

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF)
)
CLEVELAND ELECTRIC ILLUMINATING COMPANY)
)
(PERRY NUCLEAR POWER PLANT,) Docket No. 50-440-A
UNIT 1, FACILITY OPERATING LICENSE)
NO. NPF-58) Docket No. 50-346-A
)
(DAVIS-BESSE NUCLEAR POWER STATION,)
UNIT 1, FACILITY OPERATING LICENSE)
NO. NPF-3))

TO: Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

**MOTIONS OF THE CITY OF CLEVELAND, OHIO
FOR PARTIAL SUMMARY JUDGMENT OR,
IN THE ALTERNATIVE, FOR SEVERANCE OF ISSUE
AND EXPEDITED HEARING PROCEDURES**

Pursuant to NRC Rules of General Applicability 2.730 and 2.749, 10 C.F.R. §§ 2.730 and 2.749, the City of Cleveland, Ohio, which owns and operates Cleveland Public Power, ("CPP" or "the City"), a municipal electric system, hereby requests that the Commission

- (1) grant summary judgment in favor of CPP with respect Count 1 of CPP's December --, 1995, "Petition ... For Expedited Issuance of Notice Of Violation, Enforcement of License Conditions, And Imposition Of Appropriate Fines," by: (a) finding that Cleveland Electric Illuminating Company's ("CEI" or "the Company") refusal to provide firm transmission service requested by CPP violates CEI's wheeling obligation under Antitrust License Condition No. 3; (b) directing CEI to comply immediately with its Antitrust License Condition No. 3 obligation to provide the requested wheeling

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service to CPP; and (c) imposing upon CEI an appropriate fine for its refusal to provide the requested wheeling service; or

- (2) if summary judgment is not granted, the Commission should sever Count 1 from the remainder of the CPP Petition and immediately initiate expedited hearing procedures so that the Commission can resolve Count 1 — which raises time-sensitive issues — on an expedited basis.

In support of its motion for summary judgment, and in accordance with NRC Rule 2.749(a), the Appendix to this pleading contains a statement of material facts as to which there is no "genuine issue" (Fact Statement").

I. THE NRC SHOULD GRANT SUMMARY JUDGMENT TO CPP WITH RESPECT TO COUNT 1 OF THE CPP PETITION

Count 1 of CPP's January 23, 1996, Petition challenges CEI's refusal to provide 40 MW of firm transmission service needed by CPP to receive delivery of a purchase from Ohio Power Company ("Ohio Power"), an operating subsidiary of the American Electric Power System. Fact Statement, Item Nos. 2 and 3. As explained by CPP, the service was requested on August 11, 1995, as part of CPP's reservation for 1996 transmission service to be provided pursuant to CEI's Transmission Tariff No. 1. Petition at 14; Fact Statement, Item No. 1.

On November 2 and 3, 1995, CEI stated its refusal to provide the requested 40 MW of firm transmission service. (The November 2 and 3 letters are **Attachment 5** to CPP's Petition.) Fact Statement, Item Nos. 4 and 5. The basis for the refusal was not a claimed lack of adequate transmission capacity. Fact Statement, Item No. 6. Indeed, CEI's November 2, 1995 response to CPP's August 11, 1995 request

states expressly that the denial of service for the Ohio Power purchase is "not due to any limitation on the CEI transmission system." *Id.* Instead, CEI states that the requested transmission service will not be provided because, in the Company's view, the service will be used to facilitate a sale by Ohio Power to the Medical Center Company ("Medco"). As explained by CEI in its November 2 letter:

This transaction, although contractually described as a wholesale sale from Ohio Power to CPP, will be the functional equivalent of a sale "directly to an ultimate consumer"; accordingly, and in accordance with Section 212 of the Federal Power Act, CEI is not required to provide transmission services with respect to this transaction.

See **Attachment 5** to CPP Petition.

This claim is incorrect and, even more important, is irrelevant. Although Medco is currently a retail customer of CEI, CPP explained in its Petition that

CEI and CPP engaged in active competition to serve the Medco load in 1991. CEI won that competition and entered into a five-year service contract with Medco. Contemplating the 1996 expiration of that contract, Medco initiated another competitive battle between CEI and CPP. This time, Medco decided to purchase electricity from CPP as of September 1, 1996.

