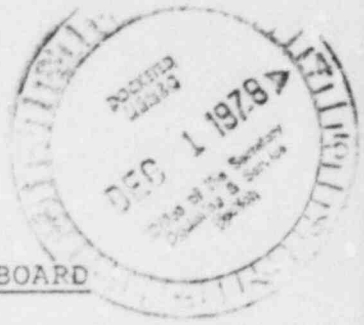


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

REPLY OF THE DEPARTMENT OF JUSTICE

Pursuant to the Atomic Safety and Licensing Appeal Board's Orders of October 20, and November 17, 1978 the Department of Justice (Department) hereby responds to the Ohio Applicants' Comments On The Ohio Statute Requiring Certification Of Exclusive Service Territories For Electric Light Companies (Applicants' Comments).

BACKGROUND

On October 13, 1978 the Ohio Applicants in the above-styled proceeding requested this Atomic Safety and Licensing Appeal Board (Appeal Board) to take judicial notice of Ohio House Bill No. 577, which was described as a statute recently enacted by the Ohio legislature. By Order dated October 20, 1978 this Appeal Board requested that Applicants advise it, by November 3, 1978, whether this bill had been enacted into



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law and to state how this bill is relevant to the issues before the Appeal Board. Other parties were given the opportunity to reply to Applicants' submission by November 20, 1978. By Order of November 17, 1978 this Appeal Board extended the Department's filing date to November 27, 1978. Pursuant to the Appeal Board's Orders, the Department hereby responds.

APPLICANT'S COMMENTS

Applicants' Comments basically amount to a rather broad discussion of legal restrictions to competition in the electric utility industry in Ohio. They do not attempt to differentiate between competition at retail and wholesale, nor do they take into account the fact that different classes of competitors (i.e. investor-owned utilities, cooperatives and municipal systems) are the subjects of different statutory restraints on competition in the state of Ohio. Because of these deficiencies Applicants' Comments give a distorted, inaccurate and incorrect picture of the competitive picture in Ohio. Rather than rebutt each of Applicants incorrect assertions seriatim the Department will initially outline the legal restrictions to competition as they existed prior to the enactment of Bill No. 577. 1/

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1/ For a more detailed discussion of competition in northern Ohio, including the legal restrictions thereto, see pp 34-42 of the Reply Brief of the Department of Justice to Applicants' Appeal Brief in Support of their Individual and Common Exceptions to the Initial Decision, filed June 30, 1977 (Department's Reply Brief).

We will then discuss the limited changes in the legal restrictions to competition occassioned by this bill and finally advise the Appeal Board of the relevance of these changes to this proceeding.

## COMPETITION PRIOR TO ENACTMENT OF BILL NO. 577

1. Sale of Firm Power At Wholesale

There were and still are no legal or statutory barriers to wholesale competition. There is no federal statute or regulatory pronouncement prohibiting such competition. As the Supreme Court said in Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1972):

> . . . The history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

The State of Ohio is without authority to raise barriers to interstate wholesale competition. 2/ The Supreme Court, in Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927), "placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the states." S. Rep. No. 621, 74th Cong., 1st Sess. 17 (1935); see also H. Rep. No. 1318, 74th Cong., 1st Sess. 7-8, 27 (1935). It was to fill the jurisdictional gap resulting from Attleboro that Congress passed the Federal Power Act in 1935. As the Supreme Court subsequently stated,

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2/ Since all of the Ohio Applicants are interconnected with electric utilities in other states all their wholesale sales are in interstate commerce.

"[w]hat Congress did was to adopt the test developed in the Attleboro line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'" Federal Power Commission v. Southern California Edison Co., 376 U.S. 205, 214 (1964); see also Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 504 (1942). Since Congress has exercised its power under Article I of the Constitution to regulate interstate wholesale sales of power, under the Supremacy Clause of the Constitution, state legislation and state regulatory policy cannot restrict the intended effect of valid federal legislation. E.g., Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Sperry v. Florida, 373 U.S. 379 (1963); Free v. Bland, 369 U.S. 633 (1962).

Nevertheless, Applicants rely on the state statutes to support their argument that wholesale competition is legally precluded. Whatever the effects of these statutes on retail competition, 3/ they can have no effect on wholesale competition. Even if a state had assumed jurisdiction over wholesale sales, that jurisdiction would be erroneous and would fall when challenged. "[A] history of unchallenged regulation by the State does not oust the [Federal Power] Commission of jurisdiction." Indiana & Michigan Electric Co., 365 F.2d 180, 183 (7th Cir. 1966), cert. denied 385 U.S. 972 (1966).

