

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
THE TOLEDO EDISON COMPANY and)	NRC Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING)	50-500A
COMPANY)	50-501A
(Davis-Besse Nuclear Power Station,)	
Units 1, 2 & 3))	
THE CLEVELAND ELECTRIC ILLUMINATING)	NRC Docket Nos. 50-440A
COMPANY, ET AL.)	50-441A
(Perry Nuclear Power Plant,)	
Units 1 & 2))	

COMMENTS OF NRC STAFF ON UNDATED MEMORANDUM OF
UNDERSTANDING BETWEEN CEI AND THE CITY OF CLEVELAND

By Order dated September 20, 1976, this Board directed the parties to consider the impact of the intended acquisition of the Cleveland municipal electric system by the Cleveland Electric Illuminating Company (as evidenced by the Memorandum of Understanding attached hereto) on the parties' Proposed Findings of Fact and Conclusions of Law.

Although an undated Memorandum of Understanding between CEI and the City has been executed, the Memorandum constitutes little more than an option agreement in that CEI's offer to purchase MELP does not constitute a firm offer until authorized by the Board of Directors of CEI (see para. 8 of Memorandum). Likewise, the City's agreement to sell MELP is subject to the express approval and authorization by the Council of the City of Cleveland. It is the Staff's understanding, in

8002 260 877

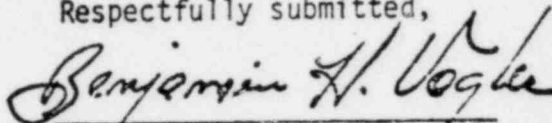
M

addition, that if the City Council approves the sale, municipal law provides the mechanism for a direct referendum in the City of Cleveland concerning the sale. Last, inasmuch as the Memorandum was executed in connection with the settlement of a private antitrust action before the United States District Court for the Northern District of Ohio, it is also subject to the prior approval of the District Court. These conditions and circumstances, in Staff's view, may well prevent or substantially delay the consummation of the acquisition.

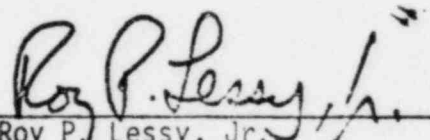
The recently-concluded evidentiary hearing clearly established that the acquisition of MELP has long been a CEI corporate goal and that CEI deliberately denied MELP the benefits of coordinated operation and development in order to force the sale of MELP to CEI. Thus, the possible sale of MELP to CEI arises in the context of a situation inconsistent with the antitrust laws. Without appropriate antitrust relief as recommended in Staff's Proposed Findings, the City must choose between having their system acquired or continuing to struggle against CEI's abuse of its dominant position. Thus, a timely decision by the Board ordering appropriate relief would make available to the City a meaningful alternative to the Hobson's choice between continued operation, without the benefits of coordinated operation and development and access to essential resources, and acquisition by CEI.

If the acquisition is however consummated in the interim, Painesville will become the last surviving entity in CEI's area, and Staff's Proposed Findings (and suggested relief) with respect to Painesville will become of paramount importance.

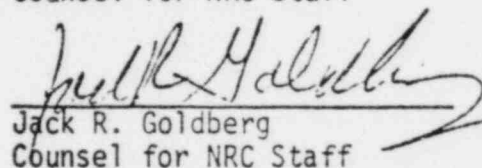
Respectfully submitted,



Benjamin H. Vogler
Assistant Director
Antitrust Division, OELD



Roy P. Lessy, Jr.
Counsel for NRC Staff



Jack R. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of October 1976.

AGREEMENT OF SETTLEMENT
Between
THE CITY OF CLEVELAND

And
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

WHEREAS, the City of Cleveland (hereinafter "City") and The Cleveland Electric Illuminating Company (hereinafter "CEI") are the Plaintiff and a Defendant, respectively, in an antitrust action now pending before the United States District Court for the Northern District of Ohio, being Civil Action No. C75-560 on the docket of said court; and

WHEREAS, the City and CEI are also engaged in numerous other legal and administrative actions with claims and counterclaims being made by each of the contending parties; and

WHEREAS, subsequent to the commencement of said litigation, the City and CEI have conducted various negotiations with respect to the resolution of the aforementioned litigation, including the sale of part or all of the facilities of the Municipal Electric Light Plant (hereinafter "MELP"), owned by the City; and

