

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Cleveland Electric Illuminating Co.,) Docket No. 50-440A
et al.)

Comments Of The City Of Clyde, Ohio
Opposing Request To Suspend The Perry
Nuclear Power Plant Antitrust License
Conditions And Petition For Leave To
Intervene

Submitted on Behalf of
The City of Clyde, Ohio

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February 5, 1988

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To: Chief, Policy Development and Technical Support Branch
Office of Nuclear Reactor Regulation

The City of Clyde, Ohio ("Clyde") submits the following comments strongly opposing the request of the Ohio Edison Company ("Ohio Edison") to suspend the antitrust conditions in the operating license (No. NPF-58) for the Perry Nuclear Power Plant ("Perry Plant"). Ohio Edison's request was submitted by application dated September 18, 1987, entitled "Application To Amend The Perry Operating License To Suspend The Antitrust Conditions Insofar As They Apply To Ohio Edison Company" ("Application").

Notice of the Application was published in the Federal Register on December 22, 1987, with comments due by February 5, 1988. These comments are submitted pursuant to that notice.

Clyde also seeks leave to intervene and requests that it be made a party to this proceeding with full rights of participation. Clyde's interest in the proceeding and its reasons for seeking intervention at this time are discussed below.

The names, titles, and offices of persons to whom correspondence regarding these comments should be addressed are as follows:

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City Manager
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(Telephone: 419/547-0575)

and

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I. NATURE OF CLYDE'S INTEREST

Clyde is a city of approximately 5,500 inhabitants, located in the retail electric service territory of the Toledo Edison Company ("Toledo Edison") in north central Ohio. Toledo Edison is a co-owner and co-licensee, along with Ohio Edison, of the Perry Plant.¹ Clyde is also located approximately four miles from Ohio Edison's retail service territory. Ohio Edison owns transmission facilities that pass within four miles of the city.

¹ The other co-owners and co-licensees are Cleveland Electric Illuminating Company, Duquesne Light Company, and Pennsylvania Power Company. Together, these five utilities make up the Central Area Power Coordination power pool ("CAPCO"). The service territory for the five CAPCO utilities is referred to as the "combined CAPCO company territories" or "CCCT." Clyde is located in the CCCT.

At present, the City of Clyde, its businesses, and residents receive retail electric service from Toledo Edison. In July of 1987, however, the City Council of Clyde unanimously passed Ordinance No 1987-33 (a certified copy of which is appended as Attachment A), which provided in relevant part:

Section 1. That the City of Clyde shall proceed to acquire, construct, own, lease and operate within or without its corporate limits, a public electric utility the product or service of which shall be supplied to the City and its inhabitants, and may contract with others for any such product or service.

This Ordinance was subsequently the subject of a referendum election. On election day, November 3, 1987, the Ordinance and its direction to the city to establish a municipally owned electric system were approved by the voters of Clyde by a 1042-to-468 margin. The city officials of Clyde have since taken steps to begin implementing this mandate.

Part of the implementation process involves the acquisition of a wholesale electric power supply, which Clyde would purchase by contract. Electric power so purchased would then be distributed by the Clyde municipal electric utility to electric consumers within the Clyde community. Since the election, Clyde has been negotiating with Ohio Edison and

with Toledo Edison, among others, to arrange for the purchase of an adequate wholesale electric power supply.²

These actions by the Clyde Council and the voters were preceded by substantial study. The Council, for example, commissioned a feasibility study on October 7, 1986. That study was performed by independent engineering and law firms, with input from other independent professionals, such as design engineers, cost-of-service experts, and a municipal insurance specialist. After that study was completed, Toledo Edison was given the opportunity to prepare and present its own "rebuttal" study. Prior to the election, both Toledo Edison and the Clyde Council presented their views to the citizens of Clyde through public presentations and debates, to which the public at large was invited and given the opportunity to ask questions.