CPP Petition at 15 n.9. Thus, as of September, Medco will become a CPP customer, not an Ohio Power customer. Fact Statement, Item No. 7. Given the impending switch in suppliers, the motive for CEI's refusal to wheel is obvious: having failed to win the competitive battle to serve Medco, CEI seeks to thwart CPP's takeover of the Company's former customer by playing the "transmission card."

CEI's gambit is doomed to failure. Even if the Commission were to assume — contrary to fact — that the purpose of CPP's wheeling request is to facilitate

an Ohio Power sale directly to an ultimate consumer, CEI would still have to provide the transmission service to CPP. Antitrust License Condition No. 3 states in pertinent part that the

Applicants shall engage in wheeling for or at the request of other entities in the CCCT:

1) of electric energy from delivery points of Applicants to the entity(ies); and,

2) of power generated by or available to the other entity, as a result of its ownership or entitlements [footnote omitted] in generating facilities, to delivery points of Applicants designated by the other entity.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of the Applicants, the use of which will not jeopardize Applicants' system.

10 NRC at 297.¹ CEI Transmission Tariff No. 1 conforms to the Company's obligations under this License Condition, as the tariff provides for firm wheeling services to eligible entities, including CPP. Transmission Tariff No. 1 states in pertinent part that "CEI *shall* provide Transmission Service within the limits of the capacity of its bulk transmission facilities ..." (emphasis added). See **Attachment 4** to the CPP Petition.

Thus, the *only* way in which CEI can avoid the obligation to provide service embodied in Antitrust License Condition No. 3 (and Transmission Tariff No. 1) is to demonstrate that the provision of service would somehow "jeopardize" operation of the CEI system. Antitrust License Condition No. 3 (and Transmission Tariff No. 1) allow *no* other bases for denying transmission service and permit *no* restrictions on the use or

¹ The omitted footnote explains that an "Entitlement" is defined broadly to include, but not be limited to, "power made available to an entity pursuant to an exchange agreement."

resale of power transmitted. CPP has never contended that capacity limitations preclude provision of the requested 40 MW of service. Indeed, CEI expressly denied that its refusal was based upon capacity limitations.

Moreover, CPP's interpretation of Antitrust License Condition No. 3 is bolstered by the NRC findings upon which this condition was based. The Licensing Board based its action in part upon NRC findings that the Applicant companies had wrongly imposed resale restrictions upon potential competitors. The NRC was well aware at the time it adopted the License Conditions of the presence of door-to-door customer competition between CEI and CPP, and of specific efforts by CEI to preclude customer switching, including through the use of direct and indirect restrictions on power transmitted to Cleveland by CEI. The Licensing Board noted, for example, CEI's willingness "in the 1960's" to interconnect with CPP "on the condition that [CPP] would fix its rates at the level of rates set by CEI and that Cleveland would reduce its charges to the City for street lighting service." *The Toledo Edison Co. and the Cleveland Electric Illuminating Co.*, 10 NRC 265 (1979), *affirming as modified*, 5 NRC 133, 167, citations omitted (1977). The Board found that in seeking these conditions, CEI's "larger motivation was clear. CEI considered an increase in the rates charged by [CPP] as essential to a successful acquisition of [CPP]." *Id.* The Board went on to note that:

CEI also believed that if [CPP] would fix its rates at CEI's level, this would not only eliminate the major reason for customers leaving CEI to take service from [CPP], [citations omitted], but also would result in customers switching from [CPP] to CEI. [citations omitted].

Id. The NRC found CEI's "attempt to fix [CPP's] rates and street lighting charges in exchange for interconnection constitutes a *per se* violation of the antitrust laws." *Id.* at 167-168.

In addition, the NRC found evidence that CEI "sought to prevent future competition with" the Painesville, Ohio municipal system (the only municipal system in the CEI service territory other than CPP) "by offering Painesville a territorial agreement which would have eliminated competition and foreclosed the growth of the municipal system by allotting to CEI those areas where Painesville had the greatest potential load growth." 5 NRC at 177, citations omitted. CEI subsequently offered to "supply an interconnection" to Painesville

in consideration for CEI taking over Painesville's greatest load growth area [citation omitted], together with Painesville's promise not to seek to serve that area in the future. [citations omitted]. In addition, CEI explicitly conditioned interconnection on rate equalization. [citations omitted].

