December 1, 1975

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A
THE TOLEDO EDISON COMPANY, et al. (Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

PRE-HEARING FACT BRIEF OF DUQUESNE LIGHT COMPANY

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Attorneys for
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UNITED STATES OF AMERICA
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PARTIAL LIST OF EXHIBITS[1]
OF DUQUESNE LIGHT COMPANY

Exhibit No.	Heading or Description
	Duquesne Light Company, Tarrifs, 1950-75.
	8/30/49 memo on the characteristics of boroughs' facilities.
	8/24/49 table, Aspinwall, Sharpsburg, Etna generator and load characteristics.
	8/24/49 chart on Etna.

1 Duquesne reserves the right to supplement this Partial List of Exhibits in light of the case presented by the NRC Staff, the Department of Justice and the City of Cleveland and also when, as and if its continuing efforts to determine the facts pertaining to allegations against it uncover additional relevant documents.

Exhibit No.	Heading or Description
	Undated, unsigned memo on Rate M contracts in Etna.
	Rate M, effective 10/21/51.
	Unsigned, undated description of Etna electric system.
	Loftus Corp. Report on Etna electric system, Sept. 1954.
	Loftus Corp. 12/17/54 memo re 12/10/54 meeting at Etna.
	5/6/55 Report of Commonwealth Services re Etna.
	Undated chart - Rate M Billing to Etna, 9/57 and 9/58.
	2/1/59 Article in Pittsburgh Press.
	Sept. 1959 study by Pa. Economy League.
	May 1960 study by Stone & Foster.
	8/10/60 Article in Sharpsburg Herald.
	9/26/60 Article in Sharpsburg Herald.
	10/19/60 Article in Sharpsburg Herald.
	10/20/60 Letter from PUC.
	11/2/60 and 11/9/60 Notices in Sharpsburg Herald.
	11/23/60 Article in Pittsburgh Post-Gazette.
	11/30/60 Article in Sharpsburg Herald.
	12/2/60 Article in Pittsburgh Post-Gazette.
	12/7/60 Article in Sharpsburg Herald.

Exhibit No.	Heading or Description
	PUC Documents re Etna acquisition; Etna ordinance authorizing sale.
	4/12/61 Article in Pittsburgh Post-Gazette.
	April 1961 Financial Survey and Report of Etna.
	Undated chart of sales of power under Rate M to Sharpsburg and Pitcairn, 1929 and 1930.
	8/24/49 Chart of Sharpsburg Rate M contract.
	Undated, unsigned chart of Sharpsburg Rate M consumption.
	Undated, unsigned chart of Sharpsburg power consumption.
	Undated table of Sharpsburg delinquent account, 1948-51.
	4/24/52 Article in Sharpsburg Herald.
	5/21/52 Article in Sharpsburg Herald.
	4/30/52 Article in Sharpsburg Herald.
	1/29/53 Article in Sharpsburg Herald.
	Undated chart of billing data re Sharpsburg - 1955-56.
	9/25/59 Chart of Service under Rate M to Sharpsburg, 1955-59.
	2/29/60 chart of electric plant characteristics of Sharpsburg.
	3/23/60 Article in Sharpsburg Herald.
	June 1960 Report by Stone & Webster.
	6/29/60 Article in Sharpsburg Herald.
	Orders and certificates of PUC re Etna purchase.

Exhibit No.	Heading or Description
	3/1/61 Article in Sharpsburg Herald.
	8/22/63 Article in Pittsburgh Press.
	1/24/61 Article in Pittsburgh Post-Gazette.
	1/25/61 Article in Sharpsburg Herald.
	2/1/61 Article and Editorial in Sharpsburg Herald.
	Undated editorial.
	2/5/61 Article in Pittsburgh Press.
	2/12/61 Article in Pittsburgh Post-Gazette.
	2/7/61 Article in Pittsburgh Post-Gazette.
	2/10/61 Chart of population and electric data for Sharpsburg.
	2/14/61 Article in Pittsburgh Post-Gazette.
	2/15/61 Article in Sharpsburg Herald.
	2/21/61 Article in Pittsburgh Post-Gazette.
	3/15/61 Article in Sharpsburg Herald.
	3/21/61 Article in Pittsburgh Post-Gazette.
	3'22/61 Article in Sharpsburg Herald.
	3/22/61 Editorial in Sharpsburg Herald.
	7/19/61 Article in Sharpsburg Herald.
	7/26/61 Article in Sharpsburg Herald.
	1/3/62 Article in Sharpsburg Herald.
	1/3/62 Ordinance in Sharpsburg Herald.

Exhibit No.	Heading or Description
	1/10/62 Article in Sharpsburg Herald.
	1/17/62 Article in Sharpsburg Herald.
	4/25/62 Article in Sharpsburg Herald.
	5/22/62 Article in Pittsburgh Press.
	7/30/62 Chart of billing data re Sharpsburg.
	Sept. 1962 Study of Pa. Economy League.
	10/17/62 Article in Sharpsburg Herald.
	2/1/63 Letter from Merriman to Urso.
	4/5/63 Article in Pittsburgh Post-Gazette.
	4/16/63 Letter from Merriman to DeBonis.
	4/63 Complaint at PUC by Sharpsburg.
	5/22/63 Chart on Rate M billing to Sharpsburg.
	5/29/63 Article in Sharpsburg Herald.
	8/27/63 Agreement between Sharpsburg and Duquesne.
	8/28/63 Article in Sharpsburg Herald.
	10/3/63 Letter from Sisca to PUC.
	Orders and certificates of PUC re Sharpsburg purchase.
	10/18/63 Letter from Bruno to PUC.
	10/30/63 Notice in Sharpsburg Herald.
	10/30/63 Article in Sharpsburg Herald.
	11/8/63 Article in Pittsburgh Press.
	11/13/63 Article in Sharpsburg Herald.

Exhibit No.	Heading or Description
	1/1/64 Article in Pittsburgh Post-Gazette.
	3/1/66 Memo from Merriman to O'Nan.
	3/2/66 Memo from Gilfillan to Fleger
	4/10/74 Letter from Gilfillan to Gerber.
	8/24/49 Chart re Aspinwall Rate M service.
	Undated, unsigned chart re Rate M contract with Aspinwall.
	10/28/65 Memo by Gilfillan.
	11/1/65 Memo from Merriman to O'Nan.
	Feb. 1966 Report of Stone & Webster.
	3/3/66 Memo by Gilfillan.
	3/10/66 Handwritten notes by Gilfillan.
	4/29/66 Handwritten notes by Gilfillan.
	4/28/66 Memo by Munsch.
	5/2/66 Letter from Munsch to Donaldson.
	5/20/66 Memo from Merriman to O'Nan.
	6/17/66 Memo by Merriman.
	7/1/66 Memo from Merriman to O'Nan.
	8/5/66 Memo from Merriman to O'Nan.
	August 1966 Report by Pa. Economy League.
	8/24/66 Letter from Donaldson to Merriman.
	8/24/66 Memo from Merriman to O'Nan.
	Undated Memo.

