THOMPSON, HINE AND FLORY
1920 N STREET, N. W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 331-8800

IN CLEVELAND, OHIO
1100 NATIONAL CITY BANK BUILDING
CLEVELAND, OHIO 44114
[illegible]5500

IN COLUMBUS, OHIO
100 EAST BROAD STREET
COLUMBUS, OHIO 43215
(614) 461-6000

ORIGINAL

October 5, 1981

Director
Office of Nuclear Reactor Regulation
Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Docket No. 50-358;
Request for Reevaluation
of Finding re No Significant
Antitrust Changes

Dear Sir:

Pursuant to procedures adopted by the Nuclear Regulatory Commission ("Commission") as set forth in the proposed revisions to 10 C.F.R. §21.101(e) published in the Federal Register of March 26, 1981 (46 FR 18747), this is a request for reevaluation of a finding of the Director of the Office of Nuclear Reactor Regulation that no significant antitrust changes in a licensee's activities or proposed activities have occurred subsequent to the previous construction permit review by the Attorney General and the Commission. The finding in question was made on July 14, 1981, in the above-referenced docket relating to the Zimmer Nuclear Unit 1 and was published in the Federal Register of August 6, 1981 (46 FR 40112).

This Request is submitted on behalf of Buckeye Power, Inc. ("Buckeye") a non-profit electric generation and transmission cooperative which provides wholesale electric service to its

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twenty-nine (29) electric cooperative members in the State of Ohio.

The basis for this Request is that the Dayton Power & Light Company ("Dayton P & L"), one of three applicants for an operating license for Zimmer Nuclear Unit 1, has engaged in a pattern of anticompetitive activity which compels remedial action in the context of this proceeding in order to implement fully the purposes of Section 105 of the Atomic Energy Act of 1954, as amended (42 U.S.C. §2135) and the regulations promulgated thereunder (10 C.F.R. §2.101). Although certain aspects of Dayton P & L's anticompetitive behavior occurred prior to the July 14, 1981 finding of the Director, Dayton P & L's true anticompetitive design did not become clearly evident to Buckeye until quite recently.

As explained in greater detail below, Dayton P & L's anticompetitive behavior has consisted of a willful refusal to provide contracted for transmission services to certain rural electric cooperatives in Ohio. In refusing to honor its obligation to provide transmission services, Dayton P & L is abusing its monopoly position in the control and ownership of transmission facilities in order to obtain an unfair competitive advantage over small rural electric cooperatives.

Under Ohio law, the primary competition between electric utilities is for the attraction of new customers. In order

to obtain new customers, an electric utility must be able to assure the customer that it can provide adequate electric power to serve that customer's needs in a timely manner. In many instances, the mere possibility of delay in receiving electric service is sufficient to induce a potential customer to seek an alternative source of supply even though service from a rural electric cooperative may be less expensive and otherwise equally or more attractive. By withholding indispensable transmission services from rural electric cooperatives, Dayton P & L is attempting to undermine the reliability of rural electric cooperatives a. ' to discourage new customers, particularly industrial and commercial enterprises, from taking electric service from rural electric cooperatives. The effect of such conduct is to assure that new customers will be more likely to locate in areas served by large investor-owned utilities such as Dayton P & L.

I. Factual Background

Buckeye, Dayton P & L and five other electric utility companies in the State of Ohio are signatories to a Power Delivery Agreement dated January 1, 1968. (A copy of this Agreement is attached as Exhibit A hereto). This agreement is both a contract and a rate schedule on file with the Federal Energy Regulatory Commission (FERC).

Pursuant to Section 4.3(c)(ii) of the Power Delivery Agreement, the electric utilities that are parties to that Agreement, including Dayton P & L, are required to make available or provide adequate delivery (i.e. transmission) service to such additional delivery points as may be designated by Buckeye at any location within the State of Ohio for the purpose of meeting the requirements of a Buckeye member resulting from load growth and/or prospective load growth in the affected area at any point of delivery where the monthly demand at the additional delivery point will be 750 kilowatts or more at the time the additional delivery point is established. The "concerned" electric utility (i.e. the utility that is in the best position to perform the service) is required to establish the new delivery point requested by Buckeye as promptly as may be practicable.