WHEREAS, as a result of the foregoing, the Administration of the City and the management of CEI have reached an agreement in principal with respect to the sale of MELP to CEI;

NOW, THEREFORE, it is agreed by and between the City, through its Mayor on behalf of the Administration of the City of Cleveland, and CEI, through its President on behalf of the management of CEI, that:

1. As consideration of the sale, transfer and conveyance to CEI of the assets of MELP described in Paragraph 2 hereof, CEI shall pay to the City the sum of \$158,500,000, payable as follows:

(a) \$38,500,000 shall be paid in cash to the City at the closing of this transaction; and

(b) The balance of \$120,000,000 to be paid to the City at the rate of \$4,000,000 per annum, adequately secured, payable on the last day of each year, commencing December 31, 1977.

2. The City shall transfer and convey to CEI all property, plant and equipment of MELP, including land, set forth as assets in the December 31, 1975 balance sheet of MELP, excluding cash on deposit in the City Treasury, which includes operating funds, sinking funds and encumbered bond funds, as agreed upon by R. W. Beck & Company and Gilbert Associates, Inc. (consultants to the City and CEI, respectively), subject to the following terms and conditions:

(a) MELP shall guarantee that its gross accounts receivable shall be not less than \$3,500,000.

(b) The net book value of all other current assets of MELP shall be not less than ninety percent (90%) of the net book value as of December 31, 1975, provided that any of said current assets which shall have been incorporated in or become a part of the property, plant and equipment transferred hereunder shall not be deemed to diminish the value of current assets. The unaudited book value as of December 31, 1975 for all other current assets was as follows:

Current Assets

Unbilled & Accrued Receivables		\$ 847,696
Accrued Interest Receivable		45,370
Stores Materials & Supplies	\$3,080,655	
Less Reserve for Obsolescence	394,021	2,686,634
Prepaid Expense		57,796
Undistributed Work Orders		216,268

(c) The book value of the property, plant and equipment of MELP at the date of transfer shall be not less than \$52,513,196, the book value of such property, plant and equipment as of December 31, 1975, adjusted for normal depreciation and normal additions and retirements.

(d) MELP shall guarantee that the gross unencumbered funds reserved for plant expansion as shown in bond construction accounts on December 31, 1975 shall not be less than \$984,570, unless reduced by expenditures or certification of funds for property, plant and equipment after January 1, 1976.

(e) If upon audit as hereafter provided, the gross accounts receivable to be transferred to CEI are less than \$3,500,000, or if the net book value of all other current assets is less than ninety percent (90%) of net book value as of December 31, 1975, as adjusted pursuant to Section 2 (b) hereof, or if the gross unencumbered funds reserved for plant expansion as shown in bond construction accounts on December 31, 1975, is less than \$984,570, unless reduced by expenditures or certification of funds for property, plant

and equipment after January 1, 1976, if the book value of the property, plant and equipment of MELP at the date of transfer is less than \$52,515,196, the book value of such property, plant and equipment as of December 31, 1975, adjusted for normal depreciation and normal additions and retirements, a deduction in the amount of said deficiency shall be made from CEI's initial cash payment of \$38,500,000 at the time of closing.

3. If CEI at its sole discretion determines to dispose of any interest in real property bordering upon Lake Erie (hereinafter "lakefront land") transferred by the City at the closing of this transaction, CEI shall, before disposing of its interest in said lakefront land to any other person or entity, notify the Mayor of the City in writing of its intent to dispose of its interest in said lakefront property and offer to the City the opportunity to repurchase said interest in land at its then appraised value. If the City is interested in the repurchase of said interest in lakefront property, it shall so notify the President of CEI in writing within thirty (30) days of the receipt of said notice from CEI. The repurchase price shall be established by a recognized real estate appraiser mutually agreed upon by the City and CEI. Said interest in lakefront property may be repurchased at said appraised price by the City.

4. CEI agrees to employ not less than eighty (80) qualified MELP employees, who shall be designated by CEI within seven (7) days from the date of the passage of a ratifying ordinance by Council and employed by CEI at the time of the closing of this transaction, it being understood that any employees of MELP in an occupation coming within the purview of CEI's collective bargaining agreement shall, as a condition of their employment by CEI, join Local 270 UWUA for collective bargaining purposes. If any MELP employee designated by CEI declines employment, CEI shall be obligated to hire another MELP employee in his or her stead, the tenor of this Paragraph 4 being that upon the consummation of this transaction, CEI shall have employed not less than eighty (80) MELP employees.