Throughout this process--not only prior to the vote on election day, but also prior to the Council's passage of Ordinance No. 1987-33--Council members and citizens have acted in reliance on the assurance implicit in the antitrust conditions here at issue, that those conditions would enable them to obtain an adequate, reliable wholesale power supply for Clyde's municipal utility. In relevant part, those conditions state that Ohio Edison, Toledo Edison, and their CAPCO partners, (1) "shall offer

² Even if Clyde's current negotiations with Ohio Edison and Toledo Edison do not end in a wholesale power supply contract and Clyde contracts with another wholesale power supplier, there remains the possibility of future power supply contracts with both Ohio Edison and Toledo Edison, due to those companies' geographical proximity to the city.

interconnections upon reasonable terms and conditions at the request of any other electric entity(ies) in the CCCT," (2) "shall engage in wheeling for and at the request of other entities in the CCCT" upon non-discriminatory terms and conditions, (4) "shall sell emergency power to requesting entities in the CCCT" upon non-discriminatory terms and conditions, (5) "shall sell economy energy to requesting entities in the CCCT, when available," upon non-discriminatory terms and conditions, and, perhaps of the most immediate importance to Clyde, (6) "shall sell wholesale power to any requesting entity in the CCCT, in amounts needed to meet all or part of such entity's requirements." In the Matter of The Toledo Edison Company, et al., ALAB-560, 10 NRC 265 (1979) at 296-99.

In short, the actions of the Council and voters of Clyde in deciding to establish a municipal electric utility were at least in part predicated on the knowledge and belief that the city could obtain a wholesale power supply and other important services from Ohio Edison, Toledo Edison and their CAPCO partners. As noted above, Clyde has been negotiating with Ohio Edison and Toledo Edison on this very issue. Suspending the

antitrust conditions for Ohio Edison³ will close one of the roads that leads to a wholesale power supply. While it may be possible for Clyde to reach this destination by other means, the antitrust conditions provide a route that is assured and direct. Thus Clyde has a substantial interest that may be affected by this proceeding.

II. CLYDE'S OPPOSITION TO THE APPLICATION

Ohio Edison's Application should be rejected outright, or at least denied, for several reasons. First, suspension of the antitrust conditions forecloses one path by which Clyde and other cities could assuredly obtain a wholesale power supply and support services. Second, suspension of the antitrust conditions is both unwarranted and would set a dangerous precedent, inviting other licensees and their customers to seek on-again-off-again application of similar conditions whenever they perceive a change in economics. Third, Ohio Edison's claims of economic hardship may not be true. Fourth, even if these claims are true, that does not necessarily require suspension of the antitrust condi-

³ By its terms, the Application applies only to Ohio Edison and only to the Perry Plant. The antitrust conditions, however, also apply to Toledo Edison and the CAPCO partners and also apply to other nuclear power plants owned by that group (e.g., the Davis-Besse Nuclear Power Plant operated by Toledo Edison). Ohio Edison's Application is unclear, and Clyde is uncertain, exactly how the antitrust conditions would be suspended only for Ohio Edison and only for the Perry Plant, given the relationship of the CAPCO partners. If they were suspended for Ohio Edison, however, the other CAPCO partners would almost certainly seek similar treatment. Clyde opposes suspending the antitrust conditions for any and all of the members of the CAPCO alliance.

tions as a remedy. Finally, Ohio Edison and its CAPCO partners may be at least partly to blame for any economic problems associated with the Perry Plant. If so, suspension of the antitrust conditions would unfairly benefit those who have helped create the problem, while penalizing those who did not.

A. Suspension of the Antitrust Conditions
Forecloses An Assured Wholesale
Power Supply

This issue was discussed in greater detail above. Simply summarized, if the antitrust conditions are suspended for Ohio Edison, Clyde and other cities will be denied one certain source of wholesale power and support services. The presence of this guaranteed source of power was at least in part one of the reasons Clyde elected to establish a municipal electric system. If this guarantee is now removed, other cities may not be willing to risk similar actions, thereby stifling future competition. Similarly, while Clyde would seek other sources of wholesale power, the certain source assured by the antitrust conditions would be eliminated. Again, competition would be lessened.

B. Suspension Of The Antitrust Conditions
Is Both Unwarranted Under the Circumstances
and would Create Dangerous Precedent

Ohio Edison seeks "suspension", as opposed to "revocation" of the antitrust conditions. This implies that, if its application is granted, those conditions could be re-applied if economic conditions change. If the NRC grants Ohio Edison's application and suspends the antitrust conditions, it sets a

precedent with the potential to re-open every license ever granted.

