the same." 198 F. 2d at 642.

In Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 97 L. Ed. 426 (1953), it was held that a prior adminis-

trative finding of absence of proof of unfair labor practice would not stand as a bar to a later charge of unfair labor practice, where conspiracy had not been an element of the first allegation but was included in the second.

Of particular interest on this issue is Tipler v. E. I. du Pont de Nemours & Co., 443 F. 2d 125 (CA 5, 1971). The plaintiff there, a discharged employee, had sought various administrative remedies in a quest for redress for an allegedly racially motivated dismissal by an employer. Following "an extended evidentiary hearing" the NLRB ruled that the dismissal was with good cause and, hence, not wrongful. That finding was held not to preclude a redetermination of the same fact. The court said, 443 F. 2d at 128-29:

> Absent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute. See Title v. Immigration and Naturalization Service, 322 F.2d 21, 25 n. 11 (9th Cir., 1963); 2 K. Davis, Administrative Law Treatise §18.04, at 577-78 (1958); cf. Commissioner of Internal Revenue v. Sunnen, 338 U.S. 591, 601-602, 68 S. Ct. 715, 92 L. Ed. 898 (1948).

Similar is Hutchings v. United States Industries, 428 F. 2d 303 (CA 5, 1970).

Of interest in the context of the nonbinding effect on a fact finding collateral to other, primary issues is Talavera v. Pederson, 334 F. 2d 52, 57 (CA 6, 1964). In that case it was held that a finding in one immigration and naturalization proceeding that acts of adultery did not present ground for deportation and did not bar later administrative action for deportation on the same acts of adultery, where proof of adultery was merely collateral to the primary issues in the first proceeding.

In Pottawatomie Nation of Indians v. United States, 507 F. 2d 852, 861 (Ct. Cl., 1974), it was said:

> We reject the contention of appellants that the Commission somehow violated this Court's mandate in Hannahville Indiana Community v. United States, supra, by determining that the Pottawatomies formed a single political unit during the period 1795-1833 . . . . It is clear that, with the benefit of the additional expert testimony taken in the do novo hearing, the Commission reassessed the documentary evidence and arrived at a different conclusion.

And in Davis, Administrative Law Treatise (1958), it is said, at §18.12:

> Lack of identity of issues may result from differences in facts, in subject matter, in periods of time, in case law, in statutory provisions, in notions of public interest, in qualifications of tribunals, and in other similar factors . . . . Slight differences in legislative history or purpose may destroy identity of issues.

There can be no question in the instant case that the FPC has the authority to weigh federal antitrust policies in the performance of its statutory functions. Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747, 758-59, 36 L. Ed. 2d 635 (1973); Otter Tail Power Co. v. United States, 410 U.S. 366, 373-74, 35 L. Ed. 2d 359 (1973); City of Huntingburg v. Federal Power Commission, 498 F. 2d 778, 783-84 (CADC 1974); Northern Natural Gas Co. v. Federal Power Commission, 399 F. 2d CADC 1968).[5/] However, there is no "pervasive regulatory scheme" by

5/ But FPC's ability to give concrete effect to its consideration of antitrust policies depends on the issues of particular proceedings. Where competing companies are vying for an FPC certificate to engage in certain operations, the FPC can certificate one company and not the other in

(Footnote continued - next page)

which FPC is entrusted with enforcement of the antitrust laws. FPC's deliberations are conducted under statutes that do not include the power to make antitrust determinations. Therefore, FPC orders to not immunize an FPC licensee against antitrust charges brought before the courts. Otter Tail, 410 U.S. at 374, 35 L. Ed. 2d at 366.

While there may be some similarity between the factual issues of this case and the factual issues in the FPC proceeding, the statutory standards that govern the vantage points from which the facts are viewed are totally dissimilar. Under these circumstances, the doctrines of res judicata and collateral estoppel are simply not applicable.

C. The Issues Involved In This Case Were Not Fully Raised, Considered And Actually Adjudicated In The Prior FPC Proceeding.

It is hornbook law that the issues to be concluded in a subsequent proceeding must have been raised, considered and actually litigated in the prior action before the doctrine of collateral estoppel can come into play. Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 671, 88 L. Ed. 376 (1944); United Shoe Machinery Corp. v. United States, 258 U.S. 451, 459, 66 L. Ed. 708 (1922); Cromwell v. County of Sac, 94 U.S. 351, 352, 24 L. Ed. 195 (1877).

Footnote 5/ continued from page

furtherance of these policies, as in Northern Natural, supra. The FPC can prohibit companies from entering into certain contractual arrangements that would hinder their competitors, as in Huntingburg. However, the FPC's view was that anticompetitive considerations were not relevant to its rate hearing function. Conway, supra. The FPC's determinations under Section 202(b) of the Federal Power Act, under which the City's petition for interconnection with CEI was filed, are on standards "unrelated to antitrust considerations." Otter Tail, supra, 410 U.S. at 373, 35 L. Ed. 2d at 366.

In the earlier FPC proceeding, the anticompetitive allegations constituted, at best, an issue peripheral to the primary issues in the case. The primary issues there were whether, and under what terms and conditions, CEI should be required to sell electricity to the City and whether CEI should be permitted to discontinue service already being rendered to the City. The allegations of anticompetitive practices on the part of CEI were not set forth for any purpose except the general one of being accorded "consideration" in connection with the resolution of the primary issues.

The City did not request the FPC to accord any specific remedy for the alleged anticompetitive conduct of CEI, and, indeed, in the submission of proposed findings of fact the City did not ask the FPC for any finding at all on the subject of anticompetitiveness. (See the discussion on the absence of any request by the City for relief on its allegations of anticompetitive conduct, supra.)

In the FPC case the City alleged only two anticompetitive acts, namely, (i) CEI's collection of an Ohio excise tax and (ii) CEI's refusal to build a parallel electrical interconnection. In the instant action the antitrust claim is based on a whole host of alleged facts. Among other things, evidence has been offered to prove (i) that the Applicants refused to allow the City the reliability benefits of CAPCO membership and then turned around to solicit business from the City's customers on the sales pitch that the City's electricity service was not reliable due to the City's lack of interconnection with CEI and other neighboring utilities, (ii) that the Applicants refused to grant the City participation in nuclear units that

would not be economically feasible for any isolated electric system (including the Applicants themselves if they did not have joint reserve planning) and depended on group cooperation and planning, (iii) that Applicants refused to wheel power for City and others although they would wheel for other investor-owned utilities, and (iv) that the Applicants committed other acts that were designed to isolate City's system from other systems and to destroy the economic viability of the City's electricity operations.

Many of the acts on which City bases its claim had not occurred at the time of the FPC hearing. Other acts had already occurred but were not known to plaintiff until the subsequent discovery in these proceedings.

The anticompetitive acts alleged in the FPC proceeding form a miniscule portion of City's present case. CEI acknowledges (Motion, p. 21) that the City offered no evidence other than the Bridges memorandum in support of its antitrust claims before the FPC.[6/] Neither did the City seek any specific relief. The FPC has consistently required a party seeking review of anticompetitive issues to state the requested relief which is within its authority to direct. Indiana & Michigan Electric Company, 49 FPC 1232 (1973). Failure to do so precludes FPC review. Since no evidence of anticompetitive acts was offered and no relief was sought, it can scarcely be argued that the issues were considered and actually adjudicated in the FPC proceeding.

Even the antitrust laws have changed during the period following the FPC ruling. The issuance by the United States Supreme Court of Otter Tail

6/ The record before the FPC does not explain why the City's then counsel raised an issue and then offered neither direct testimony nor cross-examination to prove the allegation.

is an important supervening event in the field of antitrust law relevant to the instant action.

It would seem to be beyond cavil that the issues raised in the instant case bear no significant similarity to those determined by the FPC. And it is hornbook law that the doctrine of collateral estoppel precludes only relitigation of issues actually litigated and determined in a prior suit and does not operate as a bar to the later litigation of claims that could have been, but were not, presented in an earlier case. Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 99 L. Ed. 1122, 1127 (1955). Indeed, precluding later actions on antitrust claims on the basis of an earlier denial of the establishment of such a claim "would, in effect, confer on [defendants] a partial immunity from civil liability for future violations," particularly where a substantial change in the scope of the alleged monopoly has occurred in the interim. Id., 349 U.S. at 328-29, 99 L. Ed at 1128.

Under the circumstances of this case the present inquiry should not be barred by the FPC ruling. Indeed, City should not be estopped from including as part of its proof in the instant case even the two anticompetitive acts alleged and not proved in the FPC proceeding.

A key case in this connection is Federal Trade Commission v. Raladam Co., 316 U.S. 149, 86 L. Ed. 1336 (1942). That case involved an earlier finding by the FTC that the company in question had used unfair methods of competition. The Court of Appeals had set aside the earlier cease and desist order, and the Supreme Court had affirmed the Court of Appeals ruling on the ground of lack of finding or evidence of injury to com-

petitors. Some years later, the FPC instituted the second proceeding on the same grounds, this time making the required findings of injury to competitors, and the question was whether or not res judicata effect should be given to the determination in the first proceeding that injury to competitors was not shown. The Supreme Court held that the FPC was not barred, saying, 316 U.S. at 151, 86 L. Ed. at 1339-40:

> It is clear that the reason [in the earlier case] for refusing to enforce the Commission's order are grounded upon the inadequacy of the findings and proof, as revealed in the particular record then before this Court. Hence, these reasons are not controlling in this case, arising, as it does, out of different proceedings and presenting different facts and a different record for our consideration.

In Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 84 L. Ed. 656 (1940), it was held that a court's reversal of a refusal of a license on one ground does not prevent the agency from refusing the same license application on other grounds.

In Exposition Press, Inc. v. Federal Trade Commission, 295 F2d 869 (CA 2, 1961), cert. denied 370 U.S. 917, 8 L. Ed. 2d 497 (1961), it was held that a finding that a publisher had not committed an unfair trade practice was not a bar to a later charge on additional evidence.

As was noted in Brandenfels, supra, it was held that fact finding by one administrative agency did not preclude a contrary fact finding by a different agency, where the agencies viewed factual determinations within the context of different statutes. In the same case it was also held that fact

finding in a later litigation may take in account any circumstances that may have changed since the earlier finding. 316 F2d at 378.

In Greater Kampeaka Radio Corp. v. Federal Communications Commission, 108 F2d 5 (CADC 1939), the court noted that the qualification of an individual to operate a radio braodcasting station may depend on cumulative facts. It was held that an earlier finding of qualification is not a bar to a later inquiry on the same issue and that facts known at the time of the first investigation could be relied on in the second. The court said that the argument that earlier facts are barred from introduction into the later hearing --

> has much the same substance as would a contention that because an indulgent judge had repeatedly granted probation to a confirmed criminal, he would be barred from considering the criminal's past record, when he next committed a crime and again applied for probation.

In Title v. Immigration & Naturalization Service, 322 F2d 21 (CA 9, 1963), it was ruled that a finding of fact that supported revocation of naturalized citizenship, made after a full evidentiary hearing, was not conclusive in a later deportation proceeding on the same alleged fact. Tne individual concerned was held entitled to relitigate the very same factual issue. One consideration that the court deemed relevant was that a judicial decision bearing on the law relevant to the issue had been handed down during the period between the two proceedings.

In United States v. Simon, 281 F2d 520 (CA 6, 1960), it was held that an adjudication of tax liability for one year does not estop relitigation

of similar factual and legal issues in connection with taxes payable for later years.

In the light of the foregoing authorities, it is clear that no res judicata or collateral estoppel effect can be given in the instant case to the findings made by the FPC on the City's charges of anticompetitive activities. These issues were not fully raised, considered and actually adjudicated by the FPC to the degree necessary to according binding effect to the FPC ruling thereon.

D. The Resolution Of The Issues Raised On This Motion By CEI, Even As Narrowly Raised And Adjudicated By FPC, Were Not Essential To The Conclusion Rendered By The FPC In The Earlier Proceeding.

Another precondition to the application of the doctrine of collateral estoppel is that the prior resolution of the issues to be concluded must have been essential to the judgment rendered. See Eastern Foundation Co. v. Creswell, 475 F2d 351, 354-55 (CADC 1973); Louis Ender, Inc. v. General Foods Corp., 467 F2d 327, 330-31 (CA 2, 1972). In returning to the earlier discussed case of Otter Tail, supra, it is clear that the decision by the FPC to order the Section 202(b) interconnection did not require as an essential element to that conclusion that antitrust violations be decided. Again quoting from Otter Tail, 410 U.S. at 373, 35 L. Ed. 2d at 366, the Supreme Court stated its interpretation of Section 202(b) of the Federal Power Act as follows:

> Only if a power company refuses to interconnect voluntarily may the Federal Power Commission, subject to limitations unrelated to antitrust considerations, order the interconnection. The standard which governs its decision is whether such action

> is "necessary or appropriate in the public interest." Although antitrust considerations may be relevant, they are not determinative. [Emphasis added.]

The FPC factual findings that CEI seeks on this motion to bind this Board were not essential to the FPC's determination. This is clearly shown by the fact that the FPC ordered the interconnection desired by the City notwithstanding the finding that certain of the City's difficulties were due to the City's imcompetence and not any anticompetitive conduct on the part of CEI.

Indeed, it is not all that clear from the FPC order that the FPC even bothered to make a finding on the City's allegations of anticompetitive activities. The FPC first referred to the exceptions that had been taken by the City to the initial decision of the administrative law judge, in the following words:

> Finally, City urges that it has shown anticompetitive practices on the part of CEI and that such practices should be considered in regulating the relationship between City and CEI.

After having thus referred to the City's exceptions, the FPC disposed of them in these words:

> Exceptions to the Administrative Law Judge's decision not granted herein are denied.

It does not appear, therefore, whether the FPC intended to reject the City's contention that "it has shown anti-competitive practices" or whether FPC denied the request that this issue "be considered in regulating the relationship between City and CEI."

Regardless of the actual intent of the FPC, it is clear that the factual findings that CEI seeks to foreclose on this motion were not essential to the ultimate conclusion attained by the FPC. These issues, then, have not been "fully resolved" within the necessary prerequisite for application of the doctrine of collateral estoppel. Louisiana v. Federal Power Commission, 503 F2d 844, 867 (CA 5, 1975).

E. The Doctrines Of Collateral Estoppel And Res Judicata Are Not Applied Where It Would Not Be Equitable To Do So. Considerations Of Fairness Dictate That The Doctrines Not Be Applied In This Instance.

The doctrines of colleral estoppel and res judicata are not immutable rules of law but, rather, they are applied as the interests of fairness and justness warrant.

Closely analogous to the instant case is Title v. Immigration & Naturalization Service, 322 F2d 21 (CA 9, 1963). In that decision it was held that a finding of fact that supported revocation of naturalized citizenship was not conclusive in a later deportation proceeding based on the same alleged fact. The Court said, 322 F2d at 24:

> Further, we think that the application of the doctrine of collateral estoppel would, apart [from other considerations] be unfair in this case. It has been recognized that the doctrine should not be exercised in such a manner as to work an injustice.
>
> * * *
>
> At the denaturalization hearing, petitioner did not elect to take the stand and did not present evidence in his behalf . . . . Why he did not

> choose to present evidence in his denaturalization proceeding is not of concern to us now. What does concern us is that at his deportation proceeding he desired to present evidence and was refused the opportunity to do so.

Tipler v. E. I. du Pont de Nemours & Co., 443 F2d 125 (CA 6, 1971), is another analogous case. The plaintiff there was a discharged employee who had sought various administrative remedies in a quest for redress for an alleged racially motivated firing. After a full evidentiary hearing the NLRB had ruled that the firing was with good cause. When the employee again attempted to attack the cause of the firing, this time under the Civil Rights Act, the court refused to impart a collateral estoppel effect to the NLRB ruling. The court said, 443 F2d at 128:

> Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice.

In antitrust litigation there exists a strong and overriding public interest which has specifically been recognized in the relaxation of the doctrine of collateral estoppel. This result has been identified as flowing from the role of the plaintiff in antitrust litigation in acting as a private attorney-general enforcing the public policy embodied in the statutes. See American Safety Equipment Co. v. J. P. Maguire and Co., 391 F2d 821, 826 (CA 2, 1968).

In Overseas Motors, Inc. v. Import Motors Limited, 375 FSupp 499, 521 (DC Mich, 1974), affirmed 519 F2d 119 (CA 6, 1975), it was said:

> [P]laintiff may now be afforded an opportunity to relitigate certain previously decided issues. Those issues to whose determination a public interest attaches may be termed antitrust issues, and as to them there can be no collateral estoppel. [Emphasis added.]

The "Public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action" has been adverted to by the Supreme Court. Lawlor v. National Screen Service Corp., 349 U.S. 322, 329, 99 L. Ed. 1122, 1128 (1955).

Where the doctrine of collateral estoppel to be applied rigidly in the instant case on the basis of findings entered by the FPC, it would be necessary to such an approach to first determine that Congress intended that the FPC's regulatory power override the fundamental national policies embodied in the antitrust laws. See United States v. Radio Corp. of America, 358 U.S. 334, 351, 3 L. Ed. 2d 354 (1959). In this regard, the Supreme Court in Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, held that:

> There is nothing in the legislative history [of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

As the Supreme Court noted in Otter Tail, the Power Act, as originally conceived, would have included a common carrier provision making it "the duty of every public utility to . . . transmit energy for any person upon reasonable request . . . ." Inasmuch as this provision and other similar provisions were eliminated to preserve "the voluntary action of the utilities,"

the Court also concluded:

> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.

As the Court said in United States v. Radio Corp. of America, 358 U.S. at 351, when these transactions and relationships are governed in the first instance by business judgment and not regulatory coercion, the courts must be hesitant to conclude that Congress intended to override the antitrust laws. Thus, while the statutes are similar in purpose, "there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or a repeal of" the antitrust laws. Otter Tail, supra.

