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)	)	NRC Docket Nos. 50-346A 50-500A 50-501A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 & 2)	)	NRC Docket Nos. 50-440A 50-441A

RESPONSE OF NRC STAFF TO APPLICANTS' MOTION FOR AN ORDER STAYING, PENDENTE LITE THE ATTACHMENT OF ANTITRUST CONDITIONS

I. Introduction

In its Initial Decision (Antitrust) dated January 6, 1977 (LPB-77-1, 5 NRC ____ (January 6, 1977) this Board inter alia concluded: 1/

> We have found Applicants to be engaged in activities which violate Section 1 of the Sherman Act, Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act ... Their activities also contravene the policies underlying those statutes. (Slip Op. at 252) ... The issuance of licenses for the nuclear units involved in these proceedings without appropriate license conditions will lead to the creation and maintenance of a situation inconsistent with the antitrust laws. (Slip Op. at 254).

In order to remedy the proscribed situation inconsistent with the antitrust laws, this Board ordered that ten antitrust license conditions be attached to licenses for the Davis-Besse 1, 2 and 3 and Perry 1 and 2 Nuclear Units.

1/ In arriving at this conclusion, this Board made a number of specific legal and factual findings. These specific findings help define the existing situation inconsistent with the antitrust laws in the context of which Applicants' motion must be judged. For convenience and for possible reference in the event of appeal, a number of these findings are summarized in Appendix 1 to this pleading.

By motion dated January 14, 1977, Applicants filed before the Atomic Safety and Licensing Appeal Board their "Motion For An Order Staying, Pendente Lite, The Attachment Of Antitrust Conditions". Applicants motion requests a stay of all of the ten license conditions ordered by this Board. By Memorandum and Order dated January 17, 1977 (ALAB-364), 5 NRC ___, the Appeal Board referred Applicants' motion to this Board initially, and instructed this Board to decide the motion as expeditiously as possible following the receipt of responses to it from the other parties.

II. Have Applicants Established Whether Good Cause Exists For Staying The Effectiveness of the Initial Decision?

In determining whether good cause exists for staying the effectiveness of an Initial Decision pursuant to 10 CFR 2.764, the Appeal Board has adopted the criteria established by the Court of Appeals for the District of Columbia in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (1958). 2/ The four criteria set forth by the Court of Appeals for the District of Columbia to assess whether the

2/ Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, NRCI-76/7 10, 13 (July 14, 1976); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-192, 7 AEC 420; Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-159, 7 AEC 478).

petitioner has "shown sufficient grounds warranting the exercise of the Court's power to grant the extraordinary relief requested" [3] are:

(1) Has the movant made a strong showing that it is likely to prevail on the merits of its appeal?

(2) Has the movant shown that, without such relief, it will be irreparably injured?

(3) Would the issuance of a stay substantially harm other parties interested in the proceeding?

(4) Where lies the public interest?

These criteria are next discussed in light of Applicants' motion.

A. Has The Movant Made A Strong Showing That It Is Likely To Prevail On The Merits Of Its Appeal?

This criterion has been described by the court as follows:

> Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. [4]

Applicants contend that the Board did not take into account the alleged economic and legal barriers to competition "in the electric utility industry which requires evaluation of antitrust principles on other than the "pro-competitive presumption relied upon below." Initially, Staff would point out that the focus of this proceeding was not the electric utility industry

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3/ 259 F.2d 921, 925.

4/ Id.

in general but the position, conduct and activities of five dominant utilities in the CCCT, and the relationship that this has to the requested licenses to construct and operate nuclear facilities. However, the Board dealt with Applicants' arguments concerning the alleged barriers to competition in detail in its Initial Decision (Slip Op. at 233-236; 100; 160; 166; 171; and 187). The Board also considered in detail the implications and ramifications of the recent case of Cantor v. Detroit Edison Co. ___U.S.___, 96 S. Court 3110 (1976), wherein the Board concluded that Cantor negated Applicants' arguments that the presence and observance of a state regulatory scheme precluded the possibility of finding that electric power companies subject to the scheme may violate the antitrust laws. (Slip Op. at 233). The Board also reviewed Applicants' "competition" arguments in the context of and teachings of U.S. v. Otter Tail Power Company, 410 U.S. 366 (1973) where substantive antitrust violations were examined notwithstanding the presence of state and federal regulatory schemes (Slip Op. at 236).[5/] Thus, Staff is of the view that Applicants have not established a substantial indication of probable success on appeal with respect to this principle contention.

