UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

OHIO EDISON COMPANY'S AND PENNSYLVANIA POWER COMPANY'S MOTION FOR DISMISSAL OF CERTAIN ALLEGATIONS

Preliminary Statement

The "Motion for an Order Dismissing all Allegations Made by the NRC Staff, the Department of Justice, and the City of Cleveland" was filed today by Shaw, Pittman, Potts & Trowbridge on behalf of all Applicants in these consolidated proceedings. In the event that that motion is denied or not granted in full, Ohio Edison Company and Pennsylvania Power Company (the "Companies") hereby move in the alternative for

an order of this Board granting dismissal of certain specific charges of anticompetitive conduct on the part of the Companies made by parties opposed to the Companies in their respective September 5, 1975 filings of the nature of the cases to be presented by them.

A motion for partial dismissal at this point in the hearing is consistent with the purpose and intent of Rule 41(b) of the Federal Rules of Civil Procedure,[1] the provisions of 10 CFR 2.749, and the September 28, 1973 order of the Commission in Docket No. 50-382A.[2] Furthermore, such a motion is in

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1 Rule 41(b) reads in relevant part:

"Rule 41. Dismissal of Actions

(b) Involuntary Dismissal.
For failure of the plaintiff to prosecute..., a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shcwn no right to relief."

2 "The hearing issues cannot and should not be divorced from the overriding requirement that there be a reasonable nexus between the alleged anticompetitive practices and the activities under the particular nuclear license. This is a primary and predominant question which must pervade the proceeding. We remind the Board and the parties that if it becomes apparent at any point that no meaningful nexus can be shown, all or part of the proceeding should be summarily disposed of. This can be done under the provisions of 10 CFR 2.749 or by any other appropriate means." (P. 8)

accord with this Board's often stated desire to expedite these proceedings and limit the issues to those which are actually in controversy.[3]

In the short period of time since the closing of the case against the Companies, there has not been an opportunity to examine each page of the transcript and each exhibit in detail. Nonetheless, based upon as thorough a review of the record as time would permit, it is apparent that the parties opposed to the Companies have failed to meet their burden with respect to many of the allegations of anticompetitive conduct alleged to have been committed by the Companies as set forth in the September 5 filings. The particular allegations involved fall generally into two categories.

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[3] The appropriateness of moving at this juncture with regard to specific allegations is also reflected in the following colloquy:

> "MR. STEVEN BERGER: Mr. Chairman, maybe I could just inquire. Among the list of charges set forth by the Department in their September 5 filings were charges which on their face predated the time period that the Chairman and the Board has indicated that they want to consider in this proceeding, will consider relevant for the issues in this proceeding. When is it that the Board would feel it appropriate . . . to move with respect to the charges or to otherwise indicate that it is not necessary for Ohio Edison to in any way controvert these charges in their own case?
>
> "CHAIRMAN RIGLER: Well, I wouldn't think it would be appropriate until we have had the affirmative case closed by all parties opposed to the unrestricted grant of a license for the five pending plants." (Tr. 6220-6221)

First, there were many allegations made against the Companies in the September 5 filings concerning which the parties opposed to the Companies have simply failed to place into the record any evidence at all. These allegations will be dealt with in Part I.

Secondly, the Companies believe they are entitled to dismissal of certain other allegations contained in the September 5 filings. Although some evidence regarding each of these allegations has been placed in evidence which tends to establish that the Companies engaged in certain conduct, there has been nothing placed in the record to support the charge that the conduct in question was anticompetitive or even inappropriate either standing alone or as part of a broader allegation of anticompetitiveness. These allegations will be dealt with in Part II.

I.

The September 5 filings of the parties opposed to the Companies contained several charges of alleged anticompetitive conduct on the part of the Companies which predated September 1, 1965. The Board, however, has rejected attempts to support such charges on the ground that the conduct in question is too remote from the existing situation to justify Board consideration in resolving the Matters in Controversy herein. In addition, other charges of alleged anticompetitive conduct set forth

in the September 5 filings, although post-dating September 1, 1965, have not been supported by the testimony of a single witness or any exhibit. The following represents a listing of these charges.

A. In 1962, Ohio Edison offered a substantial subsidy to the Hiram municipal electric system's largest customer to switch over to Ohio Edison in order to further its goal of acquiring that system.