F. The FPC Authority Under Section 202(b) Of The Federal Power Act To Fashion A Remedy Is Inadequate To Meet The Public Interest Test.

In its motion, CEI argues that in Section 202 cases the FPC must apply the antitrust laws pursuant to a public interest test which in effect is the same legal standard applicable to these proceedings (Motion, pp. 26-29). To make its argument, CEI is forced to ignore the plain language of the Supreme Court in Otter Tail, 410 U.S. at 373, 35 L. Ed. 2d at 366, that the FPC may order interconnections under Section 202 subject to limitations "unrelated to antitrust considerations" and while "antitrust considerations may be relevant, they are not determinative." Accordingly, in the FPC proceedings, the issues were not subject to the same standards that govern these proceedings.

Moreover, while the City requested no specific relief predicated or anticompetitive acts from the FPC, the FPC would have lacked the authority to grant full relief had such relief been requested.

The limited authority of the FPC under Section 202(b) was the subject of discussion in Otter Tail Power Co. v. United States, 410 U.S. 366, 374, 35 L. Ed. 2d 359, 366 (1973), in which the Supreme Court said:

> It is clear, then, that Congress rejected a pervasive regulatory scheme [under §202(b) for controlling the interstate distribution of power in favor of voluntary commercial relationships.
>
> * * *
>
> Thus, there is no basis for concluding that the limited authority to the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations.

Thus, under Section 202(b) the FPC was not empowered to direct CEI to engage in joint reserve sharing and capacity planning with the City, although CEI engages in these cooperative ventures with the other CAPCO members. Therefore, and in view of the limitation in Section 202(b) that the FPC may not "compel the enlargement of generating facilities" in order to provide service by one utility system to another, the FPC order in issue in the instant case granted CEI the right to disconnect its interconnection with the City when necessary for CEI to protect service to other customers.

G. Collateral Estoppel Has No Relevance To The City's Charge That CEI's Rates Were Designed To Bleed The Financial Viability Of The Cleveland System.

CEI asserts (Motion, p. 19) that collateral estoppel should bar the City from asserting that CEI's rates for service to the City were designed to bleed the financial viability of the Cleveland system. CEI admits (Motion, p. 7) that the applicability of collateral estoppel to administrative agency determinations is limited to determinations made by the agency acting in a judicial capacity. It is elementary that in rate proceedings an agency acts in a legislative capacity.

H. CEI Has Failed To Make The Showing Necessary To Invoke The Doctrine Of Collateral Estoppel.

In order to invoke the doctrine of collateral estoppel, a litigant has the burden of showing five basic requirements: (1) there must be a final and valid judgment affecting the same (or similarly situated) parties as appear in a second action; (2) the issue to be concluded must be the same as that involved in the prior action; (3) the issue must have been raised, considered, and actually adjudicated in the prior action; (4) the issue must have been material and relevant to the disposition of the prior action; and (5) the resolution of that issue must have been essential to the judgment rendered (i.e., not dictum). Overseas Motors, Inc. v. Import Motors Limited, 375 FSupp 499, 510-11 (DC Mich, 1974), affirmed 519 F2d 119 (CA 6, 1975).

None of these preconditions are present in this case. There is no identity of parties because NRC Staff and DOJ were not parties to the FPC proceeding. Consolidated Edison Co. of New York, Inc. (Indian Point Station No. 2) ALAB-399, decided May 20, 1977. Moreover, it should be noted that because of the FPC's continuing jurisdiction to review the interconnection agreement between CEI and City, the finality which would attach to the FPC's findings is less conclusive than that of a court judgment. See National Labor Relations Board v. Baltimore Transit Co., 140 F2d 51 CA 4, 1944), cert. denied 321 U.S. 795, 88 L. Ed. 1084 (1944).

CEI has failed to demonstrate the presence of the remaining four preconditions.

The Licensing Board correctly denied CEI's motion seeking dismissal of various allegations.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

City of Cleveland, Ohio	)	
	)	
v.	)	Docket Nos. E-7631 and E-7633
	)	
Cleveland Electric Illuminating Company	)	
	)	
and	)	
	)	
City of Cleveland	)	Docket No. E-7713

INITIAL BRIEF OF CITY OF CLEVELAND, OHIO

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May 8, 1972

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and	)	
	)	
City of Cleveland	)	Docket No. E-7713
	)	

INITIAL BRIEF
OF
CITY OF CLEVELAND, OHIO

I

STATEMENT OF THE CASE

Procedural Background

On May 13, 1971, the City of Cleveland, Ohio (Cleveland) filed a formal complaint with the Commission against Cleveland Electric Illuminating Company (CEI) in which Cleveland alleged that it had commercially operable capacity insufficient to meet its load. It stated that certain of its units were down temporarily for installation of environmental pollution control equipment; that in late 1969 Cleveland experienced a forced outage of its largest unit shortly

after which time an arrangement was made with CEI to transfer approximately 26,000 kva of the Cleveland load to CEI at a rate agreed between the parties.

The agreement on behalf of the City was done by enactment of Ordinance No. 115-70, which was attached to the complaint and which in part specified the agreement between CEI and the City "shall provide further that the CEI shall sell said power to the City at a rate not to exceed 30 cents a month per kva demand, $0.0085 per kwh for ten million kwh, and $0.005 per kwh above ten million." The Ordinance was effective January 15, 1970.

On January 19, 1970 the City Council passed Ordinance No. 161-70 repealing Ordinance No. 115-70 repeating the same price for power as in the earlier ordinance but adding a new section whereby Cleveland agreed to pay the cost of installing the load transfer points. Neither ordinance was ever filed with FPC.

Cleveland further stated in its complaint that CEI wrote letters subsequent to the enactment of Ordinance No. 161-70 "attempting to change the basic understanding and establish a modification of the rate schedule so as to make the price of power higher than the maximum set by the Ordinance." The letter was filed with FPC and accepted for filing as Cleveland Electric Illuminating Company's Rate Schedule FPC No. 7.

The complaint alleged that the letter changed the arrangement in the ordinance of 8.5 mills per kwh for the first ten million kwh and all energy above ten million per kwh at five mills to a provision: "first 400 kwh per kva of contract demand for kwh. . . $0.0085." The letter dated January 20, 1972 also stated "contract demand shall be the sum of such jointly determined loads to be supplied." This, according to Cleveland's complaint changed the arrangement from allowing the City to pay a single demand charge based on the highest actual peak demand to an arrangement under the letter, whereby billing would be at each substation without regard to load diversity. Cleveland alleged losing such diversity would penalize Cleveland 15 to 20% over billing on actual demand.

Cleveland also alleged that the letter sought to impose a ratchet whereas the Ordinance enacted by the Counsel had no such provision. The complaint further alleged that CEI sent another letter, dated March 17, 1970, which purported to change the agreement with the City by the words, ". . .the monthly kva demand. . .shall be calculated using the maximum registered kw demand and the average monthly power factor." This, according to Cleveland, was an attempt to make the "contract demand" substantially higher than the actual kva demand. The letter of March 17 was filed with FPC as Supplement No. 1 to Rate Schedule No

The complaint alleges that other letters of the Company to Cleveland dated June 9, 1970 and July 22, 1970, purported to make further changes at the expense of the City. These letters were filed with the Commission and accepted for filing as Supplements No. 2 and 3 respectively to Rate Schedule No. 7.

Cleveland had made some payments to CEI "under protest" and the complaint makes clear an existing disagreement between Cleveland and CEI over what amounts if any were then due in payment to CEI for service furnished at the load transfer points. The complaint asks for relief including an immediate emergency order pursuant to Section 202(c) of the Federal Power Act directing the company not to disconnect the load transfer points. It also asks for an order directing physical interconnection of the transmission systems of Cleveland and CEI and specifying terms and conditions for coordination of power supply.

On May 21, 1971 CEI tendered a "notice of termination and cancellation" of the service provided Cleveland. This notice has been designated Supplement No. 4 to Rate Schedule FPC No. 7 and was designated Cleveland Illuminating Electric Company, Docket No. E-76[illegible] CEI later agreed to certain extensions of the effective date of its notice of termination until December 16, 1971, at which time the

Commission suspended the notice of termination and cancellation until May 17, 1972.

On December 6, 1971 the City filed a motion to consolidate the two cases, to set the matter for hearing and to investigate certain anticompetitive practices it charged CEI with. This motion also requested an emergency Section 202(c) parallel interconnection with CEI.

The Commission in the previously mentioned order of December 16, 1971, in addition to suspending CEI's notice of termination to May 17, 1972 rejected Cleveland's request to investigate the alleged CEI anticompetitive practices and refused to grant a Section 202(c) emergency interconnection.

On December 22, 1971 Cleveland renewed its request for a 202(c) interconnection. On January 31, 1972 the Commission denied the City's renewed request saying, "no facts have been presented since our December order which established that the City system currently is operating in an emergency situation."

On February 7, 1972, the City suffered a forced outage of its largest generating unit which resulted in a blackout of several hours duration in the early morning heavy traffic period. Warren D. Hinchee, Commissioner of Light and Power for the City of Cleveland

comments at 10 Tr. 22 et. seq.[1] Hinchee stated that the Cleveland system was totally blacked out by 7:25 a.m. He indicated that traffic lights were out creating not only a serious problem for persons coming into town to work but increasing the problem of his maintenance people getting to Cleveland's outlying gas turbines, so they could be manually started to pick up part of the load. He stated that by 9:00 o'clock the three gas turbines had been started manually. By 10:00 o'clock all residence and commercial service was restored but all industrial customers were still out of service and were told they would remain out until further notification. (10 Tr. 22).

The day after the Cleveland blackout, February 8, 1972, Cleveland, by wire, again reiterated its request for an emergency interconnection, advising the Commission that it had suffered a serious blackout.

Two prehearing conferences were held February 10 and February 15 and staff personnel of the Commission visited Cleveland to investigate the situation and then on March 8, 1972, the Commission issued an order

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[1] Two prehearing conferences were held in these proceedings, one on February 10, 1972 and one on February 15, 1972. Transcripts of these hearings will be designated 10 Tr._____ and 15 Tr._____

The order directed CEI to permit Cleveland to establish a temporary emergency interconnection at 69 kv, nonsynchronous with switches to be kept open, to be closed only in an emergency. The Commission also directed a consolidated hearing of dockets No. E-7631, E-7633 and E-7713 (the latter being the latest request for emergency interconnection) would commence March 21, 1972.

The Commission's order of March 8 designated the issues as: (1) whether a permanent interconnection should be ordered under Section 202(b) of the Federal Power Act; (2) whether CEI should or should not be allowed to discontinue the temporary, low voltage deliveries currently being provided the City under five load transfer points; (3) whether the interconnection should be at 69 KV, 138 KV or both; (4) whether the interconnection should be synchronous or nonsynchronous at either or both 69 KV and 138 KV; (5) the issues of rate, terms of service, payment for service and conditions for maintaining the five load transfer points to the extent that those issues were not agreed upon by the parties prior to hearing, and (6) the issues of rate, terms of service, payment for service and conditions for interconnection to the extent that those issues were not agreed upon by the parties prior to hearing.

No significant agreement has been reached between the parties.

Additional Factual Background

Warren Hinchee present Commissioner of Light and Power, came to Cleveland March 15, 1971 (15 Tr. 21). When he came the City's generating units were in a sad state of disrepair. He immediately stepped up work on the machines as much as he could. (15 Tr. 22 and 23).

A fairly comprehensive assessment of the situation by Mr. Hinchee was sent to the Director, Department of Public Utilities on March 22, seven days after his arrival. This assessment appears as Exhibit 1 herein. Considerable of the information in the Exhibit relates to Hinchee's calculation that CEI was overcharging Cleveland and had sought by various means to circumvent the limitations on the price Cleveland could pay under Ordinance 161-70. Therein he mentions the suit that CEI brought in the Common Pleas Court against the City of Cleveland, claiming $1,352,286.60 and says the best estimat he can make at that time is that the claim is an attempted overcharge of more than $300,000.00.

Also, bearing upon the issue of whether Cleveland has been overcharged and why, until Hinchee's arrival no one picked it up, are two affidavits which were received in evidence as Exhibits 37 and 38. These are the affidavits of Robert J. Kapitan and Ben S. Stefanski,

who at the time the load transfer arrangement was made, were assistant director of law and director of the department of utilities of Cleveland respectively. Both of them say that they had no idea that the letters which CEI filed and which were accepted by the Commission as FPC No. 7 with three supplements, were in any way attempts to modify the price Cleveland could legally pay for power as enacted in the Ordinance.

Hinchee tells why the load transfer points were not adequate to meet Cleveland's needs. He states: "They do not provide pickup for this boiler. If we had a parallel interconnection we would be able to base load this boiler, then if we needed power, some additional power over and above what the boiler could supply, we would pick that up on a parallel interconnection." (15 Tr. 25).

Hinchee indicates the load transfers instead of a real interconnection were agreed to by "personnel other than myself," (15 Tr. 25) giving the clear indication that the personnel in charge at the time were completely incompetent to understand the consequences of such an arrangement.

By way of further explanation, Hinchee, when asked why the load transfer arrangement was not a satisfactory one, states:

> "Well, because they are simply a portion of the load separated from the rest of the City's

system, and they do not lighten the load, making it possible for us not to exceed our boiler capacity, but they increase our operating difficulties by making or forcing us to make major swings between off peak and on peak load conditions around the clock on our large boiler.

"They relieved the load to the point where we can handle it, but not properly. That is what I am saying.

"There is a difference between being able to meet the momentary requirements and being able to meet them with some reliability and without over stressing your equipment." (15 Tr. 27).

Again and again he indicates displeasure that the arrangement of transferring a load is simply "an amputation" of the Cleveland system. (10 Tr. 37). In talking about how the lack of a synchronous tie hurts the Cleveland system, Hinchee goes into some detail about why a nonsynchronous tie is damaging to his system and, though carrying some slight benefit, creates serious problems. Hinchee comments

"At the present time the Commission's Order is for an open switch situation. That is helpful to our system to this extent: With the emergency we have right at this particular moment with No. 6 boiler down, we have all three of our gas turbines operating and we are buying all of the power that we can obtain through these load transfer points and we are still curtailing service right now. Now, if we lose any one of our gas turbines and everyone knows whatever machinery you have, no matter how new it is or how well maintained, anything can happen to it -- you can lose a unit. If we lose a unit for any reason right now at this moment,

then we just have 15 megawatts of power out that there is no replacement for and that per cent of our load is down until whatever repairs are necessary, whether major or minor, can be made. So if we have the connection, even though the tie is open, we could close the tie and receive power under these conditions and that is more than we have now. That is a help. But it is not the answer. We would still have the outage, we would still have the service interruptions and still have an hour or two of switching interruptions, that is compared to an eight or ten-day period. That is a tremendous benefit. If we have the switch closed and we are operating synchronous and we lose a unit and we have an emergency, there is no reason to have service interrupted. We would not take power unless we did lose a unit. If we are starting up No. 5 boiler right now, I presume we would be buying power right at this particular time but it would be of short duration. By 5 or 6 o'clock tomorrow No. 5 boiler would be on the line and we would cease the purchase of emergency power. That is the advantage of the synchronous tie in a closed position to the City. That is what we feel is necessary. Our system has been interrupted and abused and this is abusive of equipment. This in itself generates failures of equipment when you are constantly knocking them off the line and having switches opened, you know, and interrupted because the system falls apart. This is abusive and creates additional causes of failure of equipment itself." (Tr. 212 and 213).

In addition to other disadvantages of load transfer as compared to a synchronous intertie there is the matter of basic reliability. Here Hinchee tells about three outages he had in one month caused by CEI cable failures. In response to a question by CEI Counsel

Hinchee comments:

> "There were three outages created by load transfers where trouble was detected on CEI sometime before it caused a failure and we switched over so that your people could do work, but this requires an interruption of service and there were three outages on the 2300 load feeders. If you would like to look at this. I don't think you would like it in evidence, but if you would like to look at this." (Tr. 359).

Considerable interest was shown by the Commission Staff in why the three gas turbines were located away from the rest of the generating equipment and had never had automatic startup equipment placed in operation. He was asked about the remote controls and the following questions and responses were given:

> "There have been a few instances where remote controls work but they are not reliable. GE is still trying to work this problem out and we are still holding their money until they do so we haven't accepted the first installation.
>
> "Q. When did you first put 1, 2 or 3 of these turbines on the line?
>
> "A. It was before I came here. Mr. Bergman, who was the Commissioner ahead of me put these units on the line in 1970, during the summer of 1970 I believe and I am a little hazy on this, but I believe this to be correct, with the permission of General Electric Company, although the installation was not complete, he did get permission to operate these units with fuel oil as a prime supply and put them on the line to bolster our sagging generation." (Tr. 182).

With regard to the issue of payments made by Cleveland to CEI, Hinchee indicates that the City having been promised a permanent synchronous interconnection by CEI was unhappy that CEI wouldn't make good on its promise. Then Cleveland fell behind in its payments and Hinchee was told "it was done to develop leverage over the Company to force an interconnection." (10 Tr. 39). However, when Hinchee arrived he immediately recognized the fact that CEI was not billing the City consistent with the rate established in the Ordinance and Hinchee's detailed statement of the differences between what the City was billed and what it should have been billed appears in Exhibit 39. Exhibit 39 is a month by month check showing the differences between the billings and the amount which should have been billed. The last billing which is from 2-1-72 to 2-29-72 shows an amount due CEI of $793,330.39. By Cleveland's recomputation the amount due should have been $95,665.15.

