UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-440A, et al.
THE CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY, et al.	)	

TO: Chief, Policy Development and
Technical Support Branch, Office
Of Nuclear Reactor Regulation

ANSWER OF CITY OF CLEVELAND, OHIO, IN OPPOSITION TO OHIO EDISON COMPANY'S APPLICATION FOR SUSPENSION OF PERRY OPERATING LICENSE ANTITRUST CONDITIONS

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The City of Cleveland, Ohio ("Cleveland"), files this answer in opposition to the application submitted by Ohio Edison Company ("Edison") in which it asks the Director of Nuclear Reactor Regulation ("NRR") to suspend the antitrust license conditions imposed by the Nuclear Regulatory Commission ("NRC") in this proceeding. Edison asks that the suspension of the conditions apply only to it as co-owner of the Perry Nuclear Power Plant Unit 1 (Perry)1/ and remain in effect "until such time as there may be a factual basis for imposing [the conditions]" (App. 80-81). Cleveland requests summary denial of the application.

1/ In addition to Edison, there are four co-licensees: Edison's wholly-owned subsidiary, Pennsylvania Power Company ("Penn Power"), Cleveland Electric Illuminating Company ("CEI"), Duquesne Light Company ("Duquesne"), and Toledo Edison Company ("Toledo"). In 1985, CEI and Toledo merged and a public utility holding company, Centerior Energy Corporation, was established which owns all of the stock of the two utilities. For ease of reference, Edison's application is cited as "App." whenever specific pages are referred to. For example, page 8 of the brief is cited as "App.8".

I. PREAMBLE

Edison's application rests basically on its claim that the "exclusive basis for imposing the license conditions" was the purportedly universally held anticipation of the economic superiority of nuclear power which would provide Edison and its co-licensees (CEI, Duquesne, Toledo, Penn Power) an unattainable economic advantage individually and collectively as members of the Central Area Power Coordinating Group ("CAPCO") over other entities engaged in the electric business in their respective service areas (App. 2-3).2/

Edison asserts that as matters have turned out, the "relative cost" of nuclear power has increased dramatically from the cost which the NRC purportedly assumed and relied upon when it imposed the antitrust license conditions. Consequently, argues Edison, it is "neither necessary nor appropriate for the NRC to continue to restrict [Edison's] business activities" (App. 4). Indeed, Edison contends that the "NRC has no statutory basis for overseeing the licensee's business conduct" in view of the allegedly higher cost of nuclear power. Id.

Edison's application seeks the requested relief on its own behalf in its status as co-owner of Perry along with CEI, Toledo, Penn Power and Duquesne. But if Edison were to prevail and secure suspension of the antitrust license conditions, its co-licensees, who are quietly watching and waiting in the wings,

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2/ In the decisions of the Licensing and Appeal Boards, these co-licensees are collectively referred to as "Applicants". In this answer, Cleveland also sometimes refers to the five co-licensees as "Applicants". They are the only members of CAPCO.

will be quick to file applications on their own behalf seeking the same relief. The consolidated proceeding in which the antitrust license conditions were imposed involved Perry as well as Davis-Besse Nuclear Power Station, Units 1, 2, 3 (906 megawatts each). Davis-Besse is co-owned by CEI and Toledo. In short, this application is not merely an Edison application, affecting only Edison. Indeed, the NRC's treatment of Edison's applications could set a precedent applicable to other proceedings.

In Section III, below, Cleveland shows that the NRC does not have the authority to suspend or amend the Perry antitrust license conditions. Edison's application requests the NRC to conduct another review of the antitrust consequences of the licensed activity. However, Section 105(c) of the Atomic Energy Act provides that an antitrust review can occur only in connection with a pending construction permit application and, in a narrower fashion, to an application for an operating license. Cleveland shows in Section IV, below, that even if the NRC finds that it has jurisdiction to address Edison's application, the relief sought by Edison must be denied because it is barred by the doctrine of res judicata, or, alternatively, collateral estoppel. This is because the arguments made by Edison in its application here were made, or at least could have been made, during the construction permit and operating license proceeding. If these doctrines are for some reason not applied, laches bars Edison's application, as shown in Section V below.

Cleveland demonstrates in Section VI, below, that even if the NRC chooses to address the merits of Edison's application,

the application must still be denied. Among other things, Edison misinterprets the Atomic Energy Act and NRC precedent in arguing that the NRC cannot impose antitrust license conditions if nuclear energy is not the cheapest source of power. Moreover, as Cleveland demonstrates, the events cited by Edison as the basis for its application do not undermine the legal or factual basis of the NRC's decision to impose the antitrust conditions. The NRC based its imposition of the conditions on the finding that, unless the conditions were imposed, the substantial baseload power generated by the new plants and the expanded coordination and wheeling services which would result as part of the associated transmission lines would exacerbate the pervasive anticompetitive conduct of the Applicants. Purported changes in the cost of nuclear power do not in any way undermine the NRC's analysis.

II. BACKGROUND

A. THE CONSTRUCTION PERMIT PROCEEDING

Both the decision by the Licensing Board3/ and the Appeal Board4/ provide comprehensive statements of the background of this proceeding. Cleveland briefly reviews this background.

1. The applications

The five Applicants -- Edison, its subsidiary Penn Power, CEI, Toledo and Duquesne -- are investor-owned utilities engaged in generating, transmitting and distributing electric energy to wholesale, retail and industrial customers in a 14,000 square mile area of Ohio and western Pennsylvania. In 1967, the Applicants formed CAPCO. As members of CAPCO, the Applicants agreed to engage in operational and developmental coordination. As part of operational coordination, the Applicants agreed to coordinate their operations by, *inter alia,* exchanging power and sharing reserves. As part of developmental coordination, the Applicants agreed to plan their future generation and transmission facilities as if the pool's requirements were those of a single power system.

The applications by the co-licensees at issue in this proceeding were an aspect of this developmental coordination plan. The Appeal Board described the applications in this way:

> Commencing in 1969, the Applicants sought permits from the Commission to build a series of nuclear

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3/ LBP-77-1, 5 NRC 133, 138-40 (1977).

4/ ALAB-560, 10 NRC 265, 270-81 (1979).

power plants with a combined generating capacity in excess of 5,000 megawatts. The first application, filed by CEI and Toledo Edison jointly, was for United [sic: Unit] No. 1 [906 megawatts] of the Davis-Besse facility in Ohio. The Attorney General, while noting a dispute between CEI and Cleveland pending before the Federal Power Commission over the City's request for an interconnection, did not request an antitrust hearing on Davis-Besse 1. 36 Fed. Reg. 17,888 (September 4, 1971). The city of Cleveland did, however. In a petition filed on July 6, 1971, Cleveland stressed that MELP (its municipal power system)[5/] both purchased power at wholesale from CEI and competed with it at retail. Cleveland alleged that the utility had exercised its control over generation and transmission facilities anticompetitively to block MELP's attempt to obtain bulk power at lower cost from other sources. In addition to other relief, the city asked for license conditions giving MELP access to power generated by the nuclear plant.

In March of 1973, the five applicants sought Commission permits to build Perry Units 1 and 2 in Ohio. This time the Attorney General's advice letter (dated December 17, 1973) recommended an antitrust hearing. The letter stressed activities of CEI, which was described as "engaged in intense competition with the city of Cleveland at the retail distribution level, and, to a lesser extent, with [the city of] Painesville." After observing that "CEI controls all of the transmission facilities surrounding these two cities," the Attorney General portrayed CEI's objectives as being "to reduce and ultimately eliminate" the two municipal systems. The advice letter recounted a history of unsuccessful negotiations between CEI and the municipalities over interconnections, wheeling, coordination, and access to large-scale generation, and characterized CEI's conduct in these matters as "inconsistent with the antitrust laws" 39 Fed. Reg. 2029 (January 16, 1974). The city of Cleveland also petitioned for an antitrust hearing on this application and asked leave to intervene and participate as a complaining party.

5/ At the time of the proceedings before the NRC, Cleveland's municipal electric system was known as Municipal Electric Light and Power System ("MELP"). The municipal system's present name is Cleveland Public Power.

> In August 1974, the five applicants jointly requested construction permits for Units 2 and 3 of the Davis-Besse facility [906 megawatts per unit]. The Attorney General again recommended an antitrust hearing. His advice was based on the Applicants' refusal to admit the municipal systems into the CAPCO pool and what he judged a pattern of anticompetitive dealings by the applicants with the smaller systems. According to his advice letter, "[t]he Applicants' refusals to wheel power, to interconnect and to engage in coordinated operation with smaller utilities raise problems which should be considered in the perspective of their monopoly control of the transmission facilities surrounding the smaller systems of their competitors. Antitrust principles have evolved which place distinct limits upon a supplier's exercise of monopoly power at one level of distribution to adversely affect competition at another level," citing the Supreme Court's decision to that effect in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). The Attorney General stated that a section 105c hearing was called for because the "[c]onstruction and operation of the Davis-Besse Nuclear Power Station, Units 2 and 3, and marketing of its power output would maintain such an anticompetitive situation. Granting the license applied for without adequate antitrust conditions will generate new opportunities for the Applicants to engage in coordinated operation with each other and will provide them with a new source of relatively low-cost power and energy at the time they are effectively foreclosing any possibility of their competitors sharing in the benefits of coordinated operation and development." 40 Fed. Reg. 8395-96 (February 27, 1975). The city of Cleveland petitioned to intervene in this proceeding as well.

footnotes in original omitted; footnote in brackets supplied; 10 NRC at 275-76.

2. The Licensing Board decision

The NRC consolidated the proceedings and directed the Licensing Board to conduct an evidentiary hearing to examine whether antitrust license conditions should be imposed on the construction permits. The Attorney General (represented by the

Justice Department's Antitrust Division), Cleveland and the NRC staff were admitted as complaining parties.

The Licensing Board comprehensively examined each of the antitrust allegations. The trial took place over seven months and resulted in a record of nearly 13,000 transcript pages with over 1,300 exhibits. The Licensing Board issued its initial decision on January 6, 1977. Briefly, the Licensing Board found that the Applicants possessed monopoly power individually in the relevant markets within their respective service territories and jointly in the so-called Combined CAPCO Company Territories (CCCT)6/:

> Within their respective service areas, each individual Applicant is dominant with respect to generation, transmission, and sale of electric energy.
> a) Generation. In 1973, CEI controlled 94.11% of all generating capacity in its service area Duquesne 99.90%; Ohio Edison 96.61%; Penn Power 100%; Ohio Edison and Penn Power 97.08%; TECO 95.68%. In 1973, Applicants controlled 95% or more of all existing generating capacity in the CCCT.
> b) Transmission. CEI controls 96.8% of all transmission facilities 66 KV and above within its service area; Duquesne 100%; Ohio Edison and Penn Power 99.8%; TECO 99.2%. On a combined basis, Applicants control 99.3% of transmission facilities 69 KV and above in the CCCT.

citations to record omitted; 5 NRC at 153.

Moreover, the Board found that Applicants used this control to engage in pervasive anticompetitive and unlawful conduct, both individually and jointly as members of CAPCO, to mono-

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6/ The CCCT "refers to the region bounded by the outer perimeters of the present service areas of the five CAPCO members. . ." 5 NRC at 142, n. 8.

polize the product markets. That Board summarized its findings in this way:

> . . . each of the member companies of [CAPCO] had participated in actions intended or having the foreseeable effect of reducing the reliability and the economic viability of competing electric generating and distribution entities within their respective service areas . . . . Applicants provided bulk power services to each other even as they avoided competition in the retail and wholesale power transaction market. This avoidance was not passive since several Applicants were parties to affirmative agreements or understandings not to compete with one another. Moreover, each Applicant took actions intended or with the foreseeable effect of eliminating competition with non-Applicants in retail power transactions. These restraints took the form of agreements in restraint of trade with municipal generating and distribution systems including territorial or customer allocations, attempts to fix prices for retail power transactions, and refusals to provide bulk power services where the refusals had the known effect of reducing the reliability and the economic competitive potential of these rival systems. Thus, each Applicant has entered into agreements and understandings the effect of which is to create and maintain a situation inconsistent with the antitrust laws within its own service territories. These actions or policies have continued over a period of years and their cumulative effect has been to reduce the level of competition within the CCCT or to prevent such competition from being as vigorous as it otherwise might have been.

footnotes omitted; 5 NRC 223-24. The Licensing Board went on to find that CAPCO, from its very inception, was used as a tool to exacerbate the anticompetitive situation by excluding competing utilities from access to the developmental and operational coordination:

> Although a primary purpose for the formation of CAPCO was to secure certain lawful advantages to Applicants themselves, . . . a collateral and well understood result of the formation of CAPCO was to deny to competitive entities in the CCCT access to coordinated operation and development.

citations to record omitted; 5 NRC at 224. This unlawful objective was effectuated in certain instances by simply denying requests by utilities, such as Cleveland, to join CAPCO. CAPCO also accomplished the same result by imposing burdensome reserves requirements for membership which, in purpose and effect, disqualified competing utilities. 5 NRC at 223-237. Exclusion of competing utilities from the CAPCO transmission facilities and, hence, the coordination and pooling services, was designed as one part of CAPCO's plan to undermine their ability to compete effectively.

In addition, the CAPCO members rejected requests by Cleveland and others seeking to purchase either ownership interests in the nuclear plants or unit power. *Id*. at 232-35.

The Licensing Board found that these anticompetitive activities constituted violations of the federal antitrust laws. That Board then determined that, in view of these findings, the criteria governing NRC authority to impose antitrust license conditions -- "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" -- had been met. The Licensing Board noted the significance of "the size of the five large generating stations involved in this license proceeding and the substantial contribution they will make to the resources of the CAPCO pool and in particular to the satisfaction of its base load requirements" 5 NRC at 240. The Board recognized that, in view of the Applicants' pervasive and coordinated anticompetitive conduct, any new electric generation

by the CAPCO members would simply allow them to expand their market power to serve exclusively the increased demands of present customers and the demands of new customers. Competing utilities would be foreclosed from competing for the load because of the Applicants' conduct.

Second, the Licensing Board noted that the construction of extensive, high voltage transmission lines in conjunction with the nuclear plants would exacerbate the Applicants' exclusionary tactics regarding access to these facilities for wheeling and coordination services:

> . . . there is a direct tie between the generating station construction program and the transmission program which Applicants describe as complementing it. As described in CAPCO memoranda, far more is contemplated than the mere extension of a line from the site of the proposed nuclear station to the closest terminal of the Applicant in whose service area of [sic] the plant is to be located. Applicants are engaged in substantial planning studies and construction programs specifically intended to develop a plan for high voltage transmission at low cost among CAPCO members. There will be commingling, but the commingling will be on an extraordinary scale.

5 NRC at 239. The Licensing Board also noted that construction of the new lines would heighten the barriers to construction of other lines by the non-CAPCO utilities:

> Although access to transmission facilities is a necessary concomitant of reliable and economic energy production, small systems frequently find it infeasible to construct duplicative transmission facilities. Both economic and environmental considerations prevent such construction. Applicants' construction of the high voltage transmission grid necessitated in large part by the Davis-Besse and Perry plant additions, together with the existence of excess capacity on their present systems, render the construction of duplicative transmission lines essentially impossible.

citations to record omitted; 5 NRC at 156. At the same time, the Licensing Board noted that the new lines would facilitate even more extensive coordination services. Id. at 156-57. Thus, the Board recognized that construction of the new lines would exacerbate the adverse competitive impact of the Applicants' exclusionary policies. Id. at 239-41. This, in turn, would exacerbate the anticompetitive situation.

Finally, the Licensing Board found that the Applicants' policy of placing anticompetitive restrictions on access to nuclear power also constituted an obvious nexus between the licensing of the facilities and the anticompetitive situation. 5 NRC at 241-43.

The Licensing Board imposed ten conditions. The conditions required each of the Applicants:

> 1. to refrain from conditioning the sale or exchange of wholesale power or coordination services to any entity(ies)7/ on the purchaser's agreement
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> > (a) to restrict the use or alienation of such energy or services to any customer or territories,
> >
> > (b) to give up any other power supply alternatives or to deny itself any market opportunities, or
> >
> > (c) to withdraw any petition to intervene or forego participation in any proceeding before the NRC or refrain from instigating or prosecuting any antitrust action in any other forum.
>
> 2. to offer interconnections on reasonable terms and conditions at the request of any other electric enti-

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7/ The license conditions define "entity" as meaning any electric generation and/or distribution system or municipality or cooperative with a statutory right or privilege to engage in either of these functions.

ty(ies) in the CCCT, such interconnection to be available for operation in a closed switch synchronous operating mode if requested by the interconnecting entity(ies), subject to reasonable safety procedures that do not deprive purchasing entities of a means to effect additional power supply options.

3. to engage in wheeling8/ with respect to any unused capacity on the Applicants' transmission lines, for and at the request of other entities in the CCCT, of electric energy from delivery points of the Applicants to the entity(ies) and of power generated by or available to the other entity as the result of its ownership or entitlements9/ in generating facilities to delivery points of the licensees designated by the other entity, and to make reasonable provision for future requirements for wheeling services in planning future transmission capacity.

4. to make available membership in CAPCO to any entity in the CCCT with a system capability of 10 megawatts or greater or to a group of entities as a single membership with the same capability on an aggregate basis, subject to certain specified conditions and restrictions.

5, 6 and 7. to sell maintenance power, emergency power, or economy energy to requesting entities in the CCCT upon terms and conditions no less favorable than those the Applicants make available to each other or to other entities outside the CCCT.

8. to share reserves with any interconnected generation entity upon request on an equal percentage basis or by use of the CAPCO P/N allocation formula or on any other mutually agreeable basis, at the requesting entity's choice.

9. to make available to entities in the CCCT access to Davis Besse Units 1, 2 and 3 and Perry Units 1 and 2 nuclear units and any other nuclear units for which the licensees, or any of them, shall apply for a construction permit or operating license during the next 25

8/ The license conditions define "wheeling" to mean transportation of electricity by a utility over its lines for another utility, including the receipt from and delivery to another system of like amounts but not necessarily the same energy.

9/ "Entitlement" includes but is not limited to power made available to an entity pursuant to an exchange agreement.

> years, either as an ownership share (up to 10% of capacity of the Davis-Besse and Perry Units and up to 20% of future units), unit participation, or contractual prepurchase power basis, at the requesting entities option. Commitments for the Davis-Besse and Perry units must be made either two years after "this decision becomes final" and for the future units, within two years after a construction permit application is filed with respect to such a unit or within two years after receipt by a requesting entity of detailed written notice of applicants' plans to construct the unit, whichever is earlier, subject to the 25 year limitation.

5 NRC at 256-59. Condition 10 states:

> These conditions are intended as minimum conditions and do not preclude Applicants from offering additional bulk power services or coordination options to entities within or without the CCCT. However, Applicants shall not deny bulk power services required by these conditions to non-Applicant entities in the CCCT based upon prior commitments arrived in the CAPCO Memorandum of Understanding or implementing agreements. Preemption of options to heretofore deprived entities shall be regarded as inconsistent with the purposes and intent of these conditions.

3. The Appeal Board decision

The Applicants submitted a 300 page brief challenging the Licensing Board's decision.10/ In its decision issued September 6, 1979, the Appeal Board rejected this challenge and affirmed the Licensing Board's findings. 10 NRC 265. The decision had a somewhat unusual pedigree. Jerome Sharfman, the Appeal Board member who wrote the original draft of the decision, resigned from the NRC before the draft was reviewed by the other members of the Board. The remaining Board members decided to "concur in [the] ultimate factual and legal conclusions [of Mr. Sharfman's draft] and the result it reaches except where indi-

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10/ "Applicants' Initial Brief In Support Of Their Individual And Common Exceptions To The Initial Decision", filed April 14, 1977. For ease of reference, the brief is cited as "App. Br.".

cated in our separate opinion." Id. at 270. Hence, analysis of the Appeal Board decision requires examination of both the Sharfman draft and the Board's decision.

a. The Applicants' anticompetitive activities

The Appeal Board adopted Mr. Sharfman's analysis of th anticompetitive acts committed by the Applicants individually and collectively in their status as CAPCO members. The Appeal Board noted that the Applicants "control a 95 percent or greater share of the bulk power generation and transmission facilities in their respective service areas. Id. at 273. The Appeal Board found that the CCCT is the relevant geographic market for purposes of antitrust review and that there were three relevant product markets: (1) the retail market, (2) the wholesale power market (which includes all firm bulk power production, whether retailed for 'in house' retail purposes or wholesaled 'outside' for independent retail distribution), and (3) the coordination services market. Id. at 301.

The Board then agreed with the Licensing Board's finding that the Applicants, both individually and as members of CAPCO, used their domination of generation and transmission to monopolize each of these product markets. First, the Applicants precluded other utilities in their service areas from purchasing power from alternative suppliers by refusing to provide the wheeling services on their transmission lines which provided the only interconnection with other suppliers. Id. at 327-34. The Appeal Board pointed to the repeated refusals of Edison, CEI and

Toledo to wheel power for competing utilities. For example, the Appeal Board noted that Edison refused to wheel power from Buckeye Power, Inc. to the Buckeye member cooperatives located in Edison's service area. Id. at 331-33. Likewise, CEI refused to wheel inexpensive power from the Power Authority of the State of New York (PASNY) to Cleveland. Id. at 327-28. The Appeal Board noted that the competing utilities could not, as a practical matter, construct their own transmission lines to duplicate the Applicants' facilities. Hence, the Appeal Board found that these refusals to grant access to these essential, or so-called bottleneck, transmission facilities violate Section 2 of the Sherman Act. Id. at 328.

The Appeal Board agreed with the Licensing Board that the Applicants' unlawful acts did not stop there. The Appeal Board determined that the Applicants not only excluded competitors from access to alternate suppliers but also imposed pervasive restraints on their competitors' ability to resell the power bought from them. The Appeal Board found that these resale restraints were designed to prevent the utilities from competing for customers, especially industrial loads. Id. at 311-22. These resale restraints included territorial restrictions, customer allocations and agreements not to resell power in the wholesale market. Id. at 313-14. The Appeal Board noted that these resale restraints constituted a per se violation of the antitrust laws. Id. at 316. Edison and CEI were found to be as guilty as their cohorts in imposing resale restraints. For example, Edison barred its utility customers from reselling power

to industrial or wholesale customers and limited the geographic areas in which the power could be resold. 5 NRC at 198-201.

The Appeal Board also found that the Applicants barred the utilities from receiving coordination services which, as noted, are necessary in order for a utility to operate in the efficient manner needed to be competitive. The Applicants repeatedly refused requests by the utilities to use the Applicants' transmission facilities for coordination services. The Applicants also refused access to nuclear power unless the utilities granted Applicants a right of first refusal to repurchase excess power for which the utilities had no immediate need. The practical impact of this restriction was, again, to bar access to coordination services and to relegate the utilities to a continued role as isolated utilities. 10 NRC at 313-14 (Edison); 321 (CEI).

To further consolidate control of retail and wholesale markets, Edison, like the other Applicants, engaged in a panoply of anticompetitive acts and practices including (1) seeking to acquire municipal electric systems in their service areas (id. at 376-378, 380-82), and (2) charging wholesale rates to municipal systems which were higher than comparable industrial rates, thereby creating unlawful price squeezes (id. at 382-84).

In addition, the Applicants entered into numerous agreements among themselves dividing up service areas. Id. at 369-75. Both Edison and CEI were parties to several such agreements. Id. The Appeal Board found these agreements were illegal, per se, under the antitrust laws. Id. at 375.

The Appeal Board agreed with the Licensing Board that the Applicants, acting collectively as members of CAPCO, engaged in additional anticompetitive and unlawful acts. CAPCO excluded competing utilities from access to CAPCO's coordinated operations and development. The Appeal Board found that the Applicants did this by repeatedly denying requests by utilities to join CAPCO. Id. at 339-52. Cleveland was among the utilities whose requests were denied. Id. at 349-58. Again, the Board found that these refusals constituted concerted refusals to deal and, hence, were illegal *per se* under the antitrust laws. Id. at 352. The Appeal Board noted that CAPCO also adopted burdensome reserve requirements for membership in CAPCO in order to "provide a useful excuse for refusing pool membership to municipalities" in CAPCO. Id. at 339.

Moreover, the Board agreed with the Licensing Board that CAPCO's anticompetitive conduct extended directly to the CAPCO nuclear plants. The Board found that CAPCO refused to accept Cleveland's proposal to either purchase an ownership share in, or unit power from, CAPCO's nuclear units unless Cleveland agreed to "unreasonab[illegible], anticompetitive terms." Id. at 358-62.

b. The nexus between the proposed nuclear plants and the anticompetitive situation

Armed with these findings of pervasive and pernicious anticompetitive conduct, the Appeal Board then considered whether the nexus between the "activities under the license" and the "situation inconsistent" with the antitrust laws required by Section 105(c)(5) was present. The Appeal Board recognized the

NRC's broad mandate in Section 105(c) to impose antitrust conditions:

> The provision conveys the message that Congress did not want nuclear plants authorized in circumstances that would create or maintain anticompetitive situations without license conditions designed to address them.

10 NRC at 291.

The Board adopted the Licensing Board's finding that there was an integral link between the activity to be licensed -- construction and operation of the nuclear plants -- and the anticompetitive situation extant in the CCCT. Id. at 384-85. The Appeal Board summarized the Licensing Board's findings:

> Given Applicants' one-system planning and coordinated operations, the unconditional addition of five large nuclear power plants advantageous for "baseload" (low operating cost) generation would increase the CAPCO system's bulk power generating capacity by nearly a third. This would exacerbate the existing anticompetitive situation, making it even more difficult for the isolated public power systems to continue to compete with the Applicants.
>
> Another linking factor was discerned by the Board in those instances where Applicants had deigned to make nuclear power available to the municipal and cooperative systems. The Board found that as part of the price for furnishing that power, Applicants had insisted on such anticompetitive conditions as agreements not to compete, allocations of service territories and customers and fixing of prices. These factors (among others) satisfied the Licensing Board that there was more than a sufficient "nexus" between the licensed activities and the situation it found to be inconsistent with the antitrust laws and, therefore, that remedial license conditions were in order.

footnote omitted; 10 NRC at 281.

The Appeal Board found that "the Licensing Board employed the correct legal standards in determining whether

licensing these plants 'would create or maintain a situation inconsistent with the antitrust laws'". 10 NRC at 285. Thus, by adopting the Licensing Board's reasoning and findings, the Appeal Board recognized the integral nexus between the proposed nuclear facilities and the Applicants' pervasive and pernicious anticompetitive and unlawful conduct. Therefore, the Appeal Board affirmed the decision of the Licensing Board to impose antitrust license conditions.

c. The antitrust license conditions

The Appeal Board approved the license conditions drafted by the Licensing Board with only minor modifications. Significantly, the Appeal Board rejected Mr. Sharfman's proposal to restrict the scope of the conditions ensuring non-discriminatory access to coordination and wheeling services to customers purchasing nuclear power or ownership interests in the plants. 10 NRC at 290-294. The Appeal Board noted that this restriction would allow the Applicants to continue their anticompetitive conduct in connection with pooling and coordination services and to thereby undermine the competitive position of utilities which did not buy nuclear power. Id. at 291. That would be inconsistent with the clear "message" conveyed by Section 105 of the Act that "Congress did not want nuclear plants authorized in circumstances that would create or maintain anticompetitive situations without license conditions to address them", noted the Board. Id. Therefore, the Appeal Board found that this restriction would be inconsistent with the NRC's broad mandate to impose antitrust

conditions if the license activity would cause or continue situations inconsistent with antitrust requirements. Id. at 284.

The Appeal Board also added Condition no. 10, which ensured that non-CAPCO utilities could purchase any amount of wholesale power they needed from the Applicants:

> Applicants shall sell wholesale power to any requesting entity in the CCCT, in amounts needed to meet all or part of such entity's requirements. The choice as to whether the agreement should cover all or part of the entity's requirements would be made by the entity, not the Applicant or Applicants.

10 NRC at 408.

The Appeal Board rejected the Applicants' challenge of the appropriateness of a uniform set of conditions applicable to all of the Applicants:

> Applicants forget that many of the violations of the antitrust laws which appear from the opinion below were the result of joint and concerted action by the applicants. Indeed, the CAPCO pool established a system whereby many of their activities are conducted jointly, many of their decisions are made jointly and, where this is not so, an individual decision may sometimes require the consent of the other members. In this kind of situation, it was necessary to have a single set of conditions applicable to all Applicants.

footnote omitted; 10 NRC at 393-94.

d. Subsequent review

On October 22, 1979, the Applicants submitted petitions to the NRC challenging the Appeal Board's decision.11/ They in-

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11/ "Ohio Edison Company's And Pennsylvania Power Company's Petition For Review Of ALAB-560"; "The Petition Of The Cleveland Electric Illuminating Company And The Toledo Edison Company For Review Of ALAB-560"; "Petition Of Duquesne Light Company For Review".

corporated by reference their arguments in their brief challenging the Licensing Board's decision.

The NRC declined to review the Appeal Board's decision. Therefore, the decision became a final NRC action.

Penn Power and Duquesne filed petitions for review in the Third Circuit under the name Duquesne Light Co. v. NRC.12/ However, on September 26, 1980, the petitioners submitted a "Stipulation To Dismiss With Each Party To Bear Its Own Costs". The Third Circuit dismissed the appeals on October 8, 1980.

B. THE OPERATING LICENSE PROCEEDING

The Applicants submitted an application for a full power operating license in 1980. The NRC staff asked the Applicants to comply with Regulatory Guide 9.3 and to provide information concerning any "changes that have occurred or are planned to occur since submission of the construction permit application". The NRC staff also asked the other parties to the construction permit proceeding to comment on the Applicants' responses to Regulatory Guide 9.3. On November 7, 1983, the NRR Director determined that, pursuant to Section 105(c)(2) of the Atomic Energy Act, "the changes that have occurred since the antitrust construction permit (CP) review are not of the nature to require a second antitrust review at the operating license (OL) stage of the application." 48 Fed. Reg. 52,992 (Nov. 23, 1983).

