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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'92 MAY 26 P3:49

In the Matter of	Docket Nos. 50-440-A 50-346-A
OHIO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY THE TOLEDO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58) (Davis-Besse Nuclear Power Station, Unit 1, Facility Operating License No. NPF-3)	ASLBP No. 91-644-01-A

REPLY OF CITY OF CLEVELAND, OHIO, TO ARGUMENTS OF APPLICANTS AND NRC STAFF WITH RESPECT TO THE ISSUES OF LAW OF THE CASE, RES JUDICATA, COLLATERAL ESTOPPEL AND LACHES

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TO ARGUMENTS OF APPLICANTS AND NRC STAFF
WITH RESPECT TO THE ISSUES OF LAW OF THE CASE,
RES JUDICATA, COLLATERAL ESTOPPEL AND LACHES

To the Honorable, the Members of
the Atomic Safety and Licensing Board:

In its February 7, 1992 order, as amended on March 20, 1992, the Board granted the City of Cleveland ("Cleveland") the opportunity to reply to any responses by other parties to arguments raised by Cleveland respecting law of the case, res judicata, collateral estoppel and laches in Cleveland's cross-motion for summary disposition. Only the Applicants ("OE", "CEI" and "TE") and the NRC Staff

("Staff") have filed responses on these issues.[1/] Applicants and Staff challenge the applicability of any of these preclusion doctrines. In this reply, Cleveland addresses their arguments and shows that their arguments are not valid.

INTRODUCTION

A basic concept of all preclusion doctrines--law of the case, res judicata, collateral estoppel and laches--is that a losing litigant cannot obtain another bite at the litigation apple with respect to issues raised and decided, or that should have been raised by the litigant, by simply bringing a new action. As the Supreme Court stated in Astoria F.S. & L Assn. v. Solimino, ____ U.S. ____, 115 L.Ed.2d 96, 104 (1991):

> [A] sound and obvious principle of judicial policy [is] that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system

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1/ Applicants' responses to these issues are included in its reply to Cleveland's and other parties' cross-motions directed to the so-called "bedrock" legal issue. Cleveland does not address Applicants' response to Cleveland's arguments related to the "bedrock" legal issue only because the Summary Disposition Schedule, as amended, does not authorize a reply by Cleveland. Cleveland will respond to Applicants' reply to Cleveland's cross-motion addressed to the "bedrock" legal issue at the oral argument to the extent that the time allocated Cleveland permits.

> with disputes resisting resolution. See Parkland Hosiery Co. v. Shore, 439 U.S. 322, 326, 58 L.Ed.2d 552, 99 S.Ct. 645 (1979). The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, see University of Tennessee v. Elliott, 478 U.S. 788, 798, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986) which acts in a judicial capacity. (material in brackets and emphasis supplied)

As aptly described by Staff (NRC Staff's Answer to the Motion for Summary Disposition of Intervenor, City of Cleveland at 5-6 ("Answer")) Cleveland in its motion at 65-66 correctly described the argument made by Applicants in the prior proceeding:

> Applicants took the position that there must be a finding of cost advantages offered by the nuclear plants in order for the Licensing Board's analysis of a "structural nexus" to be valid.2/

Applicants strain to obfuscate the fact that they advance here the same argument they previously made (see, e.g., Applicants' Reply at 17-18 ("Reply")). The fact is that

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2/ Applicants' (Reply at 94, n. 220) attempt to blur the issue they raised below by lengthy quotation of an Appeal Board's general description of Applicants' previous nexus arguments. The quotation indicates that Applicants argued in the prior stages that the proposed conditions had no "nexus" (i.e., no "relevance" and "no connection") to "activities under the license". The quotation, however, does not reveal the specific arguments previously made by Applicants that are relevant to the present bedrock issue. Among those nexus arguments previously made is the same argument that they make here. Applicants necessarily lost each nexus argument, jointly and severally. Thus, they lost the very argument made here. Applicants' quotation of a general description of their previous positions cannot be allowed to obscure that fact.

Applicants previously argued that, in order to reach issues of anticompetitive structure and acts, the Commission must first find "cost advantages offered by the nuclear plants." (Applicants Appeal Brief, pp. 126-127 and n. 147).