5/ The Board further examined the current state regulatory schemes in Ohio and Pennsylvania and concluded that both states have regulatory schemes which contemplate competition (Slip Op. 236-237). It should further be noted that with respect to the sale of wholesale power and other types of coordination involving the exchange of bulk power, state regulatory agencies do not have jurisdiction.

Applicants' also contend that they are likely to prevail on the merits because the Board applied a nexus standard that has no relation to the practicalities of the electric utility industry. On pages 216-224 of its Initial Decision the Board made specific findings with respect to the question of whether there has been established a meaningful nexus between the situation inconsistent with the antitrust law and the activities under the license. The Board has also issued a number of other rulings on the subject of nexus, both before and after the Appeal Board's determination in Kansas Gas and Electric and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559. Those rulings on nexus include, "Ruling of the Board With Respect to Applicant's Proposal for Expediting The Antitrust Hearing Process, June 30, 1975; 6th Prehearing Conference Order October 2, 1975 page 5; "Ruling of the Board on Applicant's Motion for Summary Disposition of September 23, 1975. In response Applicants' contend that the nexus standard followed by the Board "has been simplistic and overly-glib". The Board's discussions and findings with respect to nexus have clearly been consistent with and mindful of the definition of the phrase "activities under the license" by the Appeal Board in Wolf Creek, supra., and, the nexus standard as described by the Appeal Board in Wolf Creek, supra, and in the Commission's Waterford II decision. 6/

6/ Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3) 6 AEC 619 at 620 (1973).

Without any foundation or legal citations in support of its position, Applicants complain that the Licensing Board failed to make specific findings as to whether Applicants possess monopoly power in relevant markets or "possess a degree of market power sufficient to suggest the dangerous probability that they will acquire monopoly power in any relevant market."[7] Not only does such a complaint ignore specific findings by the Board (Slip Op. at 106-107, 124, 146, 22-26) but a finding of monopoly power is not a prerequisite to the concluding that a situation inconsistent with the antitrust laws exists. The matters in controversy under Prehearing Conference Order No. 2[8] clearly indicate that with respect to matters in controversy 4 through 8, the key issue is whether Applicants' stipulation of dominance gives them the ability to hinder or preclude competition and whether or not such ability if it exists has been used by Applicants in an anticompetitive manner. Affirmative responses to these issues in controversy were specifically made by the Board (see for example Slip Op. pages 251-253). As the Board recognizes in its opinion "the stipulation of (their) Applicants dominance renders any exclusionary conduct suspect United States v. Philadelphia National Bank 374 U.S. 321, 363, 371 (1963).[9] Likewise, the Board notes that it is well established that a firm which has significant

7/ Applicant's Motion page 8.

8/ July 25, 1974.

9/ Slip Op. at 18.

market control cannot refuse to deal or discriminate in its dealings with its customers for the purpose of preserving or extending its monopoly position. 10/ As the Board concludes on page 24 of its Slip Opinion, "a company possessing monopoly power cannot willfully act to maintain or expand that power without violating the antitrust laws." It is in the context of Applicant's stipulation of dominance and the Board's specific findings of dominance, in fact, 11/ that Applicants exclusionary conduct has been examined by the Board. Thus the Board has analyzed and reviewed the joint activities in concert by Applicants to restrain or limit competition and to exclude competitors or potential competitors and concluded that such activities violate section 1 of the Sherman Act (Slip Op. at 18). The Board has also concluded that when companies possessing the dominant share of a relevant market act jointly to restrain or limit competition or to exclude would-be competitors Section 2 of the Sherman Act is violated (Slip Op. at 18). The competitive effect of such activities was analyzed by the Board. 12/ The Board also found certain activities (such as group boycotts, concerted refusals to deal and customer allocation agreements) to be per se unlawful, and hence inconsistent with the antitrust laws.

10/ Otter Tail Power Company v. U.S. 410 U.S. 366 (1973); U.S. v. Colgate and Company 250 U.S. 300 (1919).
11/ Slip Op. at 32-34.
12/ For example, see Board Findings 120, 124-5, 127(5), 130-131.