Pursuant to Section 4.4(a) of the Power Delivery Agreement, whenever a new delivery point is established pursuant to Section 4.3(c) of that Agreement, the utility company that can most advantageously provide transmission service at the new delivery point, taking into account the nature of existing facilities, the cost of constructing additional facilities and factors affecting the reliability of service, is required

to construct, own and maintain the necessary transmission facilities including the connecting span of conductors to the facilities of Buckeye or the Buckeye member involved. Buckeye, or the Buckeye member involved, is obligated to provide or cause to be provided and maintain the necessary substation equipment at the new delivery point.

II. Dayton P & L's Course of Anticompetitive Conduct

A. An Overview

Since January 9, 1979, Buckeye has requested Dayton P & L to establish six separate additional delivery points on behalf of its members pursuant to the terms of the Power Delivery Agreement.*/ Each of the six additional delivery points was requested by Buckeye in order to serve the current and/or prospective load growth of one of its members. Although Dayton P & L has issued sporadic correspondence regarding Buckeye's requests, to date Dayton P & L has

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*/ The six delivery points requested by Buckeye are as follows:

Date of Request	Delivery Point Location	Requested Service Date	Buckeye Member
1/9/79	New California	9/79	Union REC
4/24/79	Lake	10/80 later revised to 11/83	Midwest Electric
4/24/79	E. Hollansburg	10/80	Darke REC
4/24/79	Frenchtown	10/80	Darke REC
1/22/80	Waynesfield	late 1980 (to be revised to late '83)	United REC
2/19/81	Honda	4/82	Union REC

agreed to fulfill its obligations only with respect to the Honda delivery point. Dayton P & L has failed to take any affirmative steps either to establish or acknowledge an intent to establish any of the other five delivery points requested by Buckeye (including even a simple statement that it intends to abide by its commitments under the Power Delivery Agreement).

The Power Delivery Agreement is clear on its face. That agreement requires the investor-owned utility that can most advantageously provide the necessary transmission service to establish an additional delivery point to serve a Buckeye member at the request of Buckeye. Under the Power Delivery Agreement, the selected investor-owned utility must provide the necessary transmission lines from its existing transmission lines to connect with a substation constructed by Buckeye or the Buckeye member at the new delivery point. Nothing in the Power Delivery Agreement permits the investor-owned utility that is selected by Buckeye to make its own independent evaluation regarding the need for the new delivery point. The reason that such a provision is not contained in the Power Delivery Agreement is obvious; if the investor-owned utilities were permitted independently and subjectively to determine the "need" for new delivery points, additional

delivery points would never be established in the State of Ohio unless they provided a clear benefit to the selected investor-owned utilities.

The Power Delivery Agreement is both a contract and a rate schedule that was freely bargained for between Buckeye and its members on the one hand and the investor-owned utilities on the other. Buckeye is pleased to report that the other investor-owned utilities who are signatories to the Power Delivery Agreement have, by and large, fulfilled their obligations under that agreement.*/ Only Dayton P & L has demonstrated a consistent refusal to fulfill its obligations under the Pow Delivery Agreement.

B. The Honda Delivery Point

As noted above, the only additional delivery point that Dayton P & L has agreed to establish during the past two years is the Honda delivery point. The conduct of Dayton P & L regarding this new delivery point further demonstrates Dayton P & L's anticompetitive behavior.

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*/ It should be specifically pointed out that Buckeye has no complaint against the Columbus and Southern Ohio Electric Company (which is an applicant in this proceeding) with respect to the establishment of additional delivery points under the Power Delivery Agreement. While Buckeye has a pending dispute regarding the establishment of additional delivery points with Cincinnati Gas and Electric Co. (another applicant in this proceeding) that company has provided service during the pendency of such dispute.