In this strenuous effort to obscure the fact that they argued to the Appeal Board that there can be no valid nexus determination unless it is first found that there are cost advantages offered by the nuclear plant, Applicants have argued that their previous argument was different in degree and kind from the argument they now are making (Reply at 97). To support the claim of difference in degree and kind, they point out that they argued to the Appeal Board that even if this necessary finding of cost advantage is made, no antitrust conditions are needed because the municipal electric systems will share the cost advantages. Despite Applicants' claim that "Cleveland pejoratively distorts Applicants Appeal brief", the fact is that Applicants in the Appeal brief (at 126-127) clearly argued that no nexus could be found unless it is first found that there is cost advantage. Applicants relied on their antitrust witness, Dr. Pace's testimony, that absent a cost advantage for nuclear power there can be no nexus--no antitrust consequence (Applicants Appeal Brief at 127, n. 147). That is precisely Applicants' argument today, having also submitted an affidavit to that effect from Dr. Pace in a letter response to the Department of Justice's ("DOJ") advice letter

of June 13, 1990 recommending dismissal of the applications. (Letter dated July 24, 1990 from counsel for Ohio Edison to Thomas E. Murley, Director, Office of Nuclear Reactor Regulations.)

I. LAW OF THE CASE

Staff (Answer at 2-5) and Applicants (Reply at 105-08) argue that the doctrine of the "law of the case" cannot apply here because the Licensing Board has determined that "notwithstanding a similar docket designation, this proceeding is separate and apart from the earlier Commission antitrust proceedings regarding Davis-Besse and Perry that resulted in the license conditions now at issue," quoting 34 N.R.C. 229, 244 n. 43 (1991). Whether or not this proceeding is "separate and apart from the earlier proceeding" for procedural purposes, it cannot be so considered in applying the "law of the case" doctrine with respect to Applicants' nexus/low cost contentions or any other substantive issues which had been decided in the prior stage of this action. For instance, Chairman Miller recognized, and Applicants apparently recognize,[3/] that the determination that Appli-

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3/ Applicants attempt to drift back and forth on the issue of whether re-litigation by them of anticompetitive structure of the markets and anticompetitive acts by Applicants is precluded. While Applicants have made it clear that the "bedrock" issue is to be decided on the assumption that Applicants' anticompetitive conduct found by the Boards persists (PHC Tr. at 155; CEI and TE Joint App., p. 6, n. 8), on reply (at 27) Applicants boldly claim to the contrary that there

(continued...)

cants' anticompetitive acts were grounds for the antitrust license conditions "became law of the case" when the previous Boards made their rulings. September 19, 1991 Prehearing Conference, Tr. 150-51 (specifically at 151, line 2), colloquy between Chairman Miller and Ms. Charnoff, Ohio Edison's counsel.

The judicial policy underlying any preclusive doctrine is, as already noted above, that losing litigants cannot bring a separate action to avoid the adverse determination "on an issue identical in substance to the one he subsequently seeks to raise." (emphasis supplied) Astoria, supra, 115 L.Ed.2d at 104. Applicants have brought a new proceeding to attempt to re-litigate what was litigated before (or what they should have raised previously). To designate this proceeding as a different proceeding for purposes of the application of "law of the case" would be simply to encourage the bringing of multiple proceedings by losing litigants to further their hope that earlier, adverse, final determinations could be avoided. This would not be good law nor proper jurisprudence.

Applicants allege (Reply at 106) that this Board's view that the applications initiated a separate proceeding is consistent with past NRC determinations, citing Public

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3/(...continued)
"emphatically is not [any basis] for assuming that Applicants would be . . . inclined" to act anticompetitively.

Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-3, 29 NRC 51, 53, n. 6 (1989), aff'd. ALAB-915, 29 NRC 427 (1989). As Cleveland pointed out in its cross-motion for summary disposition, not all of the NRC's licensing boards are of that view even if such a determination of separate proceeding was determinative for purposes of application of "law of the case". Cleveland cited (at 68-69), South Texas (Houston Lighting and Power Co., 4 NRC 571, 575 (1976), rev'd on other grounds, 5 NRC 582 (1977), and Farley (Alabama Power Co., 7 AEC 210, 215, n. 7 (1974), remanded on other grounds, CLI-74, 7 AEC 203 (1974).

Contrary to the attempts of Staff (Answer at 3-4) and Applicants (Reply at 106, n. 249) to dismiss the views of the Licensing Boards in South Texas and Farley because the decisions were either reversed or remanded on other grounds, the fact is that neither the reversal nor the remand in any degree undermined the holding of the Licensing Boards that the construction permit and operating stages of the process are not two separate proceedings. They are two stages of the same "cause of action".