The Department of Justice attempted to introduce several exhibits, designated as Department Exhibits 404, 405, 477 and 478 in support of this charge. These exhibits were rejected (Tr. 6190, 6239). Another exhibit, Department Exhibit 448 was rejected in relevant part. (Tr. 6194-6195)

The Companies are unaware of any evidence in the record to support this allegation.

B. At least prior to 1971, Ohio Edison had a territorial allocation agreement with Firelands Rural Electric Cooperative with respect to new customers.

The Companies are unaware of any evidence in the record to support this allegation.

C. In 1966, Ohio Edison attempted to foreclose competition with Buckeye Power, Inc. in supplying bulk power by offering Firelands Rural Electric Cooperative a new delivery point if it would withdraw from membership in Buckeye Power, Inc.

The Companies are unaware of any evidence in the record to support this allegation.

D. In 1965, Ohio Edison refused to sell the Newton Falls municipal electric system power for resale thereby denying it the benefits of coordination.

Mr. Craig, the only witness whose testimony (Tr. 2845-2970) dealt primarily with the Borough of Newton Falls, did not testify as to this charge. In addition, Department Exhibit 314 offered in support of this charge was rejected. (Tr. 5323)

The Companies are unaware of any evidence in the record to support this allegation.

E. In 1971, Ohio Edison refused to wheel power from Buckeye Power, Inc. to Norwalk in order to further its goal of acquiring that system.

Although a few exhibits (Department Exhibits 425-427) indicate that there was some contact between Buckeye and a Norwalk private citizen (Waite) and later the service director of Norwalk (Krogh), there is nothing in these or other documents now in evidence, nor in any testimony this Board has received, to indicate that Ohio Edison was ever requested to wheel power between Buckeye and Norwalk or that Ohio Edison refused such a request. Two exhibits (Department Exhibits 433 and 434) indicate that in the one documented instance in

which wheeling was mentioned no request for wheeling was made. Even accepting Department Exhibits 433 and 434 as they were offered by counsel for the Department of Justice, in this context they show no more than "Ohio Edison's statement that, in response to a question, they had no information on the company's policy regarding wheeling." (Tr. 5673 and 5674) This is hardly a refusal to wheel.

The Companies are unaware of any evidence in the record to support this allegation.

F. Since 1968, Ohio Edison has repeatedly refused and/or delayed providing new delivery points to rural electric cooperatives, thereby inhibiting their ability to compete for new customers.

The Companies are unaware of any evidence in the record to support this allegation. This is particularly noteworthy since this was the only charge of anticompetitive conduct set forth in the Davis-Besse 2 and 3 Letter of Advice involving the competitive situation in the areas served by the Companies and their relationships with the other electric entities serving in those areas.

G. In 1959, Penn Power refused to sell partial requirements power to Grove City municipal electric system, with the intent and effect of preventing competition with the municipal system for industrial customers.

The offer of proof made by the Department of Justice as a prelude to questioning Mr. Allen about this specific charge was rejected (Tr. 4782), and Mr. Allen did not testify with regard to this allegation.

The Companies are unaware of any evidence in the record to support this allegation.

II.

In addition to dismissal of the allegations listed in Part I, the Companies believe they are entitled to dismissal of certain other allegations which were made in the September 5 filings. Although some evidence concerning each of these allegations is now in the record, there is nothing in evidence to indicate that there was anything anticompetitive or even inappropriate about the alleged activities.[4] Therefore the Companies believe they are entitled to dismissal of the additional charges listed below.

A. In 1970, Ohio Edison refused to bid for the Norwalk municipal electric system's generation facilities unless the sale of these facilities was tied to a sale

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4 In ruling on evidentiary matters the Chairman has suggested that conduct which is "reasonable" and constitutes "nothing wrong" should not be included in the examination of a particular company's activities. (Tr. 6191 and 5663)

of Norwalk's distribution system thereby eliminating the municipal system's ability to compete with Ohio Edison at retail.