Hearings on the operating license application were con-

12/ Third Circuit Docket Nos. 80-1295 and 80-1296 (filed Feb. 29, 1980) and Docket Nos. 80-1307 and 80-1310 (filed March 4, 1980).

ducted in 1983 and 1985. The record was closed on May 3, 1985. On November 7, 1986, the NRC issued a final order granting a forty year full-power operating license effective November 13, 1986. The license incorporated the antitrust license conditions imposed during the construction permit proceeding. Because of a pending petition for review before the Sixth Circuit challenging an NRC order denying intervention by a party, the court stayed implementation of the license. The court consolidated the petition with other petitions challenging the issuance of the license. On March 17, 1987, the court affirmed the NRC's intervention order as well as the decision to grant the full-power operating license. State of Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987)[13]

13/ The court decision summarizes the events accompanying the NRC review of the operating license application. That summary is not repeated here.

III. THE NRC DOES NOT HAVE JURISDICTION TO GRANT EDISON'S APPLICATION

Edison is seeking suspension of the antitrust license conditions pursuant to Sections 2.101 and 50.90 of the NRC's regulations. In order to show that the NRC has the statutory authority to grant the requested relief, Edison cites certain language by the Licensing Board and Appeal Board in this proceeding. Edison also argues that this authority is a corollary of the NRC's authority to modify license conditions in entirely different settings.

As shown below, Edison's arguments are flawed. As shown in subsection A, Edison simply canvasses NRC decisions addressing the NRC's authority in contexts entirely different than that at issue here. Edison chooses to overlook the pertinent NRC decisions in which the NRC has recognized that Congress, in enacting the 1970 amendments to the Atomic Energy Act (Act), precludes the NRC from exercising the sort of continuing jurisdiction over antitrust aspects of an operating license requested by Edison. Hence, the NRC has already recognized that it does not have the authority to provide the type of relief requested by Edison. Consequently, the precedent cited by Edison is inapposite. In subsection B, Cleveland shows that the NRC decisions cited by Edison undermine Edison's argument. In subsection C, Cleveland shows that the language cited by the Licensing Board and Appeal Board in this proceeding is dicta and is misconstrued by Edison.

A. THE NRC HAS RECOGNIZED THAT THE 1970 AMENDMENTS PRECLUDE IT FROM MODIFYING ANTITRUST CONDITIONS SUBSEQUENT TO ISSUANCE OF AN OPERATING LICENSE

Edison begins its analysis by citing NRC precedent addressing Section 105 of the Act and suggests that NRC authority to grant the relief requested by it is a direct corollary of this precedent. Edison's reasoning, in its entirety, is as follows (App. 49-50):

> Subsequent to the issuance of an OL for a nuclear power plant, no further antitrust evaluations ordinarily take place unless a license amendment is sought which is determined would result in "significant [antitrust] changes" to the licensed activities. In such circumstances, the NRC undertakes another antitrust review.

footnotes omitted; Edison goes on to draw the following inference from this statement (App. 50):

> The regulatory scheme described above ensures that significant changes in the competitive environment are taken into account in the NRC regulatory process. If an antitrust remedy is warranted subsequent to the initial antitrust review of the application that takes place when a construction permit is sought, the NRC Staff is expressly authorized by its organic statute to impose it. Similarly, if (as we believe is the case here) a previously imposed antitrust remedy no longer is warranted, then the NRC Staff also must have authority to remove the unjustifiable conditions.

Edison's reasoning is undermined by the very precedent cited by it. In footnote 111 of its application, Edison cites (1) Houston Lighting & Power Co., et al. (South Texas Project, Unit Nos. 1 and 2) ("South Texas"), CLI-77-13, 5 NRC 1303 (1977), (2) Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752 (1973), and (3) South Carolina Electric and Gas Co., (Virgil C. Sumner Nuclear Station, Unit No. 1) ("South Carolina II"), CLI-81-14, 13 NRC 862 (1980). Edison also

cites Section 50.90(b) of the NRC's regulations.

South Texas and the related subsequent decision in Florida Power & Light Company (St. Lucie Plant, Unit Nos. 1, 3, 4) ("Florida Power"), ALAB-428, 6 NRC 221 (1977) (which is not even mentioned by Edison) are the seminal NRC decisions on the statutory limits of the NRC's authority to modify antitrust conditions. In South Texas and Florida Power, the NRC reviewed the legislative history and objectives of the antitrust review provisions of the Act. As discussed below, the NRC concluded that it cannot conduct an antitrust review outside the context of a construction permit or operating license proceeding and, hence, cannot impose or modify antitrust conditions outside these contexts. Because Edison is seeking suspension of antitrust license conditions outside these contexts, South Texas and Florida Power show that the NRC lacks the statutory authority to grant the requested relief. Because of the direct applicability of South Texas and Florida Power here, the decisions are described in detail below.

1. South Texas

South Texas, 5 NRC 1303 (1977), stemmed from an application for construction permits jointly filed by Houston Lighting & Power Company (Houston), Central Power and Light Company (Central) and the Cities of San Antonio and Austin, Texas. The Attorney General reviewed the application for the permit and recommended that an antitrust hearing was unnecessary. Id. at 1305. No person submitted a petition to intervene or a request

for a hearing on the antitrust aspects of the proposed project. Hence, no antitrust hearing was conducted. The construction permits were issued in late 1975.

In 1976, Central established for the first time an interconnection between its distribution facilities and those of certain out-of-state utilities. Houston responded by breaking off interconnections between its distribution system and the systems of certain other utilities, including Central. These actions led to a flurry of judicial and administrative actions in which both Central and Houston challenged the actions of the other in various judicial and administrative forums.

Pertinent here is Central's filing before the NRC of a petition seeking intervention and an antitrust hearing. Central argued that Houston's termination of interconnections was a supervening development which warranted the imposition of antitrust conditions. The petition was addressed, in turn, by the Licensing Board, the Appeal Board and the NRC. By that point, all parties agreed that an antitrust hearing should be held at the earliest opportunity but differed as to the appropriate procedure for conducting the hearing.14/

The NRC began its analysis by noting that this ostensibly procedural dispute raised "significant issues" concerning the NRC antitrust review authority:

> . . . resolution of this dispute requires a definition of the scope of our responsibility in en-

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14/ The position of each of the parties and the NRC staff is described in the decision. 5 NRC at 1307-08.

> forcing the antitrust laws and the policies underlying them in relation to the enforcement responsibilities of other agencies, particularly the Department of Justice. Some of the parties' arguments would assign to us a broad and ongoing antitrust enforcement role; they envision that we would have a continuing policing responsibility over the activities of licensees throughout the lives of operating licenses. As we shall show, we believe that the Congress envisioned a narrower role for this agency, with the responsibility for initiating antitrust review focused at the two-step licensing process.

5 NRC at 1309.

The NRC first examined the legislative history of the 1970 amendments to the Act which established pre-licensing antitrust review pursuant to Section 105. The NRC found that Congress deliberately limited antitrust review to the construction permit proceeding and, in a more narrow fashion, to the operating license proceeding. The NRC noted that "[c]oncern with the competitive aspects of licensing in the nuclear area . . . goes back to the original legislation enacted in 1946." Id. at 1313. The 1946 Act provided for anticipatory, antitrust review in the licensing context coupled with referrals to the Attorney General. The Act was rewritten in 1954 and a two-stage licensing process for privately owned reactors was set up. But antitrust review applied only upon a demonstration of the "practical value" of the facilities for industrial or commercial use. The NRC never made a "practical value" finding. In the 1970 amendments, Congress responded by finding that nuclear power has commercial value, thereby eliminating the need for a NRC finding of "practical value".

The NRC noted that the legislative history of the 1970

amendments indicated that antitrust review was to take place only in limited circumstances. The NRC quoted a statement by the Chairman of the Joint Committee on Atomic Energy in which he noted that the Committee "sees no sense" in plenary antitrust review as part of both the construction permit and operating license proceedings. Id. at 1316. The Chairman noted that plenary antitrust review would be inequitable to a utility which had invested immense sums in a nuclear facility on the basis of the construction permit. Hence, limiting antitrust review to the prelicensing stage was necessary to encourage investment in nuclear facilities, he stated. Id.

The Joint Committee also noted that prelicensing antitrust review was advantageous because the utility would have "a time-related incentive to expedite the entire process and to comply with reasonable antitrust safeguards before any competition is damaged."15/

The NRC observed that these concerns shaped the revisions to Section 105 enacted in the 1970 amendments. Pursuant to Section 105(c) of the Act whenever an application for a construction permit is submitted to the NRC, the NRC is required to submit a copy of the application to the Attorney General. 42 U.S.C. §2135(c)(1). Within 180 days, the Attorney General must advise the NRC as to whether "there may be adverse antitrust aspects" to the application which would warrant a hearing to more

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15/ Id. at 1314, quoting statement of Charles A. Robinson, Jr., Staff Counsel to the General Manager, National Rural Cooperative Association.

fully evaluate these aspects. Id. If the Attorney General finds that there may be adverse antitrust aspects, the NRC must conduct a hearing.16/

Alternatively, if the Attorney General does not recommend a hearing, the NRC must still conduct the hearing if an intervenor challenges the antitrust impact of the application and requests a hearing.17/ If neither the Attorney General nor an intervenor requests an antitrust hearing, the NRC cannot conduct a hearing.18/

If an antitrust hearing is conducted, the NRC must review all the evidence and "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . ."19/

On the basis of its findings during the hearing, the NRC has the authority to refuse to issue a license, or to issue a license with such conditions as it deems appropriate.20/

The NRC noted that there is a much narrower antitrust review in connection with an application for an operating license for a commercial facility. Section 105(c)(2) of the Act, 42 U.S.C. § 2135(c)(2), states that the antitrust review procedures

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16/ Kansas Gas and Electric Co., (Wolf Creek Generating Station Unit 1), ALAB-279, 1 NRC 559, 565 (1975).

17/ Id.

18/ Florida Power & Light Co. (St Lucie Plant, Unit No. 2), LBP-82-21, 15 NRC 639, 640 (1982).

19/ Section 105(c)(5), 42 USC §2135(c)(5).

20/ Section 105(c)(6), 42 USC §2135(c)(6).

applicable to an operating license application apply only if:

> . . . . the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

"Significant changes" are changes which "(1) have occurred since the previous antitrust review of the licensee, (2) are reasonably attributable to the licensee, and (3) have antitrust implications that would likely warrant some NRC remedy".21/

The NRC recognized that Congress, by setting up this two-step review process, intended to limit antitrust review to this process:

> We find the specificity and completeness of Section 105 striking. The section is comprehensive; it addresses each occasion on which allegations of anticompetitive behavior in the commercial nuclear power industry may be raised, and provides a procedure to be followed in each instance. The Act links Commission antitrust review with the licensing process, demanding a thorough antitrust review at the stage of application for the construction permit and allowing a narrower second review at the operating license stage, if such a review is deemed advisable on the basis that significant changes have occurred in the licensees activities. The clear implication of the "significant change" language is that the holder of a construction permit is not subject to a second antitrust review at the operating license stage unless "significant changes" in the proposed project with antitrust implications have occurred in the interim.

footnote omitted; Id. at 1312. The NRC went on to note:

21/ South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1) ("South Carolina I"), CLI-80-28, 11 NRC 817, 824 (1980). Note that the purpose of the antitrust review at the operating license stage is to add -- not delete -- antitrust conditions.

> But even among those who argued in favor of prelicense review, no evidence emerges that anything more than license connected review was considered. There is no hint in the legislative history that anyone -- advocate or foe of prelicensing review --- anticipated anything more. Indeed, the reasons underlying support for the bill as enacted indicate the importance of anticipatory review to its advocates.

emphasis in original; Id. at 1314. The NRC summarized its findings:

> In summary then, we conclude that Congress had no intention of giving this Commission authority which could put utilities under a continuing risk of antitrust review. Had Congress agreed with the proposition that this Commission should have broad antitrust policing powers independent of licensing, the statute that emerged from these discussions would have looked quite different. Little attention would have been paid to defining a two-step review process. The terminology of all participants in the drafting process would not have been focused so directly on "prelicensing" review.

Id. at 1317.

The NRC also observed that the limits on the NRC's authority in the one instance in which post-licensing review of antitrust matters is permitted also reflected the desire by Congress to proscribe such review in all other circumstances. Section 105(a) of the Act permits the NRC to modify antitrust conditions if a court finds that the licensee has violated any of the federal antitrust laws "in the conduct of the licensed activity."22/ Referring to this language, the NRC noted:

> . . . . if a broad, ongoing police power in the antitrust area had been assumed, the language in 105(a) authorizing the Commission to act with re-

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22/ Here, again, observe that the NRC action contemplated is the addition, not deletion, of conditions consistent with the court's findings.

> spect to licenses already issued, in light of the antitrust findings of courts would have been, if not superfluous, certainly redundant.

Id. at 1317.

The NRC also rejected the argument that Sections of the Act other than Section 105 could give the NRC "general antitrust police powers in the nuclear industry" which would justify reopening licensing proceedings. Id. Again, the NRC noted that the carefully circumscribed and detailed antitrust review process set forth in Section 105 was intended to alone govern the antitrust review process. Hence, other sections of the Act which deal in a general way with the NRC's authority -- such as Section 161, 42 U.S.C. §2201, and Section 186, 42 U.S.C. §2236 -- do not govern this process. Id.

The NRC found that in the special circumstances at issue in South Texas, antitrust review prior to the filing of the operating license application would not conflict with the policies underlying Section 105 of the Act. The NRC noted that all of the parties favored an antitrust review. The NRC then stated:

> . . . if antitrust review is found necessary in the period between issuance of a construction permit and application for an operating license, we can fashion remedies to expedite the review. This necessary flexibility can allow us to resolve antitrust allegations in a timely fashion, without unduly delaying the licensing process.

Id. at 1318.

The NRC recognized that, due to the special circumstances in the proceeding, it did not need to address whether antitrust review would be warranted in certain other circumstances:

> Thus, we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment which would result in a "new or substantially different facility," or where an application for transfer of control of a license has been made, or where "significant changes" occur after an operating license is issued. We note, however, that the report of the Joint Committee explicitly refers to our authority to conduct a review in the first situation, H.R. Rep. No. 91-1470, 91st Cong. 2d Sess., 3 U.S. Code Cong. and Adm. News, 4981, 5010 (1970). Authority in the second situation, not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b). The third situation presents the issues pending in the Florida Power and Light proceeding, n. 1 supra, which we do not have before us and need not resolve to decide this case. We go no further than to conclude that Section 186 can have at best limited application, in light of the "significant changes" restriction of Section 105(c)(2) and its relation to the overall scheme of Section 105.

Id. at 1318.

Remarkably, Edison in its terse discussion of South Texas simply cites the portion of the above statement in which the NRC notes that it did not decide whether an antitrust review can be justified where "significant changes" occur after an operating license is issued. Edison does not even acknowledge, much less attempt to address, the NRC's finding that Congress did not intend that the NRC "should have broad antitrust policing powers independent of licensing". Id at 1317.

Moreover, Edison chooses to overlook the second portion of the NRC's statement in which it notes that this situation "presents the issues pending in the Florida Power and Light proceeding." As shown below, this omission is not surprising. Florida Power reinforces the finding in South Texas that anti-

trust review can only occur in the context of a construction permit or operating license proceeding. Moreover, Florida Power clarifies that this statutory bar on antitrust review applies even if there are significant changes in circumstances subsequent to the license proceedings.

2. Florida Power

The Florida Power proceeding referred to by the NRC was that involving St Lucie Plant, Units 1 and 2 and Turkey Point Plant, Units 3 and 4 in Docket Nos. 50-335A, et al. In that proceeding, numerous municipal electric power utilities sought to intervene 31 months late in a proceeding and petitioned for an antitrust hearing. The NRC had already issued operating licenses in the proceeding for three of the four plants at issue pursuant to Section 104(b) of the Act: St Lucie Plant, Unit 1 and Turkey Point Plant, Units 3 and 4. For ease of reference, these are referred to as the Turkey Point plants. No requests for an antitrust hearing had been filed during the construction permit proceeding.

The Cities pointed to an array of allegedly anticompetitive practices of the applicants subsequent to the issuance of the operating licenses. Id at 798. These activities included refusals to (1) enter into an integrated power pool, (2) sell wholesale power, and (3) wheel power.23/ Among the sections cited by the Cities as a basis for their request for relief were

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23/ See "Joint Petition Of Florida Cities For Leave To Intervene Out Of Time; Petition To Intervene; And Request For Hearing", pp. 49-85 (Aug. 6, 1976).

Section 105 of the Act and Section 2.206 of the NRC's regulations.24/

The Licensing Board rejected the petition. LBP-77-23, 5 NRC 789 (1977). The Board pointed to the Appeal Board's decision in South Texas (then pending before the NRC) in which it found that neither the Licensing nor the Appeal Board has the "authority to reopen a terminated construction permit proceeding by ordering a hearing on supervening antitrust questions." 5 NRC at 791. The Board noted that this finding applied with full force to the Cities' joint petition despite the allegations of anticompetitive activities subsequent to the issuance of the operating licenses. Id. "Therefore," stated the Board, "the Joint Petition must be and is dismissed." Id.

The Licensing Board found that this same reasoning indicated that there was no jurisdictional bar to establishment of an antitrust hearing in connection with the remaining plant: St Lucie Plant, Unit No. 2. For ease of reference, this plant is referred to here as the St Lucie plant. The Board noted that the construction permit proceeding regarding that plant was still pending before the Licensing Board. The Board went on to find that the Cities had satisfied the standards governing intervention in Section 2.714 of the NRC's regulations by showing that (1) they had a sufficient interest in the proceeding due to concerns about alleged anticompetitive conduct by the applicants,

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24/ See "Notice of Appeal and Appellate brief of Florida Cities", pp. 11-12 (April 29, 1977).

and (2) they had good cause to file late because (i) the Cities and applicants had agreed to allow the construction permit to issue subject to certain conditions ensuring that the Cities had access to, or at least the opportunity to purchase access to, the nuclear capacity, (ii) the applicants had failed to meet these commitments, and (iii) the fossil fuel shortage which began in 1973 exacerbated the impact of the applicants' monopoly of nuclear power.

The Appeal Board affirmed the Licensing Board's decision regarding the Turkey Point plants, on one hand, and the St Lucie Plant No. 1, on the other, in two separate decisions. 6 NRC 8 (1977) (St Lucie No. 1); 6 NRC 221 (1977) (Turkey Point). Most significant here is the Appeal Board's decision affirming the denial of the petition seeking post-operating license antitrust review of Turkey Point. The Appeal Board noted that the NRC had decided to not review the Board's finding in South Texas that it could not order an antitrust hearing "'in the absence of a pending construction permit or operating license proceeding.'" Id. at 223.25/ Hence, the Appeal Board agreed with the Licensing Board that South Texas was fully applicable and precluded the Licensing Board from directing a hearing on antitrust issues despite the allegations of anticompetitive acts by the licensee subsequent to the issuance of the operating licenses.

However, the Appeal Board noted that the NRC had, sub-

25/ The NRC decision was issued on March 31, 1977 and was not reported. Id. at 223.

sequent to the Licensing Board, directed the Appeal Board to consider a related issue: whether the NRR Director could address the antitrust issues raised by the petitioners. The Appeal Board first noted that the Turkey Point units received construction permits prior to the 1970 amendments to the Act requiring prelicensing antitrust review. Id. at 224. The Board observed that Congress, in enacting the 1970 amendments, decided to exclude from antitrust review under Section 105(c) plants, such as Turkey Point, which had received construction permits under Section 104(b) before 1970. Id. at 224-225.

Directly pertinent here is the alternative justification given by the Appeal Board for its decision. The Board pointed to the NRC's finding in South Texas, 5 NRC 1303, that post-operating license antitrust review is precluded by the Act and found that this reasoning applied even where significant changes had occurred[26]:

> In its own South Texas decision, the Commission recently considered at length the extent of its authority to hold antitrust hearings. The precise issue in that case involved when an antitrust proceeding under Section 105(c) may be ordered after a construction permit has been issued but before the necessary additional license to commence operations has been granted. The Commission did not confine its South Texas opinion to that relatively narrow question; instead it chose to address the broad spectrum of NRC antitrust responsibilities. In so doing, it manifested the judgment in no uncertain terms that the NRC's supervisory antitrust jurisdiction over a nuclear reactor license does

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26/ 6 NRC at 226.

not extend over the full 40-year term of the operating license but ends at its inception.12/

12/ Except perhaps as necessary to enforce the terms of a license or to revoke one fraudulently obtained, or in circumstances where a plant is sold or so significantly modified as to require a new license. See CLI-77-13, supra, 5 NRC at 1318.

The NRC declined to review the Appeal Board's decision. The Cities submitted a petition for review in the D.C. Circuit. The court affirmed the NRC's decision. Ft. Pierce Utilities Authority v. NRC, 606 F.2d 986 (D.C. Cir.), cert. denied, 444 U.S. 842 (1979).

3. South Texas and Florida Power indicate that the NRC does not have the statutory authority to grant the relief sought by Edison

The reasoning in Florida Power is directly applicable here. By requesting a suspension of the antitrust license conditions, Edison is asking the NRC to conduct yet another antitrust review. Edison recognizes this. In its application (App. 42), Edison states that "[t]he critical fact, . . . for purposes of Section 105(c) review, and the fact at issue today, was the low cost of nuclear power." (emphasis added). Moreover, Edison recognizes that the relief it seeks opens the door for yet additional antitrust reviews. In its prayer for relief (App. 81), Edison asks the NRR Director to suspend "the license conditions in question until such time as there may be a factual basis for imposing them."

As the NRC recognized in South Texas and Florida Power,

an antitrust review can only take place pursuant to Section 105(c) of the Act. 5 NRC at 1317. Section 105(c) permits this review only in connection with a construction permit or operating license proceeding. In the situation here, the construction permit and operating license proceeding terminated long ago. Consequently, as shown in South Texas and Florida Power, the NRC does not have the statutory authority to consider Edison's application. Hence, Edison's application must be summarily rejected.

Indeed, Florida Power represents, in effect, a sort of flip side of the circumstances here. In Florida Power, the NRC found that it could not conduct an antitrust review even in the face of changes in economic conditions which exacerbated the Applicants' monopoly power despite the allegation that the applicant had also engaged in specific, anticompetitive conduct. Here, one of the Applicants (Edison) argues that supervening circumstances have eliminated the need for antitrust license conditions.

The antitrust review sought by Edison is even less justifiable than the review sought in Florida Power. Edison merely points to changes in economic conditions which purportedly reduce the Applicants' monopoly power.

The changed circumstances cited by Edison to support suspension of the antitrust conditions are not the type of circumstances which could even support antitrust review at the operating license stage pursuant to Section 105(c)(2) of the Act. Edison asserts that subsequent to the issuance of an operating license, antitrust review is available pursuant to the standard

in Section 105(c)(2) (App. 49). As noted earlier, Section 105(c)(2) states that antitrust review is available at the operating license stage to determine whether additional antitrust conditions should be imposed only if "significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the NRC" during the construction permit proceeding. "Significant changes" are limited to changes which (1) have occurred since the previous antitrust review of the licensee, (2) are reasonably attributable to the licensee, and (3) have antitrust implications that would likely warrant some NRC remedy. South Carolina I, 11 NRC at 824-25.

Even putting aside the fact that Section 105(c)(2) antitrust review is limited to imposition of additional conditions, Edison has not met the Section 105(c)(2) standard. The primary factor cited by Edison in trying to justify another antitrust review -- a change in the economic attractiveness of nuclear power -- is obviously not "attributable to the licensee". Thus, if this factor had been raised during the operating license proceeding, an antitrust review would not have been justified.

Moreover, the policy concerns underlying the decision by Congress in the 1970 amendments to limit antitrust review to the construction permit and operating license proceeding are directly applicable here. As noted above, the NRC in reviewing the legislative history of the 1970 amendments in South Texas observed that Congress recognized that strict limits on the frequency of antitrust reviews were needed to ensure that utilities

could rely on NRC licensing decisions. 5 NRC at 1314-16. The NRC cited statements by the Chairman of the Joint Committee on Atomic Energy and others during the congressional hearings opposing an unlimited reopening of antitrust review in the operating license proceeding. Id.

These same concerns about encouraging reliance on the findings in the construction permit proceeding apply with equal force here to protect the competitive positions of beneficiaries of the license conditions. In the situation here, the relief sought by Edison -- elimination of the license condition restraints as to it -- would have the sort of disruptive impact which Congress acted to prevent by limiting antitrust review to the construction permit and operating license proceeding. Prior to the imposition of the antitrust license conditions, Cleveland Public Power faced extinction due to the anticompetitive activities of CEI, in particular, and its sister members of CAPCO. See 5 NRC at 165-76. Cleveland Public Power was dependent entirely on power purchased from CEI for its continued existence. Cleveland Public Power had a single interconnection with CEI, and only the ability to purchase firm and emergency power from CEI.

Imposition of the license conditions provided Cleveland Public Power access to transmission and coordination services, a variety of wholesale purchase power sources, and to various agreements between the Applicants and between them and other utilities. Because of the license conditions, Cleveland Public Power has been able to add a second interconnection and plans to

add a third. Cleveland Public Power has also made use of CEI transmission services to buy and transmit low cost hydroelectric power from (1) PASNY, (2) Buckeye Rural Electric Cooperative, Inc. ("Buckeye"),27/ and (3) Big Rivers Electric Cooperative ("Big Rivers"). Cleveland Public Power has also been able to diversify its power supply, and take advantage of the variety of surplus power available as short-term, limited term, emergency and even "dump" power. These arrangements provide Cleveland Public Power and, in turn, its customers with substantial reductions in costs from what would have been paid to CEI without such competition.

Cleveland Public Power's first firm power purchase from an alternative supplier began in 1980 as a direct result of the license conditions and involved a purchase from PASNY. This purchase involved inexpensive hydroelectric power. Cleveland Public Power continues to buy this power. Cleveland Public Power had applied for an allocation of PASNY energy back in the late 1970's, and was allocated a share of the power. But Cleveland Public Power could not take advantage of this cheap power source until CEI was forced by the license conditions to transmit the power to Cleveland Public Power.

As the PASNY Power Bargaining Agent for the State of Ohio, Cleveland Public Power has represented the entire State and has fulfilled its responsibility to facilitate making PASNY Niagara Power available for transmission to municipally-owned elec-

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27/ Buckeye is now known as the Ohio Rural Electrical Cooperatives, Inc.

tric systems throughout the State. Cleveland Public Power could not have obtained low cost Niagara Preference Power for the 75 municipal electric systems in Ohio receiving the power without the ability to have the power actually transmitted from New York to each municipal system through the transmission facilities of Edison and CEI. Indeed, all but two of the 75 recipient municipal systems receive the power by having it transmitted at some point over the systems of Edison and CEI.

Cleveland Public Power's purchases in October 1987 illustrate the way the license conditions have permitted Cleveland Public Power to diversify its supply sources to procure the cheapest power available. During that month, Cleveland Public Power purchased more than 60 million kwh of power from five sources. Cleveland Public Power bought 34.86 percent of its power from Dayton Power and Light, 25.79 percent from PASNY, 23.97 percent from Ohio Power, 15.14 percent from Big Rivers, and .24 percent from CEI. During Cleveland Public Power's peak months of July and August, 1987, when it provided its customers approximately 70 million kwh of energy, Cleveland Public Power purchased power from ten different sources: Dayton Power and Light Company, PASNY, Ohio Power, Big Rivers, CEI, American Electric Power Company ("AEP"), Toledo, Duquesne, Michigan Electric Coordinated Systems and PENELEC. Cleveland Public Power also purchased power from Edison, Ontario Hydro and Buckeye during the past eight years.

In entering into these transactions, Cleveland Public Power has relied on its access to wheeling services and coordina-

tion service provided by the CAPCO members pursuant to the license conditions. These power purchases obviously are a key component of Cleveland Public Power's supply plans.

Moreover, even if the license conditions were suspended and later reimposed, Cleveland Public Power and other utilities in the CCCT would still not be able to rely on the services available pursuant to the license conditions in planning its power supply.28/ Cleveland Public Power could not assume that the services available pursuant to the antitrust license conditions would continue to be available. Therefore, Cleveland Public Power's ability to make advantageous purchase power arrangements with other power suppliers, and thus its ability to compete with CEI, would be impaired. As noted, Congress, in enacting the 1970 amendments, intended to prevent that sort of continuing uncertainty regarding the conditions governing a nuclear facility.

B. NRC PRECEDENT REGARDING ANTITRUST REVIEW IN CONNECTION WITH CHANGES IN THE NATURE OF A PLANT'S OPERATIONS OR OWNERSHIP IS INAPPLICABLE HERE

In its application, Edison cites other decisions besides South Texas in its attempt to show that the NRC has the authority to suspend the license conditions. These decisions are no more helpful to Edison than South Texas. Edison cites (App. 49, n. 111) Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2) ("Detroit Edison"), LBP-78-13, 7 NRC 583 (Licensing Board), aff'd, ALAB-475, 7 NRC 752 (1978). Detroit Edison in-

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28/ As noted, Edison argues that antitrust conditions can be suspended and reimposed by the NRC at any time.

volved an application by the permittee subsequent to the issuance of a construction permit to add new co-owners to the permit. The applicant cited South Texas and argued that the NRC did not have the jurisdiction to conduct an antitrust review of the proposed amendment. The Licensing Board rejected this argument. It noted that this finding was consistent with Congressional intent regarding the meaning of the term "license application" in Section 105(c). The Licensing Board cited the Joint Committee report on the 1970 amendments in which the Committee stated:

> The Committee recognizes that applications may be amended from time to time, that there may be applications to extend or review a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105(c) refer to the initial application for a construction permit.

footnote omitted; emphasis in original; Id. at 588. The Board also noted that this interpretation was necessary to ensure that the NRC's antitrust review authority was not circumvented:

> As to the two cooperatives, the present application for an amendment to add them as co-owners of Fermi 2 must be approved by the Commission before an ownership interest is acquired, and the cooperatives will be required to submit applications to become co-licensees of the facility prior to the issuance of an amendment allowing change in ownership. Without exalting form over substance, it is clear that these applications are within the scope of the phrase "any license application" for antitrust review purposes within the meaning of §105c(1), supra, and trigger an opportunity for intervention raising antitrust issues as to the two cooperatives. To construe the statute otherwise would permit a utility with no antitrust problems to undergo an antitrust review and obtain an unconditioned construction permit, and then

> sell an ownership interest to another monopolizing utility. Under the Licensee's argument, there could then be no antitrust review until the later operating license stage, which itself could be a more limited review than the normal prelicensing antitrust review contemplated by the statute. Such an unequal treatment of Applicants, insulating from prelicensing antitrust review those who came in later by way of amendments to construction permits, would subvert the Congressional intent and purpose of §105c.

footnotes omitted; emphasis supplied; Id. at 587-88.