The courts recognize that there is a single proceeding, albeit one that contains sequential stages. The courts have interpreted the AEA as establishing:

> a two-stage process for approving the construction and operation of nuclear power plants: first, before construction of a plant may begin, the Commission must issue a construction permit; second, before the plant may begin

> operations, the Commission must grant an operating license. (citations omitted) Seacoast Anti-Pollution, Etc. v. NRC, 690 F.2d 1025, 1026 (D.C. Cir. 1982).

In Power Reactor Develop. Co. v. Electrical Union, 367 U.S. 396, 405, 6 L.Ed.2d 924, 930 (1961), the Supreme Court said:

> It is clear from the face of this statute [referring to the AEA] that Congress contemplated a step-by-step procedure. First, an applicant would have to get a construction permit, then he would have to construct his facility, and then he would have to ask the Commission to grant a license to operate the facility. (material in brackets supplied)

Continuing, the Supreme Court reviewed the implementing NRC regulation and found confirmation of its interpretation of the statute in the regulation, stating (367 U.S. at 407, 6 L.Ed at 931):

> [T]his regulation, obviously, elaborates upon and describes in fuller detail the step-by-step licensing procedure contemplated by §§182 [License Applications] and 185 [Construction Permits] (material in brackets supplied).

Staff also seeks to distinguish the South Texas case because that case did not involve an amendment of a license (Answer at 4). If that is a valid basis for distinguishing South Texas, and presumably, Farley, then, of course, it follows that Applicants' reliance on Public Service of New Hampshire is of no precedential value since that case did not include an amendment.

II. RES JUDICATA

As Applicants concede (Reply at 92) the doctrine of res judicata precludes re-litigation of a cause of action that was or could have been raised in a prior proceeding. Applicants also concede that whether the amendment constitutes a separate or the same proceeding is irrelevant to the application of this doctrine.

As they do with respect to law of the case, Applicants deny that they raised the same argument previously. Cleveland has already shown under the discussion of the "law of the case," supra, that the same "cost advantage" argument that Applicants now make was advanced and disposed of in the prior stages of this action. The cause of the instant action, i.e., the cost of Applicants' nuclear power, is res judicata. Applicants recognized that the doctrine of res judicata precludes matters already resolved as well as those which could have been raised and resolved in the prior stage. Applicants therefore argue (Reply at 98) that they could not have argued the bedrock issue because actual costs were not available in the prior proceeding, only anticipated costs were available.

This argument is absurd. As far as the construction permit is concerned, if the existence of actual costs were essential at the construction permit stage, there could be no issuance of a construction permit. Obviously, at that stage estimated costs are all that are available and re-

quired for lawful exercise of the NRC's authority, and similarly the estimated costs are sufficient for the submission by Applicants of their contentions, including the bedrock issue. Further, actual cost was available to Applicants at the operating stage as Cleveland shows, infra 13-16. Although Applicants could have again raised the cost issue at the operating license stage, based on the actual cost data available at that time, Applicants took the position that there had been no significant changes since the issuance of the construction permit; that what Applicants now characterize as the "dramatic" (Reply at 100) increase "in the cost of generating nuclear power relative to the cost of generating non-nuclear power" after the construction permit issuance was not significant.[4/] Clearly, Applicants wished to avoid an antitrust review at that time.

Staff argues that changed circumstances provide an exception to the application of res judicata but staff does not show that there are relevant changed circumstances. Staff only argues that "changed factual circumstances may be present here" (Answer at 7; emphasis supplied) and that the "bedrock" issue represents an "undeveloped frontier of law and policy" (Answer at 7; see also Reply at 100). Staff's speculation is insufficient for the exercise of any discre-

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4/ Applicants take a contrary position now, arguing that this "dramatic increase . . . constitutes a 'significantly changed circumstance.'" (Reply at 100).

tion. Moreover, as Cleveland shows, infra 12-16, the factual changed circumstances were known to Applicants and were represented, contrary to Applicants' present contention, as not significant. As for Staff's description of the issue as an "undeveloped frontier of law and policy", the issue is neither the undeveloped frontier of law nor of policy. Alabama Power Co. v. Nuclear Regulatory Commission, 692 F.2d 1362 (11th Cir. 1982), cert. denied, 464 U.S. 816 (1983).