There may well be circumstances where re-opening the terms of a license is necessary or desirable. Doing so for a reason as easily alleged and as difficult to define as "changed economic conditions" invites a flood of filings, however. Every time the prime rate fluctuates, or a fuel or labor contract is renegotiated, or environmental requirements are amended, or insurance rates change, entities with antitrust conditions in their licenses will seek to have them suspended; the same contingencies will foreseeably provoke other entities to seek to have such conditions imposed on utilities whose licenses do not contain them.

The antitrust conditions in this case were imposed after long and careful analysis. They were not imposed only because of prospective and optimistic projections about the economics of nuclear power, as Ohio Edison suggests. They were also imposed because of a retrospective history of anticompetitive dealings. Based on this history, the Attorney General recommended an antitrust hearing. Based on that hearing, the NRC Licensing Board held that each CAPCO member had violated the antitrust laws in its individual dealings with municipal and cooperative competitors. The NRC Appeal Board affirmed those findings. See 10 NRC at 275-295. Under the circumstances present in this case, the mere allegation of an economic turnaround is a patently insufficient basis for lifting antitrust

conditions. As Justice Cardozo stated in the analogous context of considering a request to vacate an antitrust consent decree in United States v. Swift & Co., 286 U.S. 106, 119 (1932), "The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow." Ohio Edison's Application states no grounds that even approach such a showing.

Accordingly, Ohio Edison has shown no principled, legally sustainable basis for the relief it seeks. Indeed, the mere fact of the filing of the Application may well be compelling evidence of the effectiveness of the antitrust conditions. Nor does the Application furnish any basis on which to conclude that the antitrust conditions of the license are not succeeding in achieving their objective--the promotion of competition through the foreclosing of opportunities for anticompetitive practice. See United States v. United Shoe Machinery Corp., 391 U.S. 244, 249-252 (1968).

C. Ohio Edison's Claims of
Economic Woe May Be Unjustified

Much of Ohio Edison's Application is dedicated to the proposition that nuclear power has not become the economic goldmine that it was once projected to be. Regardless of the merits of that general proposition, it is by no means clear that Ohio Edison is or can reasonably expect to be suffering the extreme economic hardship it implies in its Application. During recent meetings with Clyde regarding a potential wholesale power

supply contract, for example, Ohio Edison representatives noted that the company's electric rate fuel component is the lowest in the State of Ohio. Nuclear power undoubtedly has a role in that statistic.

Moreover, Ohio Edison's allegations of change in economic circumstance cannot be viewed in a vacuum. Should the NRC decide to investigate those allegations further, it must inquire not only into the asserted change in nuclear production costs, but also into changes in the rest of the world, against which the economic advantages and disadvantages of nuclear power plants must be compared. Without that comparison, Ohio Edison's claim--that nuclear power has failed to bring the competitive advantage that the antitrust conditions were designed to address--cannot be fairly judged. The scope of that comparison not only will be immense, as it must include changes in the economics of other types of power plants, fuel costs, and the economy in general, but also will change frequently and rapidly in the course of the investigation as economic circumstances change (e.g., if acid rain legislation is adopted).

If the NRC determines that it has the authority to undertake this task and elects to do so, then Clyde and any other entities opposing the Application should be given the opportunity to examine Ohio Edison's claims and to present evidence showing that Ohio Edison's relationship with nuclear power has not changed its competitive position sufficiently to justify suspension of the antitrust conditions.

D. Suspension Of The Antitrust
Conditions Is Not Necessary

Even if Ohio Edison is correct in its claims that the production cost advantages associated with nuclear power have not materialized, this does not mean that the antitrust conditions need to be suspended. Instead, the market will determine the extent to which other entities take advantage of the services covered by the antitrust conditions.

If, as Ohio Edison suggests, its investment in nuclear power has proven more expensive than anticipated, then presumably the prices it charges for the services covered by the antitrust conditions will be correspondingly and comparatively expensive. If these services are too expensive, no entities will seek them. If no other entity seeks those services, then Ohio Edison need not provide them.