The applicant did not raise this jurisdictional issue in its appeal to the Appeal Board. Hence, the Appeal Board observed that it did not need to reach this issue. 7 NRC 752, 756, n.7. Nonetheless, the Appeal Board said that it is "sufficient simply to note our essential agreement with the decision below on this point." Id at 755, n. 7.

Detroit Edison only serves to further undermine Edison's position. Detroit Edison highlights the NRC's concern about ensuring against ploys to circumvent the antitrust review needed to determine whether antitrust license conditions should be imposed. The NRC recognized that a change in ownership of a nuclear facility introduces a new owner which has never been the subject of an antitrust review. Hence, this sort of change warrants the comprehensive antitrust review provided for in connection with construction permit applications to determine whether antitrust license conditions should be imposed.

The situation presented in the application here is entirely different. Edison is seeking suspension, not addition, of the antitrust conditions. In addition, the antitrust review of the Perry owners has already occurred. Consequently, there is

simply no need to repeat this review.

C. THE DICTA IN THE APPEAL BOARD DECISION IN THIS PROCEEDING DOES NOT AND CANNOT SUPPORT POST-OPERATING LICENSE ANTITRUST REVIEW

Edison makes much ado about certain dicta in the Appeal Board decision approving the imposition of comprehensive antitrust conditions on the Applicants because of their anticompetitive conduct. Edison cites the separate opinion written by Appeal Board member Sharfman who, as noted, resigned from the NRC while the Board was reviewing his then-draft opinion. In his draft opinion, Mr. Sharfman affirmed the license condition requiring the Applicants to provide wheeling services and to not reduce these services in the event of a capacity shortage until the capacity allocated to the other Applicants is reduced by at least five percent. But Mr. Sharfman went on to find that a waiver of this condition might be granted if it caused an "extreme hardship":

> However, should this license condition confront the Applicants with a situation of extreme hardship or impossibility at some time in the future, they may petition the Licensing Board for relief from it. We hereby vest the Licensing Board with continuing jurisdiction to entertain such a petition.

Id. at 392. Mr. Sharfman also went on to voice his approval for waiver of any license condition that causes an "extreme hardship":

> If compliance with a request authorized by one of the license conditions would cause extreme hardship, an applicant may seek relief from the Licensing Board. We vest that Board now with continuing jurisdiction to entertain such a request. But the burden will be on

> the Applicants to demonstrate a right to relief. Up to now, no such demonstration has been made.

Id. at 398.

In its separate opinion, the Appeal Board said this about Mr. Sharfman's reasoning:

> In a number of instances Mr. Sharfman would, for an indefinite period, "vest the Licensing Board with continuing jurisdiction" to relieve the Applicants from conditions that might prove an extreme hardship or impossible of compliance. See, e.g., pp. 392 and 398, infra. We agree that license conditions seemingly fair today may prove inequitable tomorrow. It is not necessary, however, to extend the Licensing Board's jurisdiction to provide for the possibility of such modifications. Commission regulations give the Director of Nuclear Reactor Regulation -- who is assisted by an able antitrust staff -- authority to modify license conditions where necessary and provide as well as means for review of his determinations. 10 CFR Sections 2.00-2.204 and Section 2.206. Indeed, the Director has already acted to modify one of the license conditions imposed in this case (albeit not at the applicant's request). We therefore see no occasion to continue the Licensing Board's jurisdiction over aspects of the case. Accordingly, we do not join in the portions of Mr. Sharfman's opinion that would do so.

Id. at 294-95; footnotes omitted.

Edison errs in interpreting this statement as a blanket endorsement of any sort of modification of antitrust license conditions. First, this statement is mere dicta. Nowhere in the licensing conditions approved by either the Licensing and Appeal Boards is there any mention that the conditions can be modified in the event circumstances change.

Moreover, the Appeal Board's statement does not go as far as Edison suggests. Again, the Board simply says that the NRR Director has the "authority [pursuant to Section 2.200, et

al. of the NRC's regulations] to modify license conditions where necessary". Those sections of the Regulations authorize the Director authority "to modify, suspend or revoke a license or to take other action for alleged violation of any provision of the Act or this chapter or the conditions of the license" (emphasis supplied).

The only decision cited by the Board to support its contention highlights the limits on the NRC's authority to modify antitrust license conditions. The Board cites the June 25, 1979 decision by the NRC in the consolidated proceeding enforcing one of the license conditions in view of CEI's failure to comply with the condition.29/ The June 25 order was in response to a request by Cleveland on January 4, 1978, asking the NRC to take enforcement action pursuant to Section 2.201, et al., of the NRC regulations against CEI for violations of antitrust license condition no. 3 in its construction permits and operating license. License condition no. 3 requires the joint Applicants to provide wheeling for entities in the CCCT. Cleveland argued that the transmission schedule filed by CEI with the Federal Energy Regulatory Commission (FERC) did not comply with this license condition. On June 28, 1978, the Acting Director of the NRR Office responded to Cleveland's motion by issuing a Notice of Violation to CEI pursuant to Section 2.2011 of the NRC's regulations. In the Notice,

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29/ "Order Modifying Antitrust License Condition No. 3 of Davis-Besse Unit 1, License No. NPF-3 And Perry Units 1 and 2, CPPR-148, CPPR-149" (unreported). The order (but not the attached appendices) is reproduced in Appendix A at the end of this pleading.

the Director reviewed CEI's January 27 transmission schedule and CEI's response to a Staff questionnaire concerning Cleveland's motion and stated that "it appears that CEI has not complied with antitrust license condition No. 3 of the subject license and construction permits. . . ."30/

Cleveland, CEI and the NRC Staff met in an unsuccessful attempt to address the concerns raised by Cleveland's filing. On June 25, 1979, the Director found that CEI had not complied with license condition no. 3:

> CEI has approached its responsibility to file a wheeling schedule for the City as if it had not been required as a condition of its operating license and two construction permits to comply with Antitrust License Condition no. 3.

mimeo. at 6. The Director noted that an April 27, 1979 initial decision by a FERC administrative law judge (ALJ) addressing CEI's transmission schedule "deals effectively with most items cited by the NRC Staff to be in violation of Antitrust License Condition No. 3" (mimeo. at 4). With respect to the matters not resolved by FERC, the Director ordered CEI to file an amendment to its transmission tariff to ensure compliance with the antitrust license condition. Consistent with these findings, the Director exercised his authority pursuant to Section 2.204 of the NRC's regulations and modified license condition no. 3 to add language requiring CEI to file a revised transmission schedule reflecting the changes ordered by the NRC and FERC.

Thus, the Board's citation to the director's enforce-

30/ The Notice is reproduced in Appendix A of the June 25 order.

ment order merely reflects the Board's recognition that a license condition can be modified to ensure that it is not circumvented by the Applicants. Significantly, the Board does not even mention the NRC decisions in South Texas and Florida Power. In view of this, it is clear that the Board was not saying that the antitrust conditions could be suspended in the circumstances here.

IV. THE RELIEF SOUGHT BY EDISON IS BARRED BY *RES JUDICATA* OR, ALTERNATIVELY, COLLATERAL ESTOPPEL

As just shown in Section III of this answer, the NRC does not have the statutory authority to conduct an antitrust review subsequent to the issuance of an operating license. The NRC, therefore, simply cannot grant the relief sought by Edison.

But even if the NRC finds that an antitrust review can occur at any time and that the NRC has the statutory authority to grant this relief, the NRC should still deny the relief and can do so without reaching the merits of Edison's arguments. This is because these arguments involve issues raised in the construction permit and operating license proceeding and were or could have been raised in those proceedings. Therefore, the arguments are precluded by the doctrine of *res judicata* or, alternatively, collateral estoppel.

In subsection A, below, Cleveland reviews the policies underlying the doctrines of *res judicata* and collateral estoppel. In subsection B, Cleveland examines the criteria used by the NRC in applying these doctrines. In subsection C, Cleveland shows that *res judicata* is the pertinent preclusion doctrine in the circumstances here and that the doctrine precludes the arguments raised by Edison in its application. Consequently, *res judicata* bars consideration of these arguments at this late stage. In subsection D, Cleveland shows that if the NRC finds that this proceeding is a different proceeding than that in which the construction permit and operating license were issued, collateral estoppel would come into play and bar Edison's application.

A. RES JUDICATA AND COLLATERAL ESTOPPEL AND THEIR APPLICABILITY TO NRC PROCEEDINGS

In a decision affirmed, in pertinent part, by the NRC, the Appeal Board cited Supreme Court precedent and set forth the basic policies underlying *res judicata* and collateral estoppel:

> *Res judicata* and collateral estoppel are judicially formulated doctrines founded upon "considerations of economy of judicial time and [the] public policy favoring the establishment of certainty in legal relations". *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948). These considerations dictate
>
> > that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.
>
> *Baldwin* v. *Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 525 (1931). They further require that a party who is given the opportunity to present his case before competent judicial authority must then put it forth *in toto*, rather than advance it piecemeal in multiple proceedings. *Cromwell* v. *County of Sac*, 94 U.S. 351, 358 (1877).

Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2) ("*Farley*"), ALAB-182, 7 AEC 210, 212, *rev'd on other grounds*, CLI-74-12, 7 AEC 203 (1974).

The Appeal Board in *Farley* cited the "general principles relating to the application and effect of" *res judicata*:

> *Res judicata* comes into play in circumstances where (1) there has been a final adjudication of the merits of a particular cause of action, claim, or demand by a tribunal of competent jurisdiction; and (2) one of the parties to that adjudication (or a person in privity with such party) subsequently seeks to advance or defeat the same cause of action, claim or demand in either (a) the same suit or (b) a separate suit involving the parties to the first action or their privies. [citations omitted]. Given those circumstances (and subject to the qualifications to be discussed below), the

> earlier adjudication is deemed to conclude the "parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose".

7 AEC at 212. The Appeal Board distinguished collateral estoppel:

> For its part, collateral estoppel does not require an identity between the two causes of action, demands or claims. It is enough that the issues of law or fact previously receiving final adjudication are the same as those being now asserted -- and that that adjudication was by a tribunal empowered to consider and decide those issues. Unlike res judicata, however, collateral estoppel can serve to conclude only "those matters in issue or points controverted, upon the determination of which the [earlier] finding or verdict was rendered."

citations omitted; Id. at 213. The criteria governing collateral estoppel have also been summarized by the NRC:

> In order to apply collateral estoppel several requirements must be met: The prior tribunal must have had jurisdiction to render the decision, there must have been a prior valid final judgment on the merits, the issue must have been actually litigated and necessary to the outcome of the first action, and the party against whom the doctrine is asserted must have been a party or in privity with a party to the earlier litigation.

Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2) ("Braidwood"), LBP-85-11, 21 NRC 609, 620 (1985).

B. APPLICATION OF RES JUDICATA AND COLLATERAL ESTOPPEL IN NRC PROCEEDINGS

The NRC has recognized and applied the doctrines of res judicata and collateral estoppel in NRC proceedings. In Farley, the Appeals Board noted:

As the Court of Appeals for the Fifth Circuit observed in Painters Dist. Coun. No. 38 Etc. v. Edgewood Contracting Co., 416 F.2d 1081, 1084 (1969):

> The policy considerations which underlie res judicata -- finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense -- are as relevant to the administrative process as to the judicial. [citations omitted].

And any doubt that the doctrines of res judicata and collateral estoppel are not strictly confined to the judicial arena has been laid totally to rest. In United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966), the Supreme Court acknowledged that

> [o]ccasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. . . .

7 AEC at 214.

The Appeal Board also observed that the "exceptions to the application of res judicata and collateral estoppel which are found in the judicial setting are equally present when administrative adjudication is involved -- namely, changed factual or legal circumstances and overriding competing public policy considerations." citations omitted; Id. at 215.

In its order, the NRC approved the finding that res judicata and collateral estoppel apply to NRC proceedings subject

to certain limits:31/

> . . . . we are in full agreement with the conclusion reached by the Appeal Board that "res judicata and collateral estoppel should not be entirely ruled out of our proceedings, but rather applied with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factors in the particular case. . . ."

citation omitted; 7 AEC at 203.

Changed circumstances can justify an exception to res judicata only if there is "cogent and compelling new evidence [showing] that the situation has changed substantially" subsequent to the prior stage of the proceeding. emphasis supplied; Schieber v. Immigration and Naturalization Service, 520 F.2d 44, 47 n. 11 (D.C. Cir. 1975).

The NRC has repeatedly applied the doctrines of res judicata and collateral estoppel to preclude relitigation of issues. Most of these situations have arisen in the context of issues raised both at the construction permit and operating license stages of an NRC proceeding. The NRC in Farley pointed out that "an operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage". 7 AEC at 203. Thus, the intervenor in an operating license proceeding was barred from relitigating an issue -- the environmental impact of the supplementary cooling

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31/ The NRC remanded the proceeding because, inter alia, the petitioner against whom the Appeal Board invoked res judicata was not specifically "afforded an opportunity to make a particularized showing of such changed circumstances or public interest factors as might exist with respect to this particular proceeding". 7 AEC at 204.

water system of the nuclear facility -- because the intervenor "did not mention any changes or new information that has come to light in this regard since the construction permit was issued." Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 590 (1985).

A party cannot escape the grasp of res judicata and collateral estoppel simply by concocting a new argument in the operating license proceeding regarding an issue litigated in the construction permit proceeding. As noted, res judicata applies "'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'". emphasis added; Farley, 7 AEC at 212.32/ Collateral estoppel has the same preclusive effect regarding arguments which could have been made in the prior proceeding33/:

> [t]he analogy to the rule against splitting a single cause of action is striking. Like a cause of action, "an issue may not be . . . split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result." Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue, then, is subsumed in

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32/ See also Ness Investment Corp. v. United States, 595 F.2d 585, 588 n. 6 (Ct. Cl. 1979) ("The assertion of different legal theories in a second suit will not defeat application of res judicata . . . nor will the fact that different types of relief are sought. . . .").

33/ Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant) ("Shearon"), ALAB-837, 23 NRC 525, 537 (1986), quoting 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶0.443[2] at 761 (2nd ed. 1984). footnotes omitted.

> that issue and precluded by the prior judgment's collateral estoppel effect.

Moreover, the NRC has recognized that res judicata applies in a situation (similar to that involved here) in which a party seeks to relitigate an issue subsequent to the issuance of the operating license by asking the NRR Director to modify the license. Consolidated Edison Co. of New York, Inc. (Indian Point, Unit Nos. 1, 2, & 3), ("Indian Point"), CLI-75-8, 2 NRC 173, 177 (1975). In Indian Point, the NRC observed:

> . . . parties must be prevented from using 10 CFR 2.206 procedures as a vehicle for reconsideration of issues previously decided, or for avoiding an existing forum in which they more logically should be presented.

2 NRC at 177.34/

C. APPLICABILITY OF RES JUDICATA TO EDISON'S APPLICATION

In view of these principles, Edison's argument is barred by res judicata. In subsection 1, below, Cleveland shows that because Edison submitted its application in the same proceeding as that in which the construction permit and operating license were issued, res judicata, not collateral estoppel, is the applicable foreclosure doctrine. Cleveland shows that Edison raised the argument regarding the high cost of nuclear power in

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34/ In Indian Point, the NRC permitted litigation in a pending Appeal Board review of an operating license application of an issue raised regarding the safety of a license nuclear plant. The NRC noted that the issue was based on "recently developed seismic data" and raised "substantial safety" concerns. Id. at 174, 177. The NRC also pointed out that the licensee, staff and the intervenor "all agree that the subjects raised warrant hearing in an adjudicatory proceeding." Id. at 177.

its appeal of the Licensing Board decision during the construction permit proceeding. Edison does not show why it should be able to reargue the issue. In subsection 2, Cleveland shows that even if the NRC looks at the circumstances cited by Edison, res judicata should still apply. Each of the purported changed circumstances occurred well before the conclusion of the operating license proceeding. Therefore, Edison had the opportunity at the operating license proceeding to make the arguments it presents in its application. Consequently, Edison is foreclosed from seeking the relief requested in its application.

1. Res judicata is the applicable preclusion doctrine here

As noted in section III above, both res judicata and collateral estoppel preclude a party from relitigating issues and are based on the same fundamental policy: "economy of judicial time and [the] public policy favoring the establishment of certainty in legal relations." Farley, 7 AEC at 212. Both doctrines come into play where there has been a final adjudication of the merits of a particular cause of action by a tribunal of competent jurisdiction.

These criteria are met here. In the construction permit proceeding, the NRC reviewed all aspects of the Perry Unit 1 facility and the other nuclear plants at issue and imposed the antitrust license conditions. In the operating license proceeding, the NRC again looked at the antitrust ramifications of the nuclear plants at issue and determined pursuant to Section 105(c) of the Act that there were no "significant changes" that would

warrant an additional antitrust review to impose additional antitrust conditions on the licenses. Edison and the other Applicants actively participated in this aspect of the proceeding and urged the NRC to find that there were no significant changes.

Edison's application arises in the same "cause of action" as the construction and operating permit proceeding. The NRC has indicated that all regulatory acts in connection with a nuclear facility are part of the _same_ proceeding or "cause of action" as the proceeding in which the operator of the facility originally sought authorization to construct and operate the facility. For example, in the seminal decision in _Farley_ on _res judicata_ and collateral estoppel, the Appeal Board observed:

> It seems to us that, for the purposes of the application of _res judicata_, there is a sufficient basis for treating an operating license proceeding as involving the same "cause of action" as the construction permit proceeding relating to the same reactor. See Section 185 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2235. There is, however, no need for a definitive decision on that question here.

7 AEC 210, 215, n. 7. Likewise, the Licensing Board in its decision in _South Texas_ noted that, as a practical matter, the various stages of NRC action on an application for NRC authorization are part of the same proceeding:

> . . . the application to NRC for a license in this, as in other cases, requests the issuance of both a construction permit and an operating license for the proposed nuclear facility. It is hardly reasonable to act as though there is a rigidly circumscribed construction permit proceeding, which terminates when the permit is issued even for nontimely but permissible antitrust proceedings, and assume that the Applicants will spend millions of dollars to construct a plant and then decide later whether or not to seek an operating

> license. The Applicants undoubtedly view the NRC licensing procedure as an integrated and continuous process from the initial license application to the ultimate issuance of a license. It is unrealistic to rigidly define two separate insulated boxes, one defined as a construction permit proceeding and the other as an operating license proceeding . . .

4 NRC 571, 575 (1976).35/

The same reasoning applies with equal force here. Edison filed its current application in the same consolidated proceeding -- Docket No. 50-440A, et al. -- in which the joint Applicants originally sought authorization for the construction permit and operating license in connection with Perry Unit 1 along with Perry Unit 2 and Davis-Besse Units 1, 2 and 3. Docket No. 50-440A is also part of the same proceeding in which the NRC issued the construction permit and operating license subject to the antitrust conditions at issue here. Hence, Edison's application is part of the Docket No. 50-440A proceeding.

In view of this, res judicata is triggered here. In its application here, Edison is seeking to defeat the judgment regarding antitrust issues in the prior stages of the same cause of action. That is, Edison is trying to show that the antitrust conditions imposed as part of the construction permit and operating license should be suspended. This satisfies the second criteria for res judicata. Farley, 7 AEC at 212.

35/ As noted in subsection III(A)(1), above, this decision was reversed by the Appeal Board which found that the licensing board erred in finding that it has jurisdiction to direct a hearing on antitrust issues in the absence of a pending construction permit or operating license proceeding.

2. Res judicata bars the arguments made by Edison

Because res judicata applies here, Edison is barred from seeking to rely on "every matter which was offered and received to sustain or defeat the claim [as well as] any other admissible matter which might have been offered for that purpose." Farley, 7 AEC at 212. Again, for purposes of this analysis only, Cleveland is accepting Edison's contention that the NRC can modify or remove antitrust conditions at any time, including during the operating license proceeding. Given this premise advanced by Edison, Cleveland shows in this section that each of the arguments raised by Edison in its application to support the contention that the antitrust conditions should be suspended was an admissible matter which was or might have been offered for that purpose during the construction permit and operating license proceeding. Hence, res judicata bars Edison from making these arguments at this late date.

Cleveland also shows that, even putting aside Edison's failure to make these arguments during the operating license proceeding, Edison has not put forth "cogent and compelling evidence" that there are any "substantial changes" in the circumstances reviewed and relied on by the NRC in imposing the antitrust license conditions. Thus, there is no basis for providing an exception to res judicata here.

a. Edison already made its arguments here during the construction permit proceeding

In the joint brief submitted by the Applicants in their

appeal of the Licensing Board's decision to impose antitrust conditions as part of the construction permit, the Applicants made an argument remarkably similar to that contained in Edison's application here. The Applicants challenged the Licensing Board's finding that there was a nexus between the licensed activity and the anticompetitive situation sufficient to justify imposition of antitrust conditions pursuant to Section 105(c)(5) of the Act. The Applicants argued that the requisite nexus could only exist if nuclear power was cheaper than any other type of power36/:

> It should be understood that such a finding is an absolute prerequisite to the Licensing Board's "structural" analysis. As Dr. Pace testified, there first must be made a "determination of whether or not the nuclear plant offers to its owners cost advantages of such a magnitude that those excluded from access to the nuclear unit in question or to similar units are at a significant competitive disadvantage"; if that is not the case, the analysis need be carried no further.

The Applicants challenged the Licensing Board's finding that "the pronounced effect [of nuclear generation] on the overall economics" of power generation would mean that the Applicants "will derive a competitive advantage by virtue of the Perry and Davis-Besse facilities" (App. Br. at 125-26). The Applicants pointed to various exhibits and testimony showing that the cost advantage of nuclear power had just about disappeared37/:

> We would initially observe that, what appeared to Applicants several years ago to be "the superior base load choice" may no longer be nearly so attractive from an economic standpoint.

The Applicants went on to note that a small coal-fired plant

36/ citations omitted; App. Br. at 127, n. 147.

37/ citations omitted; App. Br. at 127.

could generate cheaper power than the proposed nuclear facilities38/:

> [The testimony of Mr. Kampmeier on cross-examination] indicates that, given a municipal or cooperative system's lower cost of money, due to both tax and financing advantages conferred on such electric entities, a single or small group of such systems may well be able to build a small coal-fired plant in Ohio or Pennsylvania and get power at a total cost equal to, or closely approximating, the cost of power to Applicants from the large nuclear facilities being licensed. Mr. Gerber was even more confident that such could be the expected result. The availability of such an option provides the non-Applicant CCCT entities with the ability to obtain an independent power resource on a cost basis that would permit wholesale competition with Applicants -- if that is really desired. It would, moreover, require these "wholesale competitors" to assume much the same planning, managing and operating responsibilities that Applicants presently undertake, thereby providing the stimulus for greater efficiencies that must exist if competition is to be viable.

In their October 22, 1979 petitions asking the NRC to review the Appeal Board's decision, the Applicants incorporated by reference the arguments in the joint brief.

In its application here, Edison is trying to resuscitate the same argument. True, Edison's current version of this argument is based on events subsequent to the construction permit proceeding. But for purposes of applying res judicata, this makes no difference. Edison is asserting the same proposition: nuclear power has no cost advantage and, as a result, the requisite nexus between the licensed activity and the anticompetitive situation is lacking. Curiously, Edison does not even mention

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38/ Emphasis in original; citations omitted; App. Br. at 132, n. 155.

that it made this argument in its appellate brief. Nor does Edison try to distinguish the original and revised version of the arguments. Thus, it appears that Edison is seeking a second bite at the apple. The basic policy underlying res judicata -- protection of litigants from the vexation and expense of repetitious litigation -- applies with full force here.

b. The events cited by Edison could have been raised during the operating license proceeding

Even putting aside the fact that Edison already raised the argument in its application here in its appeal of the Licensing Board decision, each of the events cited by Edison could have been raised during the operating license proceeding.39/ Consequently, res judicata bars consideration of these arguments at this late stage.

i. Increased cost of nuclear power

Edison's principal argument is that recent events have undermined what Edison asserts was the only basis relied on by the NRC to impose the license conditions, namely, the economic superiority of nuclear power from Perry Unit 1. As shown below, each of the events occurred well before the termination of the operating license proceeding and, hence, could have been cited by Edison in that proceeding. Also, Edison was aware of the cummulative impact of each of the events on the cost of Perry Unit 1 power well before the termination of the operating license pro-

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39/ Again, this analysis accepts, arguendo, Edison's contention that antitrust issues can be raised at any time.

ceeding and could have cited that cumulative impact in the operating license proceeding.

In addition, Edison has not provided "cogent and compelling evidence" that these events caused substantial changes in the previous circumstances. Consequently, Edison has not justified and exception to res judicata.

- New statutory requirements

Edison refers to new, more stringent federal environmental laws adopted in the 1970s as one of the reasons for the increased cost of Perry Unit 1 (App. 62). Edison refers specifically to several statutes: 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.

There are two flaws in Edison's arguments. First, Edison does not argue that it could not have made the same arguments during the course of the operating license proceeding. Again, most of the statutes cited by Edison were enacted in the early 1970's. By the time the operating license proceeding was underway, CAPCO had already increased the projected cost of the Perry project twelve times to reflect additional costs.40/ New statutory requirements were one of the factors cited by CAPCO in explaining the increased cost projections. Thus, Edison had already anticipated the impact of the new statutes and could have raised these arguments at the operating license proceeding. Edi-

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40/ These revised cost projections are described in Appendix B.

son does not contend otherwise.

Even putting aside Edison's failure to raise this argument during the operating license proceeding, Edison also does not provide detailed evidence regarding the extent to which these new requirements may have changed the economic status of Perry Unit 1. Edison merely says (App. 62) that the statutes "significantly affected nuclear plant siting, design and construction -- and hence cost." Edison cites a page from the study of the Perry projects prepared for state regulatory proceedings by Pickard, Lowe and Garrich, a nuclear engineering firm, on behalf of CEI. Id. However, the study is not provided or even quoted.

Therefore, Edison has not satisfied its burden of showing that the 1970's statutes constitute "cogent and compelling evidence" that new legislation caused the economic status of the nuclear plants to "change substantially" subsequent to the operating license proceeding.

- Regulatory changes

Edison cites new technical regulations adopted by the NRC as another reason for the increased cost of nuclear power from Perry Unit 1. Edison says that "[t]he regulatory climate at the NRC between 1975 and 1981 can best be described as highly unstable" (App. 64).

But the flaws in Edison's argument regarding the new statutes adopted in the 1970's also undermine this argument. Again, Edison does not show why it could not have raised this argument during the operating license proceeding. As noted in

Appendix B, Edison was aware of the cost impact of the new regulations during the operating license proceeding and repeatedly revised its cost projections for the Perry project. For example, in a March 23, 1983 press release41/, CEI announced, on behalf of the joint Applicants, a revision of the estimated cost of the Perry Units 1 and 2 plants from $3.23 billion, to $3.6 billion, which represented an increase of 10 percent. CEI noted that the increased cost of the Perry "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 [and] time schedules and budgets must regularly be reviewed." Consequently, Edison clearly could have cited these increased costs during the operating license proceeding and opposed the continued imposition of the antitrust license conditions. Instead, Edison's position was that no significant changes had taken place subsequent to the antitrust review at the construction permit stage.

- Adverse economic conditions

Edison also makes much ado about adverse economic conditions which purportedly increased the costs of constructing Perry. Edison says that "[p]lants like Perry that were begun in the early 1970s had to cope with sustained high inflation and high interest rates in the 1970s and early 1980s, which dramatically increased plant costs" (App. 65). Edison also points to

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41/ Appendix C.

the reduced growth rate in demand for electricity which emerged beginning in the mid-1970s due to conservation and the economic recession.

The flaws in Edison's argument regarding the impact of new statutes and NRC regulations on Perry Unit 1 undermine Edison's argument regarding adverse economic conditions. Edison does not show why it did not raise this argument in the operating license proceeding. Again, as reflected in Appendix B, Edison had repeatedly increased the projected costs of the Perry project. For example, in the March 23, 1983 press release, CEI pointed out that the interest costs associated with constructing the project had increased. Consequently, Edison could have raised this argument during the operating license proceeding.

Edison could also have raised in the operating license proceeding its concerns about the reduced growth rate in demand for electricity. For example, in its January 23, 1980 press release cancelling construction of Units 2 and 3 of the Davis-Besse Nuclear Power Station and the 1260 megawatt Units 1 and 2 of the Erie Nuclear Plant and delaying construction of Perry Units 1 and 2 and the 833 megawatt Beaver Valley Unit 2 plant, CAPCO cited, *inter alia*, a decrease in the average growth of electricity demand from 3.3 percent to 2.8 percent42/. CAPCO said that the reduced growth rate is "attribut[able] mainly to a showdown in industrial growth, the increased availability of natural gas in the CEI service area, and conservation efforts by customers."43/

42/ The press release is reproduced in Appendix D.

43/ *Id*. at 3.

In addition, Edison fails to provide any "cogent and compelling evidence" of any "substantial changes" in economic conditions subsequent to the operating license proceeding which might have caused a "substantial change" in the cost of Perry Unit 1.

- Overall costs of Perry Unit 1

After citing the events discussed above, Edison goes on to compare the projected cost of power from Perry Unit 1 and a coal-fired plant (1) in 1976 and (2) under current conditions. Edison states:

> OE's comparison shows that in 1976 it would have been anticipated that the 30-year levelized cost (including capital, operations and maintenance, and fuel) for a nuclear power plant would be about $27 per MWh. The actual 1987 30-year levelized cost for Perry (including capital, operation and maintenance, and fuel) is $184 per MWh, or 580% higher than the $27 per MWh projected in 1976. By contrast, the projected 30-year levelized cost of a coal plant in 1976 would have been $38 per MWh, or 41 percent higher than the then-estimated cost for Perry. Based on a recent Electric Power Research Institute survey, the current levelized cost estimate of a 300 megawatts coal-fired unit with a 1987 in-service date, which represents OE's approximate ownership share in Perry, would be approximately $92 per MWh -- one-half of the cost of Perry.

footnotes omitted; App. 70.