Hinchee explains how these recomputations were made beginning Tr. 278. Part of his explanation relates to the month of March, 1970 where he states:

> "If you will look at the column you will see a total of 10,124,000 kilowatt hours. If you will then go to the fourth page from the rear and look at the energy charge as set forth there you will see that all energy was calculated by

CEI at the 8-1/2 mill rate against the total of 10,124,000 kilowatt hours. According to document 161-70 all hours over 10,000,000 kilowatt hours are to be paid at the five mill rate. Therefore, we multiplied 8-1/2 mills times 10,00,000 kilowatt hours for a total of $85,000 and then 124,000 kilowatt hours times the five mill rate for $620.00, so instead of an energy charge of $86,054, as shown on the CEI billings, the actual energy charge was recomputed to be $85,620, for a net difference, net overcharge of $434 for energy. This was in the month of March, 1970." (Tr. 281).

Also showing the sham of CEI using failure to pay bills for load transfer power as an excuse to refuse a permanent interconnection, Hinchee makes a comparison of the payments to CEI by Cleveland for street lighting. He was asked by staff counsel:

"Q. Would the City have any objection to paying its monthly bills within 30 days from the date of rendition of the bill for any service rendered through a 69 kv emergency interconnection or a 138 kv synchronous intertie?

"A. Mr. Woods, the Division of Light and Power would have no objection, but the facts of the matter are that the City must go, whether it is the Division of Light and Power or General Funds Division, through the same identical procedure in the payment of all its bills and this must be approved by the Accounting Department, by the Finance Department and by the Finance Director and by the Purchasing Commissioner. And it has been my experience, I have been with the Cityof Cleveland, that there is approximately a normal 60-day delay in payment of any bill and I have brought that to the attention of Staff before and referred specifically to the CEI street lighting contract which

is in a subdepartment of my Division of Light and Power, Bureau of Street Lighting, where the total bill runs $1,500 and CEI allows a prompt payment discount if the bill is paid within 60 days, a three per cent prompt payment discount. Our payments follow the same identical procedure as the street lighting payments and are processed in the same manner, the only difference being the street lighting payments come from one fund with a different number and ours come from our own fund which has a 104 operating charge on it. We had agreed with counsel, with Staff and with CEI in some of our previous conferences here that we thought that that time could reasonably be shortened with extra effort to about 45 days and CEI had agreed that 45 days would be fair." (Tr. 274, 275).

As another issue in this case Cleveland charges that CEI is deliberately trying to damage the Cleveland system so as to put it out of business as a municipal system and take it over and incorporate it as a part of CEI. This appears as Exhibit No. 24. It is a memorandum bearing the caption of CEI from one R. H. Bridges to Lee C. Howley, dated October 9, 1970. In it is contained on page 24 the statement "Objective #4: "Five-Year Plan Objective -- 'To reduce and ultimately eliminate the tax-subsidized Cleveland and Painesville Municipal Electric System!'"

A part of the CEI effort to impair the competitive position of Cleveland was to increase Cleveland's costs. CEI witness Loshing testifies as to the applicability of Ohio Excise Tax (Tr. 725) and

completely without justification for his legal conclusion that the tax is applicable says, ". . .it is a very necessary cost component in deriving these costs." (Tr. 801).

This ties in with his earlier testimony about Cleveland (which he calls MELP):

> "In view of this competitive milieu, the rates specified in my testimony represent a minimum acceptable level; lower rates would constitute an undue competitive advantage to MELP and would put the Company's customers in the position of directly subsidizing the customers of our competitor. Such an alternative situation is clearly not in the public interest." (Tr. 737).

Also interesting is the failure of CEI witness Howley, its General Counsel, to deny that the City of Columbus was not paying the tax on power purchased from Columbus and Southern Ohio Electric Company. (Tr. 432).

Cleveland's witness, Hinchee, makes clear he feels the attempt to apply the tax is illegal. (10 Tr. 37, 38).

Questions Presented

The Commission Staff takes the position that the long range solution to Cleveland's problem is a 138 kv synchronous intertie between Cleveland and CEI. (Tr. 747). There is no real disagreement with this but Cleveland believes it should be ordered by the Commission. (10 Tr. 32).

The Commission has already ordered a 69 kv interconnection with the switch open. (Commission Order March 8, 1972).

Remaining questions are:

(1) Should the 69 kv interconnection be operated closed instead of open.

(2) What terms and conditions should apply to the 69 kv interconnection as an emergency interconnection and as a permanent interconnection if made permanent.

(3) What terms and conditions should apply to the permantnt 138 kv interconnection.

In considering 1, 2 and 3 the Commission should also consider:

(4) The anticompetitive conduct of CEI in the past and what will the terms and conditions imposed by 1, 2 and 3 do to the competitive position of Cleveland in the future.

(5) Should not a determination be made by this Commission rather than a court as to what, if anything, Cleveland owes CEI for power delivered through the load transfer points, and

(6) If so what if anything does Cleveland owe.

II

ARGUMENT

A. The Terms and Conditions of Service to Cleveland Should be the Same as the Terms and Conditions CEI Offers Other Companies.

Throughout this case the witness for Cleveland attempted to make it clear that Cleveland was not seeking treatment preferential in relation to other bulk power suppliers with whom CEI has contractual relationships. Cleveland asserts this with regard to the availability and price of emergency power, with regard to the right of Cleveland to receive power from other sources through CEI's transmission system, with regard to Cleveland's right to short term power, economy energy, maintenance power and all the other types of service normally provided between CEI and other companies. It is Cleveland's position it should have service available to it identical to that provided other electric suppliers.

This Commission has made it abundantly clear that it views Sections 205 and 206 of the Act as prohibiting discrimination. Section 205 specifically forbids any public utility to "make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage." Section 206 prohibits any rate, charge or classification which is "unduly discriminatory or preferential."

The Commission in Georgia Power Company 35 F.P.C. 436 (1966) adopted an examiner's opinion in a case where the power company was seeking to impose a discriminatory requirement on its municipal customers, claiming that if it did not do so industrial customers of the municipals would be able to obtain power at lower rates than the industrial customers of the company. The Examiner responded to this by saying:

> "This argument is essentially a plea for a complete monopoly in favor of the Respondent. There is no evidence to indicate that industrial loads now served through municipalities having no ceilings are charged uniformly lower rates than the Respondent's customers who receive direct service. If municipal manipulation of rates is foreign to the concept of utility regulation, the same can be said of rates arrived at by negotiation and manipulation by utility companies. We agree with the Respondent that the customers should be treated alike--certainly those in the same class, which is the very purpose of this proceeding." 35 F.P.C. at 447.

The examiner in that case also rejected the complaint of the Company that the municipal systems "pay no taxes." This is the same language as appeared in the document which is Exhibit 24, where CEI states its objective "to reduce and ultimately eliminate the tax-subsidized Cleveland and Painesville Municipal Electric System."

Shortly after the decision of the Commission in the Georgia

Power case the Commission decided Alabama Electric Cooperative v. Alabama Power Company 38 F.P.C. 962 (1967). In this case a cooperative filed a complaint against Alabama Power Company alleging Alabama Power Company's contract for sale of energy to the municipalities of Troy and Luverne were unduly preferential. The cooperative maintained it was entitled to special classification by virtue of its status as a cooperative. Basically it was losing as customers the municipal systems of Troy and Luverne to the company and the cooperative wanted the company to require the cities to pay an extra contribution for construction. The Commission said:

> "We further find that to require a contribution from Troy and Luverne, as cooperative has proposed, would unduly discriminate against these cities in favor of Alabama Power's other wholesale customers, including Cooperative, particularly so since the record shows that it is not the practice of the Company to require contributions for line extensions to serve wholesale customers, and, in fact, the Company has not asked for such contribution from wholesale customers since 1950." 38 F.P.C. at 975.

So here Cleveland urges the Commission to be consistent with its previous determinations and by its order direct CEI to make the same kind of arrangement with Cleveland as it makes with investor companies.

Cleveland, as was stated by its witness Hinchee, desires to

play by the same rules of the game as any other bulk power supplier.

B. CEI's Anticompetitive Acts in the Past Should be Considered by the Commission in Prescribing Terms and Conditions of Future Service to Cleveland.

When Cleveland witness, Hinchee, was asked the question for what reason would CEI refuse Cleveland a parallel interconnection, he responded:

> "I think the reason is pretty obvious, and pretty well spelled out in the internal memorandum between Mr. Bridges and Mr. Howley, dated October 9, 1970, in which they set out a goal for completion by 1975 to reduce the City of Cleveland and the City of Painesville, and acquire those systems by 1975.
>
> "Q. You have indicated the lack of desirability of segregating the Cleveland system as compared to a permanent intertie. What would be the effect on Cleveland Electrical Illuminating Company of a permanent intertie as compared to the present method of CEIs taking over some of Cleveland's load?
>
> "A. The effect would not help but be beneficial to both parties. The present load transfer scheme has worked hardship on the operations of the City of Cleveland, and also worked a hardship on the CEI people." (10 Tr. 28, 29).

From Mr. Hinchee's testimony it is apparent that CEI is willing to do itself injury in order to damage Cleveland.

As was stated, supra, Cleveland's operation is further impaired as a consequence of a nonsynchronous interconnection by the unusual wear and tear imposed on its generating equipment as a consequence of having to "take swings." If Cleveland could base load its units and take swings as needed on the interconnection there is little doubt that it would not have the maintenance problem it has now and has had over the years. Here again is an example of CEI deliberately seeking to impair Cleveland's operations.

Yet another example of CEI's anticompetitive practices was its insistence upon collecting an inapplicable excise tax. This will be discussed later in this brief and we think the brief will clearly show the tax is not applicable to sales to Cleveland. However, the tax money is paid to the state so here again is CEI doing something not to benefit itself but simply to injure Cleveland by making Cleveland's power costs as high as possible and reducing Cleveland's ability to compete.

At times the Commission appears to be unwilling to sustain its responsibility to supress anticompetitive practices among the companies it regulates. In the City of Pittsburgh v. Federal Power Commission 237 F.2d 741 (CADC-1956), the District of Columbia Circuit Court remanded a matter to the Commission citing as one of its errors

a failure to give proper attention to the anticompetitive aspects of a proceeding relating to a natural gas pipe line. The Court, inter alia, comments:

> "The Commission, while it 'has no power to enforce the Sherman Act (15 U.S.C.A. §§ 1-7, 15 note) as such * * * (and) cannot decide definitely whether the transaction contemplated constitutes * * * an attempt to monopolize which is forbidden by that Act * * *,' nevertheless 'cannot without more ignore the (Act).' Thus, if it appears that Texas Eastern's project would tend to produce monopolization of a petroleum products market, the Commission cannot ignore that fact merely because it is an antitrust factor and such factors have been placed within the ken of the Attorney General. That he is specially competent as to the antitrust laws does not make all other officers or agencies of the Government incompetent.
>
> "Even private citizens play a role in the effectuation of our national antitrust policy. It would seem odd if circumstances upon which private citizens may found legal and equitable remedies and defenses should be wholly beyond the reliance of Government. Although the Commission has no power to enjoin conduct as illegal under the Sherman Act, or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question whether a particular certificate is required by the public convenience and necessity."
> 237 F.2d at 754.

The same court very recently called the attention of the Commissio

to its responsibilities in this regard in City of Lafayette v. Securities and Exchange Commission 454 F.2d 941 (CADC-1971). The Court in this case in reviewing an order of the Federal Power Commission and the Securities and Exchange Commission approving a bond issue, criticizes FPC for failure to concern itself with antitrust issues. In so doing the court, speaking through Judge Leventhal, says:

> "So far as antitrust issues are concerned the agency has the opportunity to obtain the comments of the Department of Justice. It may even, indeed, defer its disposition pending determination of relevant court litigation where that will aid in the determination of the 'public interest' issue. This would be in effect a reverse application of the doctrine of primary jurisdiction, a doctrine that has been appropriately referred to as supple and flexible. The doctrine of primary jurisdiction 'has become one of the key judicial switches' in furtherance of 'coordination between judicial machinery and (administrative) agencies' in matters of mutual concern. Switches operate both ways, and, depending on the nature of the issue, an agency may wait for a court as well as the reverse.
>
> "We have been at pains to set forth the latitude available to the agency in approach and procedure to obviate any concern that this court seeks to interfere with its exercise of discretion. What the court does require is that the agency take a 'hard look' at problem areas." 454 F.2d at 953, 954.

We earnestly suggest that the record in this case is replete with evidence of efforts on the part of CEI to damage the Cleveland

system. It also contains an unabashed admission in an "in house" document that it is the objective of CEI to take over the Cleveland system. If there is any anticompetitive responsibility upon this Commission surely this should be taken into consideration in prescribing the terms and conditions of future service so as to be sure that Cleveland pays only what is fair and does not bear any undue burden simply because CEI would like to price Cleveland out of competition.

C. This Commission Should Determine Cleveland Has Paid CEI What it Owes for Delivery of Power to the Transfer Points.

First of all the issue is for determination by the Commission, not a court. As has been mentioned herein CEI has sued in the Common Pleas Court in Ohio claiming a deficiency in the amount Cleveland has paid for power received at the transfer points. Clearly this involves a rate and the construction of a contract which established a rate and is not for determination by a court except upon appeal from a determination by the appropriate regulatory agency, in this case FPC. Such has consistently been the decision of courts in this country all the way from the United States Supreme Court on down.

In United States v. Western Pacific Railroad Company 252 U. S.

59 (1956) an issue involved three railroads having sued in the Court of Claims to recover from the United States as a shipper the difference between the tariff rates actually paid and those allegedly due on certain shipments. The court, in rejecting the effort, said:

> ". . .because we regard the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation policy to be of continuing public concern, we have been constrained to inquire into this aspect of the decision. We have concluded that in the circumstances here presented the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission." 352 U. S. at 63.

Similarly the Court of Claims in McLean Trucking Company v. United States 387 F.2d 657 (1967) held that not only was the matter of rate level a matter for determination by a regulatory commission not a court, but also a matter of interpretation of words relating to a rate. In this case the question at issue was a determination of the meaning of the word "destination." The court states:

> "Apparently, both parties believed that the issue is not the ordinary meaning of the word 'destination' but whether that word was used in its ordinary sense in the pertinent tariff. The latter is precisely the type of question which is to be determined preliminarily by the Commission." 387 F.2d at 660, 661.

The theory of all these cases has been that rate making is a legislative process which is part of the function of a regulatory or administrative agency and is no part of the function of a court.

Since it is clear the rate must be determined by the Commission, not the court, we turn our attention to the question of whether there is any deficiency in what Cleveland paid. Ordinance 161-70 established a contract between Cleveland and CEI. It specifically limited the amount Cleveland can pay for power to 30 cents a month per kva demand and 8.5 mills per kwh for the first ten million and 5 mills per kwh for energy above ten million. CEI is without power to amend an ordinance enacted by the council of the City of Cleveland. Thus the filings which became Rate No. 7 with supplements were not a part of the contract that had been made between CEI and Cleveland and constituted a unilateral attempt to violate that contract which is prohibited by the rule of the Sierra-Mobile doctrine.[2] In the Sierra-Mobile cases the Supreme Court held a unilateral filing was not sufficient to change a contract rate. The only contract here that has existed between CEI and Cleveland is the original contract limited to the specification of Ordinance No. 161-70.

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2 Federal Power Commission v. Sierra Pacific Power Co. 350 U. S. 348 (1956); United Gas Pipe Line Co. v. Mobile Gas Service Corp. 350 U. S. 332 (1956).

In addition to the attempt of CEI to collect more from Cleveland than Cleveland can legally pay as a consequence of the ordinance, CEI has deliberately attempted to force upon Cleveland the Ohio excise tax which it must know is clearly inapplicable. The Ohio Revised Code, Sections 5727.32, 5727.33 and 5727.38 specifically exclude and exempt receipts from interstate business. The language of 5727.32 and 5727.33 exclude "all receipts derived wholly from interstate business." 5727.38 applies only to gross receipts "of. . .intrastate business."

The statute as it is today is the consequence of determination made by the Supreme Court in East Ohio Gas v. Tax Commission 238 U. S. 465 (1931) where the Supreme Court knocked down the Ohio gross receipts tax as it might otherwise have applied to interstate gas transfers. The Court said that the tax as it purported to cover interstate business was voided by the Commerce clause of the Federal Constitution. Subsequent to the determination in the East Ohio Gas case the statute was amended specifically to put in the exemptions or exclusions for receipts from interstate transactions.

CEI is not so ignorant of the law as to fail to understand that this tax is clearly inapplicable to Cleveland. It only could

have attempted to exact the tax as one more device to increase Cleveland's costs and thus impair its position as a competitor in the field of power supply in the Cleveland area. CEI also is acquainted with the fact that in certain other cases in Ohio, municipalities are refusing to pay the tax with impunity as was mentioned in the record in the case of Columbus, Ohio purchases from Columbus and Southern Ohio Electric Company. The arrogance of CEI's attempt to foist this inapplicable tax on Cleveland is little short of shocking.

With respect to other purchases of power from CEI the only place in the record which clearly shows what was due and what was paid is Exhibit 39 wherein each of the bills was recalculated to remove the excise tax, to give Cleveland a rate consistent with Ordinance 161-70 and to correct certain CEI miscalculations that had been made on the bills by CEI. It is, therefore, submitted that the proper calculations of amounts owing between Cleveland and CEI show that as of February 29, 1972, the amount owing to CEI was $95,665.15.

III

CONCLUSION

The testimony in this case makes it clear that the parties herein have not been able to agree. It also makes it clear that CEI attempted by a simple filing, which was never understood by representatives of Cleveland, to hike a rate agreed upon between the parties in the Cleveland Ordinance 161-70. The Sierra-Mobile doctrine forbids this and the rate as specified in Ordinance 161-70 should prevail until a finding of the Commission on basic principles of rate making that this rate is no longer appropriate.