As a final example of Applicants' failure to demonstrade a substantial indication of probable success on the merits of an appeal, Applicants claim that the Board failed to "grapple with and evaluate most of the evidence introduced by Applicants during the course of the seven months of evidentiary hearings..." [13/] Throughout its initial decision, the Board evaluated many of the legal and factual arguments made by Applicants (Slip Op. at 98, 110, 111, 114, 119, 121, 127, 128, 143. 168-169, 198, 203, 210, 214, 218). In fact at pages 222-240 of the Initial Decision, the Board devotes an entire section of its decision to an in-depth treatment of Applicants' arguments.

B. Has The Movant Shown That, Without Such Relief, It will Be Irreparably Harmed

Our examination of this criterion for determining "good cause" begins with an explanation of it by the District of Columbia Court of Appeals:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, and time, and energy necessarily expended in the absence of a stay, are not enough..." [14/]

Applicants make no showing that they will be irreparably injured if the requested relief is not granted and offer no legal authority to support their argument with respect to the criterion of irreparable injury. In fact, Applicants have not specified with particularity what irreparable harm will result from each of the ten license conditions, nor have they specified the bases for such alleged harm. On this ommission alone, Staff believes the motion should be denied because Applicants have not met their burden.

Applicants first argue that, with respect to the license conditions that they should not be required to do what they cannot realistically do and should not in law or fact be required to do. [15/] The Board, however, has only required

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13/ Applicants' Motion, p. 9, n. 3.
14/ 259 F.2d at 925.
15/ Applicants' Motion, p. 10.

Applicants to offer similar power supplies options and access to nuclear units to non-applicants entities in the CCCT as Applicants make available or have agreed to make available to each other. Moreover, it should reasonably have been expected that Applicants would be required to offer access and power supply options in light of their claims that they have already adopted policies making certain of these services available to others. 16/

Applicants also argue that the relief, if implemented will undo the status quo. That is the very purpose of antitrust relief. 17/ The Board has found inter alia that a situation inconsistent with the antitrust laws currently exists, that Applicants have denied access to nuclear facilities and that if implemented, Applicants current proposals (App. 44) would both create and maintain a situation inconsistent with the antitrust laws. Thus, undoing the status quo is required. 18/ Moreover, the license conditions ordered are generally based upon Applicants repeated refusals to engage in such transactions. For example, the Borough of Pitcairn requested participation in CAPCO nuclear generation and in CAPCO membership in 1968 (Slip Op. at 103-106), and Pitcairn is still currently interested in such participation

16/ However, see pages 12-13 supra.

17/ U.S. v. Paramount Pictures, Inc. 334 U.S. 131 (1947); U.S. v. E.I. duPont de Nemours & Co., 353 U.S. 586, 607-8 (1967) Ford Motor Co. v. U.S., 405 U.S. 562 (1972).

18/ Applicants contend that the Board has ordered "preferential" access. Such a claim is based upon the assumption in Dr. Pace's testimony, on behalf of Applicants that the function of antitrust remedy should be to neutralize the impact of the nuclear units on the situation. Such an assumption is incorrect as a matter of law. See Proposed Findings of NRC Staff (contesting in all respects Dr. Pace's testimony at pp. 10-17 of the Relief section).

(Slip Op. at 225-226), although none has been offered (Slip Op. at 103).

Similarly, Applicants have been on notice of desires by other entities for access to alternative sources of bulk power requiring wheeling by Applicants for at least six years. Applicants provide or have agreed to provide such transmission services for each other, while refusing to do it for others. Applicants have jointly constructed extra-high voltage transmission to make available to each other the output of the nuclear plants (Slip Op. at 37). The question of the availability of excess transmission capacity was barely contested at the evidentiary hearing, and in some cases stipulated to (Slip Op. at 78, citing Tr. 4702-4703). In any event, if Applicants had historically and consistently not refused to wheel for others, the available transmission capacity would not only have been planned, but would have been utilized. Applicants circular argument is unconvincing to the effect that they snouldn't be required to wheel now, because they didn't plan their transmission facilities for wheeling for non-Applicant entities in the past. Such planning did not occur because Applicants refused to wheel for requesting entities in the past.