But, once again, Edison misses the mark. Edison fails to mention that it has been continuously monitoring the projected cost of Perry Unit 1 throughout the construction process and has repeatedly revised the costs upward beginning in 1976. As the cost projections in Appendix B demonstrate, the bulk of the in-

creased costs were projected well before the close of the operating license proceeding. This is not surprising because, as noted, the events cited by Edison as the basis for the increased costs also occurred well before May 1985. Therefore, Edison could have argued during the operating license proceeding that these cost increases justified suspension of the license conditions. Edison chose to not do so. Res judicata bars raising this issue now.

In addition, Edison has not even tried to quantify the extent, if any, to which the increased costs occurred subsequent to the operating license proceeding. Consequently, Edison has failed to provide the "cogent and compelling evidence" of "substantial changes" in the economic status of Perry subsequent to that proceeding needed to justify an exception to res judicata.

Moreover, Edison's contentions regarding the cost burden of Perry Unit 1 are erroneous. The comparison offered by Edison of the projected cost of nuclear power and coal-fired power in 1976 and at present is flawed. Edison has omitted vital information. For example, Cleveland cannot determine what megawatts capacity was assumed in connection with the derivation of the cost of the nuclear power. Was it capacity equivalent to the total capacity of the nuclear units or was this total capacity of the megawatts capacity of Perry Unit 1 alone? Or was the assumed capacity simply the capacity represented by Edison's ownership share of Perry Unit 1? Edison does not tell us. But Edison does tell us that the cost per megawatt hour for the coal-fired power was based on capacity equal only to its ownership share of Perry.

If the cost per megawatt hour for the nuclear power was derived on the same basis, the comparison is worthless because the cost per megawatt or megawatt hour for Perry must be based on its total capacity. If the cost derived for the nuclear power is based on the total capacity of the nuclear unit, then the comparison with the coal-fired power costs is egregiously invalid since cost per total capacity is being compared to a fictitious cost based on a fraction of the total capacity. Such a comparison is the equivalent of comparing apples and oranges.

Edison's contentions are also contradicted by recent actions by it and the other Applicants. Perry Unit 1 and Davis-Besse Unit 1 are in full commercial operation and provide substantial base load power. Obviously, if the plants were as inefficient as Edison suggests, it would be imprudent to use the plants for base load power. CEI recently stressed the importance of Perry as a source of base load power in urging the Public Utilities Commission of Ohio (PUCO) to recognize for rate purposes the operating expenses of Perry Unit 1 for its first full year of commercial operation beginning when Perry was placed in commercial operation on November 18, 1987.44/ The PUCO agreed with CEI and noted:45/

44/ "In the Matter of the Application of the Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service", Case No. 86-2025-EL-AIR (Dec. 16, 1987). (Appendix E). Cleveland and several other parties have filed rehearing requests which are now pending before PUCO.

45/ Id. at 55.

> The Perry plant did generate substantial amounts of electricity during the test period and the company has incurred substantial costs in generating that electricity.

And in a recent interview, CEI spokesman Rick DeChant noted46/:

> I don't necessarily know if [the power generated by Perry 1 is] going to be cheaper but it's going to help to stabilize rates -- down the road it will, specifically in fuel savings.

Indeed, CEI recently decommissioned a 223 megawatt coal-fired generating station because it "was probably the least cost-efficient unit in the company's system."47/ Nowhere did CEI suggest that its nuclear power was high cost.

Moreover, as shown in Section VI(c), below, the changes in the cost of Perry, regardless of its scope, would not undermine the NRC's reasoning in imposing the license conditions. As discussed in more detail in Section VI(c), both Perry Unit 1 and Davis-Besse Unit 1 are now in full commercial operation and provide substantial base load power. The NRC recognized the possibility that this power may be more expensive than anticipated. But the NRC found that the availability of this substantial new source of base load power, per se, would exacerbate the anticompetitive situation in the CCCT absent the antitrust license conditions. Consequently, the increased cost of this power does not represent the sort of "substantial change" in the prior circumstances necessary to justify an exception to res judicata.

46/ Interview on WFCN radio in Cleveland, Ohio, Dec. 21, 1987.

47/ Pruzinsky, "Avon Lake capacity cut as CEI retires generator", Crain's Cleveland Business (Jan. 4, 1988) (Appendix F).

ii. The reduction of the CAPCO nuclear program

Edison also points to the reduced scope of the CAPCO nuclear program as another basis for suspending the antitrust license conditions. Edison contends that (1) construction of Perry Unit 2 has been "indefinitely suspended", (2) Erie Units 1 and 2 have been cancelled, (3) Davis-Besse Units 2 and 3 have been cancelled, (4) Perry Unit 1 reached full power in June 1986, and (5) Davis-Besse Unit 1 returned to service in December 1986 following an 18 month outage.

But, again, Edison fails to mention that the plant cancellations and suspensions occurred well before the operating license proceeding. As early as November 1978, the status of Davis-Besse Units 1 and 2 was uncertain.48/ On January 22, 1980, the CAPCO companies cancelled Erie Units 1 and 2 and Davis-Besse Units 2 and 3.49/ The indefinite suspension of construction of Perry Unit 2 was announced in September 1984.50/ Again, Edison had ample opportunity to cite these events during the operating license proceeding as part of an argument against continued imposition of the antitrust license conditions.

Moreover, even putting aside Edison's failure to raise this argument during the operating license proceeding, Cleveland shows in Section VI(c), below, that the changes in the scope of

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48/ See Edison Securities and Exchange Commission Form 10-K for 1978, pp. 37-38 (Appendix G).

49/ See Appendix D.

50/ See Edison 1984 Form 10-K, p. 11 (Appendix H); "Cost Estimate Revised For Cleveland Electric Perry-1", Nucleonics Week, p. 7 (Sept. 20, 1984) (Appendix I).

the CAPCO nuclear program do not represent the sort of substantial change in circumstances necessary to justify an exception to res judicata. As explained in more detail in Section VI(c), the full commercial operation of Perry Unit 1 and Davis-Besse Unit 1, especially in conjunction with the new transmission lines constructed to connect the plants to the Applicants' existing transmission network, is sufficient to justify continuation of the license conditions.

The delays in the construction of Perry Unit 1 and Davis-Besse Unit 1 also do not change the applicability of res judicata. True, Davis-Besse Unit 1 did not return to service until December 1986 and Perry Unit 1 did not reach full power until 1987. Edison, however, has not made the requisite showing that these two events change substantially the circumstances at issue in the operating license proceeding. Starting well before the operating license proceeding, CAPCO repeatedly announced delays in the completion dates for the nuclear plants. For example, on November 15, 1978, CAPCO announced a delay in the completion date for three plants: a 16 month delay in construction of Perry Unit 1 to 1983, a 22 month delay in construction of Perry Unit 2 to 1985, and a 24 month delay in construction of Davis-Besse Unit 2.51/ On January 22, 1980, CAPCO announced another 1 year delay in the construction of Perry Unit 1 to May 1984, a 3 year delay construciton of Perry Unit 2 to May 1988 and two year delay in construction of Beaver Valley Unit 2 to May 1986.52/

51/ Edison 1978 Form 10-K, p. 37 (Appendix G).

52/ Appendix J contains a complete list of these delays.

Thus, in the operating license proceeding, Edison and the NRC were undoubtedly aware of the potential for additional delays in the completion date of the nuclear plants. Consequently, the fact that additional delays have occurred certainly cannot be viewed as a substantial change in the circumstances contemplated by the NRC during the operating license proceeding.

iii. Termination of the CAPCO pool

Edison also points to the termination of the CAPCO pool as another event which justifies suspension of the antitrust conditions (App. 73-76). The following events are cited:

> 1. On December 31, 1979, the CAPCO companies ceased mandatory purchases and sales that were required to be made among them under prior agreements.
>
> 2. On September 1, 1980, the CAPCO companies terminated the CAPCO Memorandum of Understanding (dated September 14, 1967) and certain other agreements. The companies also agreed to implement pool restructuring principles, the most significant of which was the abandonment of the "one-system" planning concept. Each company is now responsible for future capacity planning, authorization of additional generating units, and establishing acceptable reserve margins.
>
> 3. The CAPCO Base Operating Agreement was amended on September 1, 1980, August 1, 1981, September 1, 1982 and July 1, 1984. As a result, the companies no longer have unqualified entitlements to replacement capacity and energy. Instead more limited and qualified rights to "back-up" and emergency power have been established.
>
> 4. In addition, numerous other (less significant) administrative and operating principles have been revised or eliminated.

At the outset, it must be noted that the certain of changes in the operating terms and conditions stem directly from

the NRC decision imposing the antitrust license conditions. It is, therefore, somewhat disingenuous for Edison to portray the changes as voluntary.

Also, because those same license conditions were part of the overall set of antitrust conditions, CAPCO's compliance with the conditions can hardly be viewed as a changed circumstance justifying suspension of all of the license conditions.

Even putting this concern aside, however, consideration of these events involving the CAPCO pool is barred by _res judicata_. Once again, these events occurred well before the close of the record in the operating license proceeding. Clearly, Edison had the opportunity to raise this argument during the operating license proceeding.

Moreover, even if one overlooks Edison's failure to raise this argument during the operating license proceeding, Cleveland shows in Section VI(c) that termination of the CAPCO pool does not affect the NRC's analysis in imposing the antitrust license conditions. Consequently, the termination cannot justify an exception to _res judicata_.

Thus, _res judicata_ applies here to bar Edison's challenge of the antitrust license conditions. As shown, Edison made or could have made its arguments during the construction permit and operating license proceedings. Moreover, application of _res judicata_ is necessary to ensure that Cleveland is not harmed as a result of the extensive business commitments it has made in reliance on the antitrust license conditions (as outlined in Section III(A)(3), above).

3. Alternatively, collateral estoppel is applicable and bars Edison's arguments

As noted in subsection C(1), above, Edison's application arises in the same "cause of action" as the operating license proceeding. Hence, res judicata encompasses the situation here.

But preclusion is still warranted even if the NRC finds that the application arises in a different "cause of action". In that instance, collateral estoppel would apply to the circumstances here. As noted above, collateral estoppel applies if four criteria are met:

> (1) The prior tribunal must have had jurisdiction to render the decision, (2) there must have been a prior valid final judgment on the merits, (3) the issue must have been actually litigated and necessary to overcome of the first action, and (4) the party against whom the doctrine is asserted must have been a party or in privity with a party to the earlier litigation.

Braidwood, 21 NRC at 620.

Each of these criteria is satisfied here. First, the NRC clearly had jurisdiction to issue the operating license decision. Second, there was a valid final judgment on the merits of the antitrust conditions. Third, the antitrust issue was actually litigated and was necessary to the outcome of the proceeding. As noted, the antitrust issue was addressed both in the construction permit and operating license proceeding. During the latter proceeding, the NRC addressed the antitrust issue in the context of determining pursuant to Section 105(c)(2) of the Act whether there were any significant changes in the licensee's activities or proposed activities subsequent to the antitrust re-

view during the construction permit proceeding. Edison and the other joint Applicants actively participated in the proceeding and urged the NRC to find that there were no significant changes.53/ And, again, only for purposes of this analysis, Cleveland accepts Edison's contention that the NRC can review the appropriateness of a license condition at any time, including during the operating license proceeding. Therefore, Edison had the opportunity to argue then that the antitrust conditions should be eliminated. Finally, Edison was obviously a party to the earlier litigation.

Because each of these criteria are met, Edison cannot now raise arguments it failed to raise during the operating license proceeding. As noted, the NRC has recognized that collateral estoppel precludes a party from raising in a subsequent proceeding any argument that it neglected to raise during the prior proceeding. "If [an issue] has been determined in a former action," the NRC has observed, "it is binding notwithstanding the parties . . . may have omitted to urge for or against it matters which, if urged, would have produced an opposite result." Shearon, 23 NRC 525, 537 n. 37. As shown in Section IV(c)(2), above, virtually all of the arguments raised by Edison in its application could have been raised during the operating license proceeding. Thus, these arguments cannot be raised now. Likewise, as shown in Section VI(c) below, the events cited by Edison

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53/ See March 6, 1984 letter from CEI to Harold R. Denton, NRR Director.

do not constitute significant changes and, therefore, do not justify an exception to collateral estoppel.

V. THE RELIEF SOUGHT BY EDISON IS BARRED BY LACHES

If the NRC finds for some reason that neither res judicata or collateral estoppel apply here, laches should be applied to bar the relief sought by Edison. Laches is an equitable doctrine which bars the late filing of a claim if a party would be prejudiced because of its actions during the interim in reliance on the right being challenged in the claim. Three independent criteria must be met before laches can be invoked to bar litigation. A party must show that there was (1) a delay by another party in asserting a right or claim, (2) the delay was not excusable, and (3) the party suffered undue prejudice as a result of the delay. Environmental Defense Fund, Inc. v. Alexander, 614 F.2d 474, 478 (5th Cir.), cert. denied, 449 U.S. 919 (1980); see Costello v. United States, 365 U.S. 265, 282, (1961).

Because laches is an equitable defense, "the doctrine . . . is flexible" and "all the particular circumstances of each case must be considered, including the length of the delay, the reasons for it, its effect on the defendant, and the overall fairness of permitting the plaintiff to assert his or her action." Citizens and Landowners Against The Miles City/New Underwood Powerline v. Secretary, U.S. Department of Energy ("Underwood"), 683 F.2d 1171, 1174 (8th Cir. 1982).

The NRC has recognized that the policies underlying laches are fully applicable in administrative proceedings. In finding in South Texas that the antitrust review at the operating license stage can only encompass "significant changes", the NRC

cited laches:

> . . . a limited review at the operating license stage is consistent with the well established considerations consolidated in the doctrines of res judicata and laches. Although these judicially developed doctrines are not fully applicable in administrative proceedings, particularly where, as here, there was no adjudicatory proceeding at the construction permit stage, the considerations of fairness to parties and conservation of resources embodied in them are relevant here. We see no reason why the Attorney General, our staff, and possibly a hearing board should plow the same ground twice. Nor, in fairness to utilities engaged in long range planning, should a potential petitioner for antitrust intervention be able to stand on the sidelines at the construction permit stage and raise a claim at the operating license stage that could have been raised earlier.

5 NRC 1303, 1321.

In view of the flexible nature of laches, there is no fixed rule regarding the length of the delay necessary to support laches. Likewise, there is no rigid formula governing the type of explanation which can justify delaying the filing of a claim. But the explanation must provide a rational and satisfactory basis for the delay. Underwood, 683 F.2d at 1175-77.

One type of prejudice which typically supports the defense of laches arises when a party makes financial commitments which it would not have made if the plaintiff had not delayed. Lingenfelter v. Keystone Consolidated Industries, Inc. ("Lingenfelter"), 691 F.2d 339, 342 (7th Cir. 1982). This detrimental reliance has been summarized in this way54/:

54/ footnotes omitted; 27 Am.Jur.2d (Contracts) §171, p. 717 (1966 & 1987 Supp.).

> Proof of prejudice or injury consists frequently in evidence showing the expenditure of money or the incurring of obligations by the defendant in the belief that he had a clear or unencumbered right. The suit will be dismissed where it appears that the complainant stood by and permitted the defendant to expend sums of money in improving the property. The showing of injury is especially plain where it appears that the defendant has undertaken a public improvement.

Numerous types of pecuniary loss may be considered in weighing the prejudice suffered by a party as a result of the delay. Lingenfelter, 691 F.2d at 342.

Each of the criteria for laches is interwoven. For example, the extent of the delay necessary to support the laches defense depends, in large part, upon the extent of the prejudice suffered by the defendant:

> If only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice require before the suit should be barred is great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required.

citations omitted; Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 807 (8th Cir. 1979), cert. denied, 446 U.S. 913 (1980).

Laches has repeatedly been found to bar a claim not diligently pursued by the claimant when another party incurred financial obligations during the delay because of a reasonable reliance on the rights challenged by the claimant. For example, laches was found to bar a challenge of the construction of an electric transmission line because the plaintiffs delayed three years before filing suit. Underwood, 683 F.2d at 1175-77. The court noted that the plaintiffs could not justify the delay and that the delay prejudiced the defendant because it had construc-

ted the transmission line at substantial expense by the time the suit was filed. Id. Similarly, a suit challenging a municipal ordinance rezoning certain property was barred by laches because the plaintiff waited 21 months to file suit and the owner of the property had during that period incurred substantial expenses to improve the property. Richards v. Ferguson, 479 S.W.2d 852 (Ark. 1972); see also Lundgren v. Lundgren, 54 Cal.Rptr. 30 (Cal.Dist.Ct.App. 1966). Likewise, a court held that a challenge of a property use was barred by laches because the plaintiff delayed three years and the property owner spent over $282,000 on improvements during that period. Bresnahan v. City of Pasadena, 121 Cal.Rptr. 750 (Cal.Ct.App. 1975).

This reasoning applies with equal force here and bars Edison's application. As noted in Section V(c) above, each of the events cited by Edison as the basis for its application -- changes in regulatory requirements, adverse economic conditions, the reduction in the scope of the CAPCO nuclear program and termination of the CAPCO pool -- occurred no later than 1981. But Edison did not file its application until September 18, 1987. Nowhere in its application does Edison even try to justify this delay. Moreover, as shown in Section III(A)(3), above, Cleveland has made significant financial commitments during that period in reliance on the antitrust conditions by purchasing power from alternative suppliers. This reliance was justified at the very latest by October 1980, when the Third Circuit granted the Applicants' motion to withdraw their petition for review of the NRC decision imposing the license conditions. Hence, in view of (1)

Edison's lengthy and unjustifiable delay in submitting its request for relief, and (2) the severe prejudice to Cleveland which would result if the antitrust license conditions were suspended, laches bars Edison's application.

VI. THE EVENTS CITED BY EDISON DO NOT UNDERMINE THE LEGAL OR FACTUAL BASIS FOR IMPOSITION OF ANTITRUST LICENSE CONDITIONS

The premise of Edison's application is that events subsequent to the NRC decision to impose the antitrust license conditions undermine the basis of the NRC decision. Therefore, argues Edison, the antitrust license conditions are not needed in current circumstances and, hence, should be suspended.

Specifically, Edison argues that Congress' adoption of mandatory prelicensing review as part of the 1970 amendments was based on its assumption that nuclear power would be far cheaper than any other source of power. Consequently, according to Edison, the only concern of Congress was to ensure that all utilities had fair access to this low cost power source. Therefore, according to Edison, antitrust license conditions cannot be justified if nuclear power does not have cost advantages over other power sources.

Edison then points to the NRC decisions imposing antitrust license conditions and argues that these decisions were based exclusively on the assumption that the nuclear power would be low cost.

Next, Edison turns to the decisions in the consolidated proceeding in which the antitrust license conditions were imposed on Perry. Edison argues that the NRC's decision to impose the antitrust license conditions in the consolidated Perry proceeding was, again, based exclusively on the assumption that this power would be low cost. Because circumstances have changed subsequent to the NRC decision, argues Edison, continued imposition of the

antitrust license conditions is unjustified and the conditions should be suspended.

As shown below, Edison's argument is flawed. In subsection A, below, Cleveland demonstrates that Congress, in enacting the 1970 amendments, was not exclusively concerned about the anticipated low cost of nuclear power. Congress was equally concerned about the immense size of nuclear generating units and the transmission facilities that accompanied them. Congress recognized that a nuclear facility and the associated transmission facilities could enhance a utility's ability to exercise market power in the retail and wholesale power markets and the coordination services market unless conditions were incorporated into the license.

These concerns apply _regardless_ of the cost of nuclear power. Hence, Congress did not intend to limit antitrust license conditions to plants which produce nuclear power that is cheaper than any other power source.

In subsection B, Cleveland shows that, consistent with this Congressional mandate, the NRC has repeatedly recognized that a utility which has a dominant role in the generation and transmission of power will be able to exercise even greater market power if it operates a nuclear facility along with the associated transmission lines and coordination services. The NRC's analysis reflects its understanding that this exacerbation of an anticompetitive situation occurs regardless of whether the power is low cost. As a result, the NRC has consistently imposed license conditions requiring non-discriminatory access to nuclear

power *as well as* the coordination and wheeling services needed to obtain non-nuclear power.

Turning to the decisions in this proceeding, Cleveland shows in subsection C that the NRC, in imposing the antitrust license conditions on Perry, did not base its decision on the assumption that the nuclear power would be low cost. The NRC was concerned about the Applicants' pervasive control of generation and transmission facilities and, moreover, their use of this control to discriminate against other utilities in connection with access to coordination, wheeling and other related services. The NRC recognized that the additional generation and transmission facilities which would accompany the Perry and Davis-Besse plants would exacerbate this anticompetitive situation. A change in the relative cost of nuclear power would not alleviate this condition.

A. THE 1970 AMENDMENTS WERE BASED ON FACTORS OTHER THAN THE ANTICIPATED COST OF NUCLEAR POWER

Edison argues that the adoption by Congress of the prelicensing antitrust review procedures in section 105 as part of the 1970 amendment was based solely on the assumption that nuclear power would be the lowest cost source of power. Edison points to certain statements made during the hearings before the Joint Committee and during Congressional debate of the legislation.

The analysis below of the legislative history of the 1970 amendments, especially the Joint Committee report, indicates that Congress was not concerned only with the anticipated cost of

nuclear power. Instead, Congress recognized that in view of the large scale of a nuclear facility, and the associated transmission facilities and coordination services, operation of the facility by a utility with a dominant role in generation and transmission of electricity in a market could enhance the utility's market power. Therefore, Congress intended the NRC to impose antitrust license conditions regardless of the cost of the nuclear power to ensure that neighboring utilities have access to the transmission facilities, and the associated coordination and wheeling services, which accompanied the nuclear plant.

This analysis must start with the language of section 105 and the Joint Committee's explanation of this language. Section 105(c) states that the NRC in the prelicensing antitrust review "shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." If the NRC finds that an anticompetitive situation would result, the NRC has the authority pursuant to Section 105(c)(6) to refuse to issue a license or to issue a license with such conditions as the NRC deems appropriate.

The Joint Committee emphasized the broad scope of the type of activities under the license which would justify imposition of antitrust conditions if the activity would "create or maintain" an anticompetitive situation 55/:

> The standard pertains to the activities of the

55/ H.Rep. No. 91-1470, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4981, 5011 ("Joint Committee Report").

> license applicant. The activities of others, such as designers, fabricators, manufacturers, or suppliers of materials or services, who, under some kind of direct or indirect contractual relationship may be furnishing equipment, materials or services for the licensed facility would not constitute "activities under the license" unless the license applicant is culpably involved in activities of others that fall within the ambit of the standard.

The Joint Committee also noted that the NRC need only find that there was a "reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws" 56/:

> The legislation proposed by the committee provides for a finding by the Commission "as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105(a)." The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. It is intended that, in effect, the NRC will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.

In the hearings conducted by the Joint Committee on the 1970 amendments, there were certain statements alluding to the anticipated cost of nuclear power. But Edison overlooks the Committee's recognition that the relative cost of nuclear power was far from certain. Indeed, in a report prepared for the Joint Committee, Philip Sporn, former president of the American Electric Power Company, noted that the cost of nuclear power was

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56/ Joint Committee Report at 4994.

rapidly rising 57/:

> During the past two years there has taken place a remarkable and ominous retrogression in the economics of our nuclear power technology. The light water moderated reactor, which two years ago offered potentials for nuclear power generation competitive with fossil fuel at 22¢ to 24.8¢ per million Btu has today lost position where it is competitive at 28¢ to 29.5¢ per million Btu fossil fuel cost.
>
> This in turn makes it difficult to accept without something more than a grain of salt the statement of the Atomic Energy Commission [that] "the outlook for the future for nuclear power continues to be very promising [because] of the continuing economic competitiveness of nuclear power in spite of increasing costs as prices for both nuclear and fossil plants increase."
>
> How did this come about? The reasons for that are many. Among the most important, but nowhere near all, are higher costs of nuclear components, higher cost of turbines, higher construction costs, continuing escalation during the entire construction period due to the inflationary cycle, longer construction time which results in higher interest and overhead charges, higher capacity charges in view of the current coupon rate of approximately 9.5% on AA utility bonds which brings the necessary capital charge to give an adequate return up to 16% lower capacity factor due to the recognition that with the growth of atomic power which will take place between now and 1980 no atomic plant can, except for the shortest time, be expected to operate at a capacity factor as high as 80% and that, therefore, a more rational capacity factor is one five points lower, or 75%.

Moreover, Mr. Sporn noted that nuclear power was rapidly losing its competitive position vis-a-vis power generated by fossil fuels 58/:

57/ Prelicensing Antitrust Review of Nuclear Powerplants, Hearings Before the Joint Comm. on Atomic Energy, Part 1, 91st Cong., 1st Sess. 300 (1970) ("Joint Committee I").

58/ Joint Committee I at 300.

> It is true that fossil fuel costs also have gone up, but even so, nuclear power has lost position vis-a-vis fossil fuel (mainly coal). This can be seen very clearly in Table 1, which shows costs of both coal-fired and nuclear-fueled plants, the former in terms of an 800-megawatts unit and the latter in terms of an 1100-megawatts unit, as of July 1, 1969, for completion in the case of nuclear in 1976, and in the case of coal in 1975. All the figures in that tabulation are significant and striking but two stand out in particular -- the cost of switchboard delivered nuclear energy of 7.00 mills per kwh as against 6.65 mills for coal-fired energy with coal at 25¢ per million Btu. On the basis of these figures, the competitive break-even point for nuclear power is 29.7¢ per million Btu cost.

Table 1 is reproduced in Appendix K of this pleading.

Mr. Sporn noted that, in view of the increasing costs of nuclear power, the growth of nuclear power had virtually stopped 59/:

> It is not surprising that all these developments have already had a significant effect on the recent experience of the nuclear industry. It has caused cancellation of one or two previously announced projects, delay in scheduling of other units committed for; it has brought about interposition of fossil fuel units to be completed ahead of what might have been scheduled atomic units, and in some cases it has brought about plain decision[s] to go fossil when, if things had gone differently, atomic units would have been ordered. In connection with the last, it needs to be pointed out that every time a fossil-fueled unit is ordered for whatever reason, when an atomic unit might have been ordered under conditions more favorable to nuclear power, the particular nuclear unit is lost for approximately 30 years.
>
> Such developments obviously go beyond the loss of domestic orders. Their effect can be and most likely will be worldwide, but this will be discussed in more detail later. Regardless of the effect, it is obvious that we have had a slowdown in the ordering of atomic generating capacity. As against a peak of 25,780 megawatts placed on order

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59/ Hearings at 300-01.

> in 1967 and 19,159 megawatts average capacity placed on order in the three years 1966-1968, orders declined in 1968 to 16,044 megawatts and in 1969 to 7,190 megawatts. This, of course, does not mean that the figures for orders will not be better in 1970 than they were in 1969, but the utility industry, being young, has as yet not taken to heart the fact that in the long run it cannot safely order more capacity than is represented by its growth plus the necessary reserve.

Thus, Congress, in adopting the mandatory prelicensing review requirement, was well aware that nuclear power might not be low cost power. Consequently, there is no basis for Edison's assertion that Congress based the antitrust review provisions on the assumption that nuclear power would be low cost.

Indeed, in testimony during the hearing, several key witnesses supporting the antitrust review provisions focused not on the cost of nuclear power but on the fact that a nuclear facility could create or maintain an anticompetitive situation by enhancing the cost efficiencies which can be achieved through coordination services, thereby increasing the anticompetitive impact of a discriminatory exclusion of access to these services. The NRC has noted the important efficiencies which can be achieved by a utility which has access to coordination services.60/ In their testimony, two key officials of the Antitrust Division of the Department of Justice noted that the NRC

60/ There are innumerable types of coordination services, including reserve pooling. The NRC has noted that "[a]ll are in essence variations on one leitmotif: the utilities' attempt to reduce their production cost by either purchasing or selling "surplus' power, or to put it more accurately, power from the surplus generating capacity inherent in the industry." Consumers Power Co. (Midland Plant, Units 1 and 2), 6 NRC 892, 956-57 (1977).

can use its antitrust review authority to require non-discriminatory access to the coordination and other services associated with the plant. They recognized that, absent non-discriminatory access, the plant would exacerbate the market power exercised by a license. For example, in his testimony on behalf of the antitrust division of the Department of Justice, Ronald W. Donnem, the Director of Policy Planning said 61/:

> So far, we have been focusing on the disposition of the power of a single nuclear plant. However, the largest generating plants now being planned are apparently in the neighborhood of 1,000 megawatts. "Today, only a few individual systems can by themselves undertake 1,000 megawatts units." However, pools may be created in which even such large units may be coordinated. Such pools have a number of economic advantages: reduction in number of plants necessary to be held in reserve to be used in case of plant breakdown, avoidance of excess capacity by staggering construction of plants to more closely parallel load growth, and permitting economic loading of the generating plants depending on size and location of load demands on the system. These pooling arrangements reach substantial size.
>
> Because they can afford these efficiencies, and are so common, the AEC will undoubtedly encounter pooling arrangements forming the necessary support for some of the plants it will license. And it will need to determine whether such arrangements tend to create or maintain a situation inconsistent with the anti-trust laws. In doing this it will need to apply the same standards I have already discussed. There may be circumstances in which it would be necessary to determine whether parties seeking participation in pools are required to do so because they are unable to enter into other similarly beneficial and less restrictive arrangements. It will need to determine whether the efficiencies gained by a pooling arrangement outweigh the reduction in diversity, rivalry, and innovation created by the joinder of a number of competitors in a common program. If

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61/ citation omitted; Joint Committee I at 11.

> participation in the pool is justified, the AEC must insure fairness of the terms along the lines previously discussed. In particular, pooling arrangements which reserve major benefits to some companies and exclude others, with the result that the favored companies gain a decisive competitive advantage, would be inconsistent with antitrust policy. And we would not be inclined to accept the view that some companies should be excluded, or the terms of their entry made unduly burdensome, solely because their participation gives them substantial benefits but offers relatively little to other participants. Although there may sometimes be a basis for urging small utilities to join with others before joining the pool in order to bring more economies to the pool it is still true that a small company affords to the pool the same proportional advantages as any equally sized portion of any of the larger companies in the pool.