In short, the more expensive nuclear power becomes, the less Ohio Edison will be asked to provide under the antitrust conditions. As a result, market forces will lead to the same end that Ohio Edison asks the NRC to reach. Thus, assuming arguendo some validity to its economic contentions, Ohio Edison simply cannot establish a genuine need for the relief it seeks. Nor does the company claim that suspending the antitrust conditions will make nuclear power less expensive or otherwise improve Ohio Edison's competitive posture. There is no meaningful link between the circumstance it alleges and the remedy it seeks. Accordingly, its Application should be rejected or denied.

E. Ohio Edison Should Not be Rewarded
For Its Mistakes

If, as Ohio Edison alleges, nuclear production costs are far higher than envisioned when the antitrust conditions were imposed, then the NRC must inquire about the causes of production cost escalation and not rely blindly on a generalized plea of economic hardship. One factfinding body, the Public Utilities Commission of Ohio ("PUCO"), has placed part of the blame on Ohio Edison's owners. In January of 1988 the PUCO disallowed, for rate-making purposes, \$627.8 million of the cost of building the Perry Plant, finding that the costs were "imprudently or unreasonably incurred." In the Matter of the Investigation into the Perry Nuclear Power Station, PUCO Case No. 85-521-EL-COI.

The PUCO's audit covered the period of time beginning with the decision to build the plant up to the date of fuel loading. Total costs at that time were \$4.2 billion. The \$627.8 million disallowance thus represents about 15 percent of the plant's total cost at that time.

If the 15 percent of the costs that the PUCO ascribes to management error were removed, the production cost advantages of nuclear power may be substantially greater than alleged by Ohio Edison in its Application. Certainly if mismanagement has created or added to a cost disadvantage, it is entirely unjustifiable to reward such mismanagement by suspending antitrust conditions that were carefully designed to protect competitors

and benefit consumers, and thereby inflict still further economic hardship on the public.

Ohio Edison has the right to appeal the PUCO's ruling and it almost certainly will do so. Nevertheless, at this point the state regulatory body that has looked into the matter is on record as finding almost 15 percent of the Perry Plant costs it investigated to be improperly incurred due to management problems. If management is responsible for inflating production costs, then it should not be able to use that situation to justify a reward for itself.

III. BASIS FOR INTERVENTION

In addition to presenting these comments opposing the Application, Clyde petitions for leave to intervene and become a party to this proceeding under NRC regulations section 2.714, 10 CFR § 2.714. Clyde has an interest that may be affected by the outcome of this proceeding due to the recent election day mandate to establish a municipal election system, explained above. Clyde is unaware of any other parties that adequately represent this interest.

The licensing proceeding began years ago, and Clyde's petition for leave to intervene undoubtedly is untimely, at least as far as the licensing decision is concerned. Good cause exists for not filing earlier because Clyde has only been in a position to take advantage of the antitrust conditions since election day, November 3, 1987. Ohio Edison's Application was not noticed in the Federal Register until December 22, 1987. Also, short of

intervention, Clyde is unaware of the availability of other means to protect its interests, including the ability to appeal a determination on the Application adverse to Clyde. Moreover, due to Clyde's position in recently seeking to take advantage of the antitrust conditions, it may reasonably be expected to assist in developing a sound record. Finally, Clyde's participation will not delay the proceeding or prejudice other participants, as Clyde is willing to accept the record in this case as it exists. In short, Clyde has met all of the requirements for intervention of section 2.714 of the NRC's regulations, and should be granted intervention.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons and in the interest of justice, The City of Clyde, Ohio respectfully requests:

- (1) That Ohio Edison's Application be rejected or denied;
- (2) That Clyde be permitted to intervene in this proceeding and be treated as a party hereto, with full rights of participation; and

- (3) That Clyde be offered all other relief deemed appropriate by the Commission.

Respectfully submitted,



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February 5, 1988
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by mailing copies by first class mail properly addressed to the following:

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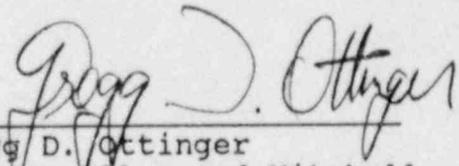
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Dated this 5th day of February, 1988.