In North Central Truck Lines, Inc. v. U.S. 384 F. Supp. 1188 (D.C. W.D. Missouri, 1974) aff. ____U.S.____, 95 S. Ct. 820 (1975) petitioner moved for a stay pending appeal of an ICC order which ordered petitioner to cease from hauling certain commodities. In denying a request for a stay, the District Court reasoned as follows with respect to the irreparable harm criterion of Petroleum Jobbers, (which reasoning is particularly pertinent here):

> Second, with respect to the criterion of irreparable injury, plaintiff states that a denial of its motion for a stay "would in effect require plaintiff to abandon a very large portion of its operations" and it would ". . . lose substantial sums of money in prepaid expenses and capital outlays which could not be recouped if this Court's decision were reversed on appeal." This contention is somewhat counterbalanced by the fact that the "irreparable injury" to which plaintiff refers constitutes, in essence, the unlawful diversion of business from the intervenor-defendants and others similarly situated. 19/

On the basis of the above discussion, in Staff view, Applicants have not demonstrated that they have satisfied the criterion of demonstrating irreparable injury.

C. Would The Issuance Of A Stay Substantially Harm Other Parties Interested In The Proceeding?

With respect to this criterion, the comments by the District of Columbia Court of Appeals are also instructive:

> On this side of the coin, we must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents. 20/

19/ 384 F. Supp. at 1191.

20/ 259 F.2d at 925.

The hearing has clearly established that the number of non-applicant entities in the CCCT has been shrinking, due in part to the illegal predatory activities of Applicants. The Board has found that within the relevant markets, Applicants have acted individually and collectively to eliminate one or more other electric entities and to preclude competition (Slip Op. at 252). Thus, for example, in recent years certain Applicants have acquired the small electric systems of Hiram, East Palestine, Clyde, Waterville and (the distribution system of) Libertyville, Ohio and Aspenwall, in Pennsylvania. In addition the Board has found inter alia that Applicants have denied access to nuclear units, denied membership in CAPCO, which was equivalent to denial of access to a bottleneck facility (Slip Op. at 215) and have used their dominant position to hinder or impede the ability of other electric entities to compete and/or survive (Slip Op. at 14-15). The relief ordered by this Board, pursuant to the 1970 Amendments to the Atomic Energy Act (42 U.S.C. §2135(c)) applies the antitrust laws to remedy a situation inconsistent with the antitrust laws. A delay in the imposition of such relief creates the likelihood that the number of those entities which might benefit from such relief, when ordered, may further and finally decrease in number. If Applicants are granted a stay, then it would be to their benefit to delay expeditiously advancing their appeal, since the results of their anticompetitive practices will continue to be felt by the smaller systems with which they compete.

Applicants argue that the license condition commitments attached to their motion (App. Ex. 44) result in no material harm to the interests of any other party with respect to Davis-Besse 1. [21/] The Board, however, has found that these same policy commitments are in and of themselves anticompetitive,

21/ Applicants Motion, p. 16.

having the effect of both creating and maintaining a situation inconsistent with the antitrust laws. (Slip Op. at 222). The evidentiary record clearly established and the Board found that Applicants' proposed license conditions were never offered to non-Applicant entities within the CCCT. 22/ In addition, the Board found that CEI has in fact made no meaningful offers of access to nuclear power (Slip Op. at 82-83); that Duquesne has denied access to the Beaver Valley nuclear unit and never offered access to any other nuclear unit (Slip Op. at 103); that Ohio Edison has denied its wholesale customers reasonable and practical access to nuclear power (Slip Op. at 136); that Toledo Edison has denied small systems access to large scale generating facilities effectively precluding access to Davis-Besse and Perry (Slip Op. at 185-186); and has never offered access to nuclear units to entities in its service area (Slip Op. at 186).

Moreover, cases hold that the burden rests on the party seeking a stay 23/ to establish that the stay would not harm any other party K.C. Royals v. Major League Baseball Players Assn., 409 F. Supp. 233 (USDC, W.D. Minn. 1976). Applicants have clearly not met that burden.

D. Where Lies the Public Interest?

As the District of Columbia Court of Appeals noted in delineating this criterion:

> In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes. The public interest may, of course, have many faces... 24/

22/ Slip Op. at 194, 204-205. See also McCabe: Tr. 1718 (Duquesne); Pandy: Tr. 3158 (CEI); Hillwig: Tr. 2409-10 (TE); Lyren: Tr. 2030 (OE).
23/ Pursuant to F.R.C.P. Rule 62(c).
24/ 259 F.2d at 925.

