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June 6, 1996

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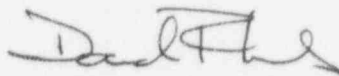
U.S. Nuclear Regulatory Commission
Att'n: Document Control Desk
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**Re: In the Matter of Cleveland Electric Illuminating Company,
Dockets Nos. 50-440 and 50-346
(City of Cleveland's 2.206 Petition to Enforce Anti-trust Conditions)**

Dear Sir:

On May 31, 1996, the City of Cleveland filed its "Reply of the City of Cleveland, Ohio to Response of Cleveland Electric Illuminating Company to Section 2.2.06 Petition" in lieu of public meeting. The Cleveland Electric Illuminating Company agrees that a public meeting is unnecessary and hereby submits a short reply to the City's further pleadings to assist the NRC in deciding this matter. A copy of this reply has been sent to the Petitioner, as well as to the persons identified on the attached service list.

Sincerely,



David R. Lewis
Counsel for Licensee

Enclosure

cc: Service List (w/ encl.)

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June 6, 1996

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Office of Nuclear Reactor Regulation

In the Matter of)	
)	Docket Nos. 50-440
CLEVELAND ELECTRIC ILLUMINATING)	50-346
COMPANY)	
)	(City of Cleveland's 2.206 Petition
(Perry Nuclear Power Plant, Unit 1, and)	to enforce antitrust conditions)
Davis-Besse Nuclear Power Station, Unit 1)	

**CLEVELAND ELECTRIC ILLUMINATING COMPANY'S
REPLY TO FURTHER PLEADINGS OF CITY OF CLEVELAND**

On May 31, 1996, the City of Cleveland filed "Reply of The City of Cleveland, Ohio to Response of Cleveland Electric Illuminating Company to Section 2.206 Petition" (City Reply). To ensure that the NRC is not misled by the City of Cleveland's further pleading, the Cleveland Electric Illuminating Company (CEI) provides this short reply.

1. NRC/FERC Consistency

The City of Cleveland argues that CEI is taking inconsistent positions before FERC and the NRC, so that "the license conditions would never be enforced because the NRC and the FERC would be simultaneously deferring to the other." City Reply at 3. This is not the case. CEI's position that NRC, not FERC, is responsible for enforcing the antitrust conditions in the NRC licenses is entirely consistent with NRC deference to FERC on certain substantive matters. The NRC license conditions require wheeling in a manner consistent with the Federal Power Act (FPA) and subject to the rates, charges, and practices approved by FERC, and it is therefore

perfectly appropriate for the NRC to allow FERC to determine whether certain transactions are consistent with the FPA and with the rates, charges and practices that FERC has established under the FPA. Indeed, Regulatory Guide 9.1 cited at page 9 of the City's Reply, supports such deference. "In general, reliance will be placed on the exercise of Federal Power Commission [now FERC] and State agency jurisdiction regarding the specific terms and conditions of the sale of power, rates for transmission services and such other matters as may be within the scope of their jurisdiction." Id.

Just to be clear, CEI has never advocated that FERC should decline to decide matters pursuant to the Federal Power Act or defer to the NRC in establishing rates, charges, and practices under that act. Indeed, all of the matters raised in the City's petition are substantively before FERC, and FERC is proceeding to decide those matters.¹⁴ Once FERC has decided these issues within its jurisdiction, the NRC will be in a position to determine whether there has been any violation of the license conditions warranting NRC enforcement action.

2. Retail Wheeling

The City next argues that there is no credible basis upon which to contend that the Medco transaction constitutes retail wheeling. City Reply at 6. CEI's basis for this contention is stated specifically at page 7 of its prior Response,²¹ and is undenied. Whether these facts are sufficient is a matter that FERC is currently considering. The City further argues that, "even if the services

¹⁴ CEI's position is only that FERC should decide CEI's obligations under its filed tariffs consistent with the Federal Power Act, and not attempt to establish independent obligations as an enforcer of NRC's antitrust conditions.