It is further evident that CEI has in numerous ways employed anticompetitive practices against Cleveland which have been damaging to the Cleveland system and have contributed, at least indirectly to many of the problems which the Cleveland system has faced, including its blackouts.

The record also shows clearly that Cleveland needs something more than a nonsynchronous interconnection at 69 kv. It needs a synchronous interconnection at 69 kv followed by a synchronous interconnection at 138 kv. Until the 138 kv interconnection is in commercial operation, since Cleveland will be limited to the approximate 40 mva of capacity on the 69 kv interconnection, the load transfer points should be maintained.

The terms and conditions for service at the 69 kv and 138 kv interconnections should be consistent with rates and services CEI provides generally and particularly with the terms and conditions contained in contracts between CEI and other companies.

In conclusion Cleveland submits this Commission should make its order in accordance with the requested findings hereinafter set out.

Respectfully submitted,

BROWN, TODD & HEYBURN

By _____

Philip P. Ardery
1600 Citizens Plaza
Louisville, Kentucky 40202

Attorneys for Cleveland

May 8, 1972

IV

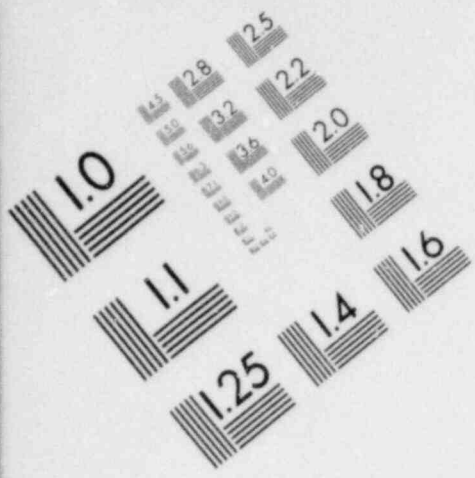
REQUESTED FINDINGS

1. CEI is a public utility within the meaning of Section 201(a) of the Federal Power Act.

2. Cleveland is a "person" within the meaning of Section 202(b) of the Federal Power Act.

3. It is necessary and appropriate for purposes of the Federal Power Act, particularly Sections 202(b) and 202(c) thereof, that the Commission order CEI to establish physical connection of its transmission facilities with the facilities of Cleveland at the CEI 72nd Street Station, to sell energy to and exchange energy with Cleveland upon the terms and conditions as ordered below. Such sale and exchange of energy will not place any undue burden upon CEI, nor require CEI to enlarge its generating facilities for such purposes, nor impair its ability to render adequate service to its customers.

4. Cleveland and CEI shall construct at Cleveland's expense a 69 kv interconnection between the Cleveland system and the CEI 72nd Street Station, which interconnection will be limited in use to 40 mva capacity and shall be operated with switches closed under normal circumstances. Said 69 kv interconnection shall be used only in case of emergency on the Cleveland system and payment for use by



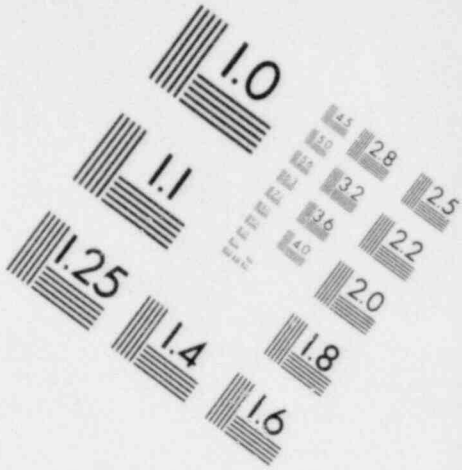
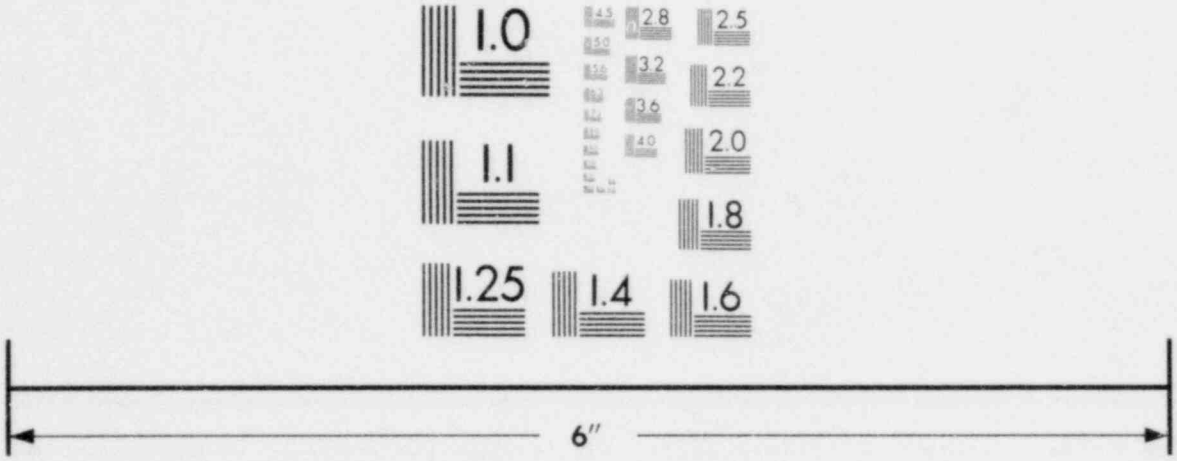
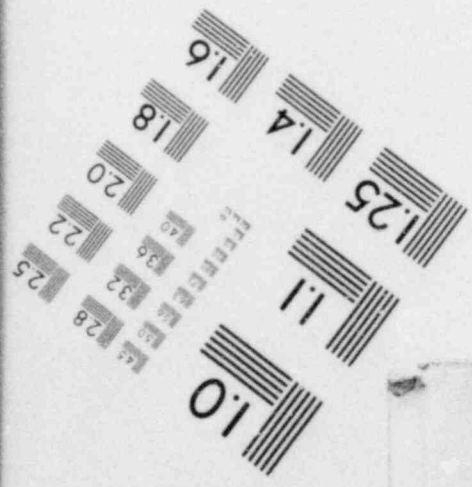


IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART



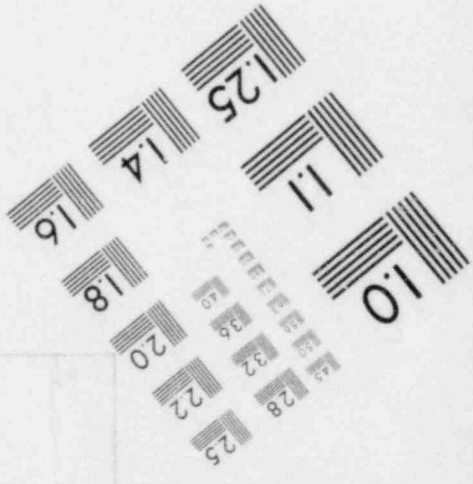


IMAGE EVALUATION
TEST TARGET (MT-3)

6"

MICROCOPY RESOLUTION TEST CHART

Cleveland to CEI shall be 17.5 mills per kwh, or cost plus 10 per cent, whichever is greater. Cleveland shall, except in emergency, maintain zero power flow over the interconnection as nearly as possible and inadvertent flows of power may be returned by either party.

5. Cleveland and CEI shall construct at Cleveland's expense a 138 kv interconnection between the Cleveland system and the CEI 72nd Street Station to be operated with switches normally closed. The terms and conditions for operating said 138 kv interconnection shall be as indicated in Appendix 1 hereto.

6. Until the 138 kv interconnection is in commercial operation, or April 30, 1973, whichever is earlier, the load transfer points now in use between Cleveland and CEI shall be continued. If within 60 days before April 30, 1973 it appears the 138 kv interconnection will not be in operation by April 30, 1973, Cleveland may report this to the Commission and request an extension of the load transfer points.

7. Payment for power and energy delivered by CEI to Cleveland over the load transfer points shall be at the rate of 30 cents a month per kva of demand with energy at 8.5 mills per kwh for the first total of ten million kwh delivered over all of the transfer

points taken as a unit, and 5 mills per kwh for kwhs above ten million. In addition to the demand and energy charges, CEI may impose its regular fuel escalation. Within 30 days of the date of the order of the Commission, CEI will submit a rate for power and energy delivered over the load transfer points in compliance herewith.

8. As regards the amounts claimed due from Cleveland to CEI, the Commission adopts the statement as contained in the Cleveland Exhibit No. 39 to the effect that as of the end of February, 1972, there was an amount due to CEI in the sum of $95,665.15. Bills for future deliveries of power over the load transfer points shall be computed in the manner of Cleveland's computation in Exhibit 39, save and except for the application of fuel escalation as hereinabove specified.

9. Cleveland shall pay bills rendered by CEI not later than 45 days subsequent to receipt of the bill unless a valid controversy exists as to the computation of the bill. If Cleveland fails to pay a bill after said 45 days, 5% shall be added to the bill. If said bill is not paid after 60 days, an additional 2-1/2% shall be added.

10. The parties hereto shall construct the aforesaid 69 kv and 138 kv interconnections in the shortest reasonable time.

11. CEI shall report to the Commission the date of commencement of service of the 69 kv interconnection within 30 days following the commencement of such service.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

City of Cleveland, Ohio	)	
	)	
v.	)	Docket Nos. E-7631
	)	and E-7633
Cleveland Electric Illuminating Company	)	
	)	
and	)	
	)	
City of Cleveland	)	Docket No. E-7713

BRIEF ON EXCEPTIONS OF THE CITY OF CLEVELAND

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Attorneys for City of Cleveland

Philip P. Ardery
BROWN, TODD & HEYBURN

August 9, 1972

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UNITED STATES OF AMERICA
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Cleveland Electric Illuminating Company	)	
	)	
and	)	
	)	
City of Cleveland	)	Docket No. E-7713

BRIEF ON EXCEPTIONS OF THE CITY OF CLEVELAND

I

STATEMENT OF THE CASE

This case comes to the Commission under the Commission's Rules of Practice and Procedure, § 1.31 as Cleveland's exceptions to the Initial Decision of the Presiding Examiner issued July 12, 1972.

This case was commenced May 13, 1971 when Cleveland filed a formal complaint against Cleveland Electric Illuminating Company (CEI). The complaint alleged that Cleveland had commercially operable capacity insufficient to meet its load, that it had attempted unsuccessfully to obtain a synchronous interconnection with CEI and that as a consequence of its isolated operation it had experienced blackouts

from forced outages and was likely to experience more.

CEI had arranged transfer to approximately 26,000 KVA of Cleveland's load to CEI at a rate which Cleveland alleged was fixed originally by an agreement which was embodied in City Ordinance No. 115-70. The ordinance specified an agreement between CEI and the City would "provide further that the CEI shall sell said power to the City at a rate not to exceed 30 cents a month per KVA demand, $0.0085 per KWH for ten million KWH, and $0.005 per KWH above ten million." Ordinance 115-70 was repealed by Ordinance 161-70 on January 19, 1970 but the repealing ordinance repeated the same agreed price for power purchased.

CEI wrote letters subsequent to the enactment of the ordinance attempting to change the basic understanding and establish a modification of the rate so as to make the price higher than the maximum set by the original agreement and the ordinance. The letters were filed by CEI with the Federal Power Commission and the Federal Power Commission accepted them for filing as CEI's Rate Schedule No. 7 with supplements.

Cleveland's complaint alleged that the letters changed the agreement between CEI and Cleveland in certain ways. The letters were approved by Cleveland's then Director of Utilities and Assistant Director of Law but both of these officials have given affidavits now

a part of the record as Exhibits 37 and 38 in which they say that they did not have any knowledge that the language contained in the letters purported to exceed the price for power theretofore agreed to and incorporated in the ordinance or they would not have approved them.

The present Commissioner of Light and Power of the City of Cleveland, Warren Hinchee, came to Cleveland on March 15, 1971 (15 Tr. 21).* At that time the City's generating units were in sad disrepair. Hinchee immediately stepped up work to put the machines in commission as quickly as possible. He also noted for the first time that CEI's billings were not in accord with the original agreement and the price of power incorporated in Ordinance 161-70.

The questions initially posed to the Examiner were whether Cleveland should have a snychronous interconnection with CEI and at what voltage level any interconnection or interconnections should be operated, what should have been the price of power for energy sold over the load transfer points and what should be the price of power prospectively for energy sold by load transfer and/or by other interconnection or interconnections in the future. Also how much, if anything did Cleveland owe CEI for service.

---

*Two prehearing conferences were held in these proceedings, one on February 10, 1972 and the other on February 15, 1972. Transcripts will be designated 10 Tr._____ and 15 Tr._____.

II

SUMMARY OF THE BASIC POSITION OF CLEVELAND

It is Cleveland's basic position that there should be two interconnections with CEI, one a 69 KV which can be made very quickly, and the other at 138 KV which will take approximately twenty-four months owing to the lag time in procurement of equipment. It is Cleveland's position that both of these connections should be operated snychronously and with switches closed.

It is Cleveland's position that the price of power purchased from CEI through load transfer was fixed in the ordinance and that CEI agreed to this at the time the ordinance was passed and by subterfuge CEI later attempted unilaterally to raise the rate, which attempt did not result in changing the legal rate or in any way modifying the rate agreed upon and prescribed by Ordinance 161-70.

It is Cleveland's position that the Examiner erred in not ordering the 69 KV interconnection to be operated with switches closed; that the Examiner erred in not adopting the price of power to the end of May, 1972 as agreed to in Ordinance 161-70. It is further Cleveland's position that any increase subsequent to the end of May, 1972 is subject to price commission regulations and that the increase adopted by the Examiner in his opinion is more than a 50% increase in

the cost of power which violates price commission regulations. It is finally Cleveland's position that the Examiner erred in completely ignoring the anticompetitive acts committed by CEI against Cleveland and that those anticompetitive acts should be borne in mind by the Commission in any change of rates to prevent CEI from getting an unwarranted competitive advantage over Cleveland.

Cleveland excepts to the conclusion drawn by the Examiner, Paragraph 1, P. 16 of the Examiner's Decision, wherein he specifies a 69 KV "non-snychronous open switch interconnection." Cleveland does not except to the price established by the Examiner for emergency service at 16.8 mills per KWH, but does except to the rate for continuation of load transfer at 13.8 mills per KWH.

As previously indicated Cleveland excepts to Paragraph 3 of the Examiner's Conclusion, P. 16 aforesaid because of the obvious and virtually admitted anticompetitive practices of CEI.

As to the first six of the "additional findings and conclusions", P. 17 of the Examiner's Decision, Cleveland excepts only to the provision of a 69 KV open switch non-snychronous interconnection.

Cleveland excepts to Finding No. 7, P. 17 as to the rate as heretofore indicated.

As to the Examiner's Order, Cleveland again excepts to

provision for a 69 KV open switch non-snychronous interconnection and it excepts to the provision for a change in rate as hereinbefore stated.

Cleveland does not except to the other provisions in the Order, including a provision for a 5% penalty if Cleveland does not pay its bills within forty-five days of receipt and an additional 2-1/2% if not paid within sixty days.

Finally, Cleveland excepts to a statement made on Page 10 of the Examiner's Decision, as follows:

> "Accordingly, Rate Schedule FPC No. 7, as supplemented, is the legal rate for service prior to May 19, 1972, and CEI claims $788,239.48, for such load transfer service as of May 19, 1972."

Cleveland has reported to the Commission and to the Department of Public Utilities, City of Cleveland, its claim that as of May 31, 1972 it was due $733,696.19. (See Attachment "A", P. 3).

III

THE GROUNDS UPON WHICH THE EXCEPTIONS REST

The grounds upon which the exceptions rest in this case are that the Examiner, in the portions of his Initial Decision, his conclusions and his order, which have been excepted to, leaves himself unsupported by facts and at odds with predominantly existing law.

Details of these grounds are hereinafter stated.

IV

ARGUMENT

1. The Ordinance Specified the Contract Rate and the Examiner is Unsupported by Evidence in His Comments about CEI's Claims for Amounts Due From Cleveland.

As indicated above, the Examiner, on Page 10 of his opinion stated that CEI claims "$788,239.48 for load transfer service as of May 19, 1972." Nowhere in the record have we been able to find the basis of that figure. CEI reports as of the end of June, 1972 as indicated in Attachment "A", Page 3 that the "total due CEI from previous bill $733,696.19." This is a statement that CEI claims that figure to be due as of the first of June, 1972, including excise tax.

But the Examiner, PP 12 and 13 of his opinion states that the rates established by this Commission should exclude excise tax, leaving it to the state court to determine whether the tax is applicable.* In the original brief filed with the Examiner a review of the excise tax statute was given, Ohio Revised Code, §§ 5727.32, 5727.33

*Attachment "B" to this brief gives a recomputation of the actual amounts due CEI if the so-called rate schedule 7 as supplemented were the legal rate. This Attachment shows face amounts of bills less tax and less payments.

and 5727.38. These sections specifically exclude and exempt receipts from interstate business and it was pointed out to the Examiner that the exemption of interstate business and the application of the tax only to "intra-state business" was the consequence of a supreme court decision in East Ohio Gas v. Tax Commission, 238 U. S. 465 (1931). There the Supreme Court knocked down the gross receipts tax as it might otherwise have applied to interstate gas transfers, saying that such a tax was voided by the Commerce Clause of the Federal Constitution. After that decision was handed down the Ohio Legislature amended the act to exempt receipts from interstate transactions.