In 1970, the Atomic Energy Act was amended to require the Commission to determine whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws.[25/] Furthermore, the Act requires the Commission to consider not only the antitrust laws themselves, but also the policies underlying those laws.[26/] As stated in Waterford II,: "The Commission is determined to assure that . . . licensed activities accord with the antitrust laws and the policies underlying those laws."[27/] By implementing a stay, this Board would only delay implementation of public policy as expressed in the 1970 Amendments to the Atomic Energy Act. In light of the Board's findings as set forth in Appendix I infra., the public interest would not be served by permitting Applicants to maintain their market position and continue to engage in the conduct that has been challenged in this proceeding.[28/] The public interest would be served by applying the settled principles of antitrust law (including the Federal Trade Commission Act) to the Applicants in this proceeding.[29/]

25/ As specified in subsection 105a, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.

26/ S. Rep. No. 91-1247, 91st Cong., 2nd Sess., at 31 (1970).

27/ Waterford II, supra. note 6, at 620.

28/ cf. North Central Truck Lines, Inc. v. U.S., 384 F.Supp. 1188 at 1192; aff. ___U.S.___, 95 S. Ct. 820 (1975).

29/ cf., K.C. Royals v. Major League Baseball Players Assn. supra, at page 770. Applicants also contend that the law is unsettled. As the Appeal Board noted in Wolf Creek, supra. p. 10 at 1 NRC 561 at 572, "it is far too late in the day to dispute that it runs counter to basic antitrust precepts to exercise monopoly power....electric utility companies are no more free then others to engage in those practices; their unjustified refusals to wheel power or to interconnect with smaller entities in the filed have regularly been called to account as violative of antitrust policies." (emphasis supplied),citing Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); Otter Tail Power Co. v. U.S., supra., Gainesville Utilities v. Florida Power Corp., 402 U.S. 515 (1971); Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy, 72 Colum. L. Rev. 64 (1972).

As the Court of Appeals noted in Hamlin Testing Lab, Inc. v. U.S. Atomic Energy Commission, 337 F.2d 221 (USCA 6th Cir. 1964) while applying Petroleum Jobbers to deny staying the enforcement of an AEC order which denied renewal of a license to perform industrial radiography:

> ...a stay must be denied whenever the petitioner fails to carry the burden of establishing that it [the stay] will not be harmful to the public interest. 30/

In Staff's view the public interest clearly lies in applying, without delay, the license conditions ordered by this Board.

III. CONCLUSION

It is the Staff's position that Applicants motion for a stay, pendente lite, be denied in that Applicant has failed to satisfy any of the criteria set forth in Virginia Petroleum Jobbers Association v. FPC, supra, which criteria has been adopted by the Appeal Board.

Respectfully submitted,

Roy P. Lessy, Jr.
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of January 1977.

30/ 337 F.2d at 222.

Appendix I

The Board's specific findings included, inter alia, the following:

(A) Applicants dominate the relevant markets (Slip Op. at 11-12).

(B) Applicants have increased their dominance since 1967 by anticompetitive acts and policies (Slip Op. at 14).

(C) Some of the actions employed by Applicants to increase their dominance (such as territorial allocations, group boycotts, and price fixing) are per se violations of the antitrust laws. (Slip Op. at 14-15).

(D) Applicants have used their dominant position to hinder or impede the ability of other electric entities to compete and/or survive. (Slip Op. at 14-15).

(E) The operation of the subject nuclear units will have a substantial effect upon both the supply and cost of electricity within the Combined Capco Company Territories Area, ("CCCT"), (Slip Op. at 13). Extra-high voltage transmission is necessary to make available to the co-owners the output of the nuclear units. There is a discernable relationship between such extra-high voltage transmission and the competitive stance of the CAPCO members. (Slip Op. at 37).

(F) The cooperation of one or more Applicants is a prerequisite to access to sources of power beyond the control of Applicants by non-applicant CCCT entities. (Slip Op. at 42).