The main document relied upon in support of this charge by the Department of Justice is Department Exhibit 422. While attempting to introduce this exhibit, counsel for the Department of Justice found it necessary to amend both his offer of proof and the charge itself (Tr. 6182). Thereafter the exhibit was admitted on a limited weight basis with the Chairman stating:

> "As to 422, the offer of proof has been amended. The objection, nonetheless, seems to survive the amendment.
>
> "Once again we come to a question of weight. The Board may take some notice with respect to it being reasonable for Ohio Edison not to wish to acquire steam generating units, except under certain conditions.
>
> "That may affect any weight we give this document. But, on a limited weight basis, the objection will be overruled, and we will receive 422 into evidence." (Tr. 6191-6192)

First, the charge of a tied purchase rather than a sale is a rather unique antitrust concept, since it is based upon an underlying premise that Ohio Edison had an affirmative duty to purchase Norwalk generating facilities. In any event, the face of Exhibit 422 belies the allegation since it documents the willingness of Ohio Edison to purchase certain generating facilities from Norwalk whether or not

Norwalk was willing to sell its distribution system. What is apparent is that Ohio Edison had no use for the steam generators. It recognized however, that if Norwalk chose to sell its distribution system, Norwalk would, of course, have no use for the steam units and therefore the sale of those units would have to be part of an overall purchase of the system.

B. Prior to 1972, Ohio Edison refused to enter into wholesale contracts with municipal systems for any shorter period than ten years.

It is undisputed that Ohio Edison has numerous contracts with municipalities for 10 year terms, however, nothing in the many FPC filings, the Ohio Edison contracts or the city ordinances that the Department has put into evidence, nor in the testimony of Messrs. Craig and Lyren relevant to such 10 year contract terms, establishes or even suggests that any municipality requested a term of service shorter than 10 years, that Ohio Edison refused such a request, or that there would be anything anticompetitive or even inappropriate if it had done so. Indeed, Mr. Mayben's testimony indicates that for certain power supply contracts with municipalities, 10 years is an "appropriate" term. (Tr. 7807)

C. During the period 1965 to 1966, Penn Power refused to supply maintenance power to the Grove City municipal electric system, thereby weakening the competitive viability of the municipal system.

Nowhere in the record is there evidence concerning possible supply of maintenance power to Grove City although the testimony of Mr. Allen did deal with the discussions had between Pennsylvania Power Company and Grove City on the possible supply of partial requirements power to Grove City (Tr. 4768-4775). These discussions, however, were admittedly "preliminary" in nature and partial requirements was but one of "alot of things . . . being discussed in and about that time frame" (Tr. 4784). Moreover, Mr. Allen appeared to agree with the statement that it was "in [Grove City's] best interest not to take partial requirements from an economic standpoint" (Tr. 4786-4787; see also 4791).

D. Ohio Edison has had a policy of imposing long-term capacity restrictions and financing restrictions in contracts or proposed contracts with wholesale customers which have an adverse effect on the operation and growth of the systems of said customer in a manner inconsistent with the antitrust laws.

Even assuming that the testimony of Mr. Craig establishes certain capacity limits and financial requirements that Ohio Edison has sought in interconnection and wholesale power contracts, the Companies are unaware of any evidence in the record which would indicate that such contract provisions were not included solely for legitimate business and engineering reasons or that there was anything

anticompetitive or even inappropriate in Ohio Edison's bargaining for contracts with such provisions.

There is evidence both in Mr. Craig's testimony and the exhibits introduced while he was on the stand, that Ohio Edison was quite flexible in negotiating with Newton Falls, raising the maximum amount of electric service available to the city from the originally proposed 5,000 KVA to 6,250 KVA (Applicants Exhibit 32, OE-16) and discussing and considering several financing options with the city, with the city making the ultimate choice. (Staff Exhibits 73-83)(Applicants Exhibits 29, 30, 31, 34)

It should also be noted that plans for the Newton Falls-Ohio Edison interconnection are proceeding on terms satisfactory to both parties. The initial agreement between the parties was filed with the Federal Power Commission on January 30, 1976 and will become effective upon the commencement of service under the agreement.

E. Since mid-1960's, Ohio Edison has had an agreement with CEI that restricts competition between the two with respect to new customers.

This charge has never been made by the Department against CEI, Ohio Edison's alleged partner in this agreement.

The only evidence which relates to this charge appears to be a single sentence from Department Exhibit 488 which reads:

> "R. G. Zimmerman called Mr. Davidson on April 1, 1974 and Mr. Davidson stated that ten years or more ago the two companies had had difficulty at certain boundaries and it was concluded that the company with the lowest cost should serve; and if this was not agreeable to both parties, it was to be referred to the respective V.P.'s."

It is submitted that by merely placing this sentence into the record the Department has fallen short of its burden of proof on this charge.