So we have a statement of CEI that to the end of May and including gross receipts tax they claim $55,000 less than the Examiner states in his opinion was due on May 19, 1972. But we urge this Commission not only that the gross receipts tax is obviously inapplicable but the legal rate was that reached by agreement of the parties prior to and inserted in Ordinance 161-70. It was the agreement fixed by CEI and the City Council and even though the so-called "letter agreements" were subsequently approved by the directors of utilities and law, those letter agreements could not have altered the prior agreement and a determination by the council.

And so with respect to the attempted changes in the so-called "letter agreements" which followed it is important to look at the Charter of the City of Cleveland which is in the record as Exhibit 36. It provides as follows:

> "All contracts, agreements or other obligations entered into and all ordinances, passed, resolutions and orders adopted, contrary to the provisions of the preceding sections, shall be void, and no person whatever shall have any claim or demand against the city thereunder, nor shall the council, or any officer of the city, waive or qualify the limits fixed by any ordinance, resolution or order, as provided in section 106, or fasten upon the city any liability whatever, in excess of such limits, or release or relieve any party from an exact compliance with his contract under such ordinance, resolution, or order." (Emphasis added.) (Charter of the City of Cleveland § 109.)

It is also well to recall that the city directors who purported to approve the letter agreements both under oath deny that they understood the trick that CEI was attempting to pull to raise the rate since they were not experts in such matters as CEI was. (See Exhibits 37 and 38).

This Commission Regulation § 35.1(d) prohibits a utility from collecting a rate "which is different from that provided in a rate schedule required to be on file with this Commission. . . ." (Emphasis added.) The law is perfectly clear that an agreement reached between parties can become an effective legal rate without

being filed. St. Michaels Utilities Commission v. Eastern Shore Public Service Company of Maryland 31 F.P.C. 1161 (1964). Here the Commission directly holds that a contract between parties is controlling and cannot be unilaterally changed even though it is not properly filed.

St. Michaels cites the City of Colton v. Southern California Edison 26 F.P.C. 223 (1961). In this case Southern California Edison and Colton had a contract which included a rate and the contract was never filed. The Commission stated "the fact that the contract rate was not filed does not prevent our jurisdiction from attaching." 26 F.P.C. at 232, and held that the contract though unfiled was the only lawful rate until changed by order of the Commission.

These cases bring to play the Sierra-Mobile Doctrine*, wherein the Supreme Court has held that a unilateral filing by a party cannot alter a legal contract rate such as has here attempted to be done.

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*F.P.C. v. Sierra Pacific Power Company 350 U.S. 348 (1956) United Gas Pipeline Company v. Mobile Gas Service Corporation 350 U.S. 332 (1956).

2. The Price of Power Since the Expiration of the So-called FPC Rate Schedule No. 7 Cannot be Supported.

Though we urge, as hereinabove stated, that the only legal rate was the rate as specified in Ordinance 161-70, even if FPC Rate Schedule No. 7 were the legal rate, the change of that rate to 13.8 mills directed by the Examiner in his Inition Decision is insupportable. Mr. Hinchee, Commissioner of Utilities for Cleveland, testified that under the billings being received by Cleveland, including the excise tax, the price came out at approximately 9.25 mills per KWH. (Tr. 257). A change from 9.25 including excise tax to 13.8 exclusive of excise tax is slightly more than a 50% increase over and above a rate which we say was much higher than the legal rate. It would be very substantially more than 50% higher than the rate originally agreed upon and specified in the ordinance.

If this Commission is to give any concern to price stabilization guide lines and to regulations of the price commission this is completely unwarranted. Not only is a 50% or more jump in the rate for power purchased by Cleveland a violation of price guide lines it allows CEI to continue its anticompetitive advantage, which is a part of the argument hereinafter made.

Cleveland makes no complaint about the rate the Examiner

specified for emergency power for, though that rate seems high it is to some extent consistent with rates for emergency power now currently in vogue.

Cleveland in its initial brief requested a rate established in the manner of Cleveland's computation in Exhibit 39 (as provided in the ordinance) with addition of fuel escalation as CEI applies fuel escalation in contracts with other bulk power suppliers. This protects CEI, gives it a reasonable return and yet does not permit CEI an excessive rate imposing upon Cleveland an anticompetitive disadvantage.

3. All Interconnections Should be Snychronous With Switches Closed.

Cleveland Witness, Hinchee, testified about the serious problems created by a non-synchronous open switch interconnection. He states that if he needs power on an emergency basis and the switches are open it causes him to have an outage which might run to an hour or two of switching interruptions. He states:

> "If we have the switch closed and we are operating synchronous and we lost a unit and we have an emergency, there is no reason to have service interrupted. We would not take power unless we did lose a unit. If we are starting up No. 5 boiler right now, I presume we would be buying power right at this particular time but it would be of short duration. By 5 or 6 o'clock tomorrow No. 5

> boiler would be on the line and we would cease the purchase of emergency power. That is the advantage of the synchronous tie in a closed position to the City. That is what we feel is necessary. Our system has been interrupted and abused and this is abusive of equipment. This in itself generates failures of equipment when you are constantly knocking them off the line and having switches opened, you know, and interrupted because the system falls apart. This is abusive and creates additional causes of failure of equipment itself." (Tr. 213).

The fact is that the Examiner has provided a "blackout" type interconnection in his initial opinion without any reason whatsoever. The Commission made the same mistake in its order issued March 8, 1972. It is well to remember that Commissioner Carver, dissenting from that order, commenting:

> "The 'emergency' now being acted upon is neither more nor less than the 'emergency' which has existed for months or years heretofore. The effect of the order of the Commission for a non-synchronous interconnection at 69 kilovolts does not serve the cause of reliability; it does not achieve anything resembling appropriate relief from an electric reliability standpoint. It meets only the public relations objective of making it appear that the Commission has taken constructive action following an outage on the Cleveland city system which got a lot of political and media attention."

It is obviously true that a 69 KV interconnection operated on a snychronous basis would not provide all the backup that Cleveland

needs, but it was quite obvious from Hinchee's testimony and virtually undenied in the record that a snychronous tie at 69 KV is infinitely more valuable to Cleveland than a tie with open switches. We submit the concern of the Commission here should be to avoid blackouts in Cleveland and if that is so there is no reason to support the Examiner's recommendation.

4. The Commission Should not Turn its Back on Anti-competitive Practices of CEI but They Should be Condemned by the Commission and Should be Considered in Prescribing Terms and Conditions of Future Service.

In the Initial Decision the Examiner sweeps under the rug the anticompetitive practices of CEI, so clearly established in the record, blandly saying: "The city did not present any testimony at the hearings on CEI's anticompetitive practices, nor did it cross-examine CEI's witnesses on this issue." (Initial Decision, P. 14)

The Examiner does this in the face of the captured in-house document which was a memorandum to Lee C. Howley, Chief Counsel of CEI from an official of the company in which one of the "major objectives--1971" is stated "to reduce and ultimately eliminate the tax subsidized Cleveland and Painesville Municipal Electric System." (Exhibit 24). This is a complete admission on CEI's part that its aim is to destroy its competitor and to have the Examiner

say there is no evidence of anticompetitive practices is preposterous.*

Other anticompetitive practices which the Examiner rejected are such things as the insistence of CEI on a blackout type interconnection for Cleveland and its attempt to foist an illegal type of tax on Cleveland knowing of its illegality, simply to increase the burden of expense and put Cleveland at an anticompetitive disadvantage.

If the Examiner can ignore these practices, he can ignore anything insofar as anticompetitive activity is concerned. So we suggest that the Commission, if it believes the Act has any policy against anticompetitive practices, these matters should be recognized and taken into consideration in regulating the relationship between Cleveland and CEI.

V

CONCLUSION

Cleveland, in conclusion, recommends the following order:

1. The calculation for amounts due CEI from Cleveland shall be recapitulated to accord with the original agreement between the

*In this brief writer's experience this compares to a situation he observed in a small county court house in Kentucky many years ago where a jury was empaneled solely to fix the penalty of a felon who had pleaded guilty. The jury went to the Jury Room, deliberated for thirty minutes and returned with a verdict of not guilty.

parties as specified in Ordinance 161-70 through the end of May, 1972. Subsequent to that time the rate fixed for all power provided except emergency power shall be 30 cents per month per KVA demand with energy at $0.0085 per KWH for a total of ten million KWHS and $0.005 per KWH above ten million together with fuel escalation as presently in effect between CEI and other bulk power suppliers.

2. Both the 69 KV and the 138 KV shall normally be operated synchronous with switches closed.

3. The anticompetitive practices heretofore engaged in by CEI against Cleveland are hereby recognized and condemned and the Commission will monitor these practices in the future so as to prevent CEI from taking illegal competitive advantage of Cleveland.

4. The conclusions, findings and order of the Presiding Examiner are adopted except to the extent that they are inconsistent with 1, 2 and 3 above.

Respectfully submitted,

BROWN, TODD & HEYBURN

By _____

Philip P. Ardery
1600 Citizens Plaza
Louisville, Kentucky 40202

August 9, 1972

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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Department of Public Utilities, City of Cleveland

Billing Memorandum - Month of JUNE 1972

For Service from 5-31-72 through 6-30-72

Load Transfer Energy Charge: (See Exhibit A)		$ 188,415.05
Total kWh = 10,716,574		
Temporary 69 kV Emergency Service: (See Exhibit B)		$ -
Total kWh = -		
Total Charge for Electric Service		$ 188,415.05
Total Arrears (See Exhibit C)		$ 642,487.73
Total Other Charges (See Exhibit D)		$ -
Total Amount Due CEI		$ 830,902.78

J. R. GUY

R. C. L. H. Wurster

Designated Alternate During Absence — Date

Approved: _____

Superintendent -- System Operation and Test Department

ATTACHMENT "A" -Sheet No. 1

The Cleveland Electric Illuminating Company

Billing, Pursuant to:

Department of Public Utilities, City of Cleveland

Load Transfer Form 29

For Service from 5-31-72 through 6-30-72

1. Energy Charge:

Total KWh = 10,766,574

KWh @ $.0175 x 10,766,574 KWh = $ 188,415.05

2. KWh Metered Energy:

Location	Meter Registration Present	Prior	Diff.	Meter K	Total KWh
From CEI Clinton Sub	4791	4638	153	30,000	4,590,000
From CEI V-380-LS-G	6592	6309	283	8,000	2,264,000
From CEI V-417-LS-G	3103	2990	113	16,000	1,808,000
From CEI V-537-LS-G	6195	5995	200	4,082	816,400
From CEI Clark Sub	7266	7003	263	4,898	1,288,174
Total KWh:					10,766,574

The Cleveland Electric Illuminating Company
Billing Memorandum to
Department of Public Utilities, City of Cleveland

Arrears

Total Due CEI from Previous Bill	$ 733,696.19
Less: Payments Received During Month:	
Date 6-27-72	$ - 91,208.46
Date -	
Arrears as of Billing Date	$ 642,487.73

CEI-MELP BILLING AND PAYMENT SUMMARY

		MONTHLY BILL	OHIO TAX	PAYMENTS	PAYMENT DATE
1970	February	$ 42508.55	$ 1634.94	$ 42508.55	4-16-70
	March	94333.10	3628.20	94333.10	5-27-70
	April	83183.70	3199.37	83183.70	6-11-70
	May	39978.60	1537.64	39978.60	8- 3-70
	June	134964.00	5190.92	134964.00	11-10-70
	July	207776.90	7991.47		
	August	222269.40	8548.82		
	September	209728.30	8066.42		
	October	183126.60	7043.33		
	November	193260.50	7433.10		
	December	179026.20	6885.62		
1971	January	157098.70	6042.26		
	February	107777.30	4145.28	107777.30	3-24-71
	March	110935.90	4266.77	400000.00	7- 2-71
	April	102330.50	3935.79	400000.00	8-13-71
	May	103268.90	3971.88	692367.06	11-10-71
	June	98652.40	3794.32	93843.46	12-17-71
	July	72638.30	2793.78		
	August	75609.90	2908.07		
	September	103959.10	3998.43		
	October	116151.50	4467.37	100401.12	1-31-72
	November	108430.10	4170.39	89248.32	2-25-72
	December	105655.70	3691.17	93856.59	3-20-72
1972	January	110704.70	4257.87	95950.66	4- 6-72
	February	109423.99	4208.62	95665.15	5- 5-72
	March	112623.98	4331.70	97764.42	5-24-72
	April	101665.11	3910.20		
	May	109313.53	4204.37		
g Adj. e, CEI		8828.15		9685.39	12-31-71 Credi
		3,405,223.61	130,258.10	2,671,527.42	
				91,208.46	6-26-72
				95,372.40	8- 2-72
		$ 3,405,223.61	$ 130,258.10	$ 2,858,108.28	

Total C.E.I. Billing thru 5-31-72	$ 3,405,223.61
Less Melp Payments thru 5-31-72	2,671,527.42
Total Balance thru 5-31-72 Per F.P.C. Rate #7	$ 733,696.19
Less Ohio Excise Tax	130,258.10
Balance as of 5-31-72 Per F.P.C. Rate #7	603,438.09
Less Payments Made After 5-31-72 for Service thru 5-31-72	186,580.86
Balance Per F.P.C. Rate #7 For Service thru 5/31/72	$ 416,857.23

1972	June	188,415.05	7246.74	
		3593,638,66	137,504.84	$ 2,858,108.28

RS:mcm
7-31-72

ATTACHMENT "B"

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon all parties of record in this proceeding in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Louisville, Kentucky, this 9th day of August, 1972.

Philip P. Ardery, Counsel for
the City of Cleveland, Ohio

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

City of Cleveland, Ohio	)	
	)	
v.	)	Docket Nos. E-7631
	)	and E-7633
Cleveland Electric Illuminating Company	)	
	)	
and	)	
	)	
City of Cleveland	)	Docket No. E-7713

REPLY BRIEF
OF
THE CITY OF CLEVELAND

I
INTRODUCTORY STATEMENT

There is much in the brief of the Commission Staff that the City of Cleveland agrees with. There is some discussion in the CEI brief that Cleveland also agrees with. The main points of disagreement between Cleveland and CEI and the Commission Staff are:

(a) Was not the legal rate the rate specified by Cleveland's Ordinance No. 161-70 despite the fact that it was never filed? We say it was the legal rate; CEI and Staff say it was not.

(b) Should not an emergency 69 kv interconnection be operated

switches closed, limited to 40 mva capacity. We say yes, Staff and CEI say no.

(c) Should not the anticompetitive practices of CEI in the past affect the terms and conditions of present and future service set by the Commission? We say yes; Staff says the practices employed by CEI are "normal". (Staff Brief p. 53); CEI says nothing.

(d) What should the terms and conditions be for an interconnection between Cleveland and CEI for temporary emergency service at 69 kv, for load transfer service, and for permanent interconnection at 138 kv? For temporary emergency service we say we would pay 17.5 mills per kwh or cost plus ten percent whichever is higher but only if the interconnection is operated closed For service at load transfer points we say the rate should be fixed by Ordinance 161-70 plus fuel escalation. Staff and CEI say the load transfer rate should be much higher. For permanent service at 138 kv we say terms and conditions should be as prescribed in Appendix 1 to our initial brief. Staff and CEI disagree.

This Reply Brief will be addressed to these points respectively.

II

THE LEGAL RATE BETWEEN CLEVELAND AND CEI IS THE RATE SPECIFIED IN ORDINANCE NO. 161-70

It is quite evident from the testimony that Ordinance No. 161-70 should have been filed with the Commission. This ordinance in part specified "CEI shall sell. . .power to the City at a rate not to

exceed 30¢ per month per kva demand, $0.0085 per kwh for 10 million kwh and $0.005 per kwh above 10 million." Clement T. Loshing, rate expert for CEI and one of CEI's chief witnesses was asked:

"Q. Why wasn't the ordinance filed with the Federal Power Commission?

"A. That is a legal question, I do not know. I think I would defer to my counsel on that.

"Q. Whose responsibility would it have been to file it?

"A. Our legal department.

"Q. Would that include Mr. Howley?

"A. Yes, it would." (Tr. 500-501).

When Lee C. Howley, Vice President and General Counsel of CEI was questioned on the same subject, he was asked:

"Q. Mr. Howley, on the top of page 15 again you mention Ordinance 16170 and you mention the so-called letter agreements. Did this ordinance play any part in establishing the rate between Cleveland and CEI?

"A. Did the ordinance?

"Q. Yes.

"A. Well, to some extent, but I think greatly it was changed and worked out over the months that followed when the problems were recognized.

"Q. Would you say the ordinance had something to do with the rate?

"A. Yes, it did.

"Q. If it had something to do with it, why wasn't it filed with the Federal Power Commission?

"A. I don't know. I didn't think it was necessary. You are talking about the local municipal ordinance?

"Q. Yes, I am talking about the ordinance you just read from.

"A. We didn't think it was necessary at the time.

"Q. Isn't it true that you just didn't want it in the Federal Power Commission files?

"A. No, not at all.

"Q. Explain that?

"A. I don't know why we wouldn't want it in. I would have no objection to that ordinance.

"Q. So you don't know why it wasn't filed?

"A. No.

"Q. Would it have been your responsibility as Chief Legal Officer to see it was filed?

"A. Yes, if we thought it was necessary." (Tr. 425-426.)

For all the effort made by CEI witnesses to contend that the so-called "letter agreements" made no change in the agreement specified in the ordinance, it is quite clear that CEI is not willing to bill according to the specifications of the ordinance but insists on the higher rate established by the "letter agreements". (Tr.497 et seq.