(G) Cleveland Electric Illuminating Company has (inter alia) attempted to acquire competitors sometime successfully (Slip

Op. 61-62); engaged in illegal price fixing (Id.); attempted to forestall proposed interconnections between the Cities of Cleveland, Painesville and Orrville, Ohio. (Slip Op. at 62); refused to wheel for both Cleveland and Painesville (Slip Op. 76-78 and 88-89); has made no meaningful offers of access to nuclear power (Slip Op. at 82-83); secured an anti-competitive and oppressive interconnection agreement with the City of Painesville (Slip Op. 87, 89); denied Painesville the benefits of coordination, coordinated operation and development by delaying construction of an interconnection (Slip Op. 88); imposed for competitive reasons severe operating problems, unnecessary restrictions and administrative delays on the operation of an 11kv load transfer arrangement with Cleveland (Slip Op. at 71); after five years of negotiation reached an interconnection agreement with Cleveland which denies Cleveland the full benefits of coordinated operation and development (Slip Op. at 76).

(H) Duquesne Light has denied access to nuclear units when requested (Slip Op. at 103); refused to sell wholesale power or interconnect with the Borough of Pitcairn (Slip Op. at 93) and other municipal electric systems (Slip Op at 96); refused to sell wholesale power to Aspenwall (Slip Op. at 94); denied the Borough of Pitcairn CAPCO membership (Slip Op. at 106); and generally abused its dominant position and exercised its monopoly power in an anticompetitive manner (Slip Op. at 106).

(I) Ohio Edison and Pennsylvania Power possess monopoly power (Slip Op. at 107); and used that monopoly power in the relevant markets to control the conditions of sale, to refuse to engage in transactions which would otherwise be economically beneficial, to exclude competition and to increase their monopoly positions and to consolidate and maintain such positions (Slip Op. at 107-108). Ohio Edison has maintained and exacerbated a situation inconsistent with the antitrust laws as a monopolist by: engaging in anticompetitive acquisitions (Slip Op. 109-113), engaging in or imposing illegal territorial allocation agreements with Toledo Edison and (Slip Op. at 114-115), Ohio Power (Slip Op. 115-118), and CEI (Slip Op. 118-119); by refusing to wheel (Slip Op. at 124-125, 125-128, 130;) by refusing to interconnect (Slip Op. 133); by the imposition of anticompetitive restrictions on the resale of power including the resale of nuclear power (Id.); by denying its 20 wholesale customers the benefits of coordinated operation and development thus hindering coordinated operation and development (Slip Op. 137-138); by denying its wholesale customers reasonable and practical access to nuclear power (Id.); by acting affirmatively and deliberately to preserve its monopoly position (Id.); by eliminating competition for industrial customers (Id.); by engaging in practices which restricted the growth of its wholesale customers (Slip Op. 139-140); and by refusing to sell bulk power (Slip Op. at 146).

(J) Toledo Edison Company has had a deliberate policy of acquiring municipal electric systems (Slip Op. at 161) and imposing illegal customer allocations and restrictions in its contracts

(Slip Op. 165, 171); by agreeing to illegal territorial allocations with neighboring investor-owned utilities (Slip Op. 166, 167); by refusing to wheel power (Slip Op. 173); by refusing to sell either full or partial-requirements power (Slip Op. at 184); by denying access to large-scale generating facilities and by effectively denying access to the Davis-Besse and Perry Nuclear Units (Slip Op. at 185-186);

(K) The CAPCO Power Pool was formed in part to deny to competitive entities in the CCCT access to the benefits of coordinated operation and development (Slip Op. 188). The CAPCO agreement is an agreement in restraint of trade (Slip Op. 194). The concerted denials of membership opportunities by CAPCO to others was a group boycott, and an act of monopolization (Slip Op. 194).

(L) With respect to access to nuclear units,all of the individual Applicants have denied access to such nuclear units (Slip Op. 204-205). These denials of access to nuclear units were made pursuant to common objectives and understandings among the Applicants; denial of membership in CAPCO is and was equivalent to denial of access to a bottleneck facility (Slip Op. 215).

(M) Applicants have denied the option of effective utilization of nuclear power to their competitors (Slip Op. at 222, 224).

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THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 & 2)	)	NRC Docket Nos. 50-440A 50-441A

CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF NRC STAFF TO APPLICANTS' MOTION FOR AN ORDER STAYING, PENDENTE LITE THE ATTACHMENT OF ANTITRUST CONDITIONS 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 26th day of January 1977:

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