UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	NRC Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING	)	50-500A
COMPANY	)	50-501A
(Davis-Besse Nuclear Power Station,	)	
Units 1, 2 & 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING	)	NRC Docket Nos. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant, Units	)	
1 & 2)	)	

RESPONSE OF NRC STAFF TO APPLICANTS' COMMENTS ON THE RELEVANCE OF OHIO LEGISLATURE AMENDED HOUSE BILL NO. 577 TO THIS APPEAL

Well over one year after oral arguments were held in this pending appeal, Applicants have requested this Appeal Board to take judicial notice of an Ohio statute (Amended House Bill No. 577, hereinafter "the Bill") which was passed last March, over eight months ago. Over seven months ago the Governor of Ohio apparently signed the Bill into law. Although the law became effective in July of 1978, by its plain terms its provisions will not be fully implemented until approximately July of 1979 (Sec. 4933.87(B)).

Yet, when requested to provide a statement of the relevancy of this statute, which plainly has only an *in futuro* effect to the instant appeal, Applicants now contend that it:

> ...should once and for all dispose of the misguided attempts by DOJ, the NRC Staff, and the City of Cleveland to resurrect allegations of territorial division as a basis for imposing nuclear related license conditions. ("Ohio Applicant's Comments On the Ohio Statute Requiring Certification Of Exclusive Territories," (November 3, 1978)).

Further, Applicants contend, that this state statute reinforces Applicants' position that reversal of the Initial Antitrust Decision is now required. In the Staff's view, such urgings have no basis in law or fact. Moreover, the statute is plainly irrelevant to the instant appeal.

I. The Licensing Board's Findings

From the outset, two important matters should be noted. First, the territorial allocation agreements engaged in by Applicants are pervasive. Second, these Applicant imposed allocation agreements clearly relate to both wholesale and retail service territories. For example, Ohio Edison ("OE") imposed territorial (as well as customer) allocation provisions in all of its wholesale contracts with municipal electric systems in effect from 1965 to 1972, DJ Ex. 44-62; see the Initial Decision at 5 NRC 200-202. The intent of OE in imposing such territorial and customer allocation provisions was clearly anticompetitive, DJ613; see 5 NRC at 202, ff. 139.

Moreover, such territorial and customer allocation provisions were the rule, not only within CAPCO, but between CAPCO companies and other electric utilities. So, for example, the following customer allocation agreements, in addition to those discussed immediately above, should be noted: 1/

1. OE and Toledo Edison were parties to a territorial allocation agreement. DJ 513-517, 519, 533-35, 537-40; see 5 NRC at 190 ff. 105, 5 NRC at 214.

1/ This listing is for example only, and is not intended to be exhaustiye.

As the complete territorial boundaries between OE and Toledo Edison (TE) were affected, and there were no exclusions for either wholesale or retail customers. Thus, the territorial allocation agreements applied both to wholesale and retail service.

2. OE had a territorial agreement with Ohio Power Company, which was in effect from (at least) 1966, DJ 519. This agreement was used to allocate and trade customers. 5 NRC 191.

3. Ohio Edison and CEI have had a territorial allocation agreement since 1964. 5 NRC 192-193.

4. TE also has a territorial agreement with Ohio Power Company (5 NRC at 214) and Consumers Power Company, (5 NRC at 215-216).

5. In a practice similar to OE's, TE also imposed territorial and customer allocation provisions in its wholesale contracts with municipal electric systems. 5 NRC 216-217. Moreover, these provisions had a demonstrated anticompetitive effect, 5 NRC 216, ff. 168.

6. CEI attempted, albeit unsuccessfully, to extract a territorial allocation agreement with Painesville. 5 NRC 177, ff. 177.

7. OE attempted to extract a territorial allocation agreement with Columbus and Southern Ohio Electric Company. The latter utility declined on the grounds of illegality. See 5 NRC 192, ff. 109.