²¹ The Cleveland Electric Illuminating Company's Response to the City of Cleveland's 2.206 Petition (May 6, 1996).

sought constituted 'retail wheeling,'" the NRC license conditions require such retail wheeling. *Id.* at 6-7. This is not true for two reasons. First, as explained in our prior Response (at page 9 and n.3), the license conditions were constructed and intended to refer to wholesale wheeling.³² Second, the conditions collectively require wheeling "in a manner consistent with the provisions of the Federal Power Act," and retail wheeling is inconsistent with current sections 211(a), 212(g), and 212(h) of the act.

The City attempts to avoid this dilemma by arguing that section 211 did not exist when the antitrust conditions were formulated. City Reply at 8. This is irrelevant, because there is no indication that, in formulating antitrust condition 11 of the Perry license and condition 10 of the Davis-Besse license, the NRC intended to freeze the requirements of the FPA and ignore subsequent amendments to it. The requirement that antitrust conditions be "implemented in a manner consistent with the Federal Power Act" must be read as referring to the current act.

The City's suggestion that the language requiring implementation "in a manner consistent with the Federal Power Act" is merely a reference to FERC's authority over the terms of services required by the antitrust conditions, and not a limitation on the services that the NRC can

³² The pithy discussion of the NRC findings that prompted the license condition, at pages 6-7 of the City Reply, does not provide any support for expanding the license conditions to require retail wheeling. In fact, the City's citation to the Licensing Board's decision at 5 N.R.C. 167, 177-78, does not even relate to wheeling. Further, if the Medco transaction is in fact a sham to facilitate retail wheeling between Ohio Power and Medco, as CEI claims and FERC should decide, the transaction would have nothing to do with "loss of [CEI] customers to competing municipals' systems."

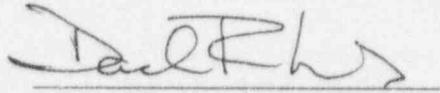
The City's characterization of *City of Cleveland v. NRC*, 68 F.3d 1361 (D.C. Cir. 1995), is also inaccurate. Contrary to the representation in the City Brief at 7, there was no "finding" by the Court that CEI (along with other CAPCO members) had used its size to forestall competition from other smaller entities in the region. In the portion of its decision cited by the City, 68 F.3d at 1363, the Court merely summarized the Licensing Board's 1975 findings. Those prior Licensing Board findings were discussed by the Court but were not subject to its judicial review.

obligate (see City Reply at 8), is equally unpersuasive. First, the City's interpretation would make this language redundant and therefore meaningless. Since the condition states elsewhere that rates, charges and practices are subject to the approval of regulatory agencies having jurisdiction over them, if the language requiring implementation of the conditions in a manner consistent with the FPA is to have any meaning at all, it must be something more than a reference to FERC's ratemaking authority. Second, FERC's recognized authority to establish rates, charges and practices governing transmission services necessarily includes the authority to rule that certain transactions are permissible and others are not.⁴ Finally, the City's notion that NRC's wheeling condition is not limited to currently allowed wholesale transactions, and therefore may be used to order other types of retail transactions, would wreak havoc and is clearly unreasonable. A decision to require a utility to engage in retail wheeling is in effect a decision to deregulate the retail market and requires careful consideration of many matters, including how stranded costs should be recovered in a deregulated market. Such a momentous decision must be made by the states or Congress, not through reinterpretation of an NRC license condition that was never intended to reach beyond wholesale transactions.

For these reasons, and the reasons discussed in our prior Response, the City's petition should be denied.

⁴ When FERC approves a tariff establishing the terms and conditions governing the wheeling of power by CEI, CEI is under no obligation, either under that tariff or under the antitrust conditions, to wheel power for the City under different terms.

Respectfully submitted,



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DATED: June 6, 1996

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