Likewise, Walter B. Comegys, acting Associated Attorney General in charge of the Justice Department's Antitrust Division, recognized that any service which "would be an intricate part of the [licensed] facility" should be subject to antitrust review 62/:

> Mr. England. One further brief question: If the smaller utility were only looking to share power from the pool but were not looking for ownership participation in the nuclear power plant, would the AEC have jurisdiction to entertain his petition?
>
> Mr. Comegys. I could not answer that question, sir, until I saw the entire arrangement. I think that you do not license the pool. The license would be the facility but maybe the pool would be an intricate part of the facility or vice versa.
>
> I am sure you know that one type of pooling arrangement is where one of the joint venturers builds a plant this year and it serves all for a time and as demand grows, another aspect of the pooling provision would require another joint ven-

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62/ emphasis added; Joint Committee I at 134.

> turer to add to a pool a second plant that he did not have to build up to that time. So the various types of pooling arrangements or other arrangements are myriad.

Thus, the Justice Department officials recognized that if pooling or coordination services are utilized by a utility in an anticompetitive manner in connection with a licensed facility, requiring non-discriminatory access to these services is essential in order to ensure that the facility does not "create or maintain" an anticompetitive situation. The cost of the nuclear power is irrelevant. Likewise, it does not matter whether the neighboring utility actually purchases any nuclear power.

Another indication that Congress was not focusing solely on the relative cost of nuclear power was the repeated reference during the Joint Committee hearings to the need to ensure that licensees which dominated the transmission facilities in a service area provide non-discriminatory access to wheeling services on their transmission facilities. Numerous witnesses testified during the Joint Committee's hearings about instances in which dominant utilities were not permitting competing utilities to use wheeling services.63/ As a result, the competing utilities had no choice but to purchase power from the dominant utility. The Committee was referred to litigation in which the Justice Department alleged that a dominant utility's refusal to provide wheeling services violated the antimonopoly provisions of

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63/ Remarks of Mr. Donnem, official in the Department of Justice Antitrust Division (Joint Committee I at 9-10).

the Sherman Act, 15 U.S.C. §§1 and 2.64/ The Committee also reprinted a court decision which held that the Securities and Exchange Commission, in evaluating a proposal by a dominant utility to acquire a utility operating a nuclear facility, must take into account the anticompetitive effects of a dominant utility's refusal to wheel.65/ Because wheeling is needed to buy third party power, the concern of Congress about the need for non-discriminatory access to wheeling services was not based on an assumption of low cost power.

Indeed, the concerns underlying the 1970 amendments indicate that an increase in the relative cost of nuclear power heightens the need for continued imposition of the antitrust conditions. Again, antitrust conditions which require access to coordination and wheeling services make it possible for a utility to buy power from an alternative supplier. If the licensee is the dominant utility in a geographic area and its rates rise, anticompetitive practices by the dominant utility which preclude access to coordination and wheeling services would force competing utilities to buy this more expensive power. Hence, an increase in nuclear costs exacerbates the anticompetitive situation to an even greater extent.

64/ Joint Committee I at 79-80. This litigation culminated in the Supreme Court decision in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), in which the Court held that the utility violated these provisions of the Sherman Act.

65/ Joint Committee I at 259-69.

B. NRC PRECEDENT REFLECTS THE NRC'S RECOGNITION THAT FACTORS OTHER THAN THE COST OF NUCLEAR POWER CAN BE THE BASIS FOR IMPOSITION OF ANTITRUST LICENSE CONDITIONS

Edison goes on to argue that NRC precedent supports its position that antitrust conditions are appropriate only if nuclear power is low cost. Edison points to the handful of NRC decisions in which an antitrust review was litigated and the scope of the NRC's authority pursuant to section 105 was at issue. As shown below, the NRC decisions indicate that the NRC recognizes that its authority to impose antitrust conditions requiring non-discriminatory access to coordination and other services associated with a nuclear facility does not depend on the relative cost of the nuclear power.

The antitrust proceeding in Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3) ("Waterford"), Docket No. 50-382A, presented the NRC with its first opportunity to discuss the scope of Section 105. Waterford addressed an application for a permit by Louisiana Power and Light Company authorizing construction of a 1,065 megawatt nuclear plant. The Attorney General negotiated an agreement with the applicant pursuant to which the applicant agreed to antitrust conditions as part of the permit. The conditions ensured that competing utilities had access to coordination arrangements. According to the Attorney General, the antitrust conditions would provide "prompt relief against many of the alleged anti-competitive practices of the applicant". CLI-73-7, 6 AEC 48 (1973). Several competing utilities petitioned for permission to inter-

vene and asked the NRC to conduct an antitrust hearing. In evaluating these petitions, the NRC analyzed the scope of its antitrust review authority. The NRC said that the standard in Section 105(a):

> requires that: (1) the allegations raised by petitioners describe a situation inconsistent with the antitrust laws or the policies clearly underlying these laws, and (2) the specified situation be "created" or "maintained" by "the activities under the license". Thus, it would be insufficient for a petitioner simply to describe a situation inconsistent with the antitrust laws, regardless of how grievous the situation might appear to be. A meaningful nexus must be established between the situation and the "activities under the license". In this connection, the relationship of the specific nuclear facility to the applicant's total system power pool, e.g., size, type of ownership, physical interconnection, may need to be evaluated. Generally, "activities under the license" would not necessarily include all the applicant's generation, transmission, and distribution of electricity. On the other hand "activities under the license," in most circumstances, would not be limited to construction and operation of the facility to be licensed. Careful analysis of the facts in each case is necessary, particularly in view of the ground breaking nature of the initial decisions in this new area of the Commission's responsibility.

6 AEC at 49. The NRC granted the petition which sought imposition of an antitrust condition requiring the applicant to provide non-discriminatory access to the facility. The NRC found that the other intervenors, who sought to challenge the Applicants' allegedly discriminatory practices regarding interconnections, wheeling and sales of power, had not specified "the relationship, if any, between these practices and the "activities under the license" involved in this proceeding." _Id_. The NRC remanded the proceeding to the Licensing Board and gave the intervenors the

opportunity to provide the missing information.

The Licensing Board applied this criteria and granted the hearing petitions. LBP-73-46, 6 AEC 1168 (1973). The Licensing Board began its analysis by summarizing the intervenor's allegations 66/:

> The petitions, fairly read, encompass a common complaint as to the nature of the anticompetitive acts alleged and the effect on the competitive situation alleged to flow from Applicant's construction of Waterford Station Unit 3 (Waterford 3), a 1,065 megawatts nuclear facility. They allege a monopoly in and an attempt to monopolize the construction and ownership of large, low cost, electric generating units in Applicant's area. This alleged monopoly of generational facilities is maintained, it is further alleged, by a monopoly by Applicant of bulk power transmission facilities. It is further alleged that petitioners' cost disadvantage is exacerbated due to Applicant's alleged refusal to enter into coordinated operation agreements. In the absence of such agreements or transmission facilities that could permit petitioners to coordinate among themselves, the petitioners claim their only option is to operate as isolated power producers. This results in even higher unit costs, thus increasing their competitive disadvantage and lessening incentives to compete in the production or sale of electric power.

The Licensing Board recognized that the operation of the proposed nuclear facility would exacerbate the anticompetitive situation by (1) encouraging the applicant to expand its anticompetitive practices to ensure markets for the nuclear power, and (2) expanding the scope of coordination services and, therefore, the adverse impact of the applicants' exclusionary practices:

66/ Id. at 1169-70.

> (1) Applicant has or is attempting to acquire a monopoly of large low cost electrical generating units in the relevant geographic market;
>
> (2) Control over the bulk power transmission system in the relevant geographic market is fundamental to the creation or maintenance of such a monopoly, and Applicant has a monopoly of facilities for the transmission of bulk power and power for system coordination;
>
> (3) Applicant has or is attempting to acquire a monopoly in coordination reserve power sales;
>
> (4) Applicant alone or in combination with others attempted to hinder or prevent efforts by the petitioners to construct their own transmission systems for bulk power and coordinating power. This conduct of Applicant, whether legal or illegal, was intended to maintain its monopoly positions;
>
> (5) Construction of Waterford 3 would maintain or strengthen Applicant's monopoly position by providing Applicant with the ability to serve the increasing demands of present customers and the demands of new customers while foreclosing petitioners from the ability to serve these demands;
>
> (6) Construction of Waterford 3 would materially assist Applicant in providing for its own coordination and reserve sharing needs without entering into agreements with intervenors.

Id. at 1169-70.

Thus, the Licensing Board recognized that the increase in market power which would accompany operation of the nuclear facility would occur regardless of whether the nuclear power was low cost because the applicant was excluding its competitors from access to alternative suppliers.

The NRC affirmed this decision. CLI-73-25, 6 AEC 619 (1973). In doing so, the NRC again clarified the scope of its antitrust review authority:

> In our view, the proper scope of antitrust review turns upon the circumstances of each case. The relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case. Denial of access to transmission systems would be more appropriate for consideration where the systems were built in connection with a nuclear unit than where the systems solely linked non-nuclear facilities and had been constructed long before application for an AEC license. While the propriety of pooling arrangements and physical interconnections could certainly be considered in appropriate cases, such matters in most circumstances could not be dealt with by this Commission where no meaningful tie exists with nuclear facilities.

Id. at 621.

Significantly, nowhere in its analysis does the NRC suggest that the relative cost of nuclear power would affect either (1) the nexus between the nuclear facility and the alleged discriminatory practices regarding interconnection and other services, or (2) the importance of access to these services. Instead, the NRC recognized that the need for non-discriminatory access to these services is independent of the relative cost of the nuclear power.

This same reasoning underlies the NRC's analysis in Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1) ("Wolf Creek"), ALAB-279, 1 NRC 559 (1975). Wolf Creek involved review of an application for a permit seeking authorization to construct a 1180 megawatt nuclear facility. The Attorney General recommended that certain conditions be imposed on the permit and the applicant agreed. The conditions imposed three obligations on the applicant:

> First, the applicant must offer the cooperative the right to purchase an ownership interest with a

> share in the power generated by the Wolf Creek facility or, at the cooperative's option, to sell it a portion of that power. Second, in the event of the partial or total unavailability of the cooperative's share of the Wolf Creek power, the applicant must, at the cooperative's option, either (a) supply the cooperative with an equivalent amount of power; or (b) transmit across its lines, i.e., "wheel", that amount of power obtained by the cooperative from some other source. Third, the cooperative may elect to have a portion of its Wolf Creek power "wheeled out" by the applicant; i.e., transmitted to some third party. If the cooperative makes this election, the applicant must "wheel in" an equivalent amount of power at the cooperative's request.

footnotes omitted; Id. at 562-63.

The cooperative filed a motion to intervene and requested an antitrust hearing. The cooperative wanted to purchase an ownership interest in the facility pursuant to the license conditions recommended by the Attorney General. But the cooperative argued that this option was "illusory" absent the access to transmission services on applicant's transmission lines needed to be able to purchase supplemental power from other suppliers. Id. at 567.

The applicant objected. It argued that its refusal to wheel supplemental power was an existing policy and, hence, has no "causal connection" with its proposed operation of the nuclear plant." Id.

The Appeal Board rejected the applicant's contention and affirmed the Licensing Board's grant of the petitions. The Appeal Board noted that "the Commission's antitrust mandate extends only to anticompetitive situations intertwined with or exacerbated by the award of a license to construct or operate a

nuclear facility." Id. at 569. The Board observed that this could include activities associated with operation of the facility:

> The words of the statute upon which the applicant relies direct the Commission to consider not only whether granting a license would "create" an anticompetitive situation but also whether it would "maintain" one. Thus, to the extent the applicant's argument suggests that the Commission's cognizance under section 105c is limited to anticompetitive consequences directly attributable to applicant's use of the nuclear plant and its output, it makes no sense. As the staff points out, for activities under a license to "maintain" a pre-existing situation inconsistent with the antitrust laws, some conduct of the applicant apart from its license activities must have been the "cause" for bringing about those anticompetitive conditions. Nothing in Section 105c suggests that Congress wanted the Commission to focus on an applicant's extra-license conduct when determining whether an anticompetitive situation would be "maintained," but to close its eyes to that conduct in deciding whether such a situation would be "created." Indeed, were we to accept the dichotomy inherent in the applicant's position, we would be at a loss to perceive how a licensing board should proceed when it is alleged -- as it is in this case -- that granting a construction permit would both create and maintain an anticompetitive situation.

footnotes omitted; emphasis in the original; Id. at 568.

Moreover, the Board observed that Congress contemplated that antitrust review should consider whether the applicant dominates transmission facilities and excludes competing utilities from the access to these facilities needed for wheeling services. Id. at 571.

Thus, Wolf Creek, too, emphasizes that the NRC's antitrust review authority encompasses any services associated with a nuclear facility -- including coordination and wheeling service -

- if the applicant's anticompetitive practices in performing this service "is intertwined with or exacerbated by the award of a license to construct a nuclear facility." The impact of such anticompetitive practices is wholly independent from the relative cost of the nuclear power or, indeed, whether a competing utility intends to buy nuclear power.67/

This reasoning was applied once again by the Appeal Board in its subsequent decision in Consumers Power Co. (Midland Plant, Units 1 and 2) ("Midland"), ALAB-452, 6 NRC 892 (1977). Midland is especially instructive because, unlike Waterford and Wolf Creek, this decision addressed the merits of an antitrust review subsequent to an evidentiary hearing. In this construction permit proceeding, the Attorney General recommended that an antitrust hearing be conducted. Several competing utilities intervened and urged adoption of antitrust conditions. The Appeal Board found that the licensed facility would enhance the applicant's existing domination of generation and transmission facilities and, hence, exacerbate the applicant's anticompetitive practice of excluding its competitors from access to bulk power supplies. Specifically, the Board found that the market for coordination services was a distinct market for antitrust analysis

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67/ Although the Appeal Board found that it had the authority to grant the type of relief requested by the cooperative, it found that the cooperative had failed to (1) show why the practices of the applicant were inconsistent with antitrust policies, and (2) describe the relief it sought. Id. at 575-76. As a result, the Board remanded the proceeding and gave the cooperative the opportunity to file an amended pleading to correct these deficiencies. Id. at 577.

pursuant to Section 105. The Board noted that the applicant controlled 80 percent of generating capacity, 85 percent of all transmission lines and 98 percent of lines 138 kV or higher in the relevant geographic market. 6 NRC at 1005. The Board found that the applicant used its dominant role to exclude competitors from wheeling and coordination services and power pools. Id. at 1036-89. The Board also noted, that, as a practical matter, the competing utilities could not construct a large generating facility absent such services and could not construct duplicative transmission lines. Id. at 933, 1095. The Board recognized that the applicant's anticompetitive conduct prevented its competitors "from turning to the most economical sources [of power] and making the most efficient uses of baseload power." Id. at 1095.

Moreover, the NRC found that these anticompetitive activities had a sufficient nexus to the proposed nuclear generating facility to justify imposition of antitrust license conditions:

> Now Consumers wishes to increase its efficiency by installing large nuclear powered generating units. Manifestly, this will exacerbate the anticompetitive situation.

Id.

To be sure, the Board did emphasize the need for nondiscriminatory access to bulk power as a way of ensuring access to nuclear power. But this is understandable because the intervenors were seeking access to the nuclear power. The Board's emphasis on the impact of the facility on the applicant's domination of generation and transmission in the relevant geographic highlighted its concern that the addition of this new power and

the associated facilities would "exacerbate the anti-competitive situation" regardless of whether the power was low cost.68/

The most recent litigated decision involving the NRC's antitrust review authority confirms this analysis. In Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2) ("Farley II"), ALAB-646, 13 NRC 1027 (1981), the Appeal Board cited Midland and found that the coordination services market and retail service markets are distinct markets for purposes of antitrust analysis. The Appeal Board in Farley II noted that the applicant had the dominant share of generation and transmission in the relevant area and used this domination in an anticompetitive manner to control the coordination services and retail markets service and discriminate against its competitors. Id. at 1069-70.

The Board recognized that the nuclear plant would increase the cost efficiencies achievable through the coordination services market and, hence, increase the anticompetitive impact of the applicant's discriminatory practices. The Board also recognized that the new transmission facilities which would accompany the nuclear plant would exacerbate the applicant's monopoly power over transmission services. Hence, the Board ordered the applicant to provide non-discriminatory access to transmission services. Id. at 1108-10.

68/ The Appeal Board remanded the proceeding to the Licensing Board because of the applicant's apparent willingness to sell ownership interests in the plant. Id. at 1098-99. The parties reached a settlement which was approved by the NRC. 12 NRC 177 (1980).

Moreover, the Board recognized that access to these services was not tied to actual purchase of the nuclear power. The Board found that one of the intervenors -- Municipal Electric Utility Association of Alabama (MEUA) -- did not compete with the applicant in the retail market and, therefore, was not entitled to be able to purchase an ownership interest in the plant. Id. at 1109-10. But the Board found that, because the facility would heighten the applicant's domination of transmission facilities, this would exacerbate the existing anticompetitive practices of the applicant regarding access to the facilities regardless of the cost advantages, if any, of nuclear power. Consequently, the Board found that MEUA was entitled only to non-discriminatory access to transmission services.

The NRC declined to exercise its discretionary review authority over the Appeal Board's decision and the decision became the final action of the NRC.

The Eleventh Circuit rejected the applicant's petition for review and affirmed the NRC decision. Alabama Power Co. v. NRC, 692 F.2d 1362 (11th Cir. 1982), cert denied, 464 U.S. 816 (1983). The court affirmed the NRC's consideration of prior anticompetitive conduct of an applicant to determine whether an unconditional license for the nuclear facility would allow the applicant to "maintain" an anticompetitive situation. Id. at 1367-68. The court also affirmed the NRC's finding that the wholesale retail and coordination service markets represent separate markets which were dominated by the applicant and that the license would exacerbate the anticompetitive situation in each

market. Id. at 1369. Consequently, the court found that the NRC's imposition of antitrust conditions dealing separately with (1) the ability to purchase an ownership interest in the facility, and (2) access to the applicant's transmission facilities, was "not an abuse of nor beyond [the NRC's] delegated discretion." Thus, the court recognized that the cost attractiveness of nuclear power has nothing at all to do with the NRC's authority to impose antitrust conditions to ensure non-discriminatory access to an applicant's transmission facilities to use coordination and wheeling services.

Hence, NRC precedent undermines Edison's argument that the sole, lawful basis for the imposition of antitrust license conditions is the assumption that nuclear power is low cost.

C. THE EVENTS CITED BY EDISON DO NOT UNDERMINE THE CONCERNS UNDERLYING THE NRC'S DECISION TO IMPOSE THE ANTITRUST LICENSE CONDITIONS

In arguing that the key factor underlying the NRC's decision to impose the antitrust license conditions in this proceeding was the anticipated low cost of the nuclear power generated by the CAPCO plants, Edison points to statements in which the Licensing and Appeal Boards refer to the anticipated cost of the nuclear power.

Edison goes on to review the evidentiary record in the antitrust proceeding and points to certain evidence which purportedly reflects the expectation that nuclear power would be low cost base load power (App. 33-36).

Edison also notes other aspects of the CAPCO program as

presented to the NRC in the antitrust proceeding. These include the substantial scope of the proposed nuclear generation, the plan to build substantial transmission lines to transmit the nuclear power and the CAPCO pool arrangement to provide coordination services (App. 41-42).

But, again, Edison argues that "[t]he critical fact, however, for purposes of Section 105(c) review, and the fact at issue today, was the low cost of nuclear power" (App. 42).

Edison argues that, in view of subsequent events, the underlying basis for the imposition of the antitrust conditions -- the low cost of nuclear power -- has been nullified. As noted, Edison cites the (1) increased cost of nuclear power, (2) the shrunken CAPCO nuclear program resulting from the cancellation of Davis-Besse Units 2 and 3 and the indefinite suspension of Perry Unit 2, and (3) termination of the CAPCO pool.

However, Edison totally mischaracterizes the Licensing and Appeal Boards' reasons for imposing the antitrust license conditions and impact of the events it cites. As noted in the summary of the Boards' decisions, the Boards' concerns were not based on the assumption that nuclear power would be the cheapest source of base load power. Instead, the Boards were concerned about the way in which this new generation and the associated transmission facilities would heighten the Applicants' market power and the incentive to continue their pervasive anticompetitive conduct. The Licensing Board noted "the size of the five large generating stations involved in this license proceeding and the substantial contribution they will make to the resources of

the CAPCO pool and in particular to the satisfaction of its base load requirements" 5 NRC at 240. The Licensing Board recognized that, in view of the Applicants' pervasive and coordinated anticompetitive conduct, any new power generation by the Applicants would simply allow them to expand their market power to exclusively serve the increased demands of present customers and the demands of new customers. Moreover, the Licensing Board realized that the new generation would give the Applicants even greater incentive to prevent the CCCT utilities from purchasing power from alternative suppliers and to thereby ensure a market for the new generation.

The NRC's recognition that the anticipated cost of nuclear power, per se, was not the basis for the imposition of the antitrust license conditions is reflected in the Appeal Board's decision to reject Mr. Sharfman's proposal to restrict the scope of the conditions ensuring non-discriminatory access to coordination and wheeling services to customers purchasing nuclear power or ownership interests in the plants. 10 NRC at 290-294. The Appeal Board noted that this restriction would allow the Applicants to continue their anticompetitive conduct in connection with pooling and coordination services and to thereby undermine the competitive position of utilities which did not buy nuclear power. Id. at 291. That would be inconsistent with the clear "message" conveyed by Section 105 of the Act that "Congress did not want nuclear plants authorized in circumstances that would create or maintain anticompetitive situations without license conditions to address them", noted the Board. Id.

Therefore, the Appeal Board found that this restriction would be inconsistent with the NRC's broad mandate to impose antitrust conditions if the license activity would cause or continue situations inconsistent with antitrust requirements. Id. at 284.

Thus, the NRC was not looking at the relative cost of the nuclear power but at the competitive impact of the presence of a new and substantial baseload power generation source for the CAPCO members along with the associated new transmission facilities.

This concern applies with full force now. As noted, Perry Unit 1 and Davis-Besse Unit 1 are in full commercial operation and provide substantial base load power. Edison and the other Applicants have repeatedly indicated that the plants are important parts of their overall generating program and will remain in full commercial operation.

Likewise, the second factor reviewed by the Boards -- the impact of the construction of the transmission facilities associated with the plants -- had nothing to do with any assumptions about the relative cost of nuclear power as a source of base load power. The Licensing Board noted that the construction of extensive, high voltage transmission lines in conjunction with the nuclear plants would exacerbate the Applicants' exclusionary tactics regarding access to these facilities for wheeling and coordination services:

> . . . there is a direct tie between the generating station construction program and the transmission program which Applicants describe as complementing it. As described in CAPCO memoranda, far more is contemplated than the mere extension of a line

> from the site of the proposed nuclear station to the closest terminal of the Applicant in whose service area of [sic] the plant is to be located. Applicants are engaged in substantial planning studies and construction programs specifically intended to develop a plan for high voltage transmission at low cost among CAPCO members. There will be commingling, but the commingling will be on an extraordinary scale.

5 NRC at 239. That Board also noted that construction of the new lines would heighten the barriers to construction of other lines by the non-CAPCO utilities:

> Although access to transmission facilities is a necessary concomitant of reliable and economic energy production, small systems frequently find it infeasible to construct duplicative transmission facilities. Both economic and environmental considerations prevent such construction. Applicants' construction of the high voltage transmission grid necessitated in large part by the Davis-Besse and Perry plant additions, together with the existence of excess capacity on their present systems, render the construction of duplicative transmission lines essentially impossible.

citations omitted; 5 NRC at 156. At the same time, the Licensing Board noted that the new lines would facilitate even more extensive coordination services. Id. at 239-40. Thus, the Board recognized that construction of the new lines would exacerbate the adverse competitive impact of the Applicants' exclusionary policies. Id. That would exacerbate the anticompetitive situation. This concern about the impact of the construction of the new transmission lines had nothing at all to do with any assumptions about the cost of nuclear power.

This concern is fully applicable now. Several extensive, high voltage transmission lines have been constructed to connect the nuclear plants with the Applicants' transmission net-

work. These include at least four 345 kV transmission lines connecting Perry Unit 1 and the rest of the CAPCO transmission system69/ and at least one 345 kV line between Davis-Besse and Beaver Valley.70/ These new transmission lines have increased the scope of the transmission network owned and operated by the Applicants. Therefore, construction of these new lines heightens the cost efficiencies and the competitive advantage associated with access to these lines. Thus, these new facilities would exacerbate the anticompetitive impact of the exclusionary policies pursued by the Applicants prior to imposition of the antitrust conditions.

Indeed, the increased nuclear power costs cited by Edison increase the need for the antitrust conditions to prevent reemergence of the anticompetitive activities. Prior to the imposition of the antitrust conditions, the Applicants, including Edison, unlawfully refused to provide the wheeling services needed by their customers to purchase power from alternative suppliers. The need for access to such services in a competitive market is obviously heightened if the rates of the traditional supplier are higher than the rates of alternative suppliers.

The same analysis applies to the other events cited by

69/ "Long-Term Forecast Report -- Electric -- Submitted To The Public Utilities Commission Of Ohio, Forecast And Power Siting Division (May 15, 1987)", filed by Centerior Energy Corp. (Appendix L); CEI 1986 Annual Report (Form 1) filed with the Federal Energy Regulatory Commission (FERC), p. 216 (Account 107) (Appendix M); Edison's response to Regulatory Guide 9.3, item C (May 12, 1981) (Appendix N).

70/ Edison 1986 FERC Form 1, p. 422 (Appendix O).

Edison. As just shown, despite the reduced scope of the nuclear plant construction program, the Perry and Davis-Besse plants are in full commercial operation and produce substantial base load power. Hence, the Appeal Board's concern about the way which the new generation would motivate the Applicants to maintain their anticompetitive acts is still applicable even though not all five plants were built.

Likewise, these plants are tied to the new transmission lines. Consequently, the Boards'concern about the way an expanded transmission network would heighten the competitive harm of the Applicants' exclusionary policies still applies despite the reduced scope of the plant construction program.

The final event cited by Edison -- the termination of the CAPCO pool -- also does not undermine the Appeal Board's analysis. The Board found that both before and after establishment of the CAPCO pool, the Applicants denied competitors access to transmission facilities to preclude the other utilities from using the coordination and other services needed to compete effectively. The Board recognized that construction of the proposed facilities and the associated transmission facilities would heighten the Applicants' market power absent access to these services. Therefore, the Board ordered non-discriminatory access to coordination services to ensure that the utilities could compete effectively.

The purported termination of the CAPCO pool does not affect the Boards' analysis. Despite the termination of the pool, the Applicants' transmission facilities are still used and

needed for coordination serv r . Therefore, the importance of access to these services not changed. The antitrust conditions are <u>still</u> needed re that the Applicants do not revive their pervasive anticompetitive conduct which, again, terminated only because of the imposition of the antitrust conditions.

VII. CONCLUSION

For each of the foregoing reasons, Edison's application should be summarily dismissed or denied.

Respectfully submitted,

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February 19, 1988

APPENDIX A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	NRC Dkt. No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 & 2)	)	NRC Dkt. Nos. 50-440A 50-441A

ORDER MODIFYING ANTITRUST LICENSE CONDITION NO. 3
OF DAVIS-BESSE UNIT 1, LICENSE NO. NPF-3 AND PERRY
UNITS 1 AND 2, CPPR-148, CPPR-149

The Cleveland Electric Illuminating Company ("CEI") is the co-holder of an operating license for the Davis-Besse Unit 1 (License No. NPF-3) and a co-permittee of construction permits for Perry Units 1 and 2 (CPPR-148, CPPR-149) issued by the Nuclear Regulatory Commission ("NRC"). The Davis-Besse 1 operating license was issued on April 22, 1977. The Perry 1 and 2 construction permits were issued on May 3, 1977. CEI is also a co-applicant for construction permits for the Davis-Besse Units 2 & 3. An Atomic Safety and Licensing Board ordered inclusion of antitrust license conditions in the license and permits for the Davis-Besse and Perry units. Toledo Edison Co. & Cleveland Electric Illuminating Co., LBP-77-1, 5 NRC 133 (1977).

II

On January 4, 1978, the City of Cleveland ("City") requested the NRC to take enforcement action against CEI for violations of Antitrust License Condition No. 3 in its operating license and construction permits. By letter dated February 28, 1978, the Assistant Attorney General, Antitrust Division, advised the NRC of the Department of Justice's support for the City's request.

Operating License No. NPF-3 and Construction Permits CPPR-148 and CPPR-149 each contain antitrust conditions. Antitrust Condition No. 3 in each of these

licenses provides as follows:

"(3) Applicants shall engage in wheeling for and at the request of other entities in the CCCT:

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

b) of power generated by or available to the other entity, as a result of its ownership or entitlements 1/ 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 Applicants, the use of which will not jeopardize Applicants' system. In the event Applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effected until reductions of at least 5 percent have been made in transmission capacity allocations to other Applicants in these proceedings and thereafter shall be made in proportion to reductions imposed upon other Applicants to this proceeding. 2/

"Applicants shall make reasonable provisions for disclosed transmission requirements of other entities in the CCCT in planning future transmission either individually or within the CAPCO grouping. By "disclosed" is meant the giving of reasonable advance notification of future requirements by entities utilizing wheeling services to be made available by Applicants."

This license condition was ordered to be included in all the licenses involved by an Atomic Safety and Licensing Board that concluded, after a full evidentiary hearing, that the activities under the licenses of CEI (and others) violated each of the antitrust laws specified in Section 105a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135(a), 5 NRC 133 (January 6, 1977). The Licensing Board's decision is now on appeal before the Atomic Safety and Licensing Appeal Board.

"1/ Entitlement includes but is not limited to power made available to an entity pursuant to an exchange agreement." (Footnote in License Condition).

"2/ The objective of this requirement is to prevent the preemption of unused capacity on the lines of one Applicant by other Applicants or by entities the transmitting Applicant deems noncompetitive. Competitive entities are to be allowed opportunity to develop bulk power services options even if this results in reallocation of CAPCO (Central Area Power Coordination Group) transmission channels. This relief is required in order to avoid prolongation of the effects of Applicants' illegally sustained dominance." (Footnote in License Condition).