Exhibit No.	Heading or Description
———	8/25/66 Memo from Gilfillan to Fleger.
	9/9/66 letter from Aspinwall customer.
	9/12/66 letter from Aspinwall customer.
	9/12/66 letter from another Aspinwall customer.
	10/12/66 Agreement between Duquesne Light and Aspinwall.
	10/7/66 Memo from Gilfillan to Fleger.
	10/13/66 Memo from Christner to Fleger.
	10/14/66 Memo from Christner to Fleger.
	Undated Memo of Meeting at Aspinwall.
	11/30/66 Memo from O'Nan to Gilfillan.
	12/5/66 Memo from Gilfillan to Fleger.
	12/15/66 Memo from O'Nan to Munsch.
	Draft Application of DLC to FPC.
	4/6/67 Memo from Murphey to O'Nan & Loucks.
	Bid information.
	4/25/67 Memo from Dempler to Murphey.
	May 1, 1967 PUC order.
	5/23/67 Memo from Merriman to Loucks.
	5/23/67 Memo from O'Nan to many.
	PUC orders re Aspinwall acquisition.
	6/7/67 Article in Sharpsburg Herald.
	June 13, 1967 Order of FPC.
	6/19/67 Memo from O'Nan to many.
	6/21/67 Memo from Staas to many.

Exhibit No.	Heading or Description
	Aspinwall circular.
	6/29/67 Letter from Gilfillan to Donley.
	Undated draft statement of counsel for PUC hearing.
	Undated chart of Rate M service to Pitcairn - 1929-30.
	6/12/46 letter from McCance to Pitcairn.
	March 1957 Report by Pa. Economy League.
	Rate M issued 10/21/51.
	3/16/59 Letter from Schimke of Loftus to Pitcairn.
	8/13/59 Article in Times Express.
	11/10/59 Article in Pittsburgh Post-Gazette.
	11/5/59 Certificate of PUC.
	7/19/66 Letter from Merriman to Fails.
	7/27/66 letter from Merriman to Fails.
	7/27/66 Memo from Dempsey to Merriman.
	8/12/66 Memo from Merriman to O'Nan.
	8/15/66 Memo from Gilfillan to Fleger.
	8/22/66 Article in Times Express.
	10/26/66 Memo from Gilfillan to Fleger.
	10/26/66 Memo from O'Nan to Gilfillan.
	10/25/66 Memo from Merriman to O'Nan.
	10/25/66 Memo from Merriman to O'Nan
	11/30/66 Memo from O'Nan to Gilfillan.

Exhibit No.	Heading or Description
	12/5/66 Memo from Gilfillan to Fleger.
	12/6/66 Memo from Fleger to Gilfillan.
	6/8/67 letter from McCabe to Heisley.
	6/20/67 letter from Heisley to McCabe.
	6/23/67 Memo from Christner to Merriman.
	7/18/67 letter from Heisley to McCabe.
	10/19/67 Article in Times Express.
	10/24/67 Report of W. M. Lewis & Associates.
	10/24/67 letter from Merriman to McCabe.
	11/24/67 Memo from O'Nan to Munsch.
	11/20/67 letter from McCabe to Heisley.
	11/27/67 Memo from Gilfillan to Fleger et al.
	11/28/67 letter from Munsch to Dunlap.
	12/1/67 letter from Dunlap to Munsch.
	12/5/67 letter from McCabe to Mansfield (OE).
	12/5/67 letter from McCabe to Mansfield (PP).
	12/5/67 letter from McCabe to Fleger.
	12/5/67 letter from McCabe to Rudolph.
	12/5/67 letter from McCabe to Davis.
	12/6/67 Article in Pittsburgh Post-Gazette.
	12/8/67 Memo by Gilfillan.
	6/12/67 Letter from Mansfield to McCabe.
	11/24/67 Memo from O'Nan to Munsch.

Exhibit No.	Heading or Description
	12/18/67 Letter from Rudolph to McCabe.
	12/18/67 Letter from Davis to McCabe.
	Undated Chart of statistics for Pitcairn - 1967.
	1/2/68 letter from Fleger to McCabe.
	1/2/68 letter from McCabe to Rudolph.
	1/25/68 letter from Davis to McCabe.
	1/2/68 letter from Mansfield to McCabe.
	1/2/68 letter from McCabe to Davis.
	1/4/68 Article in Times Express.
	1/11/68 letter from McCabe to Fleger.
	1/11/68 letter from McCabe to Mansfield.
	1/22/68 letter from Fleger to McCabe.
	1/23/68 letter from McCabe to Merriman.
	1/26/68 Memo from Gilfillan to Fleger.
	1/23/68 Memo from Merriman to O'Nan & Schmidt.
	1/30/68 letter from McCabe to Fleger.
	1/30/68 letter from McCabe to Munsch.
	1/30/68 letter from Rudolph to McCabe.
	1/30/68 letter from Mansfield to McCabe.
	Undated unsigned draft of letter from Merriman to McCabe.
	2/2/68 Memo from Gilfillan to Fleger.
	2/6/68 letter from McCabe to Munsch.
	2/6/68 letter from McCabe to Rudolph.
	2/6/68 letter from McCabe to Greenslade.

Exhibit No.	Heading or Description
	2/6/68 Letter from McCabe to White.
	2/6/68 Letter from McCabe to Davis.
	2/12/68 Letter from White to McCabe.
	2/15/68 Letter from Munsch to McCabe.
	2/15/68 Memo from Munsch to Fleger.
	2/21/68 Letter from Greenslade to McCabe.
	2/22/68 Letter from McCabe to Munsch.
	3/4/68 Letter from Munsch to McCabe.
	2/27/68 Letter from Merriman to McCabe.
	2/28/68 Letter from Davis to McCabe.
	2/29/68 Letter from McCabe to Davis.
	3/19/68 Letter from Gilfillan to McCabe.
	3/25/68 Letter from McCabe to Gilfillan.
	3/25/68 Letter from McCabe to Soisson (West Penn).
	4/1/68 Letter from Soisson to McCabe.
	4/9/68 Letter from McCabe to Soisson.
	4/17/68 Letter from Soisson to McCabe.
	1/20/69 Unsigned memo.
	5/12/69 Memo by Dempler re CAPCO.
	5/6/69 Memo by Dempler re power exchange.
	6/24/69 Memo from O'Nan to Gilfillan.
	7/31/69 Comparison of rates for resale.
	1/12/70 Memo from Gilfillan to Dudt and Stark.
	1/23/70 Memo from Merriman to Stark.

Exhibit No.	Heading or Description
	2/3/70 Memo from Stark to Gilfillan
	2/24/70 Article in Pittsburgh Press.
	11/4/70 Article in Times Express.
	11/17/70 Article in Pittsburgh Press.
	11/24/70 Memo from Dempler to Jarrett.
	11/27/70 Letter from Myers to Dempler.
	Undated, unsigned memo of Pitcairn/ Duquesne understanding.
	11/30/70 Letter from Myers to Duquesne.
	1/6/71 Article in Times Express.
	8/24/71 Letter from Lewis to Stark.
	10/13/71 Settlement Agreement.
	10/15/71 Stipulation.
	Resolution 282 of Pitcairn.
	Request to Withdraw.
	1/5/71 Memorandum of Understanding between Duquesne Light Company and Pitcairn.
	10/15/71 Memo from Gilfillan to many.
	11/22/71 Letter from McCabe to Stark.
	11/23/71 Letter from McCabe to Stark.
	11/24/71 Memo from Stark to West and Kepfinger.
	1/20/70 Letter from Howley to City of Cleveland.
	3/17/70 Letter from Howley to City of Cleveland.
	4/4/73 Letter from Whiting to Rudolph.