5. The City agrees that it shall pay to CEI from the down payment specified in Paragraph 1. (a) hereof, all moneys owing to CEI, except a sum not to exceed \$10,000,000, which may be withheld and paid to CEI upon the following terms and conditions:

The City shall pay to CEI any balance owing to CEI over a period of thirty (30) years, or during such lesser period as the City shall determine, with interest on the unpaid balance of principal and interest computed annually at three-quarters (3/4) of the Cleveland Trust Company prime rate as of January 1 of each year, commencing January 1, 1977. In no event shall the City be required to pay interest in excess of a rate of eight percent (8%) per annum.

The principal amount owing to CEI shall be amortized by equal annual payments up to a maximum of thirty (30) years. Larger principal payments may be made by the City at any time, and payments of interest owed by the City may be deferred by the City at its sole discretion for the initial period of five (5) years, provided that ultimate payments of such deferred interest must be made in a manner which insures equal amortization of the deferred interest payments over the remaining years of the City's obligation to CEI. The first payment by the City pursuant to this paragraph 5 shall be made on December 31, 1977, with subsequent payments to be made on the last day of each succeeding year.

6. Prior to the date of the transfer of the assets of the Division of Light and Power to the Company, the City will have conducted at its expense a certified audit of the assets of the Division of Light and Power by the public accounting firm of Peat-Marwick-Mitchell & Co. CEI may retain at its own expense the public accounting firm of Price, Waterhouse & Co. to make its own independent audit and to review any accounting records, working papers or other information pertaining to said audit or the results of said audit as may be necessary to render its own opinion. Any differences shall be reconciled by the respective independent public accountants as of January 10, 1977.

7. The terms of the present street lighting service contract between the City and CEI shall be extended as follows:

(a) With respect to street lights presently serviced and maintained within the City by CEI, the terms of the present contract shall be extended through December 31, 1977.

(b) With respect to street lights presently serviced and maintained by MELP, the terms of the present street lighting contract between the City and CEI adjusted for size and type of fixtures where necessary shall be applicable through December 31, 1978.

(c) On and after January 1, 1979, all street lights within the City now serviced and maintained by either CEI or MELP shall be controlled by the rates and conditions established in the street lighting service contract next negotiated by the City and CEI effective on and after January 1, 1978.

It is further agreed that CEI shall provide electricity for water pumping and all other City accounts at the lowest industrial rate where applicable, otherwise, at the prevailing approved rate schedule for the particular use involved.

8. The transaction contemplated by this Memorandum and the terms herein set forth shall be authorized by the Board of Directors of CEI not later than October 8, 1976 and shall thereafter constitute a firm offer by CEI to the City of the terms and conditions hereof, which offer shall remain in effect through and including January 10, 1977. This transaction shall also be subject to authorization by the Council of the City not later than November 30, 1976.

9. As a condition of the transfer of the assets by the City and the payment of money by CEI, as hereinabove described, the City will make provision for the discharge of what is now estimated to be \$10,164,180, constituting principal and interest upon Mortgage Revenue Bonds of the City of Cleveland secured by the Indenture of Mortgage between the City of Cleveland and the Union Bank of Commerce Company, as Trustee, dated October 1, 1948, and as supplemented by Supplemental Indentures of Mortgage dated October 1, 1954, August 1, 1960, and January 1, 1963, respectively. The City may satisfy said lien and Mortgage at the time of the execution of the sale documents, either by making direct payment to the Trustee of the principal and interest on said Bonds, or the City may, in its sole discretion, authorize and direct CEI to make payment, on the City's behalf, to said Trustee or to an escrow agent designated by the City from the proceeds of the initial gross payment of \$38,500,000, of an amount sufficient to satisfy the principal and interest due and

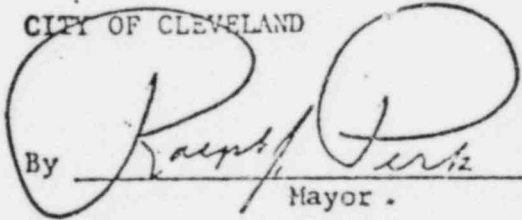
owing upon said lien and Mortgage. All benefits or savings resulting from the discharge of said Mortgage Revenue Bonds, whether discharged directly by the City or from the initial gross payment, shall inure to the benefit of the City.