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July 21, 1987

ORDINANCE NO. 1987-33

AN ORDINANCE DECLARING IT NECESSARY
TO ESTABLISH, ACQUIRE, AND OPERATE A MUNICIPAL ELECTRIC SYSTEM

WHEREAS, this Council has an interest in keeping rates for electric service to the Citizens and City of Clyde as low as possible; and

WHEREAS, Article XVIII, Section 4 of the Ohio Constitution provides in part that "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service."; and

WHEREAS, Article XVIII, Section 5 of the Ohio Constitution provides in part that "Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefore, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage."; and

WHEREAS, this Council has received, reviewed and discussed feasibility studies prepared by expert utility consultants, regarding the feasibility, costs, and benefits of establishing a municipal electric utility to serve the City and its inhabitants; and

WHEREAS, based on the feasibility studies referenced above, it is in the public interest to establish a municipal electric utility owned and operated by the City of Clyde in order to reduce electrical costs to the City and inhabitants of Clyde;

NOW, THEREFORE, be it ordained by the Council of the City of Clyde, State of Ohio;

SECTION 1. That the City of Clyde shall proceed to acquire, construct, own, lease and operate within or without its corporate limits, a public electric utility the product or service of which shall be supplied to the City and its inhabitants, and may contract with others for any such product or service.

SECTION 2. That there is hereby created an Electric Utility Division within the Department of Service and Safety. The City Manager, as Director of the Department of Service and Safety, shall have supervision over the Electric Utility Division.

SECTION 3. That the City shall have and may exercise any and all legal powers and duties necessary to implement Section 1 of this Ordinance, to provide reliable electric service to the City, businesses and inhabitants of Clyde, and may exercise all of the powers granted to municipal electric utility systems by the Constitution and laws of Ohio and the Charter of the City of Clyde.

The City Manager is authorized and directed to oversee the implementation of such powers and duties to the extent allowed by law, and to perform the activities necessary to do so, including, but not limited to, the following:

- A. Develop plans for, and enter into negotiations with third parties in connection with all aspects of the establishment of the Clyde municipal electric utility system and its program for the purchase, production, transmission, distribution and sale of electric power and energy (its "power program").
- B. Supervise the work of all consultants engaged by the Clyde City Council in connection with the establishment of the Clyde municipal electric utility system and its power program.
- C. Review all proposed contracts or other engagements relating to the establishment and operation of the Clyde municipal electric system and its power program and make recommendations

to the City Council concerning such proposed contracts or engagements.

D. Have responsibility for the development of plans and procedures for the the operation and maintenance of the Clyde municipal electric utility system and its power program and supervise the implementation thereof.

E. Have the responsibility to recommend to the City Council rates for the use of electric service provided by the Clyde municipal electric utility system.

SECTION 4. It is the intention of Council that funding for acquisition and construction for the Electric Utility Division shall be derived from revenue bonds authorized and issued by the City pursuant to Article XVIII, Section 12 of the Ohio Constitution, unless otherwise approved by the City Council in accordance with Ohio law.

SECTION 5. That if any of the provisions of this Ordinance is held invalid for any reason, the remaining provisions shall remain in full force and effect to the extent they are not dependent on and inseparable from the invalid provision.

SECTION 6. That it is found that all formal actions of this Council concerning and relating to the passage of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public or otherwise in compliance with all legal requirements.

SECTION 7. That this Ordinance shall take effect and be in force from and after its passage at the earliest period allowed by law, provided that, pursuant to Article XVIII, Section 5 of the Ohio Constitution, if within thirty days from passage of this Ordinance, a petition signed by ten per centum of the electors of the City of Clyde shall be filed with the executive authority of the City demanding a referendum on this Ordinance, it shall not take effect until submitted to the electors and approved by a majority of those voting thereon in accordance with Article XVIII of the Ohio Constitution.

APPROVED AS TO FORM: [Signature]
SOLICITOR

PASSED: 7/28/87

Filed with me this 28th Day of July 1987,
[Signature]
PATRICK E. WADSWORTH, MAYOR

ATTEST: Joyce Fry
Joyce Fry, Clerk

MOTION by Mr. Berboth

SECOND by Mrs. Pascua

EBERHARD Absent

PASCUA Aye

REXROTH Aye

WADSWORTH Aye

WINKE Aye

I hereby certify this to be a true and exact copy of Ordinance
No. 1987-33 passed by Clyde City Council on July 28, 1987.

Joyce Fry
Joyce Fry, Clerk