Exhibit No.	Heading or Description
	4/6/73 letter from White to Charno.
	4/4/73 letter from Whiting to Rudolph.
	4/13/73 letter from Whiting to Rudolph.
	4/4/73 letter from Rudolph to Whiting.
	4/17/73 letter from Rudolph to Arthur.
	4/17/73 letter from Rudolph to Whiting.
	4/27/73 letter from Whiting to Howley.
	4/27/73 Minutes of CAPCO Executive Committee.
	8/3/73 letter from Whiting to Rudolph with enclosures.
	8/13/73 letter from Rudolph to Whiting.
	9/10/73 Letter from Whiting to Rudolph.
	12/7/73 Minutes of Capco Executive Committee.
	12/10/73 Letter from Arthur to City of Cleveland.
	12/13/73 Letter from Howley to Whiting.
	1/2/74 Letter from Whiting to Howley.
	1/15/74 Letter from Howley to Whiting.
	2/21/74 Memo from Munsch to Arthur.
	2/6/74 Memo from Munsch to Arthur.

Exhibit No.	Heading or Description
	12/7/70 Memo from Dempler to Gilfillan.
	2/7/74 Letter from Howley to Goldberg with enclosures.
	Annual Report by Duquesne Light Company on FPC Form No. 1, 1940-1974
	PUC Code.
	All or part of any of the Depositions taken in connection with this proceeding.
	PUC Docket sheets, 1950-1975.
	4/10/74 FPC Fuel Conservation Energy Rate Summary
	Duquesne Light Company Annual Report, (FPC Form 1), 1940-74.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	Docket No. 50-346A
(Davis-Besse Nuclear Power Station, Unit 1)	)	
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THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	Docket Nos. 50-440A 50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	
	)	
THE TOLEDO EDISON COMPANY, et al.	)	Docket Nos. 50-500A 50-501A
(Davis-Besse Nuclear Power Station, Units 2 and 3)	)	

PARTIAL LIST OF WITNESSES OF[1]
DUQUESNE LIGHT COMPANY

G. W. Ousler, Duquesne Light Company
(Etna, Sharpsburg, Aspinwall, Pitcairn)

L. J. Lamberger, Duquesne Light Company
(Etna, Sharpsburg, Aspinwall, Pitcairn)

L. H. Lingemann, Duquesne Light Company
(Etna, Sharpsburg, Aspinwall, Pitcairn)

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1 Duquesne reserves the right to supplement this Partial List of Witnesses in light of the case presented by the NRC Staff, the Department of Justice and the City of Cleveland and also when, as and if its continuing efforts to determine the facts pertaining to allegations against it uncover additional witnesses. Duquesne also reserves the right to call as witnesses individuals not listed herein to the extent necessary to refute or contradict evidence presented by its opponents.

F. C. Niedt, Duquesne Light Company
(Etna)

R. G. Grimstead, Duquesne Light Company
(Etna)

H. L. Murphey, Duquesne Light Company
(Etna)

Vincent Bougher, Duquesne Light Company
(Etna)

William Shaginon, Duquesne Light Company
(Etna)

John J. Schultz, Duquesne Light Company
(Etna)

R. R. Murdock, Duquesne Light Company
(Etna)

T. J. Munsch, Jr., Duquesne Light Company
(Etna, Sharpsburg, Aspinwall, Pitcairn, City of Cleveland, CAPCO)

J. W. Merriman, Duquesne Light Company
(Etna, Sharpsburg, Aspinwall, Pitcairn)

E. M. Dempsey, Duquesne Light Company
(Etna, Sharpsburg, Aspinwall, Pitcairn)

Louis Morelli, Duquesne Light Company
(Sharpsburg)

J. W. O'Nan, Duquesne Light Company
(Sharpsburg, Aspinwall, Pitcairn)

W. F. Gilfillan, Duquesne Light Company
(Aspinwall, Pitcairn)

W. G. Dempler, Duquesne Light Company
(CAPCO)

Edward Heisley, Duquesne Light Company
(Aspinwall, Pitcairn)

John Daily, Duquesne Light Company
(Aspinwall)

Robert Strohm, Duquesne Light Company
(Aspinwall)

H. W. Staas, Duquesne Light Company
(Etna, Sharpsburg, Aspinwall, Pitcairn)

Joseph Koepfinger, Duquesne Light Company
(Pitcairn)

Roger Martin, Duquesne Light Company
(Pitcairn)

Charles Atkinson, Duquesne Light Company
(Pitcairn, CAPCO)

Walter T. Wardzinski, Duquesne Light Company
(CAPCO)

R. W. Vendebunt, Duquesne Light Company
(Pitcairn)

John M. Arthur, Duquesne Light Company
(City of Cleveland, CAPCO)

Stanley G. Schaffer, Duquesne Light Company
(City of Cleveland, CAPCO, Pitcairn)

Cliff Dunn, Duquesne Light Company
(CAPCO, City of Cleveland, Pitcairn)

Earl Woolever, Duquesne Light Company
(CAPCO)

Paul Schroeder, Duquesne Light Company
(City of Cleveland, Pitcairn, CAPCO)

P. A. Fleger, Duquesne Light Company
(Etna, Aspinwall, Sharpsburg, Pitcairn,
City of Cleveland, CAPCO)

Daniel Dudt, Duquesne Light Company
(Etna, Aspinwall, Sharpsburg, Pitcairn,
City of Cleveland, CAPCO)

C. B. Cochran, Loftus Corporation
(Etna)

Charles C. Knox, Loftus Corporation
(Etna)

John P. Ladesic, Etna Borough
(Etna)

Robert F. Klein, Etna Borough
(Etna)

Herbert T. Bonner, Etna Borough
(Etna)

Michael Ferketic, Etna Borough
(Etna)

William H. Ziener, Etna Borough
(Etna)

William C. Hartman, Etna Borough
(Etna)

Anthony Demaiano, Etna Borough
(Etna)

Mark Vinski, Etna Borough
(Etna)

Joseph E. Verardi, Sharpsburg Borough
(Sharpsburg)

Mary Miller, Sharpsburg Borough
(Sharpsburg)

August Bondi, Sharpsburg Borough
(Sharpsburg)

Joseph McCloskey, Sharpsburg Borough
(Sharpsburg)

Robert Brose, Sharpsburg Borough
(Sharpsburg)

Albert Morrone, Sharpsburg Borough
(Sharpsburg)

William Neff, Sharpsburg Borough
(Sharpsburg)

Peter M. Caspar, Sharpsburg Borough
(Sharpsburg)