10. Contemporaneous with the closing of this transaction, CEI and the City shall take all necessary steps to terminate with prejudice their participation in all litigation before either administrative agencies or courts of law and to extinguish all money judgments or other claims or disputes between them arising as a consequence of the City's operation of MELP.

11. The transaction contemplated by this Memorandum of Understanding shall be closed on or before January 10, 1977, unless further extended by agreement of the parties.

CITY OF CLEVELAND

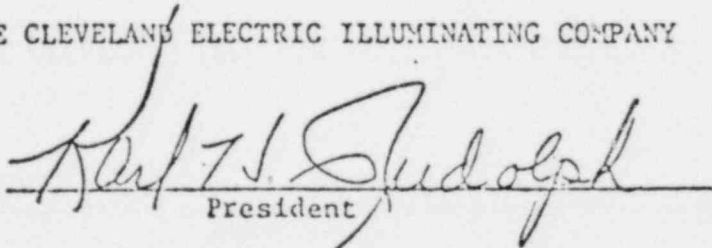
By



Mayor.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

By



President

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

THE TOLEDO EDISON COMPANY and
THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY
(Davis-Besse Nuclear Power Station,
Units 1, 2 & 3)

THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, ET AL.
(Perry Nuclear Power Plant,
Units 1 & 2)

NRC Docket Nos. 50-346A
50-500A
50-501A

NRC Docket Nos. 50-440A
50-441A

CERTIFICATE OF SERVICE

I hereby certify that copies of COMMENTS OF NRC STAFF ON UNDATED MEMO-RANDUM OF UNDERSTANDING BETWEEN CEI AND THE CITY OF CLEVELAND, in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or air mail, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of October 1976:

Douglas V. Rigler, Esq.
Chairman, Atomic Safety and
Licensing Board
Foley, Lardner, Hollabaugh
and Jacobs
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

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

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

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

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Joseph J. Saunders, Esq.
Antitrust Division
Department of Justice
Washington, D.C. 20530

Steven M. Charno, Esq.
Melvin G. Berger, Esq.
Janet R. Urban, Esq.
P. O. Box 7513
Washington, D.C. 20044

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
Michael D. Oldak, Esq.
Goldberg, Fieldman & Hjelmfelt
1700 Pennsylvania Avenue, N.W.
Suite 550
Washington, D.C. 20006

Vincent C. Campanella, Esq.
Director of Law
Robert D. Hart, Esq.
1st Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

Gerald Charnoff, Esq.
Wm. Bradford Reynolds, Esq.
Robert E. Zahler, Esq.
Jay H. Bernstein, Esq.
Shaw, Pittman, Potts &
Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

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

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

Michael M. Briley, Esq.
Roger P. Klee, Esq.
Fuller, Henry, Hodge & Snyder
P. O. Box 2088
Toledo, Ohio 43604

Russell J. Spetrino, Esq.
Thomas A. Kayuha, Esq.
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

Terence H. ... w, Esq.
A. Edward Grashof, Esq.
Steven A. Berger, Esq.
Steven B. Peri, Esq.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pa. 15219

David Olds, Esq.
Reed, Smith, Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, Pa. 15230

Lee A. Rau, Esq.
Joseph A. Rieser, Jr., Esq.
Reed, Smith, Shaw & McClay
Madison Building - Rm. 404
1155 15th Street, N.W.
Washington, D.C. 20005

Edward A. Matto, Esq.
Richard M. Firestone, Esq.
Karen H. Adkins, Esq.
Antitrust Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43215

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

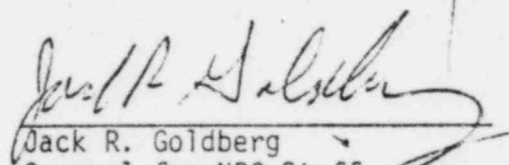
James R. Edgerly, Esq.
Secretary and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, Pa. 16103

Paul M. Smart, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

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

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

Jerome Saltzman, Chief
Antitrust and Indemnity Group
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *


Jack R. Goldberg
Counsel for NRC Staff