III. COLLATERAL ESTOPPEL

Applicants concede that whether the present proceeding is a separate or the same proceeding is irrelevant in the application of collateral estoppel (Reply at 92). What is important is that the issue was actually litigated and was material and relevant to the disposition of the outcome of the earlier action (Id.). Cleveland has already shown that the issue was actually litigated, supra 2-5. As for its disposition being necessary to the outcome of the earlier action, the disposition of an issue that challenges the NRC's authority to impose antitrust conditions was obviously necessary to the outcome of the action.

IV. LACHES

Applicants argue (Reply at 108-109) that Cleveland has failed to show unreasonable delay and undue prejudice to Cleveland which are necessary elements for the application of the laches doctrine. Applicants purport to support that

position by observing that the filing of applications in September 1987 and May 1988 involved no "unreasonable delay". Applicants state that a full power operating license did not issue for Perry Unit 1 until Fall (November) 1986; that judicial review was not complete until Spring 1987; and that Perry Unit 1 was not placed in commercial operation until November 1987. Thus, Applicants conclude that Ohio Edison's filing of its application in September 1987 and CEI and TECo's filing in May 1988 did not constitute unreasonable delay. Obviously, these Perry dates are not the pertinent dates.

The increase in cost that Applicants describe as "dramatic" did not occur overnight after Spring 1987 when it is alleged judicial review was complete. The crucial fact is that neither Ohio Edison, CEI or TE filed notices of appeal of the Appeal Board's 1979 decision. The only notices of appeal were filed by Duquesne Light Company and Pennsylvania Power on February 29, 1980, but were subsequently withdrawn. The dramatic increase in cost and the events Applicants blame for the increases occurred well before September 1987. Commercial operation was obviously not controlling or material because Ohio Edison filed its application in September 1987 before commercial operation began in November 1987. Experience with operating costs, contrary to Applicants representation (Reply at 77) was not necessary. Capital costs were known at the operating license

stage at the latest.

As for Davis-Besse Unit 1, Applicants are silent as to those dates because the CEI and TE joint application filed in May 1988 with respect to that unit was even more egregiously and unreasonable delayed. The actual cost of Davis-Besse Unit 1 was known to CEI and TE substantially in advance of May 1988. The Davis-Besse construction permit was issued in March 1971, its operating license was issued in April 1977; and it was in commercial operation in July 1978. NuReg-1350, Vol. 3 (1991), NRC Information Digest 1991 Edition, K.L. Olive. The CEI and TE application was filed eleven years after the issuance of the operating license, and ten years after commercial operation.

Returning to Perry, contrary to Applicants' assertion, it was not necessary for Applicants to wait until Perry went into full production to file its application in order to have evidence of actual cost data. In fact, they filed the application in September 1989, two months before commercial operation which began in November 1987. Actual capital costs admittedly (Reply at 77) were available with completion of the construction phase, i.e., prior to 1984.

Staff argues (Answer at 8) that Cleveland has failed to make any showing as to when the costs of nuclear power actually increased beyond the costs of electricity from alternative sources such that Applicants should have requested suspension of the antitrust conditions earlier.

Staff, however, states that "if there had been an undeniable and continuous trend upwards in the cost of nuclear power such that the 'bedrock issue' would have been ripe for adjudication earlier (which Cleveland has not demonstrated) then laches may warrant more serious attention". Cleveland's answer filed in February 1988 in opposition to Ohio Edison's application establishes from Applicants' own records that there was an undeniable and continuous trend upwards in the cost of nuclear power such that the "bedrock issue" would have been ripe for adjudication earlier, many years earlier, than September 1987.

Appendix B (attached as Appendix 1 to this Reply) to Cleveland's answer to OE's application discloses that the total cost of Perry Nuclear Project Plant (PNPP) Units 1 and 2 at February 1973 was estimated to be $1.234 billion. At August 1977 the estimated cost had increased to $2.127 billion. At January 1979 it stood at $2.552 billion. At April 1980 it was $3.890 billion. At October 1981, the unit cost of Unit 1 alone plus common facilities stood at $2.150 billion. At May 1983 the estimated cost of Unit 1 plus common facilities stood at $2.770 billion. By September 1984 it was up to $3.945 billion and through December 31, 1985 it was $4.153 billion, exclusive of CEI's estimated additional project costs, including AFUDC (allowance for funds used during construction; more simply interest during construction), which would accumulate at the rate of $2

million per day "until the plant is in service".