Charles Morelli, Sharpsburg Borough
(Sharpsburg)

Orest Panza, Sharpsburg Borough
(Sharpsburg)

Sam Panza, Sharpsburg Borough
(Sharpsburg)

Franklyn Conflenti, Sharpsburg Borough
(Sharpsburg)

Stewart Townsend, Sharpsburg Herald
(Etna, Sharpsburg, Aspinwall)

Dom DeBonis, Sharpsburg Borough
(Sharpsburg)

Michael Urso, Sharpsburg Borough
(Sharpsburg)

James Donley, Sewickley
(Aspinwall)

Lee Donaldson, Pittsburgh
(Aspinwall)

Neil Buckley, Aspinwall Borough
(Aspinwall)

Carl P. Forster, Aspinwall Borough
(Aspinwall)

Meredith Lang, Aspinwall Borough
(Aspinwall)

C. W. Hill, Aspinwall Borough
(Aspinwall)

Chester D. May, Aspinwall Borough
(Aspinwall)

E. C. Schneider, Aspinwall Borough
(Aspinwall)

Frank A. Nedrow, Aspinwall Borough
(Aspinwall)

Charles Schimke, Loftus Corporation
(Pitcairn)

Robert McCabe, Pittsburgh
(Pitcairn)

George Myers, Pitcairn Borough
(Pitcairn)

Donald Fails, Pitcairn Borough
(Pitcairn)

David Dunlap, Harrisburg
(state regulation)

Charles Thomas, Harrisburg
(state regulation)

Emory Sedlak, Pittsburgh
(Etna, Sharpsburg, Aspinwall, Pitcairn)

William Lewis, consulting engineer
(Pitcairn)

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PRE-HEARING FACT BRIEF OF DUQUESNE LIGHT COMPANY

David McNeil Olds
William S. Lerach
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Attorneys for
Duquesne Light Company

TABLE OF CONTENTS

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PRE-HEARING FACT BRIEF OF
DUQUESNE LIGHT COMPANY

A. Introduction.[1]

The basic thrust of the various allegations against Duquesne Light Company ("Duquesne") is that over a period of years Duquesne unlawfully refused to sell power for resale to municipal

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1 Duquesne's separate Pre-Hearing Fact Brief is limited to the allegations of anti-competitive conduct made against it individually. As to allegations directed to CAPCO generally and the legal issues involved in this proceeding, Duquesne relies upon the Pre-Hearing Brief for the Applicants filed on behalf of the CAPCO Companies by Shaw, Pittman, Potts and Trowbridge.

electric systems wi[illegible] its service area as part of a predatory scheme to acquire those systems. Duquesne rejects these accusations as factually preposterous. The actual facts, detailed herein,[2] are that Duquesne (i) rendered substantial assistance to municipal power systems by making available and selling firm power for resale to several systems for many years, acquiring such systems only when they were on the verge of physical and fiscal collapse due to mismanagement and neglect, (ii) acquired a municipal system only when a borough's overall fiscal problems mandated that it raise substantial monies, to pay delinquent debts or finance other municipal improvements, that could most readily be raised by the sale of the borough's electric system, (iii) was prohibited by Pennsylvania law from wholesaling power to municipal systems, other than pursuant to Rate "M" in its tariff, during the time that state law governed such transactions and (iv) currently sells wholesale power to the only municipal electric system operating within its service area, thus making available to it the benefits of coordinated operations, economies of scale and reliability of service.

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2 Duquesne reminds the Licensing Board of the substantial constitutional questions that are raised in that Duquesne is now forced to defend conduct that took place in the time period 1948-1966, long after the statute of limitations has expired on any possible private civil or criminal proceedings based on actions within that time. Similarly, much of Duquesne's challenged conduct took place so long ago that location of relevant documents and of living witnesses with actual knowledge of the events has been an extraordinarily difficult task. Duquesne reserves the right to supplement this Pre-Hearing Fact Brief.

B. History, Operation and State Regulation of Duquesne.

Duquesne was formed under the laws of Pennsylvania in 1912. Duquesne owns all the stock of Allegheny County Steam Heating Company, which furnishes steam heating service to customers in the principal business section of Pittsburgh. Duquesne is not a subsidiary of any other corporation. Its common stock is publicly owned and traded on the New York Stock Exchange.

Duquesne owns and operates an integrated electric generating, transmission and distribution system serving Allegheny and Beaver Counties, including the metropolitan area of Pittsburgh, Pennsylvania. At December 31, 1972, Duquesne furnished electric service to 517,663 customers in an area approximately 800 square miles, having a combined population of approximately 1,615,000 (based upon 1970 Census data).

In September 1967 Duquesne joined with Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company and Toledo Edison Company in the formation of the CAPCO power pool. Duquesne entered into the CAPCO arrangements because it hoped that the pool would ultimately result in improved electric service reliability and lower cost electric service. Duquesne believed these desirable results could be

achieved by pooling the generating reserve of the CAPCO companies, installation of larger more efficient and economic generating units and coordination of maintenance and operations.

Duquesne is a public utility under the Pennsylvania Public Utility Law, 66 P.S. §§ 1101 et seq. (Purdon's Pennsylvania Statutes Annotated), and is subject to comprehensive regulation under that statute by the Pennsylvania Public Utility Commission (the "PUC"). Under the law and the established policy of the PUC, Duquesne has an exclusive franchise vis-a-vis other private utility corporations within a defined service area and has the responsibility to provide electric energy to any customer therein pursuant to its filed tariffs. 66 P.S. §§ 1141, 1144, 1171 and 1172. Duquesne may not sell power to customers in a borough which is furnishing electricity to its inhabitants without the consent of the borough authorities. 53 P.S. § 47471.

C. Relations with Municipal Power Systems.

(1) Introduction.

In 1959 the boroughs of Etna, Sharpsburg and Aspinwall operated municipal electrical generation and distribution systems within Duquesne's service area. During the years 1960-1966 Duquesne acquired the Etna, Sharpsburg and Aspinwall distribution systems. For many years Duquesne provided power for resale to the overloaded Etna, Sharpsburg and Aspinwall systems, thus permitting

their continued operation. In each of the three acquisitions (i) the borough initiated the negotiations that led to the ultimate acquisition, (ii) an independent economic study recommended the sale of each borough's system and (iii) each borough sold its system because its generation and distribution facilities were outmoded and continued system operation would have required a capital spending program that each borough wished to avoid. Furthermore, all three boroughs had experienced decades of steady population decline, an increase in the age of their municipal population, a decrease in their municipal tax base and physical deterioration of their municipal facilities. This deterioration of facilities was aggravated by the deferral of municipal capital expenditures for several years. In such a context the sale of a borough's electric system was a convenient means of raising desired capital funds which were needed to improve the borough's fiscal posture.

Duquesne's actions with regard to these three boroughs were not part of any conspiracy with any other electric utility, and took place prior to the 1967 formation of CAPCO.

(2) Purchase of the Etna System.