CEI's motion (filed with other Applicants) for a stay, pending appeal, of the ordered antitrust license conditions, including license condition No. 3, was denied by the Licensing Board, 5 NRC 452 (1977) and subsequently by the Appeal Board, 5 NRC 621, ALAB-385 (1977).

III

Upon receipt of the City's request for enforcement action, the NRC Staff undertook an investigation of CEI's recently filed transmission service schedule and wheeling policies. As a result of (i) the NRC Staff investigation, (ii) an analysis of the transmission service schedule filed by CEI with the Federal Energy Regulatory Commission on January 27, 1978, and (iii) a review of CEI's Answer of March 17, 1978 to the NRC Staff's questionnaire, the Acting Director of the Office of Nuclear Reactor Regulation on June 28, 1978 issued a Notice of Violation to CEI pursuant to 10 CFR §2.201 of the Commission's Rules of Practice. The Notice also stated that, _inter alia_, Civil Penalties would be considered in order to assure compliance. A copy of that Notice is attached hereto as Appendix A.[3/] On July 14, 1978, CEI responded to the Notice of Violation and generally denied that it had not complied with Antitrust License Condition No. 3 as set forth in the Notice.

Subsequently, Representatives of CEI, the City, and NRC Staff met on August 10, 1978, in an attempt to resolve problems concerning compliance identified in the Notice of Violation. At the meeting, CEI stated that many provisions of its January 27, 1978 transmission service schedule to which the City, NRC Staff, and Department of Justice objected were necessary because the transmission service schedule was meant to apply to the Combined CAPCO Company Territories (CCCT)

3/ Attached to the Notice of Violation as Appendix B was CEI's January 27, 1978 transmission tariff with suggested changes by the NRC Staff. Appendix B is also attached hereto.

rather than just the City. Since the City (and Painesville, Ohio) were the only entities located in CEI's service area, the Staff suggested that CEI draft a more specific transmission service schedule. On September 15, 1978, CEI submitted to the Staff a revised transmission schedule. As to the deficiencies found in the January 27, 1978 schedule, CEI drafted its new schedule so as to ameliorate some of the specific objections of the Staff and City. However, CEI's revised draft contained new anticompetitive restrictions which, in part, form the basis for this Order in that it shows CEI's intent not to comply with the license conditions. A copy of CEI's September 1978 transmission schedule is attached hereto as Appendix C. On November 28, 1978, the NRC Staff met with CEI and the City in a continuing effort to reach agreement or to narrow the issues concerning CEI's second draft transmission schedule. However, the participants were unable to agree or narrow the issues at this meeting.

IV

During the same time period that the NRC Staff was attempting to work out a mutually satisfactory transmission schedule with CEI, the Federal Energy Regulatory Commission (FERC) conducted its own inquiry of CEI's January 27, 1978 transmission schedule under FERC Docket No. ER-78-194. Evidentiary hearings were held by the FERC on December 19-20, 1978 and an Initial Decision (I.D.) was rendered by the Administrative Law Judge (ALJ) on April 27, 1979. The changes ordered by the ALJ to CEI's January 27, 1978 transmission schedule are attached hereto as Appendix D. While the ALJ noted that the FERC does not have jurisdiction to enforce NRC license conditions, the Initial Decision deals effectively with most items cited by the NRC Staff to be in violation of Antitrust License Condition No. 3. Those matters not completely covered by the FERC Initial Decision are listed as items 3 and 5 in the NRC Notice of Violation (See Appendix A).

Item 3 concerns the preemption of available transmission capacity by CEI. The FERC Administrative Law Judge said there was inadequate record

support to justify the NRC preemption requirement of a five percent reduction in transmission allocations to other CAPCO members before reducing such services to other entities. However, CEI in its separate negotiations with the NRC Staff and the FERC has expressed a willingness to comply with the NRC five percent preemption requirement.[4/] In view thereof, the NRC Staff has determined that CEI should file an amendment to the CEI transmission tariff as modified by the FERC Initial Decision to include the five percent reduction requirement set forth in Antitrust License Condition No. 3.

In Item 5 of the Notice of Violation, the Acting Director found unreasonable CEI's requirement of filing a separate supplemental schedule for each wheeling request. The FERC Administrative Law Judge noted at pages 23-25 of the Initial Decision that such a requirement in and of itself was not unreasonable under FERC filing requirements and that the filing of contracts governing wholesale service is mandated by Section 205(c) of the Federal Power Act. However, the Administrative Law Judge found that CEI's tariff language was redundant and unnecessarily complicated and could lead to unnecessary delays in providing a requested service. The Administrative Law Judge thereupon modified and simplified the language of the supplemental schedule requirement and allowed it to remain in the tariff. In view of the modifications and simplification of the tariff language, the NRC Staff is of the opinion that its concerns set forth in Item 5 of the Notice of Violation have been satisfied. Therefore, the NRC Staff will not object to the modified requirement of filing supplemental schedules for wheeling transactions.

4/ See The Cleveland Electric Illuminating Company, FERC Docket No. ER 78-194, Initial Decision on Proposed Transmission Tariff, Slip Op., p. 12, (April 27, 1979). Letter from William Bingham, Principal Rate Engineer, CEI, to Jerome Saltzman, Chief, Antitrust & Indemnity Group, Nuclear Reactor Regulation, dated March 17, 1978.

Another matter raised by the FERC Initial Decision pertains to wheeling of power for or among entities within the Combined CAPCO Company Territories (CCCT). Although the FERC Administrative Law Judge clarified the extent of the transmission service requirement with respect to the municipals and cooperatives within the CCCT, he did not include other entities or other delivery points as required by the NRC license conditions. NRC License Condition No. 3 requires CEI to wheel power for other entities in the CCCT from delivery points of applicants to the entities and to delivery points of applicants designated by the other entities. Further, entity is defined as any electric generation and/or distribution system or municipality or cooperative with a statutory right or privilege to engage in either of these functions. Thus, the NRC Staff has determined that the CEI should file an amendment to the CEI transmission tariff, as modified by the FERC Initial Decision, to expand the transmission services to include deliveries for all entities within the CCCT as required by Antitrust License Condition No. 3.

V

From the foregoing, the Staff has determined that CEI has been in noncompliance with Antitrust License Condition No. 3 of its operating license and construction permits at least since January 27, 1978, in that CEI has maintained and engaged in a policy and practice of noncompliance with Antitrust Condition No. 3 of its license and permits. CEI has approached its responsibility to file a wheeling schedule for the City as if it had not been required as a condition of its operating license and two construction permits to comply with Antitrust License Condition No. 3. In view of this, and the public interest, the Director of Nuclear Reactor Regulation has determined that, pursuant to 10 CFR §2.204, License No. NPF-3 and Construction Permit Nos. CPPR-148 and 149 shall be amended

effective immediately to require CEI to file a transmission tariffs ordered by the FERC (Appendix D) and an attached amendment thereto identified as Appendix E[5/] with the Federal Energy Regulatory Commission within twenty-five (25) days after the Order and so file this tariff in conformity with applicable FERC filing requirements.

Accordingly, pursuant to the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR Parts 2 and 50, IT IS HEREBY ORDERED THAT:

Antitrust License Condition No. 3 of License No. NPF-3 and Construction Permit Nos. CPPR-148 and 149 shall be amended with the following language added as paragraph (3)c):

> The Cleveland Electric Illuminating Company shall file within twenty-five (25) days of the Order of the Director of Nuclear Reactor Regulation dated June 25, 1979, the transmission service tariff and amendment attached as appendices D and E to the Order in conformity with the applicable filing requirements of the Federal Energy Regulatory Commission.

In view of the matters discussed herein, the Director of Nuclear Reactor Regulation has determined that the public interest requires this Order be made effective immediately, pending further order of the Commission.

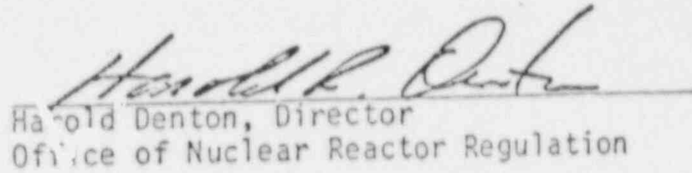
CEI may, within twenty (20) days after the receipt of this Order, request a hearing with respect to all or any part of this Amendment. However, any request for a hearing will not stay the immediate effectiveness of this Order. If a hearing is requested, the Commission will issue an Order designating the time and place of hearing. In the event a hearing is requested, the issues to be considered at such hearing shall be:

5/ Appendix E is CEI's January 27, 1978 draft transmission schedule as modified by the FERC on April 27, 1979 in Docket No. ER 78-194 and further modified by the NRC to implement requirements set forth in Antitrust License Condition No. 3.

(1) whether CEI has been in noncompliance with Antitrust License Condition No. 3 since January 27, 1978, the date it filed its first transmission tariff with FERC; and

(2) if so, whether this Order should be sustained.

FOR THE NUCLEAR REGULATORY COMMISSION



Harold Denton, Director
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland
this 25th day of June, 1979

Enclosures:
Appendices A-E

APPENDIX B

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 C

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.

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 D

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

622-9800, Ext. 2748
Or 623-1060 (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)

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 convictions 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. "Decisions 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-1980'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,

(more)

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.

(more)

"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 5900 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 new 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 charges will be reflected in earnings or rates.

(more)

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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APPENDIX E

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service.	))))))	Case No. 86-2025-EL-AIR

OPINION AND ORDER

The Commission, coming now to consider the above-entitled application filed pursuant to Section 4909.18, Revised Code; the Staff Report of Investigation issued pursuant to Section 4909.19, Revised Code; having appointed its attorney examiners, R. Russell Gooden and Paul J. Duffy, pursuant to Section 4901.18, Revised Code, to conduct a public hearing and to certify the record directly to the Commission; having reviewed the testimony and exhibits introduced into evidence at the public hearing commencing July 6, 1987 and concluding September 4, 1987; and being otherwise fully advised in the premises, hereby issues its Opinion and Order.

APPEARANCES:

Messrs. Alan D. Wright, Vice President - Governmental and Public Affairs, and Victor F. Greenslade, Vice President and General Counsel, Centerior Energy Corporation, P.O. Box 94661, Cleveland, Ohio 44101-4661; Messrs. Carl E. Chancellor, Secretary and General Counsel, and Craig I. Smith, Senior Corporate Counsel, The Cleveland Electric Illuminating Company, 55 Public Square, P.O. Box 5000, Cleveland, Ohio 44101, and Messrs. Squire, Sanders and Dempsey, by Messrs. Alan P. Buchmann, Richard W. McLaren, Jr., and Charles R. McElwee, II, 1800 Huntington Building, Cleveland, Ohio 44115, on behalf of the applicant, The Cleveland Electric Illuminating Company.

Mr. Anthony J. Celebrezze, Jr., Attorney General of Ohio, by Messrs. Robert S. Tongren, David C. Champion, James B. Gainer, Thomas W. McNamee, and Ms. Ann E. Henkener, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43266-0573, on behalf of the staff of the Public Utilities Commission of Ohio.

Mr. William A. Spratley, Consumers' Counsel, by Mmes. Beth Ann Burns, Victoria L. Mayhew, Evelyn R. Robinson, and Messrs. Michael McCord, Richard P. Rosenberry, and G. James Van Heyde, Associate Consumers' Counsel, 137 East State Street, Columbus, Ohio 43266-0550, on behalf of the residential customers of The Cleveland Electric Illuminating Company.

Messrs. Bell & Bentine, by Messrs. Langdon D. Bell and John W. Bentine and Ms. Judith B. Sanders, 33 South Grant Street,

the cost savings it claims would occur as a result of the affiliation. Mr. DeVore believes the company can evaluate the savings achieved in a manner similar to that used by the company originally to estimate the savings from the affiliation for the SEC (Staff Ex. 12, at 7). The Senior Citizens argue that the Commission should not allow recognition of the affiliation costs in rates until the company can establish the cost savings to the company's customers.

The Commission finds that before the company will be permitted to include the start-up and relocation costs associated with the formation of Centerior, it must provide the Commission with information of the achieved savings and benefits that have occurred to its customers from the affiliation. Until such time, the company will be permitted to defer these costs on its books until its next rate case. We are not persuaded by the company's argument that it is impossible to quantify the achieved savings because one cannot accurately compare the existing situation with what would have occurred if no affiliation had taken place. If the company could estimate, through a hypothetical situation, the savings to be achieved by the affiliation prior to its initiation, we fail to see why the company cannot quantify with some degree of reliability the cost savings it has achieved and the benefits received by its customers from the affiliation after the fact. Accordingly, the Commission will exclude the relocation and start-up cost associated with Centerior from operating expense in this proceeding. If the company wishes to include those costs in its next rate case, it should be prepared to quantify the achieved cost savings and benefits to its customers as recommended by the staff in this proceeding.

Perry Operating Revenue and Expense Adjustment:

Sections 4909.15(A)(4) and (B), Revised Code, require that the Commission, when fixing just and reasonable rates, shall determine the cost to the utility of rendering public utility service for the test period and that its determination of that cost shall be used to compute the gross annual revenues to which the utility is entitled. The applicant has proposed an adjustment of approximately $70 million to test year operating expenses to recognize that the costs of operating the Perry plant, which have been charged to a capital account during the test year, would be charged to expense accounts once the plant is placed in commercial operation by the company (CEI Ex. 1A, Sched. C-3.5; CEI Ex. 21). The staff recommended that the Perry operating revenue and expense effects be recognized in operating income if Perry reached 40% of its generating capacity by the end of the test year (S.R., at 12).

There appears to be little doubt that Perry was generating electricity during the test period and that it did reach 40% of its generating capacity during the test period, which ended July

31, 1987. Company witness Kaplan testified that Perry first exceeded the 40% level for a 24-hour period on May 18, 1987, and that it has exceeded that level for various periods of time since that date (CEI Ex. 26, at 3 and Attachment B). On June 30, 1987, while in test condition 6, the plant reached a level of 1,151 MW, or 96% net generation, and was operating at full reactor power. During the first six months of 1987, Perry generated 677 million kilowatt hours of electricity (Tr. II, 9-10). At the end of the test period, the Perry plant was still in test condition 6. Mr. Kaplan testified that test condition 6 would not be completed until mid-September. Following the completion of that test, he stated that the plant would proceed through test conditions 7 and 8, followed by a 100-hour warranty. Upon completion of the tests and the warranty run, the plant would be placed in commercial operation (Tr. II, 12). On November 20, 1987, CEI served a notice upon the Commission and all parties that the Perry plant had been placed into commercial operation on November 18, 1987.

The company's adjustment to recognize the expenses of operating the Perry plant during its first full year of commercial operation is based upon estimated operating and maintenance (O&M) expenses for the year following the date that the plant is placed in commercial operation. CEI's regular budgeting process was followed during the last quarter of 1986 to develop the Perry first-year operating budget (Tr. IV, 150; V, 14-17). Company witness Solanics explained that the work being performed at the plant during the last quarter of 1986 would be similar to the work performed when the plant became operational (Tr. IV, 150, 157, 189; Tr. V, 144). The applicant believes that the budget estimate is reliable because it was prepared by employees who were assigned to Perry during the budgeting process and because it was developed by the different operating units which are associated with the Perry plant (Tr. V, 14). Because costs similar to those included in the first-year Perry budget were incurred during the test period when Perry was generating electricity for the benefit of the company's customers, CEI argues that those test period costs should be normalized and included as test period expenses in this case.

The intervenors in this case argue that the Commission does not have the legal authority to grant the type of post-test-year adjustment requested by the company and the staff. They cite numerous cases in their briefs which they contend support their position that, in rate case proceedings, the Commission is not empowered to consider costs incurred by a utility subsequent to the test period. Intervenors contend that although the data submitted by the company is labeled "three months actual and nine months estimated," it is actually twelve months of estimated data. The company did not contest this point (Tr. IV, 121, 122). Further, various intervenors point out that the company has not expensed any Perry operating costs during the test period, but rather all costs associated with the Perry plant were capital-

ized. Certain intervenors have also argued that the company's fully forecasted cost data is unreliable, includes non-recurring start-up costs, and exceeds the operating costs of other comparable nuclear plants.

The company argues that it is merely transforming Perry costs that were capitalized during the test year into expense items to represent what will occur during the time that the rates approved in this case will be in effect. In support of its position, CEI cited Ohio Bell Telephone Company, Case No. 81-1433-TP-AIR (December 22, 1982), at 41, where the Commission allowed as test period operating expenses the station connection charges which had been capitalized costs during the test period. Although the case was appealed to the Ohio Supreme Court and reversed for the reason that the Commission failed to justify its inconsistency with an earlier Commission decision on the same subject, CEI argues that the Court did not reverse based upon the Commission's decision to allow the inclusion as test period expenses the costs which had previously been capitalized. The Commission justified its action in that case as follows:

> It is important to note that the Company actually incurred all of the expenses at issue during the test period. The added revenue requirement is not a result of recognizing certain additional costs, but of expensing these items rather than capitalizing them. The issue that we must decide is what treatment should be given known and measurable expenses, not what the expenses are. Thus, the argument set forth by OCC on the issue of post-test-year expense really misses the point. These are not post-test-year expenses. They are known and measurable expenses that were booked during the test year. (Emphasis added.)

The company has also cited Bd. of Commrs. v. Pub. Util. Comm., 1 Ohio St. 3d 125 (1982), in support of its argument that the costs incurred by the company in operating the Perry plant during the test period should be normalized. In that case the Commission allowed, and the Ohio Supreme Court affirmed, a post-test-year inclusion of line clearing costs because of the danger of power outages and safety hazards and because the Commission ordered Dayton Power and Light Company to clear the lines. The court found in that case, as it had in others, that, "in certain circumstances, inclusion of costs not incurred in the test year is proper." The tree trimming costs would be incurred in the period when the rates would be in effect and thus the Commission, and the court, found it appropriate that the costs be normalized. Similarly, in this case, the company contends that the costs not only will be incurred in the future, but also were

incurred during the test period, and thus it is appropriate that they be normalized.

In response to OCC's contention that Bd. of Commrs. is not applicable and that the Commission should not create a new exception to the rule against post-test-year expense adjustments, CEI argues that what it is proposing that the Commission authorize in this case is not an exception to existing ratemaking principles. The company contends that the Commission has previously recognized and normalized operating expenses for a new generating unit which was generating electricity during the test period, but was not used and useful as of the date certain. See Cleveland Electric Illuminating Company, Case No. 80-376-EL-AIR (May 10, 1981), at 29. In that case, the Commission approved a normalization adjustment to include the expenses associated with operating the Bruce Mansfield Plant, Unit No. 3, which was placed into service during the test period, but after the date certain in the case. The adjustment was made to recognize the major change in the company's plant in service and the impact it had upon operating income. The Commission did not extend its ruling to other minor projects because it found that, unless the impact of the addition was significant, it would violate the test year concept to make adjustments for every addition to plant in service.

The Commission finds that the recognition of the Perry operating revenues and expenses is proper in this case. The Perry plant did generate substantial amounts of electricity during the test period and the company has incurred substantial costs in generating that electricity. The Commission agrees with the company that those costs should be normalized and recognized for rate making purposes in this case. If we fail to include those costs in rates at this time, they will either not be recovered by the company or they will be deferred and be recovered from future ratepayers. Inasmuch as the costs are being incurred for the benefit of the company's existing customers, then it is appropriate that those customers bear the costs.

The fact that the costs were capitalized on the company's books during the test period, rather than expensed, does not preclude their inclusion in test period operating expenses, as the intervenors contend. The company has established that the level of costs capitalized during the test period would be comparable to the level of expense incurred during the first year that the plant is in commercial operation. Because the level of expense is seemingly both known and measurable, in addition to being comparable to the level of expense that was booked during the test period, as in Ohio Bell, supra, it is only appropriate that the costs be normalized and included as test period expenses because we are setting rates for a prospective period and the company will be actually expensing all such costs on its books during the time that these rates will be in effect. We do not

APPENDIX F

Avon Lake capacity cut as CEI retires generator

By DAVID PRIZINSKY

Cleveland Electric Illuminating Co. has reduced the operating capacity of its Avon Lake power plant by about 20% with the decommissioning late last month of one 233-megawatt unit at the coal-fired generating station.

The move reduced the Avon Lake plant from four to three operating units, including Avon No. 9, a 680-megawatt unit. Two smaller units also remain in operation with a capacity of 86 megawatts each. The company keeps an additional unit on standby; four, 40-megawatt units were decommissioned in 1983, and a another unit is mothballed.

Steve Lorton, a spokesman for Centerior Energy Corp., which owns CEI, said the plant's No. 8 unit was taken out of service to avoid $4 million in maintenance costs this year and because the company now has access to nuclear power from the Perry plant in Lake County and the Beaver Valley plant in Pennsylvania.

CEI doesn't expect to decommission any additional units over the near term, Mr. Lorton said.

CEI owns 31% of Perry and 24% of Beaver Valley. The two nuclear plants began producing electricity in November. CEI now has access to 375 megawatts at Perry and 204 megawatts at Beaver Valley.

The Avon Lake unit went into operation in 1959. Mr. Lorton said that it was designed as a prototype unit and incurred more than its share of maintenance costs over the years.

Mr. Lorton said Avon No. 8 was probably the least cost-efficient unit in the company's system, which includes coal-burning plants in Cleveland, Ashtabula, Eastlake and Avon Lake, as well as interests in three nu-

See AVON, Page 22

...Avon

continued from PAGE 3

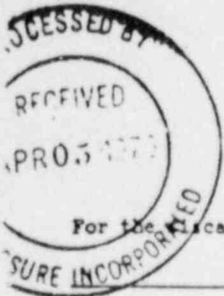
clear plants and a coal-burning plant in Pennsylvania.

Mr. Lorton said the Avon Lake action would have no impact on utility rates, and that no layoffs are expected as a result of the move. In late December, the company received approval for a two-step, 2.2% rate hike; a 1.7% increase was immediate, and the remainder will go into effect over the next 18 months.

The closing of Avon No. 8 didn't come as a surprise to Douglas Fox, associate vice president of McDonald & Co. Securities, a local brokerage firm.

"The company has been saying for about four to five years that it intends to decommission some of its older units," Mr. Fox said.

APPENDIX G



SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

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FORM 10-K

S.E.C. Recd
Apr. 3, 1979

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1978 Commission File Number 1-2578

OHIO EDISON COMPANY
(Exact name of registrant as specified in its charter)

Ohio	34-0437786
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
76 South Main Street, Akron, Ohio	44308
(Address of principal executive office)	(Zip Code)

Registrant's telephone number, including area code (216) 384-5100

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
Common Stock, $9 par value	New York Stock Exchange Midwest Stock Exchange
Cumulative Preferred Stock $100 par value 3.90% Series 4.40% Series 4.44% Series 4.56% Series 7.24% Series 7.36% Series 8.20% Series 10.76% Series 10.48% Series 8.64% Series 9.12% Series	New York Stock Exchange and Midwest Stock Exchange
First Mortgage Bonds 9-1/2% Series due 2008 8-3/8% Series due 2007 8-1/2% Series due 2006 9-1/2% Series due 2006 10 % Series due 1981 2-7/8% Series due 1980	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act:

None

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes x . No ____.

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the close of the period covered by this report.

Class	Outstanding at December 31, 1978
Common Stock, $9 par value	52,120,230 Shares

ITEM 3. PROPERTIES

The Company owns 9 coal-fired generating plants which, together with the capacity of one coal-fired plant (the New Castle Plant) owned by Pennsylvania, have a total net demonstrated capability of 3,504,000 kw. The Company and Pennsylvania also own oil-fired generating units having a net demonstrated capability of 423,000 kw. Together with one or more of the other CAPCO companies, the Company and Pennsylvania own, as tenants in common: Sammis Unit No. 7, a coal-fired generating unit at Stratton, Ohio, which has a net demonstrated capability of 650,000 kw. and which went into commercial operation in 1971; Bruce Mansfield Unit No. 1, a coal-fired generating unit with a net demonstrated capability of 825,000 kw., which went into full commercial operation in June 1976; Bruce Mansfield Unit No. 2, an 825,000 kw. coal-fired generating unit which went into full commercial operation on October 1, 1977; and Beaver Valley Unit No. 1, a nuclear unit which has full demonstrated reactor capability of 810,000 kw. and which went into full reactor commercial operation on April 30, 1977. With their ownership interest in Sammis Unit No. 7 (aggregating 447,200 kw.), Bruce Mansfield Units Nos. 1 and 2 (aggregating 909,800 kw.) and Beaver Valley Unit No. 1 (aggregating 425,250 kw.), the total capacity owned by the Company and Pennsylvania as of December 31, 1978 was 5,709,250 kw. (See "Item 1 - Business-CAPCO Program" regarding other capacity and energy entitlements.) There is also available to the Company under conditions existing at the date of this Form 10-K approximately 86,000 kw. of power under contracts with other utilities. For a description of arrangements involving Ohio Valley Electric Corporation ("OVEC"), see Note (2) of Notes to Consolidated Financial Statements.

Beaver Valley Unit No. 1 was taken out of service March 9, 1979 and, pursuant to order of the Nuclear Regulatory Commission ("NRC"), will remain out of service pending a reanalysis of the adequacy of safety-related pipe and pipe supports should an earthquake occur. Moreover, the length of the study and the length of the outage is not determinable at this time. The cost of purchased power required because of the outage of the unit, having taken into account the unavailability of other units during the period in question, averaged approximately $20,000 per day during the period from March 9, 1979 to March 31, 1979 of which approximately $4,000 relates to costs attributable to Pennsylvania, but the Company cannot predict that such costs will remain at that level. Due to seasonal variations the load during this period was at a leval substantially lower than that which can occur in subsequent months. In the future, fluctuations in load and the availability of other units will affect the amounts of power the Company must purchase as a result of the outage of Beaver Valley Unit No. 1 and the costs thereof will depend on the rates associated with the source and classification of power that is available when purchases are required.

The CAPCO companies, as further discussed under "Item 1 - Business-CAPCO Program", have undertaken a program for the joint development of power generation and transmission facilities. All of the major additions to the generating capacity of the Company and Pennsylvania presently planned or being constructed are a part of this program as shown below. On November 15, 1978, the CAPCO companies, citing present economic, environmental and regulatory uncertainties, together with reduced load forecasts, announced the deferral of construction schedules for three generating units and the commencement of detailed studies with respect to four other units. Perry Unit No. 1 will be deferred 16 months; Perry Unit No. 2 will be deferred 22 months; and Beaver Valley Unit No. 2 will be deferred 24 months. The status of Davis-Besse Units Nos. 2 and 3 and Erie Units Nos. 1 and 2 is uncertain pending completion of studies, but it is currently contemplated that these units may be delayed by an average of three years. These studies will address certain of the CAPCO capacity planning concepts and will develop a definitive program with respect to these four units. The resultant completion dates and estimated total cost are reflected in the table below:

Site (a)	Type	Capability (b)	Estimated In-Service Date	Estimated Total Cost to the Companies (c)	Estimated Total Cost per Kilowatt (c)	Companies as of December 31, 1978
Beaver Valley Station, Unit 2, in Shippingport, Pa.	Nuclear	833 MW-initial 862 MW-ultimate	1984	$ 590,836,000	$1,636.66	$214,682,000
Davis-Besse Station, Units 2 and 3, in Ottawa County, Ohio	Nuclear	906 MW each	Unit 2 - 1988 Unit 3 - 1990	$1,452,364,000	$1,911.01	$ 45,742,000
Bruce Mansfield Plant, Unit 3, in Shippingport, Pa.	Coal-fired	825 MW	1980	$ 247,460,000	$ 715.20	$166,007,000
Perry Plant, Units 1 and 2, in North Perry Village, Ohio	Nuclear	1,205 MW each	Unit 1 - 1983 Unit 2 - 1985	$1,024,076,000	$1,013.94	$290,772,000
Erie Nuclear Plant, Units 1 and 2, in Berlin Heights, Ohio	Nuclear	1,260 MW each	Unit 1 - 1989 Unit 2 - 1991	$1,598,049,000	$1,513.30	$ 35,587,000
				$4,912,785,000		$752,790,000

(a) With the exception of Beaver Valley Unit 2, in which Pennsylvania no longer has any interest, the Company and Pennsylvania will have undivided interests as tenants in common with one or more of the other CAPCO companies in each of the units listed above. Except for Beaver Valley Unit 2, their interests will be 35.6% and 6.28%, respectively. With respect to Beaver Valley Unit 2, the Company's interest is 41.88%.

(b) The rights of the owners of the various units to the energy produced by such units are subject to the capacity and energy entitlements described under "Item 1 - Business-CAPCO Program". See "Item 1 - Business-Environmental Matters" with respect to the effect on capability that the pollution control equipment presently being installed at the Bruce Mansfield Plant will have.

(c) The costs listed do not include the cost of fuel for the nuclear plants ("Item 1 - Business-Fuel Supply") not do they include the costs ($28,033,000 of which $1,266,000 was spent prior to 1979 and $1,146,000 has been or will be expended during 1979) of step-up transformers associated with the various units (except units at the Perry Plant) and related equipment necessary to provide connection to the system. The listed costs do include costs in connection with the air and water pollution control equipment presently known to be required.

APPENDIX H

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF
THE SECURITIES EXCHANGE ACT OF 1934

FOR THE FISCAL YEAR ENDED DECEMBER 31, 1984 COMMISSION FILE NUMBER 1-2578

OHIO EDISON COMPANY

(EXACT NAME OF REGISTRANT AS SPECIFIED IN ITS CHARTER)

OHIO	34-0437786
(STATE OR OTHER JURISDICTION OF INCORPORATION OR ORGANIZATION)	(I.R.S. EMPLOYER IDENTIFICATION NO.)