In Cleveland's February 1988 answer to OE's application Cleveland further showed that each of the "recent" events alleged by OE which gave rise to the increased costs of the nuclear power could have been raised by OE during the operating license stage since each of the events occurred well before the termination of the operating license proceeding. These events were new, more stringent environmental laws adopted in the 1970s such as the National Environmental Policy Act of 1969, the Clean Air Act Amendments of 1970 and 1977, the Federal Water Pollution Control Act Amendments of 1972 and the Endangered Species Act of 1973. By the time the operating license stage was underway in the mid 1980s, the project cost of the Perry project had already increased as described above.

Another event cited by OE as the reason for the increased cost of nuclear power was new technical regulations. Again this could have been and should have been raised at the operating license stage. In a March 23, 1983 press release (Appendix C to Cleveland's February 1988 Answer to OE's Application, attached hereto as Appendix 2) CEI, on behalf of the joint Applicants, announced a revision of the estimated cost of Perry Units 1 and 2 from $3.23 billion to $3.6 billion; a 10 percent increase due to "regulatory requirements that affect the final design and construction activities" (Appendix 2, page 1).

Another event cited by OE which it alleged in its application for suspension of the license conditions was adverse economic conditions such as inflation, high interest costs and reduced growth rate in the demand for electricity which emerged in the mid 1970s (OE Application at 65; see also Reply at 100-01). All of these factors were considered by the Director of Nuclear Reactor Regulation in his 1983 finding of No Significant Change for Perry Unit and were determined not to warrant further antitrust review (See Staff Report at pp. 28-29).

In its March 1983 press release referred to above, CEI pointed out that interest costs associated with construction of the project had increased. In a January 23, 1980 press release (Appendix D to Cleveland's February 1988 Answer to OE's application for suspension of the antitrust license conditions, attached hereto as Appendix 3), announcing the cancelled construction of Davis-Besse Units 2 and 3 and the 1260 MW Units 1 and 2 of the Erie Nuclear Plant and the delay in construction of Perry Units 1 and 2 and the 833 MW Beaver Valley Unit 2, among other things, the decrease in the average growth of electricity demand from 3.3 percent to 2.8 percent, was singled out as the culprit due to a slowdown in industrial growth, the increased availability of natural gas in the service area and customer conservation efforts (Id, at p. 3).

OE could have raised all these events and their

consequences at the operating license stage. It did not. Instead, its position was that no significant changes had taken place subsequent to the antitrust review at the construction permit stage because OE wanted no additional antitrust review. On November 23, 1983, the NRC published a notice in the Federal Register (48 Fed. Reg. 52992-93) of the Director of the Office of Nuclear Reactor Regulation's initial finding that no significant antitrust changes had occurred. In a letter to the Director dated March 8, 1984, CEI's counsel requested that the initial finding, of no significant changes be made the Director's final determination. It was so made.

As for comparison to alternative sources of power that the Staff says should be shown, Staff overlooks the fact that, for purposes of this aspect of the proceeding, it is assumed that the cost of the nuclear power is in excess of alternative sources of power in the relevant market appropriately measured and compared.

Thus, the "bedrock" issue now raised could have and should have been raised at least a decade ago and is now time-barred by the equitable doctrine of laches.

Finally, Applicants argue (Reply at 109) that Cleveland has not established that it suffered prejudice as a result of the alleged delays. In support of this allegation Applicants, citing a newspaper article in a City of Cleveland newspaper of April 12, 1992, allege that Cleveland has

an agreement which assures Cleveland of the continuation of the antitrust license conditions "in effect without regard to their imposition by the NRC". Cleveland has no such agreement. There is an agreement between AMP-Ohio and CEI and TE but OE is not a party to the agreement and, of course, is not bound by any of its provisions. Counsel for Cleveland have secured a copy of the agreement which on the first page is stamped "Confidential." Counsel understand that the agreement, executed on October 18, 1985, has not been filed with the Federal Energy Regulatory Commission as required by Part II of the Federal Power Act and that commission's regulations. The wheeling provision in the agreement is not the same as the wheeling rights Cleveland has under the antitrust license conditions. In fact, the wheeling condition in the agreement includes a restraint on the wheeling rights which, in the opinion of counsel, may violate the antitrust laws. That may explain why Applicants did not submit the contract and chose, instead, to rely on an unattached newspaper story.[5/]