For many years prior to 1960, the borough of Etna operated an electric power generation and distribution system

to serve its residents. The population of the borough had declined from 7,493 in 1930, to 6,750 in 1950 and to 5,847 in 1959. By 1960 Etna's system serviced 1,660 residential customers and 211 commercial and small industrial customers.

Because Etna's two major generators had been acquired prior to 1930 and had been poorly maintained, its generating plant was in poor condition by the early 1950's. One generator was uninsurable because of damage. The other was so old and in such poor condition that it was not insured. It had been beset with power plant problems for years because of the obsolete character of its equipment. By 1952, the Etna system was overloaded--it had generating capacity of 1500 kw and a maximum load of 1600 kw. In 1952, Etna's Borough Council announced a need to acquire two 1000 kw units and proposed a $300,000 bond issue to finance their purchase. However, the citizens of Etna defeated the bond issue. The Etna system was able to continue operations while this overloaded condition existed only because Duquesne provided power to the system under Duquesne's Tariff Rate "M"--Emergency Municipal Service. (Appendix I). Duquesne never refused to provide power to Etna for resale, quite to the contrary, it provided power to Etna which was in fact resold. In 1940-1953 and 1958 (the only years for which comparative data is available) Duquesne provided at least 6.3% of the Etna system's energy needs. Moreover, for the more recent years, 1950-1953 and 1958, Duquesne provided at least

7.7% of Etna's needs.[3] Etna never requested that Duquesne wheel power for it. These sales of power to Etna were made continually during 1952-1960 despite the fact that Etna was chronically delinquent in paying Duquesne for this power. By 1960, when the system was sold to Duquesne, the delinquent charges were $139,731.

The extent to which Duquesne provided Etna power for resale is highlighted by the following table:

Year	Total Power (kwh) Distributed by Etna System	Total Power (kwh) for Resale Provided Etna by Duquesne	% of Power Provided by Duquesne
1940	4,103,117	120,000	2.9%
1941	4,240,872	105,000	2.5%
1942	4,045,751	102,400	2.5%
1943	4,073,044	112,800	2.8%
1944	4,242,798	143,600	3.4%
1945	4,518,539	185,200	4.1%
1946	4,718,862	197,200	4.2%
1947	5,027,651	292,600	5.8%
1948	5,285,795	582,000	11.0%

3 Duquesne believes that these figures understate the extent of the assistance that Duquesne rendered to Etna. Duquesne believes that, in order to reduce the load on Etna's generators, it was selling energy to Etna for use by the borough as a final consumer, e.g., for use in borough buildings or by the borough water plant. However, this information is not separately recorded by borough in any reports filed by Duquesne.

Year	Total Power (kwh) Distributed by Etna System	Total Power (kwh) for Resale Provided Etna by Duquesne[4]	% of Power Provided by Duquesne
1949	5,737,120	515,400	9.0%
1950	6,232,240	1,158,200	18.6%
1951	6,583,420	186,800	2.8%
1952	6,794,200	368,640	5.4%
1953	7,016,145	345,000	5.6%
1954		390,000	
1955		612,200	
1956		642,800	
1957		536,000	
1958	6,362,468	475,600	7.4%
1959		672,000	
1960		2,085,000	
1940-1953, 1958	78,982,022	4,990,440	6.3%
1950-1953, 1958	32,988,473	2,534,240	7.7%

3 continued

Furthermore, because of the long period of time which has passed, Duquesne has not been able to locate billing sheets which would have been associated with these transactions. This is merely a very minor example of the burden and disadvantage under which Duquesne has unfairly been laboring because of the staleness of the transactions underlying the allegations of anticompetitive practices.

4 Duquesne Light Company Annual Report to FPC (Form No. 1) for each of the years indicated.

Duquesne also rendered substantial assistance to the Etna power system by supplying power to a number of large industrial users within the borough. Duquesne was under no legal obligation to provide service to such customers as they were not located within Duquesne's exclusive service area, in which Duquesne had a duty to provide service. Had Duquesne refused to provide this service, the borough's electric system would have been grossly overloaded and Etna would have been placed in a difficult and embarrassing position. Substantial expenditures would have been required to increase capacity, thus exacerbating Etna's financial difficulties. Indeed, in light of the 1952 rejection of a proposed bond issue to finance an electric plant improvement program, such expenditures would have been politically difficult. Furthermore, Duquesne's refusal to provide such service would have resulted in considerable political pressure on borough officials to sell the system and allow Duquesne to serve the entire borough if the borough was unable to provide the power required by large employers in the community.

In 1954, an evaluation of Etna's generating plant was undertaken by Peter F. Loftus Corporation, an engineering consulting firm. The report concluded that, to serve present and prospective system loads, Etna needed to undertake a plant improvement and expansion program ranging from $409,000 to $695,000. Etna did not implement any of the proposed improvement or expansion programs.

In early 1959 Etna's Borough Council asked an independent organization, the Pennsylvania Economy League, to conduct a financial analysis of Etna's electric plant to determine the advisability of making capital improvements to the plant or disposing of it. In a detailed report the Economy League recommended that Etna sell its system. The recommendation was based on the following conclusions. Etna's generating plant was old and would soon need to be replaced at a minimum $500,000 cost. Etna would have to exhaust its entire borrowing capacity of $482,000 if it were to undertake even the minimal capital improvement program that was required to rehabilitate the plant. Etna's then-existing electric rates, which were the highest in the country,[5] would have to be maintained and all electric revenues generated by these rates would have to be committed to finance the capital improvement program for at least the next 20 years. Accordingly, there would have been no transfer of the electric fund surplus to the Etna General Fund, as had been the case in the past. At the same time this report was painting a bleak prospect for the electric system's prospects, Etna's General Fund was severely strained, having incurred net deficits the previous three years. Finally, the report concluded that Etna residents and commercial electricity users would experience a net annual savings of $77,000 if Duquesne provided the electric service.

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5 Etna's existing residential and commercial rates were 50% and 64% higher respectively than Duquesne's.

After the public release of this report, Etna's Borough Council requested Duquesne to present a proposal for the sale of the Etna system. A 1960 study by Stone and Webster Service Corporation concluded that a price of $425,000 - $450,000 for the system would be justified. At this time Etna did not ask Duquesne to wheel power to it or to sell it wholesale power as an alternative to purchasing the system.

In August 1960, Etna's Borough Council accepted Duquesne's $450,000 offer to purchase its distribution system. After public notice, the puchase was approved by the PUC on November 21, 1960. The Etna distribution system was in such poor condition that Duquesne subsequently expended an additional $206,000 to upgrade it to conform to Duquesne's engineering safety standards.

Etna decided to terminate its electric power business because the borough's financial problems would be exacerbated if it retained the financial burden of operating and maintaining an outmoded and deteriorating electric system. Even if Etna had been willing and able to raise the capital to make the needed improvements to its system, Etna's property taxes would have had to have been doubled. By getting out of the power business the borough and its citizens received a useful large lump payment, paid all of the borough's delinquent indebtedness and released its borrowing capacity for other more desirable municipal improvements. It, in fact, was able to use this money to reduce its bonded indebtedness and to repair its streets.

(3) Purchase of the Sharpsburg System.