In late 1980, Honda of America Mfg., Inc. ("Honda") announced its intention to construct an automobile assembly facility near Marysville, Ohio. The Honda plant is to be completed and operational on or about April 1, 1982. After Honda announced its construction plans, a dispute arose between Dayton P & L and Union Rural Electric Cooperative, Inc. ("Union"), a Buckeye member, as to which utility had territorial service rights to the territory on which the Honda plant is being constructed. Dayton P & L, Buckeye and Union each understood that this territorial dispute ultimately would be resolved by the Public Utilities Commission of Ohio ("PUCO"). Although there was obviously a question whether Dayton P & L or Union ultimately would be permitted to serve the new Honda plant, there was agreement among Dayton P & L, Union and Buckeye that a new delivery point would be required to serve the Honda plant.

Pursuant to Section 4.3(c)(ii) of the Power Delivery Agreement, on February 19, 1981 Buckeye instructed Dayton P & L to establish a new delivery point to serve the Honda plant and, in connection therewith, to construct the transmission facilities necessary to provide transmission service to the new delivery point. Buckeye's selection of Dayton P & L to provide the transmission service to the new delivery point

was based on the factors set forth in Section 4.4(a) of the Power Delivery Agreement. Indeed, Dayton P & L was, and is, the utility subject to the Power Delivery Agreement which most advantageously and practicably can provide transmission service to the new delivery point. (A copy of Buckeye's February 19, 1981 letter to Dayton P & L is attached as Exhibit B hereto).

By letter dated March 6, 1981 (a copy of which is attached as Exhibit C hereto), Dayton P & L agreed to establish the requested delivery point. Thereafter, Buckeye and Union each acted in reliance on Dayton P & L's promise to establish the new delivery point to serve the Honda plant.

On July 1, 1980, the PUCO entered an Opinion and Order (a copy of which is attached as Exhibit D hereto) which stated that, under Ohio law, the territory on which the Honda plant is being constructed is within the certified service territory of Union.

After the PUCO's decision was announced, Dayton P & L had a sudden change of heart regarding the establishment of the new delivery point to serve the Honda plant. By letter dated July 31, 1981 from Mr. W. C. Shoup, Assistant Vice President Customer Business Operations of Dayton P & L, Buckeye was advised, for the first time, that Dayton P & L

would refuse to honor Buckeye's request for the establishment of the new delivery point to serve the Honda plant. (a copy of Mr. Shoup's letter is attached as Exhibit E hereto). As a result of Dayton P & L's incredible decision, Buckeye's counsel began to prepare both a complaint asserting violations of federal and state antitrust laws and this Request.

On August 26, 1981, representatives of Buckeye met with Mr. Shoup of Dayton P & L in order to give Dayton P & L an opportunity to reevaluate its decision not to establish the additional delivery point to serve the Honda plant. At this meeting, Buckeye's counsel advised the representatives of Dayton P & L that Buckeye intended to pursue both judicial and administrative remedies to counteract Dayton P & L's anticompetitive behavior.

After the meeting of August 26, 1981, Dayton P & L again had a sudden change of heart and, by letter dated September 4, 1981 (a copy of which is attached hereto as Exhibit F), Dayton P & L agreed to establish an additional delivery point to serve the Honda plant. It is the opinion of Buckeye and Buckeye's counsel that Dayton P & L only agreed to establish this delivery point because of a well-placed concern that the failure to establish the requested delivery point would so obviously manifest an anticompetitive attitude that this Commisson would be compelled seriously to

reconsider the fitness of Dayton P & L as a nuclear plant licensee and Dayton P & L would be liable under Federal and State antitrust laws. As will be explained more fully below, however, Dayton P & L's agreement to supply one delivery point does not alter the underlying trend of anticompetitive activity nor the need for this Commission to evaluate and consider remedies for Dayton P & L's anticompetitive conduct.