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3/ Applicants also misconstrue the effects of the state statutes on retail competition. See pp. 5-7 infra and pp. 38-41 of the Department's Reply Brief.

2. SALE OF FIRM POWER AT RETAIL

Competition for retail customers exists between two distribution systems wherever one system is in a position to serve the retail customer(s) of another or wherever two or more of these systems are in a position to serve a new retail customer. This competition takes two principal forms -- competition for the franchise or opportunity of serving "blocks" of retail customers on a de facto exclusive basis, and competition for individual retail customers, either residential, commercial, or industrial, at the boundary or in overlapping portions of the service areas of two or more distribution systems. Two utilities may be in a position to compete for the franchise or privilege providing electric service to a municipality, or the municipality itself may wish to compete by condemning the previously franchised utility's facilities and providing its own electric service (DJ 200 Attachments 5, 5a, 6, 8; Wein DJ 587, pp. 117-28, Tr. 6944-47, 6958-59). 4/ The municipal system may obtain a supply of bulk power either by (1) self generation, (2) purchase at wholesale from its former supplier, (3) purchase at wholesale from another supplier or (4) any combination of the above.

State statutes in Ohio did prevent to some degree actual and potential competition between investor-owned utilities, on the one hand, and other investor-owned or

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4/ Municipalities have the power of condemnation in Ohio. Ohio Constitution, Article XVIII, §4. The City of Cleveland, for example, has considered using this power to condemn CEI distribution facilities (App. 205, 206).

cooperative utilities, on the other hand for individual customers. Ohio law prohibited the switching of existing individual retail customers of a private utility to another private utility or to a cooperative for a period of 90 days after disconnecting from the former supplier. Ohio Revised Code, Section 4905.261. To avoid the prohibition of this law, exceptional circumstances had to be shown, or the two utilities had to agree to the switch. However this provision did not govern customers who switched from a private utility to a municipal utility or vice versa. Furthermore, this provision of Ohio law did not prevent a municipality whose residents were served by an investor-owned utility (or cooperative) under a franchise from refusing to renew that franchise upon its expirations and granting a new franchise to another investor-owned utility (or cooperative). 5/

The only past or present legal limitation on either actual or potential competition between private and municipal utilities for new or existing retail customers in Ohio is that municipalities may only sell an amount of power outside their city limits that does not exceed 50 per cent of the

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5/ The power of a municipality to grant a franchise stems from Section 4, Article XVIII Ohio Constitution. This section is self executing, need not be supplemented by statutory provision and controls over any statutory provisions (i.e. Section 4905.261, Ohio Revised Code) that is inconsistent therewith. Ohio Power Co. v. Attica, 4800 (2d) 221, (1969) affirmed 52 00 2d 90 (1970).

amount of power sold within the City limits. 6/

## CHANGES IN COMPETITIVE PICTURE OCCASSIONED BY BILL NO. 577

### 1. CONTENTS OF BILL 577

Bill 577 establishes a procedure wherein the Public Utilities Commission of Ohio (PUCO) is authorized to establish exclusive retail service territories for all investor-owned and cooperative electric systems in the state of Ohio. This is accomplished by having the various investor-owned and cooperative systems submit maps to the PUCO for approval by that agency which maps show the location of the utility's distribution facilities in the state as well as proposed territorial boundaries. However, territorial certification is not necessarily permanent certification since the PUCO has the authority to authorize a second electric supplier to

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6/ Applicants have argued that retail (and wholesale) competition is precluded because a full-requirements wholesale municipal customer has no surplus power and is therefore prevented by Article XVIII, Section 6 of the Ohio Constitution from selling power outside its corporate limits (App. Brief at 51, 196-98, 240; App. Comments at 6). The question of whether a full requirements wholesale municipal customer has surplus power has not been litigated in Ohio (White Tr. 9525-26, 9680-81). Mr. White, the only one of Applicants' witnesses to testify on this matter, stated that while he personally believed that a full-requirements wholesale customer does not have "surplus" power to sell outside its boundaries, he was aware that this interpretation could be wrong (White Tr. 9525-26, 9683, 9688-89). Mr. White also testified that OE had no company policy with respect to that provision of the Ohio Constitution (White, Tr. 9683-84). Note that Bowling Green, a full-requirements wholesale municipal customer of TE, serves outside its municipal boundaries at retail and wholesale (DJ 166, p. 11, 059; Hillwig Tr. 2426).

render service to a load center which is located in the certified territory of another supplier if that first supplier does not render adequate service. Section 4933.83(B).