Equally unreliable is Applicants' assertion (Reply at 110) that whatever actions Cleveland took in reliance on the antitrust license conditions were taken with full knowl-

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5/ If as Applicants argue elimination of the license conditions will not affect Cleveland's rights to wheeling, etc. even if the antitrust license conditions are eliminated, why have Applicants expended time and expense in a strenuous effort to eliminate the license conditions?

edge that the conditions could be terminated or suspended for a variety of reasons. The Board is well aware that Cleveland's position has consistently been that the conditions are not subject to termination, suspension or amendment. Further, the conditions themselves invited reliance by Cleveland in the form of extensive capital expenditures for interconnection, transmission and distribution facilities.

CONCLUSION

For each and all of the foregoing reasons in Cleveland's cross-motion for summary disposition and in this reply Cleveland's motion for summary disposition should be granted, Applicants' motion should be denied, and the applications should be summarily denied. The NRC's authority to impose and retain antitrust license conditions is not dependent on the nuclear power being low cost. The NRC's authority to impose and retain antitrust license conditions depends only on antitrust activities of the Applicant having a nexus to the license. Further, Applicants' applications are

barred by the law of the case, res judicata, collateral estoppel and laches.

Respectfully submitted,

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May 1992

APPENDIX 1

PUBLIC UTILITIES COMMISSION OF OHIO

AN EXECUTIVE SUMMARY OF THE RESULTS OF THE REVIEW OF COSTS OF THE PERRY NUCLEAR POWER PLANT

TOUCHE ROSS & CO./NIELSEN-WURSTER GROUP/
CHAPMAN & ASSOCIATES

AUGUST, 1986

COST AND SCHEDULE HISTORY

Over the duration of PNPP, there have been twelve (12) estimates of project cost and schedule. Total project cost estimates increased from $1.234 billion in February 1973 for the total project (including Unit 2) to $4.153 billion* (excluding Unit 2) as of December 31, 1985. The commercial operation is not anticipated prior to fourth quarter, 1986 for Unit 1. The following table summarizes these estimates:

PNPP COST AND SCHEDULE ESTIMATES

Number	Estimate Date	Total Cost) ($ Billion)	Project Basis	In-Service Date (Unit 1)
1	2/73	1.234	Total Project	4/79
2	10/74	1.444	Total Project	4/79
3	6/75	1.547	Total Project	6/80
4	8/76	2.023	Total Project	12/81
5	8/77	2.127	Total Project	12/81
6	2/78	**		12/81
7	1/79	2.552	Total Project	5/83
8	4/80	3.890	Total Project	5/84
9	10/81	2.150	Unit 1 & common	5/84
10	5/83	2.770	Unit 1 & common	5/85
11	4/84	3.470	Unit 1 & common	12/85
12	9/84	3.945	Unit 1 & common	12/85
13	12/85	4.153*	Unit 1 & common	

* This figure represents the expenditures incurred through December 31, 1985. CEI estimates additional project costs, including AFUDC, to accumulate at the rate of $2 million per day until the plant is in-service

** The February 1978 definitive estimate of $2.125 billion prepared by GAI was never officially adopted by CEI.

APPENDIX 2

THE ILLUMINATING COMPANY
PUBLIC RELATIONS

FOR RELEASE WEDNESDAY,
MARCH 23, 1983, 8 a.m.

622-9800, ext. 2231

PERRY BUDGET REVISED

The Cleveland Electric Illuminating Company today announced a revision in the estimated cost of completion of the Perry Generating Plant Project. Engineering and construction are now estimated to cost $3.6 billion, an increase of $370 million from earlier estimates.

Perry is a joint project of CAPCO (Central Area Power Coordination Group) which includes CEI, Ohio Edison and its wholly-owned subsidiary, Pennsylvania Power, Toledo Edison and Duquesne Light.

In addition to the construction budget, CEI says interest and related costs of funds may add at least $1.6 billion, for a total estimated cost of $5.2 billion. The previous total, estimated in 1980, was $4 billion.

Last week, CEI announced a delay of up to one year in plans to load fuel at Perry Unit 1, with that activity now predicted to take place in late 1984.

The $1.6 billion interest is based on existing treatment of interest charges as provided under Ohio law and Public Utilities Commission of Ohio (PUCO) rulings. Proposed legislation in the Ohio Legislature could increase interest charges on Perry by as much as $400 million.