76 SOUTH MAIN STREET, AKRON, OHIO 44308
(ADDRESS OF PRINCIPAL EXECUTIVE OFFICE) (ZIP CODE)

REGISTRANT'S TELEPHONE NUMBER, INCLUDING AREA CODE: (216) 384-5100
SECURITIES REGISTERED PURSUANT TO
SECTION 12(B) OF THE ACT:

TITLE OF EACH CLASS	NAME OF EACH EXCHANGE ON WHICH REGISTERED
Common Stock, $9 par value	New York Stock Exchange Midwest Stock Exchange
Cumulative Preference Stock, no par value	
$1.80 Series	New York Stock Exchange
$3.92 Series	New York Stock Exchange
Cumulative Preferred Stock, $100 par value 3.90% Series 8.20% Series 4.40% Series 10.76% Series 4.44% Series 10.48% Series 4.56% Series 8.64% Series 7.24% Series 9.12% Series 7.36% Series	All series registered on New York Stock Exchange and Midwest Stock Exchange
Cumulative Class A Preferred Stock, $25 par value	
$3.50 Series	New York Stock Exchange
Convertible Adjustable -- Series A	New York Stock Exchange
First Mortgage Bonds 11-7/8% Series due 2010 8-1/2% Series due 2006 15-1/2% Series due 2010 9-1/2% Series due 2006 9-1/2% Series due 2008 15-1/4% Series due 1987 8-3/8% Series due 2007	All series registered on New York Stock Exchange

SECURITIES REGISTERED PURSUANT TO SECTION 12(G) OF THE ACT: None

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days:
Yes X No

State the aggregate market value of the voting stock held by non-affiliates of the registrant: $1,653,141,474 as of January 31, 1985

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date:

CLASS	OUTSTANDING AT MARCH 7, 1985
Common Stock, $9 par value	123,879,292

Documents incorporated by reference (to the extent indicated herein):

DOCUMENT	PART OF FORM 10-K INTO WHICH DOCUMENT IS INCORPORATED
Annual Report to Stockholders for the fiscal year ended December 31, 1984 (Pages 18-37)	Part II
(Page 39)	Part I
Proxy Statement for 1985 Annual Meeting of Stockholders to be held April 25, 1985	Part III

A number of safety modifications required by the NRC to be made on all nuclear units operating in the United States have been completed at Beaver Valley Unit No. 1, in addition to routine maintenance work and equipment inspections in connection with a scheduled refueling outage of the unit which began on October 11, 1984 and ended January 5, 1985. The currently estimated cost of anticipated remaining modifications is included in the Companies' construction program (see "Financing and Construction Program").

The construction and operation of nuclear generating units are subject to the regulatory jurisdiction of the NRC including the issuance by it of construction permits and operating licenses. The NRC's procedures with respect to application for construction permits and operating licenses afford opportunities for interested parties to request public hearings on health, safety, environmental and antitrust issues. In this connection, the NRC may require substantial changes in proposed operation or the installation of additional equipment to meet safety or environmental standards with consequent delay and added costs and the possibility exists for denial of licenses or permits. The construction permits for Beaver Valley Unit No. 2 and for Perry Units Nos. 1 and 2 have been issued, and a full power operating license for Beaver Valley Unit No. 1 was issued on July 1, 1976. See "Item 2. Properties" for a description of the status of the application for a full power operating license for Perry Unit No. 1.

In September 1983, the Ohio Office of Consumer's Counsel, The City of Cleveland, the Board of County Commissioners of Geauga County, Ohio and three local public interest corporations filed a petition with the PUCO and the Ohio Power Siting Board (the "OPSB") requesting that each of those bodies investigate the public need for the construction of Unit No. 2 at the Perry Plant. The petition alleges that completion of Unit No. 2 will result in an undesirable and unreasonable level of excess capacity for each of the Ohio utilities in CAPCO and that the rates charged or proposed to be charged by those companies will therefore be unjust, unreasonable and unjustly discriminatory. The petition asks that construction of Unit No. 2 be halted and that no further AFUDC be accrued with respect to that Unit (approximately $3,600,000 of AFUDC is currently being accrued monthly by the Companies and that amount will gradually increase each month as construction continues). The petition further requests a declaration be issued stating that the issuance of securities, the proceeds of which will be used to finance construction of Unit No. 2, will not be approved. The Company is contesting the petition. In another proceeding, the OPSB has denied a request to delay hearings on the siting of the Perry-Hanna transmission line, which will serve Unit No. 2, until the PUCO completes its investigation of Unit No. 2.

The CAPCO companies are continuing to review the status of Perry Unit No. 2. Until this review has been completed, there will be no defined schedule for the completion of Unit No. 2. Possible alternatives being reviewed with respect to Unit No. 2 include temporary cessation of work on the Unit and termination of the Unit. In accordance with the CAPCO Agreement, none of these alternatives may be implemented without the approval of each of the CAPCO companies. Presently, the only significant work being performed on Unit No. 2 is that necessary to enable Perry Unit No. 1 to be placed in service. This work is expected to be completed sometime in 1985. Under those circumstances it is not likely to be appropriate to continue capitalizing AFUDC (as described in Note 1 of Notes to Consolidated Financial Statements) to Unit No. 2. Accordingly, if the CAPCO companies do not decide to resume significant construction, the Companies do not expect to be able to include this AFUDC in net income. Instead, a reserve would be provided for AFUDC capitalized to Unit No. 2 prospectively. This would not affect cash flow but

it would cause a corresponding reduction in net income.

As of December 31, 1984, the Company and Penn Power had invested approximately $348,700,000 and $57,300,000, respectively, applicable to Perry Unit No. 2. Delays in the completion of the Unit can be expected to increase its total cost by amounts which are not presently determinable. If a decision were made to terminate Unit No. 2, certain costs which are currently assigned to Unit No. 2 would be reassigned, where appropriate, to Unit No. 1. However, cancellation charges payable to contractors and other costs of termination could be incurred. Pending completion of the CAPCO review, the Company is unable to predict whether the construction on Perry Unit No. 2 will continue or, if continued, on what basis such continuation will proceed. If construction of Perry Unit No. 2 is terminated, the Company would seek to recover its investment as it is presently doing with respect to previously terminated units (see "CAPCO Program") but cannot now predict whether its investment in Perry Unit No. 2 applicable to its PUCO jurisdictional customers will be recoverable. If no means of recovery of the costs of Unit No. 2, in the case of termination, were available to the Company from its PUCO jurisdictional customers and no other basis for recovery could be found or anticipated, the Company would be required to write off the portion of its investment applicable to its PUCO jurisdictional customers. Based upon the Company's investment in Unit No. 2 as of December 31, 1984, the Company estimates that this write-off could be in the range of $205,000,000, net of income tax effect. The Company

APPENDIX I

funding for government programs that have not received FY-85 funding yet through separately enacted appropriations bills. That continuing resolution will be taken up by Congress before it adjourns in early October. An amendment to increase funding for the IAEA is expected to be offered, at least in the Senate, sources say.

The U.S.'s voluntary contribution goes primarily to the IAEA's technical assistance and cooperation fund and to the program of technical assistance to safeguards. Money also goes to pay for such things as fellowships for foreign specialists studying in the U.S. and other technical assistance projects, the so-called footnote A projects, which are not funded through the IAEA's regular program but which are judged to have technical merit).

A reduction in funding in the U.S.'s voluntary contribution would, says the administration, "seriously undermine U.S. efforts to put forth a positive record of compliance with Article IV of the Nonproliferation Treaty (NPT)," which calls for cooperation with nonnuclear weapons states in exchange for their agreement not to acquire nuclear weapons. This funding is particularly important at this time, says the administration, because of the NPT review conference scheduled for 1985. "Clearly, a cut in our technical assistance in this preparatory period would seriously impair the credibility of U.S. declaratory policies in support of the NPT and make it more difficult to promote a constructive outcome to the review conference," the administration says.

COST ESTIMATE REVISED FOR CLEVELAND ELECTRIC'S PERRY-1

Cleveland Electric Illuminating Co. (CEI) has revised its cost estimate for completion of Perry-1 to $3.94-billion from $3.47-billion. Utility sources said that the total estimated cash construction cost of Perry-1 had been raised to $2.76-billion from $2.4-billion. In addition, they estimated an increase in the allowance for funds used during construction to $1.18-billion from $1.07-billion.

Utility sources said that the revised estimate included $218-million for additional construction costs and $147-million for costs previously budgeted for Perry-2 or for facilities common to both units. They said that the costs of common facilities such as fuel handling equipment and emergency diesel generators had been reassigned to Perry-1 on advice from the company's auditors. A utility spokesman said that Price Waterhouse had recently completed a four-month review of the project's costs to determine where certain expenses should be properly assigned.

The reapportionment of costs has fueled speculation that the utility will eventually cancel Perry-2; however, the company spokesman denied that there was any connection between the two. He said that the company was considering four options for Perry-2, which include cancellation, but he denied suggestions that any decision would be made soon. Construction at Perry-2, which is 44% complete, was virtually stopped in April, but the company said that its completion schedule and budget are still "under review." The spokesman said that a decision on the future of Perry-2 would be made "sometime between now and the completion of unit 1." The company has estimated that Perry-1, which is 95% complete, will begin commercial operation by the end of 1985. They emphasized that "absolutely no" changes have been made in the schedule for Perry-1.

Standard & Poor's Corp. said that it is reviewing the debt ratings of CEI and the four other utilities in the Central Area Power Coordination Group (CAPCO), which own the Perry plant. An S&P analyst said that the review was initiated after CEI announced its estimated cost increases last week, because of the "substantial financial stress" incurred by simultaneous construction of three nuclear units. The CAPCO utilities are also building Beaver Valley-1 and -2.

Each Perry unit is a 1,205-megawatt BWR. The architect-engineer at Perry is Gilbert-Commonwealth.

RESPONSE TO SEAL TABLE LEAK AT TROJAN RAISES EYEBROWS AT NRC

Utility response to a reactor coolant leak found in the seal table room at Portland General Electric Co.'s Trojan last week while the unit was at an elevated pressure and temperature has NRC raising questions about whether the response was proper. While there is a "world of difference between this incident and what happened at Sequoyah," where the Tennessee Valley Authority's (TVA) plant staff tried to perform seal table maintenance while the unit was at 30% power (NW, 23 Aug., Special Issue), NRC sources said that workers at Trojan "probably should not have done what they did."

While the plant was returning to service after a refueling outage, a leak was observed in the seal table room at Trojan. Workers determined that it was being caused by an improperly seated compression fitting and attempted to fix it. The reactor continued to operate at 2,235 pounds per square inch, and the coolant temperature remained at 550 degrees F. while workers attempted to adjust the fitting. In their attempts, however, workers ended up loosening the two bolts and bracket that functioned as the primary support devices holding the fitting in place. As a result, the entire fitting broke off, causing

APPENDIX J

APPENDIX J

DELAYS IN CONSTRUCTION OF, AND CANCELLATIONS OF, THE CAPCO NUCLEAR PLANTS

November 15, 1978 -- CAPCO announces deferral all of construction schedules for three plants: (1) Perry Unit 1 (16 month delay to 1983), (2) Perry Unit 2 (22 month delay to 1985), and (3) Beaver Valley Unit 2 (24 month delay). CAPCO says that "[t]he status of Davis-Besse Units Nos. 2 and 3 and Erie Units Nos. 1 and 2 is uncertain pending completion of studies, but it is currently contemplated that these units may be delayed by an average of three years." (Edison 1978 Form 10-K, p. 37, reproduced in Appendix G).

January 22, 1980 -- CAPCO announces termination of plans to construct Davis-Besse Units 2 and 3 and Erie Units 1 and 2. Construction of three plants is delayed: (1) Perry Unit 1 (12 months to May 1984) (2) Perry Unit 2 (36 months to May 1988), and (3) Beaver Valley Unit 2 (24 months to May 1986). CAPCO says that "[t]he political and regulatory uncertainties affecting the future construction of nuclear plants has intensified following the [1977] accident at Three Mile Island". CAPCO also points to the dramatic decrease in projected growth rate of demand for electricity "attribut[able] mainly to a showdown in industrial growth, the increased availability of natural gas in the CEI service area, and conservation efforts by customers." (CAPCO January 23, 1980 news release, reproduced in Appendix D).

March 8, 1983 -- CEI announces "a delay of up to 12 months in the fuel load date of Unit #1 of the Perry generating plant." (CEI press release, reproduced in Appendix C).

May 1983 -- CEI reschedules Perry Unit 1 fuel load date to May 1985 (Public Utilities Commission of Ohio, "Comprehensive Assessment Of The Perry Nuclear Power Plant", study prepared for PUCO by Touche Ross, The Nielsen-Wurster Group and Chapman & Associates ("PUCO Study"), vol. I, p. III-11 (1986)).

February 1984	--	CEI announces delay in completion of construction of Perry Unit 1 to May 1985 (PUCO Study, vol. I, p. III-[illegible])
April 1984	--	Construction of Perry Unit 2, which was 44 percent complete, is terminated and indefinitely suspended. CEI says that the status of plant is under review. (Ohio Edison 1985 Form 10-K, p. 6, reproduced in Appendix P).

APPENDIX K

being nuclear). This in turn will make possible the generation, transmission, and utilization of all energy without polluting soil, water, and air.

It will solve the problem of the utilization of the three great AEC national laboratories. With these much enlarged terms of reference, they will no longer need to carry out their divagations into strange areas of public health, education, agronomics, transportation, urbanization, etc. They will have a major task in rationalizing our energy economy.

With broadened authority, the JCAE and the AEC would be responsible for guiding and reviewing the country's energy planning, energy research, energy conversion and transportation, and energy utilization. Review and remodeling of the entire decision-making process with respect to energy in the governmental and private sectors is required. At a time when our requirements are rapidly accelerating, the decision-making process is being extended rather than shortened. This reflects the many institutional interests which call for balancing and resolution. Failure to balance or irresolution helps no one.

TABLE 1.—NUCLEAR VERSUS COAL-GENERATED ELECTRIC ENERGY AS OF JULY 1, 1969 FOR COMPLETION (NUCLEAR, 1976—FOSSIL, 1975)

	At 14 percent, 7,000 hours per year		At 16 percent, 6,570 hours per year	
	Nuclear	Coal	Nuclear	Coal
Fixed charges per year	$28.50	$23.88	$32.56	$27.30
Fixed charges, mills per kw.-hr	4.07	3.41	4.95	4.16
Fuel charges, mills per kw.-hr	1.70	[1] 2.19	1.70	[1] 2.19
Operating and maintenance, mills per kw.-hr	.30	.30	.30	.30
Insurance, mills per kw.-hr	.10		.11	
Total switchboard cost, mills per kw.-hr	6.17	5.90	7.06	6.65
Nuclear competitive at 8750	[2] 28.1		[2] 29.7	

[1] At 25 cents.
[2] Cents per million B.t.u.

Note: Capital cost—1,100 MW nuclear, $203.5 per kw.; 800 MW coal, 170.6 per kw.

TABLE 2.—GROWTH IN DEMAND AND IN GENERATING CAPABILITY, ELECTRIC UTILITY INDUSTRY

Year	Growth in demand (percent)	Generating capability $MW \times 10^3$	Capacity to be ordered on basis of 8-percent growth $MW \times 10^3$	Actually ordered $MW \times 10^3$
1960	[1] 6.7	170.6		
1961	4.8	184.7		
1962	5.5	193.6		
1963	6.7	205.3		
1964	[2] 9.7	216.5		
1965	6.4	[3] 228.9	18.15	21.94
1966	9.2	240.7	19.15	42.57
1967	4.9	257.95	20.6	58.78
1968	11.6	[illegible]	22.2	39.40
1969	10.1	[4] 300.0	24.0	[5] 32.46
Total	73.6		104.1	195.15
Average	7.4			104.10
Say	8			91.05×10^3 MW excess capacity

[1] December peak.
[2] Summer peak.
[3] Noncoincident summer peak 186,300 MW. Reserve available, 23.0 percent.
[4] Estimated.
[5] Figures available as of Dec. 2, 1969.

Source: Edison Electric Institute Statistical Yearbook for 1968.

APPENDIX L

LONG-TERM FORECAST REPORT

ELECTRIC

SUBMITTED TO

THE PUBLIC UTILITIES COMMISSION OF OHIO

FORECASTING AND POWER SITING DIVISION

May 15, 1987

By: Centerior Energy Corporation
6200 Oak Tree Blvd.
Independence, Ohio 44131
Telephone: (216) 447-3100

Mail Address:
P.O. Box 94661
Cleveland, Ohio 44101-4661

Fred J. Lange, Jr.
Assistant General Counsel
Centerior Energy Corporation
P.O. Box 94661
Cleveland, Ohio 44101-4661
Telephone: (216) 447-3248

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
ODOE FORM FE3-1: CHARACTERISTICS OF EXISTING TRANSMISSION LINES

Transmission Line No.	Transmission Line Name	Point of Origin and Terminus	Voltage (kV) Operating Level	Voltage (kV) Design Level	Right-of-Way Length (Miles)	Type of Supporting Structure	Number of Circuits	Substation Names on the Line
I.	Avon-Beaver (Ohio Edison)	Avon 345 kV Station - Point of Interconnection with Ohio Edison, Sheffield Township	345	345	6.4	S.C.T.	1	
II.	Juniper-Star (Ohio Edison)	Juniper Substation - Point of Interconnection with Ohio Edison, Richfield Township	345	345	0.6 1.5 9.2	D.C.T. S.C.T. D.C. H-Frame	1	
III.	Juniper-Canton (Ohio Power)	Juniper Substation - Point of Interconnection with Ohio Power, Osnaburg Township	345	345	54.6	S.C.T.	1	Hanna-Ohio Edison Station
IV.	Ashtabula-Erie West (Penelec)	Ashtabula 345 kV Station - Interconnection Point with Pennsylvania Electric Co., Ohio-Penn State Line	345	345	14.9	S.C.T.	1	
V.	Perry-Eastlake	Perry Station - Eastlake 345 kV Station	345	345	17.9 2.6	S.C.T. D.C.T.	1	
VI.	Juniper-Eastlake	Juniper Substation - Eastlake 345 kV Station	345	345	30.8 6.1	S.C.T. D.C.T.	1	
VII.	Avon-Juniper Line	Avon 345 kV Station - Juniper Substation	345	345	1.0 12.9 20.9 9.2	D.C.T. D.C. H-Frame D.C.P. H-Frame S.C.T.	1	
VIII.	Harding Supply	Juniper Substation - Harding Substation	345	345	0.9 2.1 5.0	D.C.T. D.C. H-Frame D.C.P.	2	

1551:1-1-03(E)(1)(a)

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

ODOE FORM FE3-1: CHARACTERISTICS OF EXISTING TRANSMISSION LINES

Transmission Line No.	Transmission Line Name	Point of Origin and Terminus	Voltage (kV) Operating Level	Voltage (kV) Design Level	Right-of-Way Length (Miles)	Type of Supporting Structure	Number of Circuits	Substation Names on the Line
IX.	Harding-Fox Line	Harding Substation - Fox Substation	345	345	5.1 0.1	D.C.P. D.C.T.	2	
X.	Galaxie Supply	Fowles Substation - Galaxie Substation	132	132 345	1.8 11.8	D.C. H-Frame D.C.P. H-Frame	2nd Circuit	
XI.	Avon-Beaver (OE) Line	Avon 345 kV Station - Point of Interconnection with OE Avon-Beaver ROW, Lorain County	345	345	3.6	D.C. H-Frame	2nd Circuit	
XII.	Perry-Macedonia-Inland Line	Perry Station - Inland Substation	345	345	43.8 11.4	D.C.T. D.C.S.P.	2	
XIII.	Inland-Harding Line	Point on Perry-Macedonia-Inland Line - Harding Substation	345	345	1.3 0.2 0.1	D.C.S.P. D.C. 2P Structure D.C.T.	2	
XIV.	Perry-Ashtabula	Perry Station - Tap Point to Ashtabula Township, Ashtabula County	345	345	1.1 22.1	D.C.T. S.C.T.	1	
XV.	Juniper-Mansfield (OE) Line	Juniper Substation - Point of Interconnection with OE, Sagamore Hills	345	345	0.6 1.5	D.C.T. D.C. H-Frame	1	

THE CLEVELAND ELECTRIC ILLUMINATING CO.
ODOE FORM FE3-2: SUMMARY OF EXISTING SUBSTATIONS

Symbol	Substation Name	Voltage	Line Association (FE3-1 or FE3-3 Notation)	Line Existing or Proposed
MX	Maxwell	132-13.2 kV	11	E
NB	Newburgh Substation	132-66-11 kV	22	E
NE	Newell Substation	132-13.2 kV	26	E
NF	Northfield Substation	132-33 kV	11	E
NL	Nelson Substation	132-13.2 kV	11	E
NP	Newport Substation	132-13.2 kV	24	E
NS	Nash Substation	132-13.2 kV	26	E
NT	Nathan Substation	132-33 kV	26	E
NW	Norway Substation	132-13.2 kV	11	E
NY	Nursery Substation	132-33-13.2 kV	26	E
PG	Pinegrove Substation	132-13.2 kV	27	E
PV	Pleasant Valley Switching Substation	132 kV	11	E
			12	E
			13	E
			20	E
PY	Perry Plant Transmission Substation	345 kV	V	E
			XII	E
			XIV	E
			108	P
SN	Sanborn Substation	132-33 kV	25	E
SP	Spruce Substation	132-13.2 kV	25	E
ZN	Zenith Substation	132-13.2 kV	29	E

1551: 1-1-03 (C)(1)(a)

AV, LR, DS, GW, CL, FX, HM, FW, LS, JG, LTF, LTW, LTE, HD, GT, SSP, PV, JD, IN, IV, NB, JR, NF, EL, LY, LB, MB, PY, AT, WA, SN, SP, LC, PG, MF

111-DS-S

170-CL-FM

129-HO-S

To PENELEC

To O.E.

108 PY-HNA-OE

STATE OF OHIO

STATE OF PENNSYLVANIA

LEGEND

		FORM
(G)	GENERATORS	FE 2-1,
☐	EXISTING SUBSTATIONS	FE 3-2
☐	PLANNED SUBSTATIONS	FE 3-4
———	EXISTING 132KV LINES	FE 3-1
·········	PLANNED 132KV LINES	FE 3-3
———	EXISTING 345KV LINES	FE 3-1
– – –	PLANNED 345KV LINES	FE 3-3

(SEE FORMS FOR DETAILS OF FACILITIES)

—•— OPEN LINE DISCONNECT

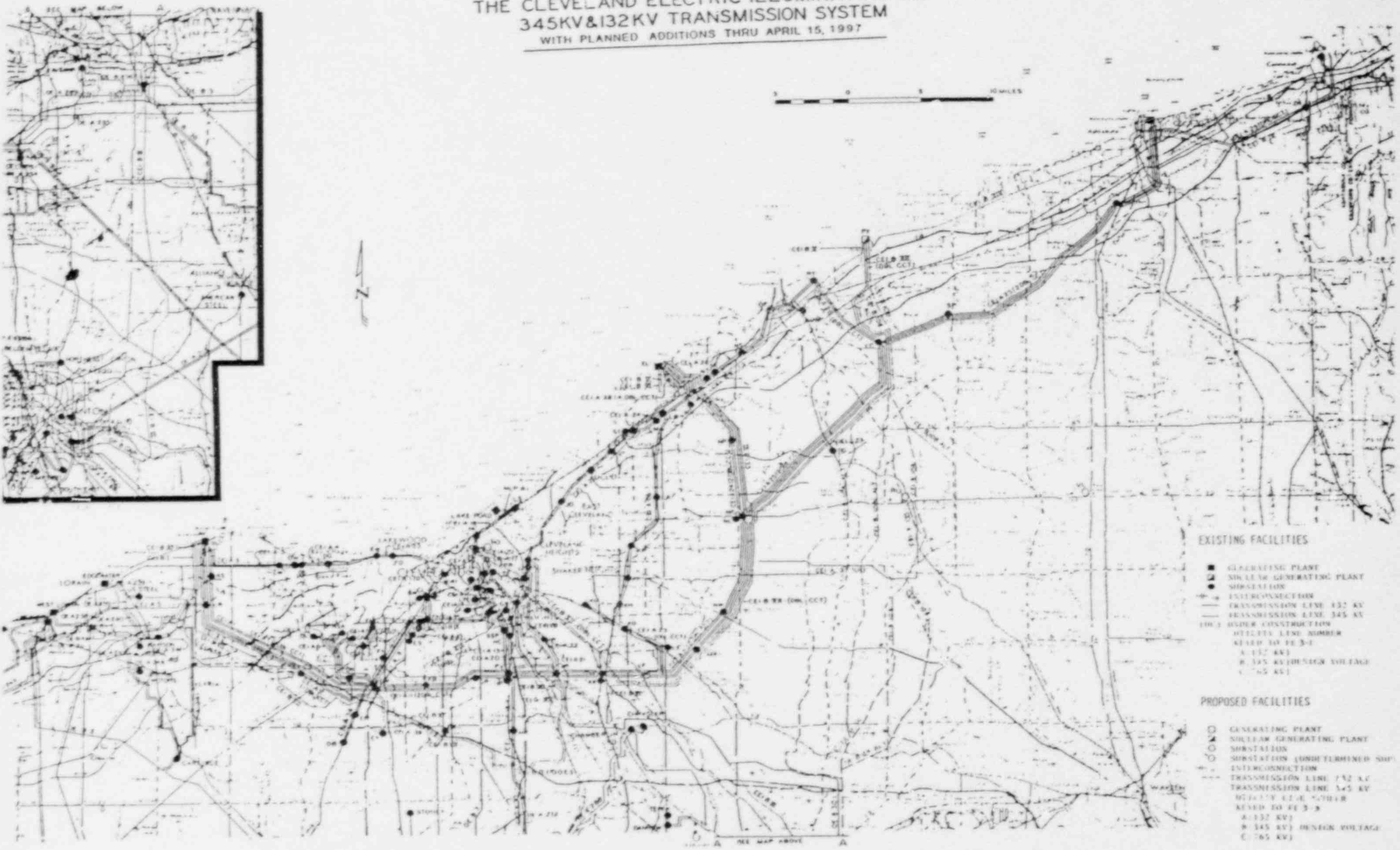
U.C. UNDER CONSTRUCTION

DIAGRAM NOT TO SCALE

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

SCHEMATIC DIAGRAM OF 345KV AND 132KV TRANSMISSION SYSTEM

PLANNED ADDITIONS THRU APRIL 15, 1997


1551:1-1-03 (C)(1)(b)
THE CLEVELAND ELECTRIC ILLUMINATING CO.
345KV&132KV TRANSMISSION SYSTEM
WITH PLANNED ADDITIONS THRU APRIL 15, 1997
EXISTING FACILITIES
GENERATING PLANT
NUCLEAR GENERATING PLANT
SUBSTATION
INTERCONNECTION
TRANSMISSION LINE 132 KV
TRANSMISSION LINE 345 KV
UNDER CONSTRUCTION
PROPOSED FACILITIES
GENERATING PLANT
NUCLEAR GENERATING PLANT
SUBSTATION
SUBSTATION (UNDETERMINED SITE)
INTERCONNECTION
TRANSMISSION LINE 132 KV
TRANSMISSION LINE 345 KV
SEE MAP ABOVE

1551: 1-1-03 (B)(2)(a)

LEGEND	FORM
Ⓖ GENERATORS	FE 2-
☐ EXISTING SUBSTATIONS	FE 3-
EXISTING 132KV LINES	FE 3-
EXISTING 345KV LINES	FE 3-
(SEE FORMS FOR DETAILS OF FACILITIE	
OPEN LINE DISCONNECTS	
DIAGRAM NOT TO SCALE	

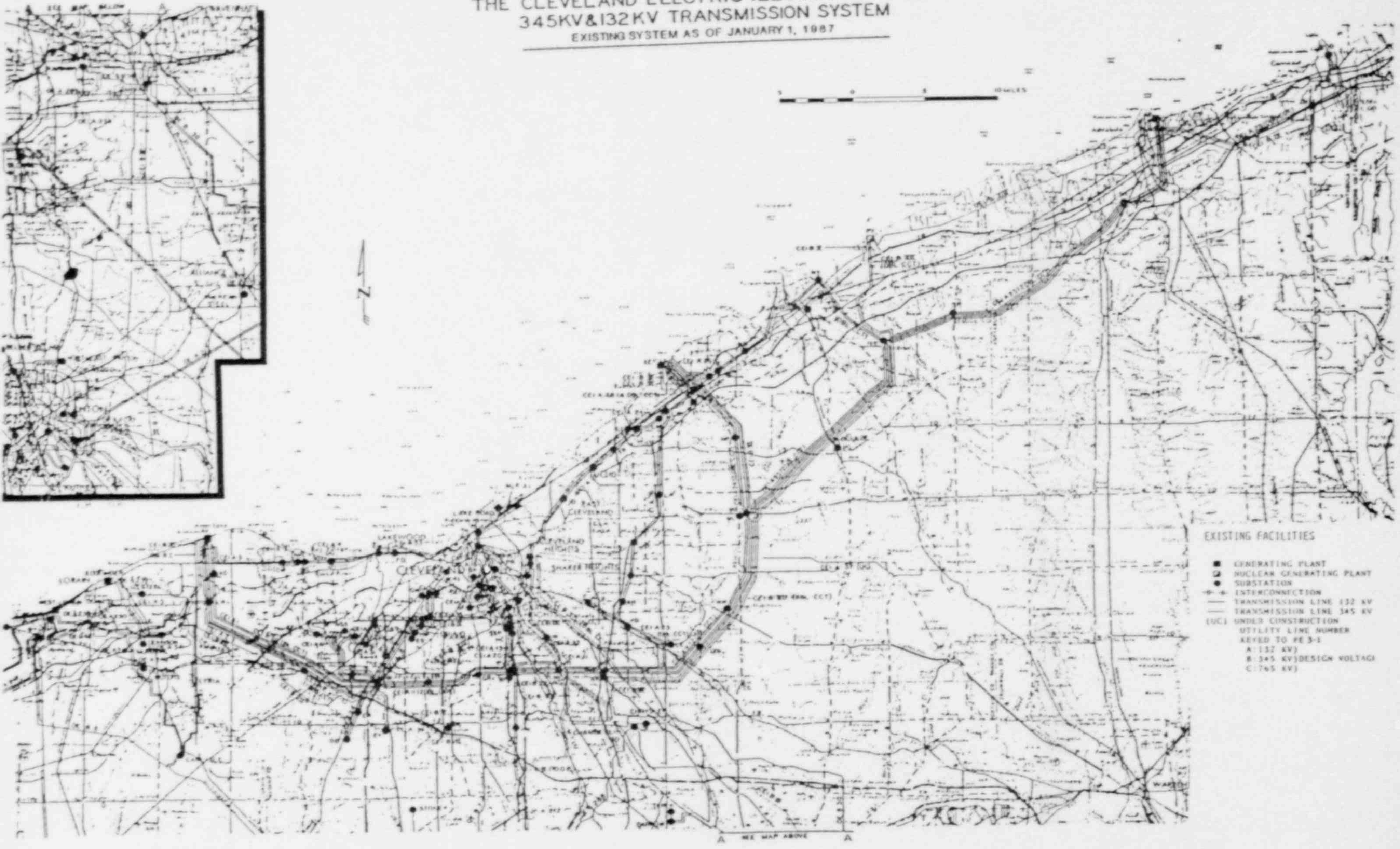
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

SCHEMATIC DIAGRAM OF 345KV AND 132KV TRANSMISSION SYSTEM

EXISTING SYSTEM AS OF JANUARY 1, 1987

THE CLEVELAND ELECTRIC ILLUMINATING CO.
345KV & 132KV TRANSMISSION SYSTEM

EXISTING SYSTEM AS OF JANUARY 1, 1987



APPENDIX M

Line No.	(a)	(b)
1	Davis-Besse - Cont'd	
2	783 - Emergency Diesel Generator	112,143
3	899 - 1983 General Project	235,240
4	916 - Contamination Containment	1,239,930
5	933 - Reactor Coolant Pump	274,276
6	988 - 1984 General Project	695,858
7	991 - 2 Spare Letdown Coolers	112,990
8		
9	Eastlake Plant	
10	7 - Oil Ignitor System	724,919
11	24 - Coal Belt and Dumper Samplers	136,787
12	56 - Modify Basement Sump	236,260
13	133 - Steam Seal Conversion	655,285
14	145 - Replace Coal Burner Lighters	101,270
15	169 - Low Pressure Turbine Reblade	761,767
16	582 - Turbine Buckets	113,452
17	918 - Balanced Draft Conversion	11,011,227
18		
19	Perry Plant	
20	35 - Construction of New Nuclear Plant	1,930,228,353
21	107 - New 345 kV Transmission Station Lines	
22	and Equipment	6,624,183
23		
24		
25	Various Plants	
26	707 - 1981 Project for Fossil Fuel Plants	117,082
27	977 - 1984 Project for Fossil Fuel Plants	188,814
28	66 - 1985 Project for Fossil Fuel Plants	748,189
29	141 - 1986 Project for Fossil Fuel Plants	918,547
30	733 - 1981 Project for Nuclear Fuel Plants	270,673
31	65 - Various Replacement Projects, All Plants (1985)	505,836
32	140 - Various Replacement Projects, All Plants (1986)	315,458
33	178 - "Major" General Project for Fossil Fuel Plants	400,484
34		
35	Transmission-Substations	
36	108 - Rainbow - South ROFW	3,943,690
37	370 - Juniper - Construct 345 kV Circuit	2,244,246
38	377 - Northfield - Automate	2,078,859
39	512 - Newburgh - Automate	1,183,225
40	525 - Clinton - Automate	896,132
41		
42	Miscellaneous Transmission Projects	
43	33 - New Automatic System, SOC	837,868
44	129 - New 11 kV UG Service at St. Alexis Hosp.	146,543
45	146 - Lake Shore & Newburgh, Upgrade Relays and	
46	Optic Cable	551,334
47	157 - PCB Capacitor Replacement for 1986	362,569

APPENDIX N

OHIO EDISON COMPANY

Nuclear Regulatory Commission
(10CFR Part 50)
Licensing of Production and Utilization Facilities

PERRY NUCLEAR POWER PLANT

UNITS NOS. 1 AND 2

Information Needed by the Nuclear Regulatory Commission for Antitrust Review of Operating License Applications for Nuclear Power Plants as detailed in Regulatory Guide 9.3

Item 1.c. (Cont'd)

2. The following changes in interconnections have occurred or will occur within the Ohio Edison System (OES).

   1. The Sammis (OES) - South Canton and South Canton - Star (OES) 345 kV interconnections with Ohio Power Company were previously metered together and considered a single interconnection. Today they are separately metered and have been classified as separate interconnections.