The borough of Sharpsburg operated an electric power generation and distribution system for many years. The population of the borough declined from 8,202 in 1940 to 7,296 in 1950 to 6,096 in 1960. In 1961, there were 1,925 residential, 235 commercial and 40 industrial customers in the system. As early as 1952 an independent study of Sharpsburg's utilities severely criticized the borough's use of electric fund revenues to support the borough's general fund and noted that the electric plant was in need of considerable rehabilitation and modernization.

During the 1950's and early 1960's, Sharpsburg was able to continue the operation of its electric system only because Duquesne provided it with substantial amounts of power for resale pursuant to Duquesne's Tariff Rate "M". During the years 1954-1959 and 1961, the only years for which comparable data is available, Duquesne provided 14% of the Sharpsburg system's energy needs. Duquesne continued to provide this power despite Sharpsburg's chronic delinquency and periodic recalcitrant refusals to reduce substantial, long past-due balances. In the period 1955-1956 Sharpsburg's delinquent account ranged from a high of $102,117 to a low of $74,000. By 1961, the delinquency reached $135,000, and by 1963 it was $175,000.

The extent to which Duquesne provided power for resale to Sharpsburg is highlighted by the following table:[6]

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6 Duquesne believes that this understates the extent to which it was providing assistance to the Sharpsburg system for the reasons set forth in footnote 3, supra.

Year	Total Power (kwh) Distributed by Sharpsburg System	Total Power (kwh) for Resale Provided Sharpsburg by Duquesne[7]	% of Power Provided by Duquesne
1940		100,840	
1941		290,400	
1942		127,980	
1943		78,380	
1944		151,800	
1945		133,200	
1946		237,280	
1947		1,163,820	
1948		2,542,980	
1949		1,183,840	
1950		1,630,000	
1951		246,800	
1952		755,860	
1953		1,679,222	
1954	10,632,320	1,571,240	14.7%
1955	10,846,620	799,640	7.3%
1956	11,158,880	1,131,640	10.1%
1957	11,634,499	1,985,120	17%
1958	10,966,000	909,000	8.2%
1959	11,012,800	2,098,940	19%
1960		874,340	
1961	8,594,908	2,031,900	23.6%
1962		1,688,050	

Year	Total Power (kwh) Distributed by Sharpsburg System	Total Power (kwh) for Resale Provided Sharpsburg by Duquesne[7]	% of Power Provided by Duquesne
1963		1,555,380	
1964		1,202,340	
1954-1959, 1961	74,846,027	10,527,480	14%

By early 1960, Sharpsburg was considering the possibility of making substantial improvements to its electric system. The borough had comprehensive engineering and financial studies of its electric system prepared by Chester Engineering Co. and Arthurs Lestrange & Co. At the same time, the borough invited Duquesne to have a study of the system made so Duquesne could make an offer to purchase the system. In early 1961 Duquesne offered to buy the system for $450,000. In February 1961, Sharpsburg Borough Council, in a highly controversial decision which generated a great storm of public opposition, rejected this offer and authorized a $1,200,000 electric plant improvement program. At the same time Sharpsburg rejected an offer from Citizens Utility Company to purchase the system for $300,000 and pay a 5% Franchise Tax on its gross billings.

In 1962 newly elected borough officials who had campaigned against the expansion program voted to rescind the electric system expansion program and requested an independent consulting group (the Pennsylvania Economy League) to study Sharpsburg's electric power problem and advise whether Sharpsburg should sell its electric system or undertake a program to

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7 Duquesne Light Company Annual Report to FPC (Form No. 1) for each of the years indicated.

improve its generating plant and distribution system. At this time, Sharpsburg had been experiencing a net deficit in its General Fund with future deficits projected. The report concluded that Sharpsburg should sell its municipal electric system as part of an overall program to solve its financial problems.

The Economy League report concluded that Sharpsburg had maintained a low tax rate for years by utilizing the revenues of its electric system to provide revenues for its General Fund. It found that during 1952-1961 Sharpsburg transferred $246,000 from its electric fund to the General Fund. This was almost 10% of the system's total revenues during this time period. Further, the report found that insufficient attention had been paid to the maintenance of Sharpsburg's municipal electric plant. The report concluded that Sharpsburg would have to spend $1,250,000 for capital improvements if it decided to continue to operate its electric plant. Finally, it concluded that Sharpsburg residents would experience a net savings of $62,000 annually if Duquesne provided the electric service. Sharpsburg's residential rates were 22.8% to 41.7% higher than Duquesne's, and its commercial and industrial rates were 74.5% and 120.2% higher, respectively.

At the time of the Economy League's report in 1962 it would have been difficult for Sharpsburg to undertake the capital improvement program necessary if it were to continue

operation of its electric plant. While the borough had contracted for the installation of a diesel plant, the installation was being blocked by a suit brought by a taxpayers' organization. In addition, Sharpsburg had accumulated no reserve in its electric fund to finance such a program and had no councilmanic bonding power (i.e., borrowing power not requiring specific voter approval) available. Any improvement program would have to have been financed by the sale of general obligation bonds (requiring voter approval, which would have been difficult to obtain) or by non-debt revenue bonds (which would have prevented the transfer of any electric fund surplus to the General Fund and which would have removed the only reason for keeping the system). In any event, the entire system was suffering from gross mismanagement, as evidenced by the fact that five Sharpsburg councilmen were indicted in 1961 and later convicted for taking "kickbacks" on coal supply contracts for the borough's electric system.

In July 1963, the borough--without prompting from Duquesne--offered to sell its distribution system to Duquesne for $500,000. In August 1963, Duquesne accepted this offer. The PUC, after public notice, held a hearing concerning the acquisition at which protestors were heard. The PUC approved the acquisition on December 31, 1963. Subsequently, Duquesne expended more than $298,000 to upgrade the system to meet Duquesne's utility, engineering and safety standards.

(4) Purchase of the Aspinwall System.

Aspinwall Borough for many years operated an electric power generation and distribution system that in 1964 served 1,120 residential, 123 commercial and 27 other customers. The population of Aspinwall had declined from 4,716 in 1940 to 3,727 in 1960.

Prior to a 1950 rehabilitation of the Aspinwall generating plant, Duquesne provided power for resale to the Aspinwall system under Duquesne's Tariff Rate "M" at times of peak load.

The extent of such Rate "M" sales is set forth below:[8]

Year	Total Power (kwh) for Resale Provided Aspinwall by Duquesne[9]
1940	39,600
1941	72,000
1942	83,400
1943	78,600
1944	82,200
1945	88,200
1946	68,400

8 Duquesne believes these figures understate the assistance it provided Aspinwall for the reasons set forth in footnote 3.

9 Duquesne Light Company Annual Report to FPC (Form No. 1) for each of the years indicated.

1947	110,400
1948	139,200
1949	255,600
1950	337,400

In 1961 Aspinwall considered selling its system to Duquesne but ultimately decided to rehabilitate the system by purchasing a second-hand twenty-year old 1000 kw gas engine generator. This turned out to be a poor management decision because the new generator never operated properly, and Aspinwall was forced to use it principally as a standby unit, when able to use it at all.