F. In 1965, Ohio Edison entered into an agreement with Ohio Power Company that should Buckeye Power, Inc. be dissolved, the rural electric distribution cooperatives purchasing Buckeye generated power from Ohio Power through Ohio Edison would become Ohio Edison customers again.

The Companies are unaware of any evidence which would prove the existence of such an agreement. Department Exhibit 490 indicates only that two Ohio Power representatives believed that these cooperative loads would revert to Ohio Edison. The only reasonable reading of the word "agreed" here is that Lacopo and Martinka agreed <u>with one another</u>, <u>i.e.</u>, shared the opinion, that these loads would revert to Ohio Edison if Buckeye Power were dissolved.

The deposition testimony of C. W. Frederickson, the memorandum's author, portions of which are now in evidence as Department Exhibit 573 is consistent with this interpretation:

> "Q. Mr. Frederickson, are you aware of any agreement between Ohio Power and Ohio Edison to allocate exclusively to Ohio Edison certain co-ops presently members of Buckeye, should Buckeye be disbanded?
>
> [After some discussion between opposing attorneys]
>
> "A. The answer is no." [p. 225]
>
> [Somewhat later.]
>
> "Q. Referring to paragraph 8 on page 2 of your memorandum would those co-ops be wholesale customers of Ohio Edison in the event Buckeye disbanded?
>
> "A. I believe that is what is inferred by Mr. Lacopo and Mr. Martinka." [p. 226]

No conduct by Ohio Edison representatives at the November 17, 1965 meeting reported in Department Exhibit 490 can be characterized as "entering into an agreement with Ohio Power" on behalf of Ohio Edison.

G. Ohio Edison has eliminated, through acquisition, competing municipal electric systems, including the following systems which had their own generation capability: Norwalk, Hiram and East Palestine.

The Companies are unaware of any evidence that

has been introduced concerning Ohio Edison's purchase of the East Palestine electrical system. Numerous documents, among them Department Exhibits 422-23, 426-438 and 445-448, do deal with the circumstances surrounding Ohio Edison's acquisition of the assets of the Norwalk and Hiram electric systems, however, there has been no evidence that there is anything inconsistent with the antitrust laws or even inappropriate in the purchase of these systems.

The Board may take judicial notice of the provisions of the Public Utility Holding Company Act of 1935, 15 U.S.C. 797 et seq. (1970) which requires the approval of the Securities and Exchange Commission (the "SEC") for any acquisition of utility assets by a registered holding company such as Ohio Edison. Companies regulated under the Act may not, "acquire, directly or indirectly, any securities or utility assets or any other interest in any business," unless an application for approval of the acquisition has been filed with and approved by the SEC (15 U.S.C. §§ 79i and 79j).

The standards applied by the SEC in considering such acquisitions amount to rigorous antitrust analysis. Thus, the SEC cannot approve such an acquisition unless it finds that the acquisition:

(1) will not "tend towards interlocking relations", nor "unduly complicate the capital structure," nor be

detrimental to carrying out the reorganization provisions of the Act (15 U.S.C. §§ 79j(b)(1) & (3), 79j(c)(1)); (2) is not in violation of any applicable state law (15 U.S.C. § 79j(f)); and (3) "will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system" (15 U.S.C. § 79j(c)(2)). The SEC may also impose terms and conditions on the acquisition "necessary or appropriate in the public interest or for the protection of investors or consumers." (15 U.S.C. § 79j(e)).

Furthermore, intervention by interested parties opposing approval of such an acquisition is permitted. Indeed, persons opposed to the acquisition of the Hiram system did intervene during that SEC proceeding and a charge of "subsidization" similar to that leveled by the Department of Justice in this proceeding, was considered and rejected by the Commisssion:

> ". . . various of the participants also assert that applicant employed unfair acquisition tactics by inducing the College, by a promise to reduce the rates charged it, to exert undue pressure upon Hiram's council to make the sale. This is denied by the College and is not supported by the record." (Holding Company Act Release No. 17842 p. 4)

Accordingly, the Companies submit that the SEC's consideration and approval of the acquisitions in question preclude this Board from finding that such acquisitions

were anticompetitive or inappropriate and should obviate the necessity of the Companies having to justify those acquisitions in this proceeding.

H. (1) Ohio Edison has eliminated the ability of its wholesale municipal customers to compete with it for industrial customers by refusing, since at least 1970, the requests of Niles and Cuyahoga Falls municipal electric systems that Ohio Edison file rates for 138 kv service.