III. Anticompetitive Impact of Dayton P & L's Conduct

Buckeye believes that Dayton P & L's prior refusal to establish the additional delivery point necessary to serve the Honda plant was based on two anticompetitive factors: first, by refusing to construct the additional delivery point, Dayton P & L could virtually assure that Union would be unable adequately to serve the Honda plant and that Dayton P & L would be asked to replace Union as the provider of electricity to that plant; second, even if Union could somehow manage to provide electricity to the Honda plant, the delays and embarrassments to Union caused by Dayton P & L's refusal to establish the additional delivery point would serve as a stern warning to any company contemplating the construction of a plant in the State of Ohio not to locate in an area served by a rural electric cooperative.

Although the refusal to establish the delivery point requested for the Honda plant is the most dramatic of the

six instances of Dayton P & L's willful breach of its obligations under the Power Delivery Agreement, the other five instances also demonstrate an anticompetitive purpose. The Honda delivery point is more dramatic only because Dayton P & L could have directly benefitted financially by serving the Honda plant had Union been unable to do so. However, in each of the instances of Dayton P & L's refusal to establish requested delivery points, Dayton P & L is demonstrating, clearly and unequivocally, that new business and industry dare not take the risk of locating in areas to be served by rural electric cooperatives. Dayton P & L is sending a loud signal to the business community that it is far safer for new plant and industrial facilities to be located in territories served by investor-owned utilities such as Dayton P & L. Only by locating in areas served by investor-owned utilities can a prospective customer be assured that necessary transmission facilities will be provided to serve that customer.

Under Ohio law, electric utilities in the State of Ohio can only really compete by inducing new customers to locate in their service areas. Absent the Power Delivery Agreement, the Buckeye members would be at an absolute disadvantage in

this competition since they lack the transmission facilities necessary to guarantee adequate service to new customers. If the customer locates in a territory served by a rural electric cooperative, the customer will be at the mercy of the investor-owned utilities for the provision of transmission service. Only the Power Delivery Agreement assures that rural electric cooperatives in the State of Ohio can compete on a near-equal footing with the large investor-owned utilities.

From an antitrust standpoint, Dayton P & L's conduct constitutes an abuse of monopoly power. Dayton P & L is in a position to freighten prospective customers from locating in various areas served by Buckeye members because, in certain sections of Ohio, Dayton P & L owns virtually 100% of the transmission facilities that could feasibly serve those Buckeye member territories. Although Dayton P & L's monopoly position in the ownership and control of electric power transmission facilities in such areas may have been obtained lawfully, Dayton P & L's refusal to make these transmission facilities and necessary interconnections available to dependent Buckeye members constitutes a flagrant abuse of Dayton P & L's monopoly power. The Power Delivery Agreement was

designed, in part, to assure that large investor-owned utilities in the State of Ohio could not abuse their respective monopolies over the control and ownership of transmission facilities. However, Dayton P & L's consistent course of conduct over the past two years, culminating in the refusal to establish the Honda plant delivery point, manifests a clear intent to make a mockery of those provisions of the Power Delivery Agreement that are specifically designed to assure and protect competition between the large investor-owned utilities and the small rural electric cooperatives.

As noted above, Dayton P & L suddenly agreed to construct the delivery point requested by Buckeye to serve the Honda plant only after Buckeye made it known to Dayton P & L that Buckeye intended to pursue this Request before the NRC. Undoubtedly recognizing that its refusal to establish the Honda delivery point constituted an obvious and egregious example of its anticompetitive behavior, Dayton P & L reluctantly agreed to establish this one delivery point. However, Buckeye does not believe that a two year pattern of anticompetitive behavior, which reached its zenith only a few short weeks ago, should now be ignored by the NRC because Dayton P & L has suddenly agreed, in its own self-interest, to provide one out of six requested delivery points. It is more than an ephemeral fear, indeed there is a substantal likelihood,

that once Dayton P & L has crossed the hurdle of this licensing proceeding, Dayton P & L will immediately revert to its anticompetitive pattern. Indeed, continuing efforts by Buckeye and its counsel between the time of the Dayton P & L agreement on September 4, 1981, to provide the Honda delivery point and the date of this filing (October 5, 1981) have not only failed to elicit agreement from Dayton P & L to abide by the terms of the Power Delivery Agreement but have failed to obtain even a discussion of the matter. This failure of Dayton P & L to respond to Buckeye's continuing requests for clarification of intent with respect to supplying the other requested delivery points as well as additional delivery points in the future amply justifies Buckeye's concern. So long as Dayton P & L violates the express terms of the Power Delivery Agreement, Buckeye members will not be able to compete with Dayton P & L for new customers, particularly industrial and manufacturing facilities.