CEI says the revised schedule and increased cost of the Perry Project is the result of implementation of regulatory requirements that affect the final design and construction activities. All nuclear power plants under construction have been greatly affected by these conditions meaning time schedules and budgets must regularly be reviewed.

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The fuel load date for Unit 2, late 1987, remains unchanged at this time. However, as work progresses on Unit 1, the Unit 2 schedule will be evaluated.

The five CAPCO companies are dedicated to insuring that Perry is a safe, reliable facility, according to CEI, which is in charge of building the twin 1205-megawatt generators.

CEI owns 31.11% of the project and will receive a corresponding percentage of the electricity generated. Ohio Edison and its Pennsylvania Power subsidiary own 35.24%; Toledo Edison, 19.91%, and Duquesne Light, 13.74%.

The five companies serve some 7 million people in an industrial crescent across northern and central Ohio and western Pennsylvania.

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APPENDIX 3

I-5

FROM: Public Information Department
The Cleveland Electric Illuminating Company
P. O. Box 5000, Cleveland, Ohio 44101

622-9500, Ext. 2746
Or 623-1065 (24-hour phone)

FOR RELEASE WEDNESDAY, A.M.
JANUARY 23, 1980

CAPCO NEWS RELEASE

The Companies in the Central Area Power Coordinating Group (CAPCO) today announced the termination of plans to build four additional nuclear units presently in the design stage. The estimated cost to build those units was $7.3 billion. However, construction will continue under an extended schedule on two nuclear units near North Perry, Ohio, and another at Shippingport, Pennsylvania.

"We remain convinced after considering all of the options, that nuclear power is a safe, economical and environmentally superior method of generating electricity" said the statement issued by Robert M. Ginn, President of the Cleveland Electric Illuminating Company, Justin T. Rogers, President of Ohio Edison, John P. Williamson, Chairman of Toledo Edison, and John M. Arthur, Chairman of Duquesne Light Company. "Accordingly, we are completing three nuclear units already well along in construction."

According to the CAPCO chief executives, the estimated dates for completing the three CAPCO nuclear units now under construction have been extended between 12 and 36 months. Unit 1 at the Perry Nuclear Power Plant near North Perry, Ohio has been rescheduled from May 1983 to May 1984; Unit 2 at the Beaver Valley Power Station at Shippingport, Pennsylvania from May 1984 to May 1986; and Unit 2 at the Perry Plant from May 1985 to May 1988. Construction of these units range from 32 to 52 per cent complete. The new target dates reflect a more realistic time frame for the construction and licensing of nuclear plants.

(more)

- 2 -

The companies explained, "The political and regulatory uncertainties affecting the future construction of nuclear plants has intensified following the accident at Three Mile Island. Nuclear construction scheduled further in the future carries greater uncertainty of eventual cost. In spite of our conditions regarding nuclear power, this uncertainty has compelled the CAPCO Companies to terminate those nuclear units not yet under actual construction in order to reduce the future costs to our customers and shareowners," they said.

"These decisions are not without risk," the joint statement said. "Decision made today will affect adequacy of electrical supply in the future. The companies are concerned about the reliability of electric service to their customers in the mid-1990's - particularly by the 1990's. These concerns are being continually addressed as each company monitors the growth in customer demand in relation to capacity," the executives continued.

The CAPCO Companies' plans for 906 MW each of the Units 2 and 3 at the Davis-Besse Nuclear Power Station near Port Clinton, and the 1260 MW each of the Erie Nuclear Plant Units 1 and 2 at a site north of Berlin Heights, all presently in the design stage, were terminated.

The CAPCO Companies--Cleveland Electric Illuminating, Duquesne Light, Ohio Edison, Pennsylvania Power, and Toledo Edison--serve some 2.5 million customers in an industrial crescent in northern and central Ohio and western Pennsylvania. The revised projected rate of growth in customer demand for electricity for the CAPCO Companies in the 1980's is in the range of two to four per cent each year.

The statement also announced another decision reached by members of the CAPCO Group. The Cleveland Electric Illuminating Company (CEI) will increase its ownership share in the Perry Plant, now well along in construction. CEI,

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which will build and operate the plant, will increase its ownership of Perry 1 and 2 by 80 megawatts per unit. Ohio Edison ownership of each unit will be reduced by 80 megawatts.