In August 1965 Aspinwall asked the Pennsylvania Economy League to undertake a study of the borough's generation and distribution system. Aspinwall also gave Duquesne permission to have a study of the system performed by Stone & Webster Service Corporation to enable Duquesne to make an offer for the system. The Stone and Webster report concluded that a "fair and equitable" price for the system was $450,000.

The study by the Pennsylvania Economy League completed in August, 1966 recommended that Aspinwall "discontinue its electric plant operation and seek to negotiate a satisfactory sale of the system...." That report and a report by an independent engineering consultant firm made clear that to continue the operation of its system Aspinwall would have to undertake

a major rebuilding program to replace its distribution system, and would have to spend at least $225,000 for new generation equipment within the next few years.

At the time this rebuilding program was required to continue operation of the system, Aspinwall was experiencing financial problems. Its General Fund had operated at a deficit every year between 1955 and 1964. This deficit was financed, in part, by a net transfer of over $200,000 from the electric fund to the General Fund. However, the Economy League report concluded that the electric fund would not produce such surpluses in the future. In order to finance the plant improvement program, council would have had to (i) sell general obligation bonds, requiring voter approval because of the limitation on council-manic bonding power or (ii) sell revenue bonds, which were not subject to the debt limitation but which would not allow surpluses from electric operations to be transferred to the General Fund. The Economy League report also concluded that Aspinwall electric consumers would save $51,000 annually if electric service was provided by Duquesne.

Shortly after the borough received the report of the Economy League study, negotiations for the sale of the system commenced. Neither during these nogitations, nor at any other time, did Aspinwall ever ask Duquesne to wheel power for it. In October 1966, Duquesne agreed to purchase the Aspinwall distribution system for $510,000. The borough reported to its residents that it had decided to sell the system because

"steadily increasing operating costs and the need for substantial capital investment indicated it would no longer be feasible to continue operation." The borough used this purchase money to finance a much-needed sewage treatment plant. Subsequent to its acquisition Duquesne expended more than $287,000 to upgrade the Aspinwall distribution system.

On May 1, 1967 the PUC approved the acquisition after a March 1967 public hearing at which opponents of the sale were heard. The FPC approved the sale on June 13, 1967.

D. Dealings with Pitcairn Borough.

1. Introduction

The borough of Pitcairn currently operates the only municipal electric distribution system within Duquesne's service area. Since December 2, 1970 Duquesne has been selling power to Pitcairn for resale. This power was initially supplied on an emergency basis, the price to be agreed upon later. Since October 13, 1971 Duquesne has sold wholesale power to Pitcairn pursuant to FPC Rate Schedule 11. (Appendix II). Duquesne is currently wholesaling over 9,000,000 kwh annually to Pitcairn, which no longer generates any power.

As Duquesne presently has an interconnection with Pitcairn and sells wholesale power to the borough, its prior dealings and disagreements with Pitcairn are not relevant to this proceeding. Nevertheless, Duquesne presents the following

history of its dealings with Pitcairn which demonstrates that it assisted Pitcairn's system in times of real emergency, adhered to its tariffs in its dealings with Pitcairn and ultimately provided wholesale power to Pitcairn when it concluded it could do so without violating its tariff and Pitcairn had demonstrated an arguable legal right to such service.

2. Prior Assistance to Pitcairn

As early as 1929-1930 Duquesne sold Pitcairn power for resale under Duquesne's Rate "M" tariff. In 1946, when the Pitcairn generating plant was disabled due to a fire, Duquesne provided 1,632,240 kwh to Pitcairn for resale. Without a source of power for resale, Pitcairn's system would have ceased to exist.

A 1957 financial survey of Pitcairn Borough and a 1959 study of the Pitcairn generation and distribution system raised serious questions as to whether or not continued operation of the system was desirable. As a temporary expedient Pitcairn elected to discontinue service to some 134 customers outside the Pitcairn borough limits which Pitcairn had served for years in violation of the law without obtaining a Certificate of Public Convenience from the PUC. In 1959, with PUC approval, Duquesne acquired those facilities of Pitcairn that were outside the borough and had been used to serve these customers.

3. Pitcairn's Requests for Wholesale Power or an Interchange.

In late 1967 Pitcairn had an independent consulting engineering firm report to it as to how it could meet its bulk power supply requirements. The report recommended that Pitcairn obtain a "purchase-interchange type agreement" and recommended various approaches, only one of which was an interchange with Duquesne. The report stressed that in order to qualify for power pool membership, Pitcairn's system "would have to assume a new role and character of responsibilities" and noted that Pitcairn's excessive generating costs would preclude its obtaining an interchange with a larger utility or participation in a power pool. The report also made clear that Pitcairn would have to be able to make excess power available to other utilities if it were to qualify for an interchange agreement or power pool membership.

Between mid-1966 and mid-1968, Pitcairn sporadically requested that Duquesne interconnect with it or sell it electrical energy for resale. Pitcairn never asked Duquesne to wheel power for it. Certain Pitcairn officials favored selling the system to Duquesne while others wished to continue its operation. At one point the borough informed Duquesne that the FPC had advised the borough it could not request the FPC to order Duquesne to sell wholesale power to it. Duquesne informed Pitcairn it had no rate under which it could sell power for resale to Pitcairn other than Rate "M".

Pitcairn persisted in its attempts to get Duquesne to violate its tariff by interconnecting with it and selling it power for resale at rates less than provided for under Rate "M". Duquesne's management was informed by legal counsel that there was no clear legal obligation or authority to provide what Pitcairn was requesting. Duquesne therefore repeatedly offered to sell Pitcairn Rate "M" power but would not deviate from its tariff in favor of this one customer.

In mid-1968, Pitcairn filed an antitrust suit against Duquesne for failing to sell it wholesale power. It became apparent during pre-trial proceedings that Pitcairn was really using the antitrust lawsuit to obtain wholesale service from Duquesne, and the district judge handling the case indicated he would stay the case until Pitcairn took advantage of the Federal Power Act to obtain an interconnection for wholesale service. Accordingly, in July 1970 Pitcairn filed a complaint with the FPC seeking to have Duquesne ordered to interconnect with it and sell it wholesale power. As the FPC proceeding went forward, Duquesne concluded that the FPC would assert jurisdiction over the controversy and had the power to grant the relief requested by Pitcairn. This assertion of federal regulatory power meant that Duquesne was freed from the restrictions of its tariff which, under state law, permitted sales to a municipal electric system only pursuant to Rate "M". Duquesne negotiated a settlement of its dispute with Pitcairn and agreed to sell it wholesale power under a contract filed with and approved by the FPC.

Duquesne was very reluctant to enter into an interchange agreement with Pitcairn for several sound business and technical reasons.[10] It was Duquesne's fundamental belief that a mutual exchange of electric capacity and/or energy had to be based on substantial physical and economic advantages accruing to each party. For Duquesne to engage in such transactions when these requirements were not present would have been inconsistent with its obligations to its stockholders and other investors and unfair to its retail customers. Therefore, Duquesne was willing to consider an arrangement for the use of electric capacity and energy which would have been available from the Pitcairn system if such capacity and energy would (i) be available when called for, (ii) be of an amount and be located so that it could be effectively used to improve the operation of the Duquesne system and (iii) be available at a cost to Duquesne that was less than the cost of providing such capacity and energy from alternate sources.