Exhibits 37 and 38 are affidavits of Robert J. Kapitan and Ben S.Stefanski. Kapitan was the Assistant Director of the law of Cleveland, who ok'd the letter dated January 20, 1970 which purported to change the ordinance provision. He states he had no idea that the letter made any change in the rate and that had he had any idea that it did purport to change the rate he would not have approved it. In any event § 109 of the City Charter (Ex. 36) makes it impossible for any city officer to waive or qualify that which is established by ordinance.*

Stefanski was the Director of the Department of Public Utilities at the time the so-called letter agreements were approved. He said that he thought the letter made no change in the rate established by the ordinance. These affidavits show conclusively that the "letter agreements" constitute a simple attempt on the part of CEI unilaterally to hike the rate.

With regard to the law applicable to such matters the Commission Staff makes a very good argument in favor of Cleveland's position

*Staff brief p.3 states the ordinance was passed January 21, 1971. The ordinance shows on its face to have been passed January 19,1971 (Ex.5).

without appearing to understand it, as indicated in the Staff Brief, page 10 et seq. Commission Regulation, § 35.1(d) prohibits a utility from collecting a rate "which is different from that provided in a rate schedule required to be on file with this Commission..." (emphasis added).

The cases cited by the Commission Staff are all in favor of the position taken by Cleveland in this case. St. Michaels Utilities Commission and Commissioners of St. Michaels, Maryland v. The Eastern Shore Public Service Company of Maryland, 31 F.P.C. 1161, 1172 states:

> "That contract between the parties is controlling and cannot be unilaterally changed by the action of one of the parties. See United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U. S. 332, F.P.C. v. Sierra Pacific Power Company, 350 U. S. 348. Consequently, the reduced rates contained in Resale Service Schedule No. 1 are the legal rates of Eastern Shore after May 1, 1963, notwithstanding its omission to complete a proper rate schedule filing. See City of Colton v. Southern California Edison Company, 26 F.P.C. 223, 232."

As the Commission says, the contract between the parties is controlling. Here the contract was the ordinance which had previously been agreed to by CEI. It is obvious that this ordinance was a rate schedule "required to be on file" with the Commission as specified by § 35.1(d) of the Commission's Regulations. The Colton case cited in St. Michaels was also a case where a contract had not been filed

and yet was held to be the legal rate. The Sierra and Mobile cases, also cited in St. Michaels and in Cleveland's initial brief, give the authority of the Supreme Court to the principle that a filing like that attempted here does not suffice to change a contract between a regulated utility such as CEI and a customer such as Cleveland.

It is difficult to understand the Commission Staff quoting Colton as supporting any contention other than that of Cleveland, where the Court says:

> "The fact that the contract rate was not filed does not prevent our jurisdiction from attaching. . . the contract rate, even though unfiled became and remained the only lawful rate until changed by order of the Federal Power Commission." Commission Staff Brief, page 14.

How Staff could cite such cases as being in support of Staff's position that the "letter agreements" effectively changed the contract is indeed difficult to understand. The Staff later says the contract as specified by the ordinance was not effective "simply because it was not filed." (Staff Brief, page 16). This is directly contrary to the law Staff cites.

III

AN EMERGENCY 69 kv INTERCONNECTION OPERATED SWITCHES CLOSED LIMITED TO 40 MVA CAPACITY SHOULD BE ESTABLISHED BETWEEN CLEVELAND AND CEI AS SOON AS POSSIBLE.

The Commission Staff argues for an open switch emergency inter-

connection. Staff Brief, p. 22, et seq. CEI refers to such an interconnection saying "all the parties are now agreed that this should not be a normally closed tie." CEI, Proposed Findings, p. 22. This is obviously untrue as indicated in Cleveland's initial brief and its requested findings. To Cleveland an open interconnection is a blackout type interconnection. As noted in various places in Cleveland's initial brief, Cleveland witness, Hinchee, makes it clear that he wants backup so that Cleveland does not have to be in a state of blackout for an extended period of time until switches can be closed and other procedures followed, to enable the emergency service to be provided.

Perhaps one of the best observations made about the comparison of a synchronous or closed as compared to a nonsynchronous or open interconnection is the comment made by Commissioner Carver in his dissent in the order issued March 8, 1972 herein. Commissioner Carver says:

> "The 'emergency' now being acted upon is neither more nor less than the 'emergency' which has existed for months or years heretofore. The effect of the order of the Commission for a non-synchronous interconnection at 69 kilovolts does not serve the cause of reliability; it does not achieve anything resembling appropriate relief from an electric reliability standpoint. It meets only the public relations objective of making it appear that the Commission has taken

> constructive action following an outage on the Cleveland city system which got a lot of political and media attention."

Passing from the situation as Commissioner Carver sees it to further details of the situation confronting us, it is quite apparent that the Commission Staff has erroneously interpreted the testimony with regard to the CEI Lake Shore switch house. Commission Staff says with regard to the five 69 kv cables leading into the switch house "operation without all five 69 kv cables would result in severe overloading of some facilities during any CEI outage on the Lake Shore-Newburgh area." Staff Brief, p. 24. The Staff Brief on the same page talks about CEI having only a 24 mva margin which it says "represents approximately 5% of the total load at that substation."

In using that language Staff has completely misinterpreted the testimony of the CEI witness, Harold L. Williams. Mr. Williams, a vice president of CEI in charge of engineering, shows the total capacity at Lake Shore-Newburgh as being 694 mva and the load as 450 mva leaving a reserve of 244 mva. Even with an outage of two ninety megawatt units which would subtract 180 mva, there is 64 mva yet remaining as unallocated reserve. (Tr. 685). In other words, the real reserve at Lake Shore-Newburgh is 180 plus 64, or 244 mva. If 40 mva (one

cable) were allocated to Cleveland, the remaining reserve would be 204 mva. Such a reserve is not 5% as stated by Staff but more than 45%. And so if we want to go so far as to count a single maintenance outage plus a single contingency loss netting 180 mva, a release of one line for Cleveland would still leave 24 mva unallocated reserve.

Staff's discussion of reserves is a departure from the almost impossible into a completely fanciful never-never land. It violates all reasonable standards of calculating and maintaining reserves, and conclusively shows that Staff has failed to make a proper analysis of the testimony.

In addition to the abundant reserves as shown in Mr. Williams testimony, Cleveland witness, Hinchee, at the conference of February 15 talks about the Newburgh-Lake Shore location, as reported by CEI to the Commission. He states that in the latest year reported, the five lines, one of which might be allocated to Cleveland, sustain loading on all five of only 30 megawatts at peak with normal use at 15 megawatts. (15 Tr. 45).

CEI witness Sener in his prepared testimony talked about the operators at Lake Shore maintaining proper balance between power infeeds and loads. (Tr. 570). He was asked on cross examination if a cable went out would an operator have any trouble maintaining

balance. He stated he could do that without serious difficulty. (Tr. 584).

Also, it is to be remembered that all of the arrangements proposed to be made between Cleveland and CEI are on a when, as and if basis and obviously if all of CEI's generation in its entire system went down at once, Cleveland would not expect to draw from the Lake Shore-Newburg connection.

One further comment appears appropriate at this point. Staff talks about ECAR and states "the Cleveland Electric Illuminating Company (Company) conforms to the principles and obligations which the interconnected parties are expected to comply." Staff Brief, p. 44. Staff then cites testimony of CEI witness Sener at Tr. 558-563. It is true Mr. Sener went over the ECAR standards but he carefully avoided testifying that CEI complied with the established standards. When asked on cross examination if CEI did comply he responded: "The ECAR standards are in here as -- I am afraid I can't answer that question." (Tr.579, 580)

So there is absolutely no support for the conclusion of Staff. The position of Cleveland is that it will measure up to the standards on a basis reasonably comparable to the way CEI and other participants do. More should not be expected of it.

There can be no doubt CEI has ample capacity at Lake Shore to

take care of its own needs and Clevelands with adequate reserves. The only remaining question is whether this Commission believes that people being served by the Cleveland system should be blacked out for a period of time, even if it is only a half hour. If so then the order would normally follow that the switches on the 69 kv interconnection would be left open. If on the other hand the Commission believes it is in the public interest to prevent blackouts, then it seems clear that the suggestion made in the Cleveland testimony that the interconnection should be synchronous with the switches closed is appropriate.

IV

THE ANTICOMPETITIVE PRACTICES OF CEI IN THE PAST SHOULD BE CAREFULLY CONSIDERED IN ESTABLISHING TERMS AND CONDITIONS FOR PRESENT AND FUTURE SERVICE.

The Commission Staff brief gives the anticompetitive activities of CEI a simple brushoff. With regard to the Bridges Memorandum stating the goal of CEI to eliminate Cleveland as a competitor, Staff says this "constitutes normal competitive practices." Staff Brief, p. 63. It would be odd if the Commission should adopt such an attitude making it policy to leave to the Justice Department the responsiblity of washing linen more appropriately consigned to FPC.

Certainly an attempt on the part of one competitor to dominate

another or to eliminate another as a competitor is not considered legal by Justice. We will not reiterate examples given in Cleveland's initial brief here, except to say that the many things CEI has done to Cleveland to reduce Cleveland's effectiveness as a competitor present a picture of predatory practice which runs seriously counter to the responsibility of this Commission to do what is "necessary or appropriate in the public interest." The proposed findings filed as a brief for CEI give no concern to this aspect of the case at all.

Cleveland, therefore, renews its request for an order which takes into consideration these practices in past relationships and which seeks to improve Cleveland's competitive position in the future.

V.

CONCLUSION

In conclusion Cleveland can do little but reiterate what it said in the beginning of this case. Cleveland wants to be treated not as a captive customer of CEI but as a bulk power producer in the same spirit that this Commission and the Supreme Court of the United States directed the Florida Power Corporation to treat Gainesville, Florida. Gainesville Utilities Department et al. v. Florida Power Corporation, 402 U.S. 515 (1971).

Cleveland believes this can best be done by following the requested findings in its initial brief. Particularly for the long term arrangement between Cleveland and CEI covering the 138 kv interconnection, Cleveland believes the arrangement specified in Appendix 1 to its initial brief would put Cleveland on the same basis that CEI deals with other utilities. As regards load transfer service, Cleveland believes this should be as specified in Ordinance 161-70 with fuel escalation added. As to emergency service, Cleveland has indicated its willingness to pay 17.5 mills per kwh if the interconnection is operated with switches closed.

It seems to us that it takes these essentials to put Cleveland on a footing reasonably comparable to the way CEI is treated by other utilities and to the way CEI treats others.

Respectfully submitted,

BROWN, TODD & HEYBURN

By _____

Philip P. Ardery
1600 Citizens Plaza
Louisville, Kentucky 40202

Attorneys for Cleveland

May 26, 1972

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon all parties of record in this proceeding in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Louisville, Kentucky, this 26th day of May, 1972.

Philip P. Ardery, Counsel for
the City of Cleveland, Ohio

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

City of Cleveland, Ohio	)	
	)	
v.	)	Docket Nos. E-7631 and E-7633
	)	
Cleveland Electric Illuminating Company	)	
	)	
and	)	
	)	
City of Cleveland	)	Docket No. E-7713

REPLY BRIEF

OF

CITY OF CLEVELAND, OHIO

BROWN, TODD & HEYBURN
Sixteenth Floor
Citizens Plaza
Louisville, Kentucky 40202

Attorneys for City of Cleveland

Philip P. Ardery
BROWN, TODD & HEYBURN

May 26, 1972

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TABLE OF AUTHORITIES

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

OPINION NO. 759

Gulf States Utilities Company	)	Docket Nos. E-8600, E-8601, E-8003, E-7676, et al. , and Docket No. E-7567.
v.	)	
Federal Power Commission	)	

OPINION AND ORDER AFFIRMING AND MODIFYING INITIAL DECISION OF PRESIDING ADMINISTRATIVE LAW JUDGE APPROVING SETTLEMENT

Issued: April 12, 1976

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Gulf States Utilities Company	)	Docket Nos. E-8600, E-8601, E-8003, E-7676, et al. and Docket No. E-7567.
v.	)	
Federal Power Commission	)	

OPINION NO. 759

APPEARANCES

B. H. Hughes for Gulf States Utilities Company

Robert C. McDiarmid for the Cities of Lafayette, Louisiana and Plaquemine, Louisiana.

Walter E. Workman for Central Louisiana Electric Company.

Richard Boone for the Staff of the Federal Power Commission.

INITIAL RATE, INTERCONNECTION, JURISDICTION DISCLAIMER, PRACTICE AND PROCEDURE, BURDEN OF PROOF, RATE FILING

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Gulf States Utilities Company	)	Docket Nos. E-8600, E-8601,
	)	E-8003, E-7676, et al.,
v.	)	and Docket No. E-7567.
	)	
Federal Power Commission	)	

OPINION NO. 759

OPINION AND ORDER AFFIRMING AND MODIFYING INITIAL DECISION OF PRESIDING ADMINISTRATIVE LAW JUDGE APPROVING SETTLEMENT

(Issued April 12, 1976)

On August 18, 1975, Presiding Administrative Law Judge Isaac D. Benkin issued an initial decision which would approve agreements between Gulf State Utilities Company (Gulf) and the Cities of Lafayette and Plaquemine, Louisiana (Cities) providing for settlement of long-standing disputes between Gulf and the Cities concerning alleged anticompetitive practices. The agreements would provide interconnection facilities between Gulf and the Cities, reciprocal sale of power, particularly during emergency periods, between the parties and the rates to be charged for such reciprocal service. The prime consideration for Gulf finally agreeing to transmit power for the Cities and to sell Cities emergency power is an agreement on the part of the Cities to cease further litigation with reference to anticompetitive issues both before the Commission and in the United States District Court, and further to drop its opposition to the issuance of certain mortgage bonds pending before the Commission in Docket No. E-7567.

We will affirm the initial decision of the Presiding Administrative Law Judge with certain modifications. We will modify his decision to the extent of dismissing, without prejudice, charges by all parties against any other parties in

these proceedings with reference to antitrust matters in any of the pending dockets. Both the decision below and the briefs submitted by the parties indicate that the parties will be able to settle their differences without further litigation of these issues in the Commission. Additionally there is now pending an antitrust action in the United States District Court for the Eastern District of Louisiana involving the same issues. We emphasize that should the parties reveal that the Commission can provide additional remedies notwithstanding the settlement approved herein they may refile complaints. Further the description of the facts in this case which follows is not intended to be binding either in this Commission or in any other forum insofar as it concerns allegations of violations of anti-trust law.

This matter involves a long-standing dispute over many years and in many forms between a number of parties. The matter involves not only Cities and Gulf, but Louisiana Power and Light (LP&L), the Central Louisiana Electric Company (CLECO), the Cajun Electric Power Cooperative, Inc. (Cajun) 1/

BACKGROUND

I E-7676, et al.

On October 16, 1970, the Commission noticed the application of Gulf in Docket E-7567 to issue $30,000,000 in first mortgage bonds. On November 2, 1970, Cities filed a Protest and Petition to Intervene in that docket, pointing out that the money sought would further a pre-existing combination or conspiracy of Gulf, LP&L, CLECO and others, which had sought to extinguish a pool set up to allow Cities, and Cajun in cooperation with Dow Chemical Company, to obtain an integrated pool. Cities requested that the Commission set the application down for hearing unless conditioned upon the cessation of the alleged unlawful action, and the establishment of conditions which would allow "the original pool or its equivalent" to operate. On December 3, 1970, the Commission issued an Order allowing the intervention of the Cities, but denying the relief sought. Rehearing was denied on January 13, 1971. A petition for review was promptly filed and the Court of Appeals for the District of Columbia Circuit reversed on October 12, 1971. City of Lafayette, Louisiana, City of Plaquemine, Louisiana v. SEC, 454, F.2d 941, (CADC 1971).

1/ Cajun which was formally known as Louisiana Electric Cooperative, Inc. is a generation and transmission cooperative financed by the Rural Electrification Administration, made up of twelve electric distribution cooperatives, all of which operate in Louisiana.

On September 30, 1971, Cities filed a Protest and Petition to Intervene in Docket No. E-7663, a second Gulf States financing application. In that filing, Cities incorporated in its entirety previous Protest and Petition to Intervene in Docket No. E-7567. By Orders of November 4, 1971, in Docket No. E-7663, and E-7676, the Commission authorized the issuance of the securities in question, and simultaneously initiated, sua sponte, a "complaint" proceeding in Docket No. E-7676 against Gulf, LP&L and CLECO.

The Cities' Petition for Rehearing in Docket No. E-7663 was denied by order of December 30, 1971.*

Interventions or responsive pleadings were filed in Docket No. E-7676 by Gulf, LP&L, CLECO, Dow, and Cajun. By letter of November 8, 1971, from the Commission's General Counsel, the Department of Justice, Antitrust Division, (Justice) was invited to participate. The invitation was declined by letter of December 15, 1971, from the Acting Assistant Attorney General. That letter noted that:

> "Because of the view which the Commission has taken of its jurisdictional limitations under Part II of the Federal Power Act, it is our view that the Commission would provide only a small part of the necessary relief; Federal Power Act, Section 202b, Gainesville Utilities Department v. Florida Power Corporation, 402 U.S. 515 (1971), City of Paris, Kentucky v. Kentucky Utilities, 38 FPC 269 (1967), 41 FPC 145 (1969). On the other hand, the Courts under the Sherman Act would have complete authority to deal with any violation. U.S. v. Otter Tail Power Company, (D. Minn., 6 DIV.) 6-69-CIV-139. We further note that an application by Louisiana Power & Light to construct nuclear generation is presently pending before the Atomic Energy Commission, and that under Section 105 of the Atomic Energy Act as amended, the AEC has authority to condition nuclear licenses against licensee conduct that would be inconsistent with the policies of the antitrust laws."