CEI will increase its ownership in each of the two 1205 MW Perry Units from 295 MW (24.47%) to 375 MW (31.11%), Ohio Edison (and Penn Power) will reduce their ownership from 505 MW (41.88%) to 425 MW (35.24%). There will be no change in the Duquesne Light ownership of 165 MW (13.74%), or in the Toledo Edison ownership of 240 MW (19.91%) in each unit.

The percentages of ownership in the 833 MW Beaver Valley Nuclear Unit 2, under construction at Shippingport, Pennsylvania, is as follows: CEI, 24.47%, Duquesne Light 13.74%, Ohio Edison 41.88%, and Toledo Edison 19.91%.

The construction schedule and percentages of ownership of the 825 MW Bruce Mansfield Unit 3, also at Shippingport, Pennsylvania, a coal-fired CAPCO unit to be completed later this year, are unchanged.

"The Illuminating Company's decision to increase our ownership share in the Perry Nuclear Power Plant, reflects CEI's belief in and commitment to nuclear power," said Ginn. "This purchase of an additional 160 megawatts of the Perry Plant gives us the capacity we need to meet our customers expected demands for electricity throughout the decade of the 80's."

The Illuminating Company said its revised forecast anticipates an average increase in demand for electricity of 2.8% a year for the next ten years. As recently as one year ago, in December of 1978, the Company was forecasting an average annual growth rate of 3.3%. The decrease in the growth rate is attributed mainly to a slowdown in industrial growth, the increased availability of natural gas in the CEI service area, and conservation efforts by customers.

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"By 1990 we expect to have a peak demand of 4,750 megawatts," Ginn said. "With our purchase of an increased share of the Perry Plant, our generating capacity will be approximately 5300 megawatts by 1990. We are confident that this increased generating capacity will provide adequate supplies of electricity in our service area through 1990."

According to The Illuminating Company, all of the decisions made have caused some downward revision in the construction budget. The previous construction budget for the five years 1979 to 1983 was $1.7 billion. Prior to the decisions being made and with an additional one year's inflation, the 1980 to 1984 construction budget was estimated to be $1.94 billion. Termination of the four future nuclear units and extension of the construction schedules of the three others results in a CEI construction budget for 1980 through 1984 estimated to be somewhat less than $1.7 billion. The company plans to detail its 1980-1984 construction program at a later date.

The Illuminating Company also said it did not expect to lay off any construction workers currently building the Perry Nuclear Power Plant.

The extension of the construction schedule will permit the Company to construct the plant without a prior anticipated increase in the number of workers and at the same time reduce anticipated overtime.

The Illuminating Company reported that it had invested approximately $60 million in preliminary work for the four nuclear units that were terminated. Claims for additional charges may be made by contractors. Although the amount of the claims cannot now be estimated, the Company believes their resolution should not have a material adverse impact. The company plans to ask the Public Utilities Commission of Ohio for authority to amortize these costs over a suitable number of years. Until these amounts can be reasonably estimated and the PUCO acts, none of the charge will be reflected in earnings or rates.

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In a final comment CEI President Ginn said, "The Illuminating Company is disappointed that the four planned nuclear units must be terminated. However, we believe this action to be prudent and in the best interests of our customers and shareowners while maintaining our commitment to nuclear power through our larger share of new plants already well along in construction. When the uncertainties are resolved, we expect nuclear power to be a viable alternative in our future plant construction program."

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-440-A
	)	50-346-A
OHIO EDISON COMPANY	)	
(Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58)	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	
THE TOLEDO EDISON COMPANY	)	
(Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58)	)	ASLBP No. 91-644-01-A
(Davis-Besse Nuclear Power Station, Unit 1, Facility Operating License No. NPF-3)	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY OF CITY OF CLEVELAND, OHIO, TO ARGUMENTS OF APPLICANTS AND NRC STAFF WITH RESPECT TO THE ISSUES OF LAW OF THE CASE, RES JUDICATA, COLLATERAL ESTOPPEL AND LACHES has been served upon the parties or their attorneys on the attached Service List, this 26th day of May, 1992, by hand delivery to those persons located in Washington, D.C. and Maryland and by Federal Express to persons located in other states.

Reuben Goldberg

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of	Docket Nos. 50-440-A 50-346-A
OHIO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY THE TOLEDO EDISON COMPANY (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58) (Davis-Besse Nuclear Power Station, Unit 1, Facility Operating License No. NPF-3)	ASLBP No. 91-644-01-A

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