5 NRC at 177-178.

Similarly, the NRC noted the presence of language in each of Ohio Edison Company's contracts with several rural electric cooperatives prohibiting sale for resale of wholesale power wheeled by Ohio Edison. 5 NRC at 201. The Commission found that "[b]y these restrictions, Ohio Edison has eliminated wholesale competition between it and the rural electric cooperatives within its service area." *Id.* Similarly, the Commission found that

[p]rior to 1965, Ohio Edison restricted its municipal wholesale customers in reselling power to industrial customers except in relatively small amounts controlled by Ohio Edison [citation omitted].

The effect of these restrictions was to maintain Ohio Edison's position with the municipalities and to eliminate competition for virtually all new industrial loads located outside the boundaries of the municipality although, under Ohio law, municipalities were entitled to compete for such business.

Id.

As a result of these findings (and other equally significant findings), the Commission imposed conditions that would prohibit precisely that which CEI now seeks to do. That is, the NRC conditions were intended to preclude, *inter alia*, restrictions on the resale of power wheeled by the Applicants, including CEI. In refusing to provide wheeling to CPP in order that CPP may provide service to a significant retail customer formerly served by CEI, the Company ignores the NRC's conditions and, equally important, their historical bases.

In short, summary judgment in favor of CPP is mandated because there are no material factual issues in dispute, and all of the material evidence supports the position urged by CPP. CEI's obligation under Antitrust License Condition No. 3 is clear, as is the Company's refusal to comply with this obligation. The License Condition states expressly that CEI "shall engage in wheeling for or at the request of other entities in the CCCT [including CPP]" and that such services "shall be available with respect to any unused capacity on the transmission lines of the Applicants [including CEI]." Thus, even if CEI's stated explanation for its refusal to serve, *i.e.*, that the Federal Energy Regulatory Commission lacks statutory authority to order the requested transmission service under Sections 211 and 212 of the Federal Power Act, were correct, this contention would not justify the Company's outright refusal to serve. The License Condition imposes a

mandatory obligation upon CEI that cannot be avoided absent a showing of capacity limitations. No such showing has been attempted, let alone made.

II. IF SUMMARY JUDGMENT IS DENIED, THE COMMISSION SHOULD SEVER COUNT 1 AND ADDRESS IT SEPARATELY AND ON AN EXPEDITED SCHEDULE

Alternatively, if the Commission denies CPP's request for summary judgment, CPP asks that Count 1 be severed and addressed on an expedited schedule, separate and apart from the Commission's consideration of the remaining portions of CPP's Petition. CPP contends that in the absence of summary judgment, such relief would be appropriate for at least two reasons. First, as explained in Section I, *supra*, Count 1 raises a limited set of issues, none of which requires evidentiary hearings (or certainly not extensive hearings) to resolve. CEI's obligations are clear, as is the unwarranted basis for CEI's refusal to comply with those obligations. Second, and even more important, the refusal to transmit addressed in Count 1 must be rectified expeditiously or CPP will be unable to take delivery of the Ohio Power purchase and to use that power to provide service to its customers, including Medco. CPP is scheduled to begin service to Medco in September 1996.

Finally, CPP notes that the pendency of two proceedings at FERC concerning the legality of CPP's refusal to transmit should not forestall expeditious action in this case. On November 29, 1995, CPP filed a complaint (and related requests for relief) against CEI under Section 206 of the Federal Power Act. This complaint, designated as Docket No. EL96-21-000, challenges CEI's failure to provide the Ohio Power purchase wheeling as contrary to CEI's transmission tariff and license condition

obligations. In addition, on November 2, 1995, CEI filed a Petition with the Commission, designated as Docket No. EL96-9-000, requesting that the Commission rule that CEI is not required under Sections 211 and 212 of the Federal Power Act, 16 U.S.C. §§ 824j and 824k, to provide the transmission service requested by CPP. CPP filed its opposition to the CEI Petition on December 13, 1995.

This Commission should not stay its hand, because it is entirely possible that the FERC will resolve CPP's complaint based entirely on the language of Transmission Tariff No. 1, and will choose not to address CEI's obligation under Antitrust License Condition No. 3. (CEI's Petition does not address the Antitrust License Conditions.) Indeed, CEI has taken the position in another pending FERC proceeding, Docket No. EL93-35-000, that the FERC does not have the authority to enforce the NRC License Conditions, stating that "[e]nforcement of nuclear plant license conditions is subject to the jurisdiction of the Nuclear Regulatory Commission, not this Commission." See **Attachment 6** at 19.² CEI went on to contend that "[i]mplementation of the Atomic Energy Act is beyond the FERC's jurisdiction, and the FERC has no basis for usurping the NRC's statutory authority." *Id.* at 19-20.