Volumes of pleadings, counter pleadings, etc., followed. Prehearing conferences were held to resolve issues of discovery, but only limited discovery, pursuant to an order of January 14, 1972, by the Presiding Examiner, took place. On February 23, 1972, Cities filed with this Commission a Motion for Extraordinary Relief and/or Reconsideration, dealing with discovery. The Motion was granted by Commission Order Granting Extraordinary Relief of April 6, 1972. Pursuant to that order, the Examiner scheduled a further prehearing conference and thereafter issued an order, requiring production of documents in conformity with the Commission order.

On May 2 through 9, 1972, Gulf States, CLECO, and LP&L filed applications for rehearing of the Commission's April 6, 1972, Order. On May 30, 1972, the United States Supreme Court granted certiorari in Gulf States Utilities Co. v. F.P.C., in which Gulf States had petitioned for certiorari from the decision of the Court of Appeals for the District of Columbia Circuit. On June 1, 1972, the Commission, relying upon the grant of certiorari, granted rehearing of its April 6 order for purposes of reconsideration and clarification, and "determined that the public interest would best be served by staying all further proceedings in this docket until the United States Supreme Court has entered its decision on appeal of City of Lafayette, Louisiana v. SEC, 454, F.2d 941 (CADC 1971)." Thereafter the Cities and Dow Chemical filed petitions for reconsideration of the Order of June 1, requesting that, at the very least, the Commission allow discovery to go forward. On July 14, 1972, the Commission denied rehearing.

On May 14, 1973, the Supreme Court issued its opinion in Gulf States Utilities Co. v. F.P.C., 411 U.S. 747 (1973). That decision affirmed the holding of the Court of Appeals that the FPC must consider the anticompetitive consequences of a security issue under Section 204 of the Federal Power Act.

In the meantime, on January 26, 1973, Gulf filed an agreement with Cajun for the integration of the Cajun generation station into the Gulf system and for transmission of power from Cajun to points of delivery of its member Cooperatives located on the Gulf system. On February 5, a notice of that application was issued in Docket No. E-8003. On February 15, both Cities and Dow filed protests and petitions to intervene, alleging that the proposed contract provided for transmission service only to Cajun's member coops, and appeared to provide for the purchase by Gulf States of most if not all of Cajun's excess capacity and energy from its present units, and appeared to preclude Cajun from purchasing power in the future for the needs of its member Coops from Cities or other members of the Louisiana Power Pool. Cities pointed out that:

"The Cities would not object to Gulf States joining the members of Louisiana Power Pool in an arrangement which would allow appropriate coordination and savings for all of the parties. In such circumstances, the Cities could not and would not object to purchases and sales such as those which appear to be contemplated by the instant contract, if these were economic for the group and indicated as such and if the present contract was conditioned to require that similar co-ordination, reserve sharing, transmission and outage services, adjusted as necessary to accomodate the Cities' circumstances, be made available to the other Pool members."

On March 1, 1973, the Commission issued an Order accepting rate schedules and consolidating proceedings in that docket with those in Docket No. E-7676.

II. LP&L AEC PROCEEDINGS

On August 18, 1972, Justice furnished an "advice letter" to the AEC in a pending AEC docket, Louisiana Power & Light Company, 50-383-A, advising that the Department had commenced an antitrust investigation of LP&L's conduct based on essentially the same antitrust allegations set forth in City of Lafayette v. SEC, 454 F.2d 941 (CADC 1972), that the investigation was continuing, and that if the allegations proved to be supported by the facts the Department would seek relief against all the participants in the alleged conspiracy. The Department advised however, that LP&L had agreed to conditions which, in the view of the Department, would allow an AEC license without further hearing. Interventions were filed by Cities, Dow, Louisiana Municipal Association Utilities Group, and Cajun. These petitions alleged that conditions on which the Justice Department and LP&L had agreed were insufficient to support the conclusion of Justice that a license should issue. By memorandum and order of February 23, 1973 the AEC admitted the Cities as Intervenors, designated an Atomic Safety and Licensing Board, and remanded the proceeding to that Board to determine specified issues and to certify the record to the AEC for further consideration. After further proceedings, and negotiations on October 24, 1974, the Board entered a memorandum with respect to appropriate license conditions which should be attached to a construction permit. The Board imposed conditions in addition to those previously agreed requiring the option of access to LP&L's Waterford Unit transmission between and among the entities and a more specific requirement for reserve sharing. On

November 14, 1974, LP&L advised AEC that it would accept the conditions and not proceed further. Justice however requested the Board to modify or clarify one of the elements of its Order. On February 3, 1974, an Order was entered by the Atomic Safety and Licensing Appeal Board of the NRC (the Nuclear Regulatory Commission assumed the responsibilities and obligations of the AEC in mid-January, 1975) which granted in full the relief sought by the Justice.

III. GULF STATES AEC PROCEEDING

Coincident with, and after its negotiations with Cities for the agreement at issue in this docket, Gulf had apparently been negotiating with Justice as to the antitrust review under the Atomic Energy Act of its application for a license for its River Bend Nuclear Power Plant. On March 25, 1974, the Attorney General forwarded to the AEC a letter of advice, which after noting that the Department had been investigating the antitrust situation in Louisiana, concerned with "...basically the same antitrust allegations against the Company as those set forth in the decision of the Court of Appeals in 'City of Lafayette v. Securities and Exchange Commission', 454 F.2d 941 (CADC, 1972)," concluded that:

> "It is unnecessary to detail here these allegations... Within the past year or so, Applicant has evidenced a constructive attitude in its relations with the smaller systems in Louisiana. In the course of our antitrust review of the instant license application, Applicant has discussed with the Department its future policies...While not conceding that any of its prior conduct may have been anticompetitive, Applicant had indicated...the policies which it will follow with respect to such aspect of its operations in Louisiana as access to nuclear units, interconnection and reserve sharing, wheeling, and exchanges of bulk power...These developments enable the Department to inform the.../AEC/ that it would not appear necessary that an antitrust hearing be held in the instant application..."

The commitment letter from Gulf attached to the Attorney General's letter noted,

> "We have now filed with the Federal Power Commission copies of the power interconnection agreements entered into by applicant with Cajun Electric Power Cooperative, Inc., and with the Cities of Lafayette and Plaquemine, Louisiana. Such agreements contain terms and provisions for bulk power coordination and transmission service. Such agreements with Cajun and the Cities were offered and negotiated by applicant in pursuit of the policy commitments attached, and it is applicants's understanding that such agreements (as subject to regulatory action and change by actions of the parties) comply with such commitments."

In its commitments, Gulf States agreed to (1) interconnect and coordinate reserves with entities in reasonable proximity to its service area, (2) exchange emergency service and/or scheduled maintenance service, (3) jointly set minimum reserves as a percentage of peak load responsibility, (4) set ready reserve capacity, (5) not limit interconnections to low voltages, (5) not embody unlawful or unreasonably restrictive provisions on intersystem coordination in interconnection and coordination agreements, (7) sell or purchase bulk power when economically desirable, (8) offer an opportunity to participate in the nuclear units to entities in proximity to its service area which had requested participation, (9) transmit between two or more entities over its lines, (10) include requested transmission capacity in its construction program when compensated therefore and (11) sell power for resale to entities in its service area in Louisiana engaging or proposing to engage in retail distribution of electric power under certain conditions.

Commitment 9, in full, reads:

> "Applicant shall facilitate the exchange of bulk power by transmission over its transmission facilities between two or more entities engaging in bulk power supply in its service area in Louisiana with which it is interconnected; and between any such entity(ies) and any entity(ies) engaging in bulk power supply outside Applicant's service area in Louisiana between whose facilities Applicant's transmission lines and other transmission lines would form a continuous electrical path: Provided,

that (1) permission to utilize such other transmission lines has been obtained by the entities involved, (2) Applicant has appropriate agreements for transmission service with the entities interconnected with Applicant at both the receiving and delivery point on Applicant's system, and (3) the arrangements reasonably can be accomodated from a functional and technical standpoint. Such transmission shall be on terms that fully compensate Applicant for its cost. Any entity(ies) requesting such transmission arrangements shall give reasonable advance notice of its (their) schedule and requirements." (The foregoing applies to any entity(ies) engaging in bulk power supply to which Applicant may be interconnected in the future as well as those to which it is now interconnected).

THE DISTRICT COURT PROCEEDINGS

Pursuant to a suggestion of the United States Court of Appeals for the District of Columbia Circuit in City of Lafayette, Louisiana, City of Plaquemine, Louisiana v. SEC, 481 F.2d 1101, 1105 (1973), in remitting the Cities to forums other the SEC in that proceeding, that "...the activities of LP&L in Louisiana can form the basis for court action by private plaintiffs, like the Cities, as well as by the Department of Justice. Cf. Otter Tail Power Co. v. United States, 410 U.S. 366 (1963)", the Cities, in the summer of 1973, filed a treble damage action against LP&L, Middle South Utilities, Inc., LP&L's parent holding company, CLECO, and Gulf States. City of Lafayette, Louisiana and City of Plaquemine, Louisiana v. Louisiana Power & Light Company, Middle South Utilities, Inc., Central Louisiana Electric Company, and Gulf States Utilities Company, (E.D. La., No. 73-1970). All defendants in that proceeding have answered, and discovery is proceeding.

COMMISSION ACTION

By Order issued July 5, 1974 the Commission noticed the filings of January 21, 1974 of the interconnection agreement and the rates therefore. The July 5 Order required the

Cities and Gulf to file comments on

(1) "The antitrust issues originally set forth in all petitions to intervene filed by the intervening parties, and the basis upon which those issues are settled by the filings in this docket.

(2) The parties will set forth the alleged anticompetitive issues which are not proposed to be settled.

(3) The proposed effect the settlement of the issues in the instant submittals will have upon other intervenors in the previously cited dockets who are not parties to the instant submittals."

The Commission also invited Dow and Cajun to comment.

Comments were received from Cities, Gulf, Cajun, and CLECO. No comments were received from LP&L or Dow, and Dow filed a motion to withdraw as a party. The filed comments indicated that the tendered interconnection agreements appeared to provide some of the benefits which the Cities had hoped to obtain through the LEC 2/Pool. There was, however, little information provided in the comments on the manner in which the agreement specifically remedies the alleged past practices of the companies of harassing litigation and lobbying which resulted in demise of the LEC Pool, and formed the bulk of the Cities complaints in Docket E 7676.

2/ Now Cajun.

The Commission therefor on March 14, 1975, issued an Order Accepting Initial Rates Consolidating Proceedings and Setting Hearing which Order provided for hearing on the following issues:

(a) "Whether the agreements which constitute Gulf States' offer of settlement 3*/ are in the public interest.

(b) Whether, in light of previous allegations, Gulf States' offer of settlement will violate the antitrust laws or policy of the United States.

(c) Whether any anticompetitive issues remain for decision in Docket No. E-7676, et al., and, if so, the precise issues which remain for decision on the merits.

(c) Whether the rates and terms and conditions of each interconnection agreement filed as part of Gulf States' offer of settlement are just and reasonable under the provision of 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e."

A one day hearing was held on April 22, 1975 and an initial decision issued by Presiding Administrative Law Judge Benkin on August 18, 1975.

THE INITIAL DECISION

The Administrative Law Judge states that it was clear that the agreements filed in Docket Nos. E-8600 and E-8601 resolve the antitrust allegations made by Cities against Gulf States now pending in E-7676 and that there has been no resolution of charges against LPL or CLECO. He stated however counsel seemed confident that Commission approval of the States agreement as a settlement would result in rapid settlement of the Cities disputes with the other two utilities and that Cajun was not represented at the hearing and the record does not support any conclusion that the controversy between Cajun and any of the three utilities has changed, and that the claims by Cajun and Cities against LPL and CLECO would have to proceed to hearing and disposition on the merits unless further settlements are filed and approved.

"3*/ Docket Nos. E-8003, E-8600 and E-8601 are to be construed as an offer of settlement. Consolidation of these Dockets with Docket No. E-7676, et al., will allow the parties to the latter Docket the opportunity to enter an appearance
(Footnote continued on next page.)

The Judge stated that it was agreed that the two agreements filed in each case must be construed together, that the effectiveness of the transmission and interconnection contracts is contingent upon Commission approval of the settlement in each case in its entirety. He stated that the Staff counsel argument that the Commission's acceptance of the contracts for filing suffices to make them fully operative is to misread the intention of the parties as manifested by the documents they offered. He stated that the interconnection agreement and the side agreement for the cessation of litigation taken as one, represent the integrated contract that the parties wrought.

The Judge then proceeded to the question "whether the Commission should, in the public interest, give its sanction to the whole of the settlements."

He observed that since the original objective of the Cities and Cajun in the early 1960's i.e. formation of a true power pool, cannot now practicably be achieved, having fallen victim to the passage of time and galloping inflation, that the "interconnection and coordination of power generation between each of the Cities and Gulf States is the next best thing, and that is what the contracts before the Commission would accomplish." He stated the agreements would end each of the Cities isolation from available sources of power and allow the Cities to build new generating capacity to satisfy future growth.

Judge Benkin pointed out that one clear indication that the agreements conformed to the public interest is the fact that they have been subjected to close scrutiny by Justice and have been approved. He states that the Commission which sees antitrust issues only on a sporotic basis should give great deference to the Justice Department's views. The Judge made a number of pertinent observations concerning the lengthy history of litigation in this case the public interest in ending that litigation and the agreement of all parties including Staff that the implementation of the agreements will promote the public interest.

The Judge then came to the question of whether or not the rates and other terms and conditions of the interconnection agreements are just and reasonable under the relevant provision of the Federal Power Act. He stated that since the rates and conditions

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"3*/ (Footnote continued from previous page.)
on the record in former Dockets, and to elicit through cross-examination, or otherwise, the impact of such settlement on their respective positions in Docket No. E-7676, et al. We are concerned that piecemeal settlement of the proceeding in Docket No. E-7676, et al, may prejudice the rights to parties to that proceeding."

are the product of a contractual arrangement rather than a tariff filing, the scope of the Commission's power to set aside the rates and other publications is rather narrow. The Judge cited in support of this contention F.P.C. v. Sierra Pacific Power Company, 350 U.S.348, 355 (1956) and also Sam Raburn Dam Electric Cooperative v. F.P.C D.C. Cir., July 11, 1975. He quoted the following language from Sierra in support of his view:

> In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest--as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.

Judge Benkin says that it is idle to expect the rates in an interconnection agreement to achieve optimum goals of providing a fair, but not excessive, return and equivalent treatment to all affected parties with the same precise certainty of a rate developed by the Commission after a hearing and close impartial scrutiny of the evidence.

Judge Benkin stated that the Staff attack on the rates which is limited solely to the clause in both providing for rates for emergency service while covering "troublesome aspects" must be reviewed in the light of the limited scope for Commission inquiry prescribed by Sierra. He says "in the context of that rule, it is not the Commission's function to withhold its approval of contractual bargains merely because of one or more de minimis idiosyncracies in the rates the parties have agreed upon."

Judge Benkin found the agreements to be just and reasonable and in the public interest, that they are accepted and approved as settlements of the controversies between the parties pending before the Commission in Docket No. E-7676, and that the complaint and protest of the City of Layfayette against Gulf States Utilities and the City of Plaquemine against Gulf States Utilities now pending before the Commission in Docket No. E-7676 should be dismissed.

POSITIONS OF THE PARTIES

Staff Position:

Staff in its prehearing brief and in its brief on exceptions takes violent umbrage with the decision. Staff states that the burden of supporting the agreements is on the proponents and that they have failed to tender any evidence which would support a conclusion of lawfulness,

and that the case must be remanded for further hearing on this issue. Staff points to "serious errors in the Presiding Administrative Law Judge's process of reasoning which ultimately resulted in his eroneous finding of lawfulness." Staff excepts to the Judge's conclusions relating to the jurisdictional powers of the Commission and to his questionable use of the rule of de minimis.

Staff states that with reference to the requirements of Section 205 and 206 of the Federal Power Act with regard to just and reasonable rates that the "evidentiary hearing upon this aspect of the case was of such a nature and quality as to be tantamount to no adjudication whatsoever, necessitating a remand by the Commission to the Presiding Administrative Law Judge for further, and more adequate, treatment of this issue in an evidentiary proceeding." Staff points out that the initial decision does not clearly make a finding that the rates are just and reasonable and that it was not within the power of the Judge to completely ignore, or procedurally nullify, a discretionary Commission decision to adjudicate the lawfulness of an initial, or superseding, rate. There is more on this such as the statement that the proceeding held on April 22, 1975 "was so deficient and the resultant record so incomplete as to constitute a gross failure process,. . ." Staff states that the precise issue with regard to the Judge's findings is "which party in a proceeding before the Commission bears the risk of failure of proof?" Staff takes strong umbrage with the use of the term "de minimis" and says that the emergency rates are not de minimis.

Staff states that the initial decision erroneously holds that the Commission has limited jurisdiction to regulate the lawfulness of initial rates and that he has erroneously relied on the Sierra doctrine. Staff points out, correctly it must be observed, that the instant proceeding has absolutely no factual resemblance to the Sierra type case. Staff states that there is no law,no presumption,which assists a jurisdictional rate in achieving approval by the Commission as "just and reasonable," and thereby lawful. Staff disagrees with the Judge's conclusion that since the rates are contractual rates rather than a tariff filing the scope of the Commission's power to set aside the rates and other obligations is rather narrow. Staff says "the mischief resultant from the cramped jurisdictional holding of the initial decision is pervasive. The notion of a limited inquiry to determine lawfulness has a subtle and erroneous effect of shifting the burden of proof."