(2) Pennsylvania Power Company had, and has, a corporate policy of refusing to file a rate for 69 kv service to its wholesale municipal customers, thereby restricting the municipalities' ability to compete with it for industrial customers.

Since each of these charges deals with the willingness of the Companies to file a rate for high voltage service to wholesale municipal customers, they are treated together.

At the outset, it must be emphasized that the willingness of the Companies to establish high voltage service has never been questioned. Moreover, the Companies have been willing to provide general information on the cost savings to a customer receiving high voltage service (Department's Exhibits 415-420). The Companies have taken the position, however, that they cannot file a specific rate with the FPC

for such service until such time as the customer demonstrates that it is ready and able to receive service at a higher voltage. Indeed, Section 35.3 of the FPC's Rules and Practice provides in relevant part that rate schedules shall not be filed "more than 90 days prior to the date on which the electric service is to commence and become effective." Moreover, the question of whether Pennsylvania Power Company was required to file a rate for 69 kv service prior to a municipal customer demonstrating that it is ready and able to receive such service was fully litigated at the FPC in Docket No. 8159. The Commission there sustained Penn Power's position concluding that no rate need be filed until Penn Power receives written notice from any of its municipal customers, that such customer is or will be ready and able on a date certain to accept service at the higher voltage. Penn Power to date has not received the requisite notice from any of its wholesale municipal customers and thus has no rate on file with the FPC for 69 kv service.

Conclusion

It has been demonstrated herein that the parties opposed to the Companies have simply failed to meet the burden on the vast majority of charges of anticompetitive conduct leveled against the Companies in the September 5 filings.

Until the Board acts on this motion,* however, the Companies must be prepared to address all charges made against them--which of necessity diverts their attention from the charges actually in controversy. Indeed, the Chairman, without in any way intending to prejudge the motions, instructed the Applicants for planning purposes to assume in preparing their direct cases that all motions would be denied (Tr. 8062). The fact, however, that the Companies have not had the benefit of the Board's determination of the instant motion does not mean that the cause of expedition will not be furthered by a swift resolution of it, since a favorable ruling on the instant motion would unburden the record of unnecessary testimony and exhibits.

Finally, the Companies want to make clear that no concession should be implied from their failure to move against certain of the allegations set forth in the September 5 filings. On the contrary, the Companies are prepared to demonstrate in their direct case that those charges either have no basis in fact or that the conduct in question has been taken out of context and labeled anticompetitive when in reality

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* As indicated at the outset, this motion assumes that the "Motion for an Order Dismissing all Allegations Made by the NRC Staff, the Department of Justice and the City of Cleveland" will be denied. Of course, should that motion be granted, the Board need not reach the instant motion.

the Companies' actions have uniformly been consistent with sound business and engineering justification, and based upon the Companies' recognition and performance of their public utility responsibilities to meet the needs of the customers in the areas in which they serve.

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS

By Terence H. Benbow

Terence H. Benbow
A Member of the Firm
40 Wall Street
New York, New York 10005
(212) WH 3-0700
Attorneys for Ohio Edison Company
and Pennsylvania Power Company

OF COUNSEL:

Steven A. Berger
Steven B. Peri

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Ohio Edison Company's and Pennsylvania Power Company's Motion for Dismissal of Certain Allegations made by Parties Opposed to Applicants," dated April 20, 1976, have been served by first class U.S. mail, postage prepaid, on this 20th day of April, 1976 on the following:

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

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

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

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

Mr. Chase R. Stephens
Docketing and Service Section
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20006

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

Joseph J. Saunders, Esq.
Steven M. Charno, Esq.
Melvin G. Berger, Esq.
Janet R. Urban, Esq.
Antitrust Division
Department of Justice
Washington, D.C. 20530

Jack R. Goldberg, Esq.
Benjamin H. Vogler, Esq.
Roy P. Lessy, Jr., Esq.
Office of the General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

Gerald Charnoff, Esq.
William Bradford Reynolds, Esq.
Shaw, Pittman, Potts & Trowbridge
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Donald H. Hauser, Esq.
Victor A. Greenslade, Jr., Esq.
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

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

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

David M. Olds, Esq.
William S. Lerach, Esq.
Reed, Smith, Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, Pennsylvania 15219

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

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

Robert D. Hart, Esq.
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

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

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

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Ave.
Pittsburgh, PA 15219

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

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

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

Steven A. Berger