If CEI's argument were accepted by FERC, or if FERC simply chooses to act on the basis of the CEI tariff, FERC would likely not address CEI's obligations under Antitrust License Condition No. 3. As there can be no dispute about this Commission's

² Docket No. EL93-35-000 involves CPP's challenge to CEI's refusal to provide a requested fourth interconnection point between the CEI and CPP systems. On June 9, 1995, the FERC issued an order which, *inter alia*, directs CEI to provide the requisite interconnection. *City of Cleveland v. Cleveland Electric Illuminating Co.*, 71 FERC ¶ 61,324. On July 7, 1995, CEI sought rehearing of the June 9 order.

authority to enforce the License Conditions, the NRC should not withhold action in anticipation of FERC action. Therefore, absent a grant of summary judgment in CPP's favor, CPP asks that the Commission establish hearing procedures to resolve on an expedited schedule CPP's valid contention that CEI — independent of any obligation it has under Transmission Tariff No. 1 — has violated its obligation to provide firm transmission service.

CONCLUSION

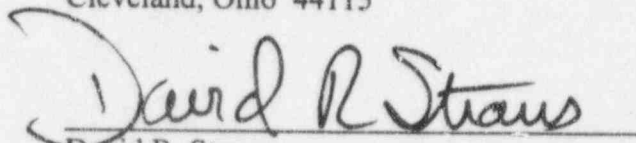
WHEREFORE, for the foregoing reasons, CPP requests that the Commission grant summary judgment in favor of CPP with respect Count 1 of its January 23, 1996, Petition, by finding that CEI's refusal to provide the 40 MW of firm wheeling requested by CPP violates CEI's wheeling obligation under Antitrust License Condition No. 3. Alternatively, if summary judgment is denied, CPP asks that the Commission sever the issues raised by Count 1 of the CPP Petition and immediately initiate hearing procedures

that will enable the Commission to resolve the issues presented in Count 1 on an expedited schedule.

Respectfully submitted,

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January 23, 1996

**RULE 2.749(a) STATEMENT OF MATERIAL FACTS
ABOUT WHICH THERE IS NO GENUINE ISSUE**

Pursuant to NRC Rules of General Applicability 2.749(a), 10 C.F.R. § 2.749(a), the City of Cleveland, Ohio, which owns and operates Cleveland Public Power, ("CPP" or "the City"), submits its statement of material facts as to which there is no genuine issue to be heard. These facts are:

- (1) On August 11, 1995, CPP served upon CEI a written request for firm transmission service to be provided under CEI Transmission Tariff No. 1 during 1996.
- (2) CPP's August 11, 1995, letter included a request for the provision of 40 MW of firm transmission service needed by CPP to receive delivery of a purchase by CPP from Ohio Power Company.
- (3) Ohio Power Company is an operating subsidiary of the American Electric Power System.
- (4) By letters dated November 2 and 3, 1995, CEI responded to CPP's 1996 request for transmission service.
- (5) CEI's November 2 letter to CPP states that CEI is willing to provide all of the transmission service requested by CPP, with the exception the 40 MW of service needed to transmit CPP's Ohio Power purchase.
- (6) CEI's November 2 letter to CPP states that the refusal to provide the requested 40 MW of firm transmission service is "not due to any limitation on the CEI transmission system" but is based upon CEI's

objections to the contractual arrangements pursuant to which CPP will serve the Medical Center Company ("Medco") and pursuant to which CPP will purchase wholesale power from Ohio Power Co.

- (7) Medco is a retail customer of CEI but has entered into a contract with CPP to become a retail customer of CPP on September 1, 1996.

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TO: Executive Director for Operations
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 1996, copies of the foregoing documents were served upon each of the following by first-class mail:

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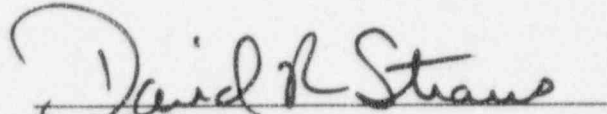
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