Finally Staff takes lengthy and laborious exception to the interpretation of the contract by the parties to it and by the Administrative Law Judge that the contract is not effective until finally approved without conditions unacceptable to the parties by the Commission. Staff takes the position that the contract was effective on the date, i.e. March 14, 1975, that the agreements were accepted for filing by the Commission. This specific clause at issue (only in so far as Staff is concerned) is Section 7.6 of the agreement which is as follows:

> This Agreement shall not be binding upon the parties hereto until approved or accepted for filing by the Federal Power Commission or other regulatory bodies, if any, having jurisdiction, without conditions unacceptable to either party. (emphasis supplied).

Staff devotes six pages in both its prehearing brief and its brief on exceptions to arguing this issue. The argument with reference to the parol evidence rule does not appear to be apropos. It does not appear that the Judge relied on extrinsic oral evidence to modify a written agreement, but rather construed two contemporaneous written arguments. In any event he could have reached the same conclusion based on the literal language of Section 7.6. Further as we shall observe in more detail later since there is no dispute between the parties with reference to the questioned paragraph there is no justiciable issue concerning contract interpretations either for the Presiding Judge or for this Commission to decide.

Finally Staff argues that it was error for the Judge to fail to dismiss the pending investigation in Docket No. E-7676, et al. against both States and LP&L and urges that all antitrust problems have been solved with reference to both States and LP&L.

Cities Brief In Response To Exceptions:

Cities says there has been undue delay in this case since they have fought since 1960 together with other entities to obtain the economies and reliability of interconnection and pooling. The Cities say the Commission refused to investigate or pursue its claims

until the decision of the Court of Appeals in 1971, and that the Commission's response to the decision could fairly be termed as "grudging". Cities say that their interconnection agreement filed with the Commission on January 21, 1974 is a perfectly straight-forward interconnection much like hundreds of others between equals throughout the country. Cities say they have repeatedly contacted Staff of the Commission to see if there was any problem of understanding or interpreting the filing and that on July 5, 1974 more than five months after the filing of the initial agreement the Commission issued an order requiring filing of comments. Cities say that their two entities have spent in excess of one and one half million for interconnection equipment and that because of lack of connection Plaquemine has had several blackouts during the summer of 1975. Cities say that Sections 7.6 and 7.12 of the interconnection agreement when taken together can only be construed to impose an obligation on Gulf to construct its part of the interconnection on final acceptance and approval without conditions unacceptable to the parties by the Commission.

Cities say that on March 14 nearly fourteen months after the filing of the interconnection agreement the Commission issued an order which "accepted" the initial rate filing in terms so conditional that no attorney representing a client could give the client any assurance that the interconnection agreement might not be changed by the Commission or indeed even what issues the Commission had in mind, and that consequently both Cities and Gulf found the filing unsatisfactory and the parties did not release each other from claims.

Cities object to the finding of the Judge that there is no resolution of the dispute between Cajun and Gulf in Docket 8003. Cities state they are willing to withdraw objections in Docket E-8003 as now being moot.

Cities point out that until the hearing on April 22 no one connected with the proceedings knew what problems, if any, Staff had with the interconnection and that the rates issue was first raised in Staff's brief after the hearing. Cities say that it is anticipated that there will be approximately equivalent service in both directions between the interconnection parties but the exact terms and cost of each service are not nearly as important as they would be if service were only to be one way. Cities point out that there has been no evidence to indicate the rates are not just and reasonable and that the proponent of a change (Staff) has the burden of proof, and that the only legal basis on which the Commission could effect a change in the rate would be on the basis of evidence that the rates were not just and reasonable.

Cities do not agree with Staff that the Judge should have dismissed claims against LP&L. Cities agree with the contention of LP&L in its brief that many of the matters which it appears that the Commission wishes to investigate are involved in the district court antitrust proceeding, that the discovery in that action is likely to be more extensive than that before the Commission, and that Cities are willing if other parties are willing to make discovery in that proceeding available to the Commission if desired.

Cities disagree with LP&L and CLECO's position in their briefs that the Law Judge's narrative history is incorrect. It says that the main reason for the objections is LP&L and CLECO's fear that these findings will bind it in the antitrust proceeding. Cities state that the Judge's findings are not binding in the district court proceeding.

Finally, Cities disagree with CLECO's position in its brief on exceptions that the Judge should have dismissed the claims against CLECO. They say however that settlement with CLECO is close and will depend on the resolutions in this proceeding.

Gulf States Brief Opposing Exceptions:

Gulf States says the agreements constitute constructive offers of settlement and that Staff in its brief on exceptions attempts to raise questions which do not exist in the proceeding. Gulf States says that the contracts specifically provide that they shall not become binding until approved or accepted for filing by the Commission without conditions unacceptable to either party. It says that the Commission's order of March 14, 1975 accepting the contracts and providing for further proceeding did not constitute conditions acceptable to the parties, and that Cities gave written notice to Gulf States by letter dated March 24, 1975, to the effect that the provisions of the order were not acceptable. It says both parties want to know that their arrangements are acceptable as filed, subject to the continuing jurisdiction of the Commission. Gulf States says the decision grants the relief required except for its failure to dismiss Gulf States with respect to Cajun. 3/ Gulf States says that the interconnections are in the public interest and that in their brief on exceptions, after more than twenty months of consideration, Staff raises only technical procedural issues which will further delay worthwhile interconnections.

Gulf States says that respect to rates and terms and conditions of the interconnection agreements, financial justification while not presented to the Judge at the hearing was filed in Dockets E-8600 and E-8601 in January 1974. It says the records of the Commission containing financial justification filed in the reference dockets together with the testimony of the various parties uncontroverted by any positive evidence from any other source, including the Staff, do constitute substantial evidence that the agreements, and the rates and terms and conditions are just and reasonable and cost justified. It says that the point raised on cross-examination by Staff that the rates between it and Cities and the rate in the Cajun contract is distinguishable because the Cajun contract is a one-way rate only for sales from Gulf

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3/ Gulf States also filed a short brief on exceptions for the purpose of arguing its position that no further charges or complaints by Cajun against Gulf States exist and additionally taking exception to some of the proported factual statements of the ALJ.

States to Cajun and the rate in the Cities contract is a two-way rate and therefore reflects a negotiated rate acceptable to both parties. It says that the four mill adder which Staff questions was deemed necessary and reasonable by both parties because of a higher margin of error which had to be compensated for at the higher and more wildly fluctuating fuel cost levels. It points out that a five mill adder was adopted in 1974 in emergency service schedules between eleven interconnected systems, including Gulf States, and was accepted for filing without hearing in Docket E-8860 on August 29, 1974 presumably after its review by Staff. It says that to the existing justification on file in support of the filed rates, customarily sufficient for acceptance of the rates as just and reasonable without further investigation or hearing is added to the uncontroverted testimony of all parties that the rates were just and reasonable justified the Judge in finding that no further rate issue existed.

Brief Opposing Exceptions of Cajun:

Cajun says the interconnection agreements should be approved, that it has settled its differences with Gulf States and seeks no further relief. Cajun does not agree with Staff's view that LP&L should be dismissed as a party to the proceedings and says that with respect to LP&L and CLECO the Commission should cause the allegations of anticompetitive conduct to be the subject of hearings and relief. It "takes strong umbrage" with CLECO's characterizations of the legality and validity of the REA loan to Cajun, and a number of other statements made by CLECO of a factual nature in its brief. It asks the Commission to approve the interconnection agreements between Gulf States and Cities dismiss Gulf States as a party to these proceedings and order hearings with respect to LP&L and CLECO.

Brief On Exceptions of LP&L:

LP&L disputes the Judge's summary of the history of the case and asks that the Commission nullify that part of the initial decision with respect to any recitations that might be regarded as findings of fact on allegations of anticompetitive conduct. It also asks that the Commission approve the interconnection agreement and that it dismiss the proceeding in all the dockets as to LP&L or alternatively if LP&L is not dismissed require that Gulf States remain in the case as a defendant with respect to all antitrust allegations. It says that it should be dismissed as to all antitrust allegations for the reason that the Commission has no general jurisdiction

to entertain antitrust allegations as such, and that in the absence of a proceeding by the Commission pursuant to a Section of the Federal Power Act under which it might afford some concrete remedy, either enforcing the anti-trust laws or specifically directing an action that might otherwise be inconsistent with such laws, the Commission has no primary jurisdiction, citing Otter Tail Power Company v. United States, 410 U.S. 366 (1973). It says that if Gulf States remains in the proceeding the Commission might afford the relief, if Cities proved their allegations of requiring Gulf States to cease and desist from anti-competitive conduct in order to get financing, and that this possibility affords the basis for Commission jurisdiction. It points out that LP&L is already physically interconnected with Plaquemine and could not physically be interconnected with Layfayette because of the location of its system. It says there is no rate dispute between LP&L and Cities and therefore there is no "nexus of jurisdiction" under the Commission's wholesale rate jurisdiction.

FINDINGS AND CONCLUSIONS

Sierra-Mobile:

Since we are approving the proposed agreements between the parties in this proceeding it is not necessary to decide the correctness of the Presiding Administrative Law Judge's reliance on the "Sierra-Mobile" doctrine, 5/ but we believe the Judge's reliance upon this doctrine raises questions for future administrative proceedings before this Commission, and thus we are impelled to observe that we believe the Judge has unnecessarily widened the applicability of this doctrine. Judge Benkin states in his initial decision that "since the rates and other terms and conditions upon which Gulf States and the Cities propose to render service are the products of a contractual arrangement inter sese rather than a tariff filing, the scope of the Commission's power to set aside the rates and other contractual obligations is rather narrow:" The Judge quotes from the Sierra case

> In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest--as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.

Judge Benkin also cites Sam Raburn Dam Electric Cooperative v. F.P.C. No. 73-1996, D.C. Cir., July 11, 1975.

5/ F.P.C. v. Sierra Pacific Power Co., 350 U.S. 348 (1956). United Gas Pipeline Company v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

We do not believe that the facts in the proceeding before us justify the Judge's holding. Sierra involved the abbrogation of a duly filed pre-existing contract without any finding that the contract rate was unreasonable. This case involves an initial contract. We specifically reject the idea that the cited cases limit the Commission's authority to determine the justness and reasonableness of an initially filed rate.

Burden of Proof:

Since we do not agree that we are circumscribed by Sierra-Mobile in the review of the justness and reasonableness of an initial rate, the next question is on whom does the burden of proof fall if an initial rate is challenged. Staff's brief is in error in its position on burden of proof. In American Louisiana Pipeline Company v. Federal Power Commission, 344 Fed. 2d 525 (1965); the Court of Appeals for the District of Columbia Circuit in interpreting the identical provision of the Natural Gas Act with reference to the burden of proof in rate cases made the following statements:

> "The Commission seemed to assume that American Louisiana had the burden of proving the reasonableness of its proposed rate form. In its opinion, for example, the Commission stated that American Louisiana's arguments "do not support the requested change, nor was any evidence adduced to support it." In the view we take of Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e), and the proceedings in this case, the Commission's assumption is unwarranted. Section 4(e) states in part:
>
> > 'At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural gas company * * *.' (Emphasis supplied.)

> "It is our view, and the respondent's brief seems to concede as much, that Section 4(e) governs as to burden of proof, and that the burden of proof is on the gas company only if an increase in rates is involved. If the change in rate is not an increase, the burden of proof is on the Commission if it attacks the tariff. 4/

The language which the court was interpreting from Section 4(e) and 5(a) of the Natural Gas Act, is paralleled by the identical language in Section 205(e) and 206(a) of the Federal Power Act.

Since Staff's arguments with reference to the burden of proof must fail, the question for the Commission is whether or not the record as it stands sustains the Judge's decision that the proposed rate is just and reasonable.

Just and Reasonable Rate:

The rates were initially filed on July 5, 1974. Between July 5, 1974 and the filing by Staff of its brief on May 5, 1975, there has been no suggestion by any party including Staff in its various memoranda that the proposed rates were not just and reasonable. At the hearing held April 22, 1975, Staff did not suggest that the proposed rates were unjust or unreasonable, but did raise some questions concerning the emergency rates. That cross examination which appears at pages 84-91 does not sustain a conclusion on the part of Staff that certain features of the emergency rates might be unjust and unreasonable. In any event, the Staff does not contend that they are unjust or unreasonable but only that the hearing was not complete. One of the sponsoring Witnesses, Sylvan Joseph Richard, Director of the Utilities System, City of Layfayette, testified that he was familiar

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4/ "If we took the view that the Commission was acting under Section 5(a), 15 U.S.C. § 717d(a), it would still have the burden of showing that the contract demand rate was "unjust, unreasonable, unduly discriminatory, or preferential."

with the rates and proposed interconnections and that it was his opinion that the rates were just and reasonable. (Tr. 62). The rates in question had been on file with the Commission eight months at the time the hearing April 22, 1975. The evidence of record is that the rates are just and reasonable. There is no evidence of record to sustain a holding that they are not just and reasonable, and Staff apparently does not contend that they are, but only that they might be if further evidence was adduced. Given the state of the record before him and the requirements of Sections 205 and 206 of the Federal Power Act the only holding that the Presiding Judge could have made was that the rates were just and reasonable, and he should be sustained.

Contract Interpretation:

Staff has strongly urged that the parties to this proceeding and the Presiding Administrative Law Judge have erred in their interpretation of Section 7.6 of the proposed agreement between the parties. As we pointed out above since there is no disagreement between the parties as to the meaning of the clause there is no justiciable issue pending before this Commission with reference to the clause. In reaching this conclusion we caution that the Commission is not bound by the parties' interpretations of their own contracts if a clause in a contract clearly is in violation of the Federal Power Act or is not in the public interest. We cannot say that a requirement in a contract that it is not effective until finally approved by this Commission without conditions unacceptable to the parties is per se a violation of the Act or not in the public interest.

We make the above finding with a caveat. While we cannot say that contract clauses conditioning the effectiveness of the contract on final approval of the Commission are per se either a violation of the Act or not in the public interest, the condition in this particular contract comes close to being violative of the public interest. Staff's position in this matter while it lacks legality has a certain spiritual quality. The effect of the agreement of the parties to delay the installation of interconnection facilities and other supporting equipment until final determination by this Commission builds into the final action that further delay required by completion of the administrative process. Meanwhile the parties can blame the "bureaucracy" for their failure to effect their interconnection agreement. Further we must observe that it is difficult to discern what "conditions" this Commission might have imposed that would have been so unacceptable to the parties as to justify their failure to complete their interconnection agreement.

Antitrust Issues:

We believe that it is in the public interest to end all pending antitrust litigation before this Commission in each of the pending dockets. In doing so we make no final determination as to any issues raised with reference to anticompetitive practice. Most of these matters have either been considered by the Department of Justice by the Atomic Energy Commission or are now pending in federal court. With the settlement of this case as it applies to Gulf States Utilities Co., there is no regulatory proceedings pending in this Commission having to do with the exercise of its primary jurisdiction under the Federal Power Act. We do not adjudicate nor do we enforce antitrust law. California v. F.P.C., 369 U.S. 482, 486 (1962). This Commission's duty to consider allegations and evidence of anticompetitive conduct arises as a consequence of, and in conjunction with, our regulation of public utilities and their activities subject to our jurisdiction. Gulf States Util. Co. v. F.P.C., 411 U.S. 747 (1973). The propriety of our consideration of allegations of anticompetitive conduct turns, then, on a showing that the alleged conduct is materially furthered by the transactions subject to our regulatory jurisdiction. 5/ This "nexus" principle is a prerequisite to any investigation of anticompetitive issues by this Commission to guard against a usurpation or bootstrap by the Commission of the power to adjudicate and enforce antitrust law, doing by indirection that which cannot be done directly. Northern California Power Agency v. F.P.C., 514 F.2d 184, 189 (D.C. Cir. 1975). That the "nexus" pleaded in the Docket No. E-7676 proceeding was our jurisdiction under Section 204 of the Federal Power Act, 16 U.S.C. 824c, to regulate a proposed security issuance by Gulf States is clear. Dismissal of Gulf States as a respondent to the complaint proceeding, therefore, removes the statutory nexus upon which our jurisdiction to proceed with the pending investigation was predicated. City of Lafayette, City of Plaquemine v. S.E.C. and F.P.C., 454 F.2d. 941 (1971). It follows that it is appropriate to dismiss the pending complaint proceeding against LP&L and CLECO unless and until the complainants can demonstrate, by amended pleadings or otherwise, a rational nexus between the alleged conduct to LP&L and CLECO and some jurisdictional transaction.

5/ See also, Conway Corporation v. F.P.C., 510 F.2d 1264, 1274, cert. granted, 44 L.W. 3279 wherein the Court noted, "However, the FPC concedes that it is authorized to consider nonjurisdictional matters when necessary to the exercise of its jurisdictional authority."

Should the complainants file additional pleadings, those pleadings should reflect the Commission's minimum pleading standards as previously set forth in Indiana & Michigan Electric Company 49 FPC 1232, (1973). The Commission in the Indiana and Michigan order, supra indicated that the pleading must clearly specify "(1) the facts relied upon, (2) the anticompetitive practices challenged, and (3) the requested relief which is within this Commission's authority to direct." 6/

The Commission further finds:

The initial decision of the Presiding Administrative Law Judge issued August 18, 1975 in this proceeding approving a proposed settlement between the Cities of Lafayette and Plaquemine and Gulf States Utilities Company, except as modified herein is approved.

The Commission orders:

(A) The agreements tendered to the Commission in Docket Nos. E-8600 and E-8601 are accepted and approved by the Commission in all respects as settlements of the controversies between the parties thereto pending before the Commission in Docket No. E-7676 and allied dockets.

(B) The complaints and protests of all the parties against any other party now pending before the Commission in Docket No. E-7676 and allied dockets are dismissed without prejudice.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

6/ Id. These standards were required in the Conway case. The FPC held that petitioners failed to meet third criteria. The Court disagreed with the Commission's finding as being unsupported and remanded for further proceedings.