   2. The 345 kV Beaver Valley - Shenango (OES) interconnection with Duquesne Light Company has been replaced by 2 - 345 kV interconnections. At the Mansfield Plant, this was changed to form the Beaver Valley - Mansfield (OES) and the Crescent - Mansfield (OES) interconnections with Duquesne Light Company.

   3. A 345 kV transmission interconnection with CEI is scheduled to be put in service in 1981. The circuit will extend between the Avon Power Plant (CEI) and the Beaver Substation (OES).

   4. A 345 kV transmission interconnection with CEI is scheduled to be put into service between 1982 and 1984. The circuit will extend between the Mansfield Power Plant (OES) and the Juniper Substation (CEI).

   5. The 345 kV Ohio Edison Mansfield - Hanna line, which currently passes near Duquesne Light's Beaver Valley Nuclear Plant, is scheduled for modification in 1986. The line will be changed to form a second Beaver Valley (DL) - Mansfield (OES) 345 kV interconnection (the first discussed in Item 2 above) and a Beaver Valley (DL) - Hanna (OES) 345 kV interconnection.

   6. A 345 kV transmission interconnection with CEI is scheduled to be put into service in 1988. The circuit will extend between the Perry Nuclear Power Plant (CEI) and the Hanna Substation (OES).

These changes are reflected in the following table:

Ohio Edison System Interconnections (In Service and Planned)

Year	345 kV	138 kV	69 kV	34.5 kV	Total
1976	9	14	5	1	29
1980	11	14	5	1	31
1981	12	14	5	1	32
1984	13	14	5	1	33
1986	15	14	5	1	35
1988	16	14	5	1	36

APPENDIX O

Name of Respondent	This Report is:	Date of Report (Mo, Da, Yr)	Year of Report
OHIO EDISON COMPANY	(1) [x] An Original (2) [ ] A Resubmission		Dec. 31, 1986

TRANSMISSION LINE STATISTICS

1. Report information concerning transmission lines, cost of lines and expenses for the year. List each transmission line having nominal voltage of 132 kilovolts or greater. Report transmission lines below these voltages in group totals only for each voltage.
2. Transmission lines include all lines covered by the definition of transmission system plants given in the Uniform System of Accounts. Do not report substation costs and expenses on this page.
3. Report data by individual lines for all voltages if so required by a State commission.
4. Exclude from this page any transmission lines for which plant costs are included in Account 121, Nonutility Property.
5. Indicate whether the type of supporting structure reported in column (e) is: (1) single pole, wood, or steel; (2) H-frame, wood, or steel poles; (3) tower; or (4) underground construction. If a transmission line has more than one type of supporting structure, indicate the mileage of each type of constuction by the use of brackets and extra lines. Minor portions of a transmission line of a different type of construction need not be distinguished from the remainder of the line.
6. Report in columns (f) and (g) the total pole miles of each transmission line. Show in column (f) the pole miles of line on structures the cost of which is reported for the line designated; conversely, show in column (g) the pole miles of line on structures the cost of which is reported for another line. Report pole miles of line on leased or partly owned structures in column (g). In a footnote, explain the basis of such occupancy and state whether expenses with respect to such structures are included in the expenses reported for the line designated.

Line No.	DESIGNATION From (a)		DESIGNATION To (b)	VOLTAGE (Indicate where other than 60 cycle, 3 phase) Operating (c)	Designed (d)	Type of Supporting Structure (e)	LENGTH (Pole Miles) (In the case of underground lines, report circuit miles) On Structures of Line Designated (f)	On Structures of Another Line (g)	Number of Circuits (h)
1	Avon (CEI)		Beaver #1	345 KV	345 KV	Steel Tower	9.74	-	1
2	Avon (CEI)	(1)	Beaver #2	345 KV	345 KV	Steel Tower	1.29	9.74	1
3	Avon (CEI)		Beaver #2	345 KV	345 KV	Steel Pole	1.58	-	1
4	Beaver		Carlisle	345 KV	345 KV	Steel Tower	17.80	-	1
5	Beaver	(2)	Davis-Besse (TE)	345 KV	345 KV	Steel Tower	39.02	3.55	1
6	Beaver		Davis-Besse (TE)	345 KV	345 KV	Steel Pole	1.66	-	1
7	Beaver Valley (DL)	(3)	Hanna	345 KV	345 KV	Steel Tower	-	52.02	1
8	Beaver Valley (DL)		Hanna	345 KV	345 KV	Wood H Frame	0.69	-	1
9	Beaver Valley (DL)	(4)	Sammis	345 KV	345 KV	Wood H Frame	0.21	-	1
10	Beaver Valley (DL)		Sammis	345 KV	345 KV	Steel Tower	0.17	-	1
11	Canton Central (OP)		Hanna	345 KV	345 KV	Steel Tower	0.07	-	1
12	Carlisle		Star	345 KV	345 KV	Steel Tower	33.39	1.73	1
13	Carlisle		Star	345 KV	345 KV	Wood H Frame	1.14	-	1
14	Hanna		Highland	345 KV	345 KV	Wood H Frame	23.76	-	1
15	Hanna		Highland	345 KV	345 KV	Steel Tower	0.70	-	1
16	Hanna		Harding (CEI)	345 KV	345 KV	Steel Tower	-	0.07	1
17	Harding (CEI)	(5)	Mansfield	345 KV	345 KV	Steel Tower	78.11	0.70	1
18	Harding (CEI)		Mansfield	345 KV	345 KV	Steel Pole	3.03	-	1
19	Harding (CEI)		Mansfield	345 KV	345 KV	Wood H Frame	2.21	-	1
20	Highland	(6)	Mansfield	345 KV	345 KV	Steel Tower	40.61	-	1
21	Highland		Mansfield	345 KV	345 KV	Steel Pole	0.16	-	1
22									
23									
24									
25									
26									
27									
28									
29									
30									
31									
32									
33									
34									
35									
36						TOTAL			

	Name of Lessee	Inception Date	Terms of Lease	Yearly Rent	
(1)	CEI, TE, DL, PP	9/01/81	540 mos.	$ 661,175	Determined from CAPCO Agreement dated 9/14/67
(2)	CEI, TE, DL	10/01/75	540 mos.	1,163,011	Determined from CAPCO Agreement dated 9/14/67
(3)	CEI, TE, DL, PP	9/01/80	540 mos.	1,139,125	Determined from CAPCO Agreement dated 9/14/67
(4)	CEI, TE, DL, PP	12/01/70	540 mos.	56,149	Determined from CAPCO Agreement dated 9/14/67
(5)	CEI, TE, DL, PP	10/01/77	540 mos.	6,556,735	Determined from CAPCO Agreement dated 9/14/67
(6)	CEI, TE, DL, PP	6/01/77	540 mos.	1,193,190	Determined from CAPCO Agreement dated 9/14/67

NOTE: The terminals of all 345 KV and 138 KV lines are designated by Transmission Substation name unless otherwise shown.

APPENDIX P

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF
THE SECURITIES EXCHANGE ACT OF 1934

FOR THE FISCAL YEAR ENDED DECEMBER 31, 1985 COMMISSION FILE NUMBER 1-2578

OHIO EDISON COMPANY

(EXACT NAME OF REGISTRANT AS SPECIFIED IN ITS CHARTER)

OHIO (STATE OR OTHER JURISDICTION OF INCORPORATION OR ORGANIZATION)	34-0437786 (I.R.S. EMPLOYER IDENTIFICATION NO.)
76 SOUTH MAIN STREET, AKRON, OHIO (ADDRESS OF PRINCIPAL EXECUTIVE OFFICE)	44308 (ZIP CODE)

REGISTRANT'S TELEPHONE NUMBER, INCLUDING AREA CODE: (216) 384-5100

SECURITIES REGISTERED PURSUANT TO SECTION 12(B) OF THE ACT:

TITLE OF EACH CLASS	NAME OF EACH EXCHANGE ON WHICH REGISTERED
COMMON STOCK, $9 PAR VALUE	NEW YORK STOCK EXCHANGE MIDWEST STOCK EXCHANGE
CUMULATIVE PREFERENCE STOCK, NO PAR VALUE $1.80 SERIES $3.92 SERIES	 NEW YORK STOCK EXCHANGE NEW YORK STOCK EXCHANGE
CUMULATIVE PREFERRED STOCK, $100 PAR VALUE 3.90% SERIES 8.20% SERIES 4.40% SERIES 10.76% SERIES 4.44% SERIES 10.48% SERIES 4.56% SERIES 8.64% SERIES 7.24% SERIES 9.12% SERIES 7.36% SERIES	ALL SERIES REGISTERED ON NEW YORK STOCK EXCHANGE AND MIDWEST STOCK EXCHANGE
CUMULATIVE CLASS A PREFERRED STOCK, $25 PAR VALUE $3.50 SERIES CONVERTIBLE ADJUSTABLE - SERIES A ADJUSTABLE RATE - SERIES B	ALL SERIES REGISTERED ON NEW YORK STOCK EXCHANGE
FIRST MORTGAGE BONDS 11-7/8% SERIES DUE 2010 8-3/8% SERIES DUE 2007 15-1/2% SERIES DUE 2010 3-1/2% SERIES DUE 20[illegible] 9-1/2% SERIES DUE 2008 9-1/2% SERIES DUE 20[illegible]	ALL SERIES REGISTERED ON NEW YORK STOCK EXCHANGE

SECURITIES REGISTERED PURSUANT TO SECTION 12(G) OF THE ACT: NONE

INDICATE BY CHECK MARK WHETHER THE REGISTRANT (1) HAS FILED ALL REPORTS REQUIRED TO BE FILED BY SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 DURING THE PRECEDING 12 MONTHS (OR FOR SUCH SHORTER PERIOD THAT THE REGISTRANT WAS REQUIRED TO FILE SUCH REPORTS), AND (2) HAS BEEN SUBJECT TO SUCH FILING REQUIREMENTS FOR THE PAST 90 DAYS.

ITEM 1. BUSINESS

THE COMPANY

OHIO EDISON COMPANY ('COMPANY') WAS ORGANIZED UNDER THE LAWS OF THE STATE OF OHIO IN 1930 AND OWNS PROPERTY AND DOES BUSINESS AS AN ELECTRIC PUBLIC UTILITY IN THAT STATE. THE COMPANY ALSO HAS OWNERSHIP INTERESTS IN CERTAIN GENERATION FACILITIES LOCATED IN THE COMMONWEALTH OF PENNSYLVANIA. THE COMPANY'S PRINCIPAL EXECUTIVE OFFICES ARE LOCATED AT 76 SOUTH MAIN STREET, AKRON, OHIO 44308, TELEPHONE NUMBER (216) 384-5100.

THE COMPANY FURNISHES ELECTRIC SERVICE IN 488 COMMUNITIES AS WELL AS IN RURAL AREAS OF OHIO. IT SUPPLIES TRANSMISSION SERVICES TO 8 RURAL COOPERATIVES, ELECTRIC ENERGY FOR RESALE TO 3 MUNICIPALITIES AND BOTH TRANSMISSION SERVICES AND ELECTRIC ENERGY FOR RESALE TO 18 MUNICIPALITIES IN OHIO. THE COMPANY ALSO ENGAGES IN THE SALE, PURCHASE AND INTERCHANGE OF ELECTRIC ENERGY WITH OTHER ELECTRIC COMPANIES. THE AREA IT SERVES HAS A POPULATION OF APPROXIMATELY 2,500,000.

THE COMPANY OWNS ALL OF THE OUTSTANDING COMMON STOCK OF PENNSYLVANIA POWER COMPANY ('PENN POWER'), A PENNSYLVANIA CORPORATION, WHICH FURNISHES ELECTRIC SERVICE IN 139 COMMUNITIES AS WELL AS IN RURAL AREAS OF WESTERN PENNSYLVANIA, AND WHICH ALSO SELLS ELECTRIC ENERGY AT WHOLESALE TO 5 MUNICIPALITIES. THE AREA SERVED BY PENN POWER HAS A POPULATION OF APPROXIMATELY 350,000.

CAPCO CONSTRUCTION PROGRAM

IN SEPTEMBER 1967, THE CENTRAL AREA POWER COORDINATION GROUP ('CAPCO') COMPANIES, CONSISTING OF THE COMPANY, PENN POWER, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY ('CEI'), DUQUESNE LIGHT COMPANY ('DUQUESNE') AND THE TOLEDO EDISON COMPANY ('TOLEDO'), ANNOUNCED A PROGRAM FOR JOINT DEVELOPMENT OF POWER GENERATION AND TRANSMISSION FACILITIES. INCLUDED IN THE PROGRAM ARE UNIT 7 AT THE W.H. SAMMIS PLANT, UNITS 1, 2 AND 3 AT THE BRUCE MANSFIELD PLANT AND UNIT 1 AT THE BEAVER VALLEY STATION, EACH NOW IN SERVICE. THE CURRENT CAPCO PROGRAM INVOLVES THE CONSTRUCTION OF NUCLEAR GENERATING UNITS. THE TABLE ON THE FOLLOWING PAGE SHOWS CERTAIN DETAILS WITH RESPECT TO THE UNITS UNDER CONSTRUCTION IN WHICH THE COMPANY AND PENN POWER ('COMPANIES') HAVE OWNERSHIP INTERESTS.

SITE(A)	TYPE	CAPABILITY	ESTIMATED IN-SERVICE DATE	ESTIMATED TOTAL COST TO THE COMPANIES (B) (THOUSANDS)	APPROX. TOTAL COST PER KILOWATT (B)	EXPENDITURES BY THE COMPANIES THROUGH 12/31/85 (THOUSANDS)
BEAVER VALLEY STATION UNIT 2, IN SHIPPINGPORT, PA..............	NUCLEAR	833 MW	LATE 1987	$1,750,000	$5,014	$1,270,000
PERRY PLANT, IN NORTH PERRY VILLAGE, OHIO UNIT 1 AND COMMON FACILITIES..	NUCLEAR	1,205 MW	LATE 1986	$1,781,000(C)	$4,191(C)	$1,526,300
UNIT 2.........	NUCLEAR	1,205 MW	(D)	(D)	(D)	$ 430,400

(A) WITH THE EXCEPTION OF BEAVER VALLEY UNIT 2, IN WHICH PENN POWER HAS NO INTEREST, THE COMPANY AND PENN POWER HAVE UNDIVIDED INTERESTS AS TENANTS IN COMMON WITH THE OTHER CAPCO COMPANIES IN EACH OF THE UNITS LISTED ABOVE. THE COMPANY'S INTEREST IN BEAVER VALLEY UNIT 2 IS 41.88%. THE COMPANY'S AND PENN POWER'S INTERESTS IN BOTH PERRY UNITS ARE 30% AND 5.24%, RESPECTIVELY.

(B) THE COSTS LISTED INCLUDE ALLOWANCE FOR FUNDS USED DURING CONSTRUCTION ("AFUDC") BUT DO NOT INCLUDE THE COST OF FUEL.

(C) INCLUDES ESTIMATED COSTS FOR COMMON FACILITIES FOR BOTH PERRY UNITS. THESE ESTIMATED COSTS DO NOT INCLUDE ADDITIONAL ESTIMATED COSTS TO THE COMPANIES OF APPROXIMATELY $800,000 PER DAY THAT WILL ACCRUE FOR EACH DAY SUBSEQUENT TO SEPTEMBER 30, 1986 UNTIL PERRY UNIT 1 IS PLACED IN SERVICE. SEE "PERRY UNIT 1" BELOW.

(D) THE STATUS OF PERRY UNIT 2 IS CURRENTLY UNDER REVIEW. SEE "PERRY UNIT 2" BELOW.

REPRESENTATIVES IS SCHEDULED TO HOLD A HEARING IN CONNECTION WITH AN EARTHQUAKE WHICH OCCURRED ON JANUARY 31, 1986 AND WHICH WAS CENTERED ABOUT 10 MILES SOUTH OF THE PLANT. CEI HAS STATED THAT IT, THE NRC, AND THE ADVISORY COMMITTEE FOR REACTOR SAFEGUARDS (AN INDEPENDENT GROUP OF SCIENTISTS), ALL HAVE FOUND THE PERRY PLANT TO BE UNAFFECTED BY THE EARTHQUAKE.

PERRY UNIT 2 -

THE CAPCO COMPANIES ARE CONTINUING TO REVIEW THE STATUS OF PERRY UNIT 2, WHICH IS ABOUT 44% COMPLETE. THE ONLY SIGNIFICANT WORK THAT HAD RECENTLY BEEN PERFORMED ON UNIT 2 WAS THAT NECESSARY TO ENABLE PERRY UNIT 1 TO BE PLACED IN SERVICE. THAT WORK WAS ESSENTIALLY COMPLETED IN THE SECOND QUARTER OF 1985. AS OF JULY 1, 1985, THE COMPANIES STOPPED INCLUDING AFUDC RELATED TO PERRY UNIT 2 IN NET INCOME AND INSTEAD BEGAN CREDITING AFUDC CAPITALIZED TO PERRY UNIT 2 TO A RESERVE ACCOUNT ESTABLISHED FOR THAT PURPOSE. PRIOR TO THIS CHANGE, THE COMPANIES' AFUDC RELATED TO PERRY UNIT 2 HAD BEEN INCLUDED IN NET INCOME AT THE RATE OF APPROXIMATELY $3.7 MILLION PER MONTH. THIS CHANGE HAS NOT AFFECTED CASH FLOW BUT HAS CAUSED NET INCOME TO BE LOWER THAN IT OTHERWISE WOULD HAVE BEEN.

UNTIL REVIEW OF THE STATUS OF PERRY UNIT 2 HAS BEEN COMPLETED, THERE WILL BE NO DEFINED SCHEDULE FOR THE COMPLETION OF UNIT 2. POSSIBLE ALTERNATIVES BEING REVIEWED WITH RESPECT TO UNIT 2 INCLUDE INDEFINITE SUSPENSION OF CONSTRUCTION OF THE UNIT, RESUMPTION OF WORK ON THE UNIT AND TERMINATION OF THE UNIT. IN ACCORDANCE WITH THE CAPCO ARRANGEMENTS DISCUSSED BELOW, NONE OF THESE ALTERNATIVES MAY BE IMPLEMENTED WITHOUT THE APPROVAL OF EACH OF THE CAPCO COMPANIES.

AS OF DECEMBER 31, 1985, THE COMPANY AND PENN POWER HAD INVESTED APPROXIMATELY $370.0 MILLION AND $60.4 MILLION, RESPECTIVELY, APPLICABLE TO PERRY UNIT 2. DELAY IN THE COMPLETION OF THE UNIT CAN BE EXPECTED TO INCREASE ITS TOTAL COST BY AMOUNTS WHICH ARE NOT PRESENTLY DETERMINABLE. IF A DECISION WERE MADE TO TERMINATE UNIT 2, CERTAIN COSTS WHICH ARE CURRENTLY ASSIGNED TO UNIT 2 WOULD BE REASSIGNED, WHERE APPROPRIATE, TO UNIT 1. HOWEVER, CANCELLATION CHARGES PAYABLE TO CONTRACTORS AND OTHER COSTS OF TERMINATION COULD BE INCURRED. PENDING COMPLETION OF THE CAPCO REVIEW, THE COMPANY IS UNABLE TO PREDICT WHETHER THE CONSTRUCTION ON PERRY UNIT 2 WILL CONTINUE OR, IF CONTINUED, ON WHAT BASIS SUCH CONTINUATION WILL PROCEED.

IF CONSTRUCTION OF PERRY UNIT 2 IS TERMINATED, THE COMPANY WOULD SEEK TO RECOVER ITS INVESTMENT BUT CANNOT NOW PREDICT WHETHER ITS INVESTMENT IN UNIT 2 APPLICABLE TO ITS PUBLIC UTILITIES COMMISSION OF OHIO ("PUCO") JURISDICTIONAL CUSTOMERS WILL BE RECOVERABLE. THE COMPANY HAS BEEN RECOVERING COSTS OF PREVIOUSLY TERMINATED CONSTRUCTION PROJECTS THROUGH AN INCREMENT TO THE ALLOWED RATE OF RETURN IN RETAIL RATE CASES. SEE "REGULATION AND RATE MATTERS - RATE TREATMENT OF TERMINATED CONSTRUCTION PROJECTS." IF NO MEANS OF RECOVERY OF THE COSTS OF UNIT 2, IN THE CASE OF TERMINATION, WERE AVAILABLE TO THE COMPANY FROM ITS PUCO JURISDICTIONAL CUSTOMERS AND NO OTHER BASIS FOR RECOVERY COULD BE FOUND OR ANTICIPATED, THE COMPANY WOULD BE REQUIRED TO WRITE OFF THE PORTION OF ITS INVESTMENT APPLICABLE TO ITS PUCO JURISDICTIONAL CUSTOMERS. AS OF DECEMBER 31, 1985, THE COMPANY ESTIMATES THAT THE MAXIMUM AMOUNT OF SUCH A WRITE-OFF WOULD BE APPROXIMATELY $215 MILLION, NET OF INCOME TAX EFFECT. THE COMPANY DOES NOT PRESENTLY ANTICIPATE THAT A WRITE-OFF OF EVEN THIS MAGNITUDE, IF REQUIRED,

WOULD AFFECT ITS ABILITY TO PAY COMMON STOCK DIVIDENDS AT CURRENT LEVELS, AND STUDIES INDICATE THAT THE MAGNITUDE OF ANY SUCH WRITE-OFF COULD BE MUCH SMALLER. IF, DESPITE ITS BEST CURRENT INFORMATION, A MUCH LARGER WRITE-OFF WERE REQUIRED, DEPENDING UPON THE TIMING INVOLVED, SUCH A WRITE-OFF COULD TEMPORARILY AFFECT THE COMPANY'S ABILITY TO PAY COMMON STOCK DIVIDENDS AT CURRENT LEVELS. UNDER THE COMPANY'S INDENTURE, THE COMPANY'S CONSOLIDATED RETAINED EARNINGS UNRESTRICTED FOR PAYMENT OF CASH DIVIDENDS ON THE COMPANY'S COMMON STOCK WERE $319 MILLION AT DECEMBER 31, 1985.

BASED ON THEIR EXPERIENCE TO DATE, THE COMPANIES WOULD EXPECT TO RECOVER THEIR INVESTMENTS IN UNIT 2 WITH RESPECT TO THEIR FEDERAL ENERGY REGULATORY COMMISSION ('FERC') JURISDICTIONAL CUSTOMERS IF THE UNIT WERE TERMINATED. PENN POWER ALSO EXPECTS THIS TO BE THE CASE WITH RESPECT TO ITS PENNSYLVANIA PUBLIC UTILITY COMMISSION ('PPUC') JURISDICTIONAL CUSTOMERS, ALTHOUGH PENN POWER'S RECOVERY OF THE COSTS OF TERMINATED PROJECTS THROUGH RATES IS STILL BEFORE THE COURTS IN PENNSYLVANIA. SEE 'REGULATION AND RATE MATTERS - RATE TREATMENT OF TERMINATED CONSTRUCTION PROJECTS.'

SEE 'SYSTEM CAPACITY AND RESERVES' FOR A DESCRIPTION OF A PROCEEDING PENDING BEFORE THE PUCO SEEKING A HALT TO CONSTRUCTION OF PERRY UNIT 2.

BEAVER VALLEY UNIT 2 -

BEAVER VALLEY UNIT 2 IS APPROXIMATELY 91% COMPLETE. IN JANUARY 1985, THE CAPCO COMPANIES ANNOUNCED A DELAY IN THE COMPLETION OF BEAVER VALLEY UNIT 2 FROM LATE 1986 TO ABOUT THE END OF 1987. ESTIMATES OF THE TOTAL COST OF THE UNIT AND THE COMPANY'S SHARE OF SUCH COST INCREASED AS A RESULT OF THE DELAY.

IN OCTOBER 1985, THE COMPANY WAS ADVISED BY DUQUESNE, THE CONSTRUCTING COMPANY, THAT ITS REVIEW INDICATES THAT BEAVER VALLEY UNIT 2 WILL COST APPROXIMATELY $4.2 BILLION WHEN IT IS COMPLETED, BASED UPON THE CURRENT CONSTRUCTION SCHEDULE. THIS IS AN INCREASE OF $343 MILLION OVER PREVIOUSLY ESTIMATED COSTS. THE COMPANY'S SHARE OF THE INCREASE IS REFLECTED IN THE TABLE ON PAGE 2. THE ESTIMATED COST AND CONSTRUCTION SCHEDULE FOR BEAVER VALLEY UNIT 2 IS CURRENTLY THE SUBJECT OF A DETAILED STUDY WHICH IS EXPECTED TO BE COMPLETED IN THE SECOND HALF OF 1986. THE COMPANY EXPECTS THIS STUDY TO PROVIDE A MORE DEFINITIVE COST ESTIMATE.

DUQUESNE SUBMITTED AN APPLICATION TO THE NRC FOR AN OPERATING LICENSE FOR BEAVER VALLEY UNIT 2 IN 1982. AS OF JANUARY 1986, APPROXIMATELY 60% OF THE ACTIVITIES REQUIRED TO OBTAIN THE LICENSE HAD BEEN COMPLETED. ATOMIC SAFETY AND LICENSING BOARD ('ASLB') HEARINGS WERE HELD IN LATE 1983, AND IN JANUARY 1984, THE ASLB ISSUED A REPORT AND ORDER CONCLUDING THAT SINCE NO BASIS IN FACT OR LAW HAD BEEN PROVIDED BY THE INTERVENORS FOR HOLDING AN ADJUDICATORY HEARING, NO HEARING WOULD BE HELD. ADVISORY COMMITTEE ON REACTOR SAFEGUARDS ('ACRS') MEETINGS WERE CONDUCTED IN LATE 1985, AND THE ACRS COMMITTEE HAS CONCLUDED THAT SUBJECT TO SATISFACTORY COMPLETION OF CONSTRUCTION, STAFFING AND PREOPERATIONAL TESTING, THERE IS REASONABLE ASSURANCE THAT BEAVER VALLEY UNIT 2 CAN BE OPERATED WITHOUT UNDUE RISK TO THE HEALTH AND SAFETY OF THE PUBLIC.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon the participants in this proceeding.

Dated at Washington, D.C., this 19th day of February, 1988.

Kenneth M. Albert

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