It is clear, from the nature, operation, and enforcement of these, and like, territorial agreements engaged in by Applicants that they applied to all aspects of the utilities' business, i.e., to both wholesale and retail sales. This is particularly true as the locus of many of the agreements was centered in wholesale contracts with competing municipal

systems. Thus, the Staff specifically supports the Licensing Board's relevant analysis as set forth below (which is particular as regards OE, but also generally relevant):

> The Board does not attach the same relevance and importance as do Applicants to the argument that the territorial agreements affected only retail accounts. Even assuming this to be true, the methodical gathering of retail loads, embracing each new opportunity to serve areas at retail as it arises, effectively precludes the emergence of any competition among investor-owned utilities.
>
> However, the Board has examined each of the exhibits pertaining to the territorial allocation agreements and even Applicants' claim as to the impact upon wholesale business is not supported by the evidence in almost each instance. The territorial allocation was determined on the basis of geography without regard to the functional level of sales. In some instances the territorial allocations were single parcels and would undoubtedly be retail accounts. Then in other instances there were rather substantial areas such as the Madisonburg area, State Route 19 between Galion and Bucyrus, Myers Lake, and Savannah, DJ 523, and the territory southwest of Fairfield, DJ 529, which could ultimately have its impact upon wholesale business. (5 NRC 194, ff. 113). 2/

II. The Statute Analyzed

The Staff has indicated in its introduction its doubts concerning the relevancy of Amended (Ohio) House Bill No. 577 to the record below, which record was closed in the Summer of 1976.

As the Licensing Board found, the locus of many of the anticompetitive acts engaged in by Applicants appeared in Applicants' relationships with

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2/ The Staff cannot accept Applicants' argument that the territorial agreements must have been retail only, because the maps "introduced into evidence" setting forth the territorial and customer allocations shows "only the distribution facilities". Rather, many of these maps depict the entire service areas of the companies, without segregation as to wholesale or retail service. Moreover, there is no evidentiary support for Applicants' proposition that the maps were not intended for wholesale use. Indeed, many of the illegal allocations appear in wholesale contracts, as discussed supra. Finally, many relevant maps could not be "introduced into evidence" because they were destroyed and not produced to the parties. See 5 NRC 194, ff. 114. It is not the destruction of such documents that the Staff now questions, but Applicants' use of such an argument in light of the destruction.

the municipal electric systems located in Ohio. Applicants have attempted to argue (Ohio Applicants' Comments..., p. 6, n.5) that competition between the municipal electric systems and Applicants is severely limited by Article XVIII, section 6, of the Ohio Constitution. Applicants contend that:

> The "surplus product limitation specified in Article XVIII, section 6 clearly precludes full or partial requirements wholesale customers ... from even lawfully serving any customers outside the [municipals'] corporate limits." (Ohio Applicants Comments, p. 6, n.5).

At no time have Applicants offered any legal citations to support this proposed conclusion of law. In fact, while Article XVIII, section 6 of the Ohio Constitution limits a municipal's surplus electric sales outside the municipal limits to 50% of the kilowatt hours sold inside the municipal limits, no case or commission has held that a municipal electric system which itself is a partial or full requirements purchaser can not possess such "surplus". As John White, an attorney and President of Ohio Edison testified:

> There was a question in our minds and it is something that has been discussed from time to time in Ohio for many years, whether a municipality which, in fact, had no means of producing might, indeed, have a surplus when all the electric energy it had available for sale had to be purchased in the first place. ... That was the question that was being kicked around then and has been kicked around from time to time since, but it has never been litigated in Ohio.
>
> I suppose since it hadn't been litigated, nobody can be sure he knows the answer. (White: Tr. 9525-9526).

More importantly, as the Staff reads Amended House Bill No. 577, the Ohio legislature was careful to preserve competition between Ohio municipal electric systems and other electric utilities in that state. At the outset of course, as is required by law, the Bill is only seeking to deal with

retail electric service (Sec. 4933.9(F)). 3/ In addition, the Bill specifically preserves the rights of municipal electric systems to compete. For example, Sec. 4933.87 expressly provides that the Bill is not to affect the rights of municipal electric systems to generate, transmit, distribute, or sell electric energy. Section 4933.82(B) provides that the entire Bill shall not in any manner prohibit or restrict the rights of municipalities. The legislative history (provided by Applicants) states:

> The bill makes it clear that it does not limit the rights of municipally owned electric companies in general (R.C. 4933.87) or by the certification process (R.C. 4933.82(E)). 4/

3/ The State of Ohio is without authority to raise barriers to wholesale competition, as jurisdiction over interstate wholesale transactions are entirely beyond the reach of the states, Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927), and vested in the Federal Power Commission (now Federal Energy Regulatory Commission), FPC v. Southern California Edison Co., 376 U.S. 205, 214 (1964). Moreover, under the Supremacy Clause of the Constitution, state legislation and state regulatory policy cannot restrict the intended effect of valid federal legislation. Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Sperry v. Florida; 373 U.S. 379 (1963); Free v. Blend, 369 U.S. 663 (1962).

4/ Ohio House Ins., Util., & Fin. Inst., Amended House Bill 577, p. 3 (1977 report).

III. Summary

We are left, then, with the question posed by the Appeal Board as to the relevancy of this Bill to the instant appeal. The law although enacted, has not yet caused to be delineated retail service areas for the electric utilities who are subject to its provisions. Municipal electrical systems are not subject to the provisions of the Bill. Ipso facto, the Bill has no effect whatsoever on either competing municipal electric systems or on any utility during the period examined by the Licensing Board, 1965-1976. Quite properly, the Bill cannot seek to reach, let alone vindicate, the wholesale territorial allocation agreements engaged in by Applicants during the period examined by the Licensing Board. One of the clear "signals" the Bill does give, the Staff believes, is the unwillingness of the Ohio legislature to affect the competitive posture of municipal electric systems.

As to the future, if the Ohio Applicant companies establish retail territorial allocation agreements pursuant to the provisions of this Bill, and if it is concluded by a reviewing court or agency that such retail allocation agreements were compelled by the State acting as sovereign, then Applicants' may seek to invoke a Parker v. Brown defense, 317 U.S. 341 (1943) if such future retail agreements are challenged under the antitrust laws. 5/

5/ The evaluation of such a defense would necessarily include an examination of Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975) and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the latter case holding, inter alia, that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.

The Staff therefore finds little, if any, relevance of this Bill to this appeal. 6/ Applicants' point out that License Condition 1a prohibits Applicants from selling electric energy or providing bulk power services upon the condition that the entity enter into a customer or territorial allocation agreement. If state law permits certain future allocation agreements between certain parties engaging in retail sales, the Staff is perfectly capable of appropriately considering that state law in the context of enforcing compliance with ordered antitrust license condition 1a.

Respectfully submitted,

Roy P. Lessy, Jr.
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 20th day of November 1978.

6/ Applicants also contend that repeal of section 4905.261 of the Ohio Revised Code and its replacement by this Bill, 'should resolve any remaining antitrust concerns in this area' [the Buckeye Project] (Ohio Applicants Comments, p. 9). Such a statement is simply unsupportable. The Licensing Board found that OE refused to wheel Buckeye Power to the seven rural electric cooperatives located in its service area, 5 NRC 196-197. The 1978 repeal of the 90 day disconnect provision provides no defense to OE today. Similarly, the Licensing Board found that when OE did enter into buy/sell arrangements with certain coops, it restricted the coops from re-selling that power, 5 NRC 201. The 1978 repeal of the 90 day disconnect provision cannot legitimize that restriction on alienation. Likewise, TE's refusal to wheel Buckeye Power to Napoleon cannot be defended on the basis of the 90 day provision. TE's refusal to operate in parallel with Napoleon if Napoleon purchased Buckeye Power stands on a similar footing, 5 NRC 220. Even the Licensing Board's findings that TE had an anticompetitive intent when it refused to waive the 90 day disconnect provision, and when it refused to plan reconnection on an expeditious basis (5 NRC 219-220) are not legitimized by a subsequent repeal of the 90 day provision. The 90 day disconnect provision was simply not the cause of any of the above anticompetitive acts, evidencing an abuse of dominance of these companies.

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CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF NRC STAFF TO APPLICANTS' COMMENTS ON THE RELEVANCE OF OHIO LEGISLATURE AMENDED HOUSE BILL NO. 577 TO THIS APPEAL in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 20th day of November 1978.

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