This bill also repeals Section 4905.261 of the Ohio Revised Code, the 90 day cut-off provision.

2. CHANGES IN LEGAL RESTRICTIONS IN SALE OF FIRM POWER AT WHOLESALE

As stated above, the state of Ohio is without authority to raise barriers to wholesale competition. Thus, even if it wanted to, Ohio could not restrain wholesale power transactions by establishing territorial boundaries.

However, it is clear from the bill itself, that the Ohio legislature was only attempting to establish a method of certifying territories for retail customers. Section 2933.81(F) specifically defines the term "electric service" to exclude electric power or energy sold at wholesale for resale. Furthermore, other sections of the Bill as well as the proposed rules and the legislative report (attachments to Applicants Comments) repeatedly refer to distribution facilities which are utilized to serve retail customers, as opposed to transmission facilities which are utilized to serve wholesale customers.

3. SALE OF FIRM POWER AT RETAIL

While Bill 577 does to some extent limit competition at retail its effect is not as great or as far reaching as Applicants assert. Initially, we note that Bill 577 specifically excludes municipalities from the territorial certification scheme, (Section 4933.81(A). Bill 577 also does not

effect franchise competition in Ohio. Thus, this bill does not in any way change the existing law with regard to the legal restrictions on fringe area competition between municipalities and the Applicants. See Section 4933.87. As noted above, the only legal restriction on such competition is the 50 percent rule.

The statute repeatedly recognizes that municipalities in Ohio retain the power of condemnation under Article XVIII of the Ohio Constitution, which power may be utilized by a municipality to condemn the facilities of the existing electric utility supplier and establish its own municipal system. Sections 4933.82(B), 4933.83(A) and (C), 4933.84 and 4933.87. In addition, this law specifically recognizes the right of a municipality to refuse to grant a franchise to an electric supplier whose certified territory includes the municipality, and then to obtain service from any other electric supplier 7/ under a franchise or contract with the municipal corporation. Section 4933.83(A).

The only type of competition actually eliminated by Bill 577 is fringe area competition among the investor-owned utilities and with the cooperatives, if the PUCO has approved a territorial certification plan.

RELEVANCE TO THE PRESENT PROCEEDING

This statute has no effect whatsoever on the question of whether there exists in northern Ohio and western Pennsylvania

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7/ Other electric suppliers would include municipal systems which can compete for a franchise to serve another municipality.

a situation inconsistent with the antitrust laws. The Initial Decision of the Licensing Board, dated January 7, 1977 found that a situation inconsistent with the antitrust laws existed at that time. The legal framework defining the permissible and impermissible bounds of competition prior to the rendering of the Initial Decision is that discussed above at pp. 3-7.

Bill No. 577 which was enacted after the rendering of the Initial Decision, does not place the State of Ohio's approval on any conduct which the Licensing Board found to be inconsistent with the antitrust laws. Indeed, passage of this statute undermines Applicants' claim that previous Ohio law somehow legitimized the territorial agreements to which the Ohio Applicants were parties. It is clear that when Ohio wanted to authorize certified service territories it was able to pass appropriate legislation giving the Public Utilities Commission authority to do so. Absent such an enabling statute there was no authority for the Ohio Applicants, without the approval of the PUCO, to divide service territories. See Initial Decision (ID) 5 NRC, 133, 214.

The Applicants have asserted that the repeal of Section 4905.261 of the Ohio Revised Code renders moot the findings of the Licensing Board that participation by Ohio Edison and Toledo Edison in the Buckeye Project is inconsistent with the antitrust laws (Applicants Comments at 8-9). This assertion

is totally without merit. As Applicants correctly point out, the basis for the above finding is a definition in the Buckeye Project Agreements (NRC 188, ¶ 1-1, p.3; NRC 190, ¶ 1, p.2) which made applicable to those agreements the 90 day cutoff provision of § 4905.261 as that section existed on the effective date of the Buckeye Agreement. 8/ The Buckeye Agreement did not provide for automatic revision of the Agreement in the event that § 4905.261 was revised or repealed. Thus, even though Section 4905.261 has been repealed the provision which the Licensing Board found to be anticompetitive still exists. ID at 219-21.