IV. The Propriety of This Request

The foregoing developments deserve to be fully explored and analyzed by the Commission. They fully meet the criteria which the Commission employs in making a "significant change" determination with respect to matters of antitrust significance which have arisen since the last antitrust review. These criteria are "that the change or changes (1) have occurred

since the previous antitrust review of the licensee(s); (2) are reasonably attributable to the licensee(s); and (3) have antitrust implications that would likely warrant some Commission remedy."*/

Considering the above criteria in relation to the specific facts which Buckeye has alleged, it is evident that all three of these criteria are met. First, although Dayton P & L's pattern of anticompetitive conduct commenced as early as January, 1979, the anticompetitive purpose of Dayton P & L did not become apparent until July 31, 1981, when Mr. Shoup rejected Buckeye's request for establishment of a new delivery point to serve the Honda plant. Not only is this development so recent as to have occurred since the previous antitrust review, it has also occurred subsequent to the finding of the Director on July 14, 1981. Thus, the Director did not have access to this information when he made his initial finding that no significant changes had occurred.

Second, it is clear from the information presented in this Request that the activities are reasonably attributable to the licensee, Dayton P & L.

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*/ South Carolina Electric and Gas Co. and South Carolina Public Service Authority (Summer Nuclear Station, Unit No. 1), CCI-80-28, 11 NRC at 824-25.

Third, the type of antitrust implications evident from the facts set forth in this letter warrant a clear and unambiguous response from the Commission to ensure against the misuse and abuse of monopoly power by Dayton P & L. It is apparent that Dayton P & L's conduct is designed to eliminate Buckeye members as viable competitors in the provision of electric power to new customers by making it unreasonably risky for new customers to locate in territories served by rural electric cooperatives. Dayton P & L is in a position to carry out this plan because of its monopoly position in the ownership and control of vital transmission facilities.

The course of conduct described above has far reaching and ominous implications for rural electric cooperatives as well as municipalities that may, in the future, need access to a Dayton P & L facility, including facilities relating to Zimmer Nuclear Unit 1. Indeed, every rural electric cooperative in Ohio is totally dependent on Dayton P & L (and other investor-owned utilities) to supply indispensable transmission services through its transmission facilities pursuant to the Power Delivery Agreement. The anticompetitive attitude demonstrated by Dayton P & L in its dealings with Buckeye and various of its members should b of primary concern to the Commission in the context of this licensing proceeding.

V. Relief Requested

Buckeye requests that, as a result of the significant changes since the initial antitrust review in this proceeding, the Commission conduct a second antitrust review at this stage of the proceeding. Buckeye believes that the precise nature of any remedy in the form of a license condition which might be imposed in response to the problems presented in this letter is for the Commission to determine after full and complete evaluation of all of the facts.

The basic thrust of any such remedy, however, will need to ensure that Dayton P & L will not engage in any future anticompetitive conduct vis-a-vis Buckeye, the Buckeye members, and other utilities dependent on Dayton P & L for transmission service. A primary means to accomplish this, in addition to whatever additional remedies the Commission might deem appropriate, would be to require Dayton P & L to fulfill its obligations under the Power Delivery Agreement in a complete and timely manner.

Please let us know if you desire any additional information in this matter.

Respectfully submitted,

Robert P. Mone (RG)

Robert P. Mone

THOMPSON, HINE AND FLORY
100 East Broad Street
Columbus, Ohio
(614) 461-6060

Robert C. Goodwin, Jr.

Charles L. Freed

Charles L. Freed

THOMPSON, HINE AND FLORY
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

Attorneys for Buckeye Power, Inc.