Applicants contention that this Appeal Board should not require License Condition 1a (Applicants Comments at 9-10) 9/ because of the new Ohio legislation. This contention is totally without merit. As explained above the new Ohio legislation will have a dampening effect only on fringe area competition among Applicants and cooperatives. It has no

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8/ The Buckeye Agreement defined the word "consumer" as it appeared in 4905.26.1 to apply to any customer of a power and/or energy supplier served at wholesale or at retail. This definition of "consumer" requires a stricter interpretation of § 4905.261 than has been required by the Ohio Courts in interpreting that section of the Ohio Code (see Department's Reply Brief at 37-38).

9/ License Condition 1a reads:

1. Applicants shall not condition the sale or exchange of electric energy or the grant or sale of bulk power services upon the condition that any other entity,

a. enter into an agreement or understanding restricting the use of or alienation of such energy or services to any customers or territories.

effect on wholesale competition and no effect on retail competition involving municipalities. Clearly, even if this law were in effect for the time period utilized by the Licensing Board in examining Applicants conduct, it would not have immunized the territorial agreeements involving wholesale transactions, See ID 5 NRC 190-195, 214-17, nor the territorial agreements between Applicants' and municipalities. See ID 5 NRC 177, 200-3, 216-17. 10/ Thus, Condition 1a is needed to prevent territorial agreements restraining 1) wholesale competition with all other entities, 2) retail competition with municipalities, 3) the resale of purchased power and 4) retail competition between investor-owned utilities or cooperatives where the agreement has not been approved by the PUCO. To omit License Condition 1a would again allow, if not invite, Applicants to insert into existing and future contracts the restrictive provisions which the Licensing Board condemned.

Applicants contend that License Condition 1a "could be read as precluding the types of activities the State of Ohio (and its PUCO) are now proposing to require from the Ohio Applicants' with regard to the establishment of certified

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10/ The illegal agreements in wholesale contracts with municipalities (5 NRC 200-3, 216-17) can also be viewed as restraints on alienation since they prevented the purchasers of power from reselling to others regardless of their territorial location. Bill 577 provides no authority for legalizing this type of restriction.

retail service territories (Applicants Comments at 9). 11/ Applicants offer no proof of this contention and are simply attempting to water down relief that is necessary to eliminate a situation inconsistent with the antitrust laws. As was noted at page 3 of Appendix B to Applicants' Comments:

> It is a settled principle of Federal law that no conduct of a private individual which is carried out to implement a state statute regulating competition can constitute a violation of the antitrust laws even if such conduct would be a violation of the antitrust laws if it were not being carried out for the purposes of implementing a state statute. Parker v. Brown, 317 U.S. 341. This principle was recently affirmed by the U.S. Supreme Court in Bates v. State Bar of Arizona, 97 S.CT. 2691. There are numerous decisions of the courts following the Parker v. Brown principle. See e.g., Gas Light Company of Columbus v. Georgia Power Company, 313 F. Supp. 860 (M.D. Ga.); Allstate Insurance Co. v. Lanier, 361 F.2d 870 (C.A. 4th Cir.)

Thus, Applicants are fully protected as long as they operate within the proscribed Ohio statutory scheme. If Applicants have a legitimate question about whether particular acts which the PUCO is requiring them to perform are violative of License Condition 1a they should submit the details of particular transactions to the NRC and the

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11/ License Condition 1a requires that Applicants not condition the sale or exchange of power on an agreement to restrict alienation or divide territories, i.e., to use their leverage in the sale or exchange of power to extract illegal agreements. We do not read Bill 577 to require Applicants to engage in such a "tying" arrangement.

other parties to this proceeding for a ruling. If a true problem exists, the condition can be modified. However, it would be improper to modify or eliminate License Condition 1a at this time when that condition is needed to eliminate a situation inconsistent with the antitrust laws as found by the Licensing Board and Applicants have merely asserted the existence of a problem without providing proof thereof.

## CONCLUSION

In summary, the enactment of Bill 577 has had no effect whatsoever on: wholesale competition; franchise competition; and, any retail competition involving municipalities. The only competition which has been effected by the Bill is fringe area competition among investor-owned utilities and between investor-owned utilities and cooperatives. Nor has the enactment of Bill 577 effected either the factual findings of the Licensing Board or the license conditions imposed by that body.

For the reasons stated in the the Department's Reply Brief as well as those stated above the Department

urges this Appeal Board to affirm the decision of the Licensing Board in this proceeding in its entirety.

Respectfully submitted,

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Department of Justice

November 27, 1978

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the REPLY OF THE DEPARTMENT OF JUSTICE have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand this 27th day of November 1978.

Melvin G. Berger

Melvin G. Berger
Attorney
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