During the period Duquesne was considering an interconnection with Pitcairn the principal characteristics of their respective systems were as set forth below:

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10 It must be understood that Duquesne was not Pitcairn's only potential source of bulk power or energy. Pitcairn's consulting engineers in 1967 advised the borough that West Penn Power, a nearby investor owned utility and part of the Allegheny Power System was a potential source of such power and that West Penn was currently selling bulk power to two rural electrical cooperatives. Pitcairn contacted West Penn in early 1968 to request an interconnection, noting that its "facilities are located within reasonable proximity of your existing lines...." Thus Pitcairn's system was not isolated from power sources other than Duquesne.

	Duquesne	Pitcairn
Installed generating capacity - mw	1,777	3.5
Firm power purchases - mw	225	0
Effective load carrying capability - mw	2,002	3.5
Maximum system peaks level - mw	1,691	1.7
Indicated reserve capacity available - mw	311	1.8
Size of smallest generating unit - mw	52	.3
Size of largest generating unit - mw	270	1.3
Effective interconnection capability with other power systems - mw	770	0

As Duquesne was not involved in the operation of the Pitcairn system, it could not precisely determine the reliability of the Pitcairn generating equipment and hence its availability. However, it was aware that the Pitcairn generating units were old and their reliability open to serious question. In 1959 Pitcairn had been advised by an independent consultant that its generation system "contains a hazardous situation" and "that the present physical condition of the overall electrical system is such that a major outage at certain critical points could occur [and] present demands in the equipment exceed the equipment rating and capacities." Subsequent to receiving this report Pitcairn did increase its

generating capacity by acquiring a gas engine generator. However, Pitcairn subsequently experienced substantial difficulties with this machinery.

In 1969 the maximum available generating capacity possessed by Pitcairn over its own load requirements was approximately 1.8 mw. Of course, future load growth on the Pitcairn system would decrease this figure in the future. Pitcairn had not indicated any desire to increase its generation capacity, despite the report of its own engineering consultants in 1967 which made clear the need for additional capacity if Pitcairn was to be a legitimate candidate for an interchange arrangement with a larger system.

To maintain a high degree of service reliability Duquesne provided reserve generating capacity to protect against a generating unit failure and to permit generating unit shutdown for maintenance and overhaul. The minimum reserve capacity required is at least equal to the capability of the largest generating unit on the system.

The 1.8 mw reserve capacity potentially available from Pitcairn was less than 0.6% of Duquesne's requirements of at least 270 mw. It was not possible for Duquesne to determine its reserve requirements with a degree of accuracy that could recognize a variation as small as 0.6%. Therefore, the availability of Pitcairn's capacity could not have changed Duquesne's investment for installed reserve or commitments in respect to reserve capacity with other systems.

In the hour-to-hour operation of the Duquesne System, it was necessary to operate sufficient generating capacity above the existing load requirements to provide for load fluctuations and to avoid interruption of customers' service should a generating unit fail. As with installed reserves the amount of operating reserves was largely controlled by the load requirements and by the largest generating unit in operation. Of course, Duquesne's operating reserve requirement was reduced through sharing of reserves with other systems. At the time it evaluated Pitcairn's request for an interconnection Duquesne's operating reserve requirement was approximately 120 mw. It was not possible for Duquesne to predict its system load for any ensuing several-hour period or for the next day within 2 mw. Therefore, the possible availability of 1.8 mw from Pitcairn (which would decrease in ensuing years) would not have permitted Duquesne to delay the start up, or remove from service earlier, any of its generating units.

Pitcairn's system offered no worthwhile benefits to Duquesne from the standpoint of maintenance scheduling. Duquesne and its interconnected systems had a coordinated maintenance program that required scheduling outages for generating units ranging in size from approximately 20,000 kw to 625,000 kw. Including maintenance of Pitcairn's generating units, which ranged in size from 360 kw to 1360 kw, into such a program would have produced no change in the capacity requirements for the maintenance program.

Thus, Duquesne would not have been able to reduce its capacity required for maintenance by interconnecting with Pitcairn.

Duquesne's interconnection contracts with other major systems contained provisions for exchange of economy energy. While such provisions did not alone justify any of Duquesne's interconnections, they were viewed as a possible fringe benefit. This fringe benefit would not have existed in any interconnection with Pitcairn as Duquesne was certain that the minimum Pitcairn generating cost was greater than Duquesne's maximum cost. Under these circumstances, there would never have occurred an economy energy flow from Pitcairn to Duquesne.[11] Thus, any so-called economy interchange would in fact have been merely a flow of energy in one direction only, from Duquesne to Pitcairn.

Duquesne was perfectly reasonable in being reluctant to enter into an interconnection agreement with Pitcairn. Pitcairn's express purpose in seeking such an interconnection was

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11 Duquesne was absolutely correct in this conclusion. During the period it was attempting to persuade Duquesne to interconnect with it, Pitcairn received a report from a consulting firm which was very critical of Pitcairn's high generating costs. The report concluded:

> "Generating costs of this magnitude render moot the proverbial arguments for interchange agreements and in our opinion would preclude Pitcairn's participation in one of the area power pools."

to buy power for resale from Duquesne at rates lower than that which Duquesne could provide under its then-existing tariff. In any event, Pitcairn's system was potentially unreliable and did not have sufficient capacity to assist Duquesne in the operation of its system, precluding the creation of a meaningful interconnection.

4. Pitcairn's Request to Join CAPCO.

In December 1967 Pitcairn wrote each of the five CAPCO Companies identical letters requesting discussions "aimed at including the Borough of Pitcairn in the CAPCO pool." The CAPCO Companies, including Duquesne, individually responded. Duquesne answered that it would be impractical for Pitcairn to join CAPCO.[12]

Duquesne never flatly rejected Pitcairn's request to join CAPCO. Duquesne merely stated that such membership did not seem practical or feasible but that Duquesne was willing to discuss the situation.

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12 It should be noted that Duquesne was justified in being very wary of Pitcairn during this period in time. For some time virtually all communications received from Pitcairn came not from borough officials, but from a private law firm which included the borough's solicitor. Pitcairn was already in possession of a recommendation that if Duquesne did not agree to interconnect with it "a formal complaint should be filed with FPC". That this cautious attitude was justified is made clear by the fact that just six months after Pitcairn's initial inquiry concerning CAPCO membership Pitcairn sued Duquesne for alleged violations of the antitrust laws.

In early 1968, Duquesne officials met with Pitcairn's representatives to consider the feasibility of Pitcairn's CAPCO membership. Duquesne stressed to Pitcairn that Pitcairn's (i) miniscule reserve capacity (less than 2 mw) would not enable it to make a meaningful contribution to the pool and (ii) low system voltage and lack of transmission facilities as well as the disparity between Pitcairn's 2,300 volt facilities and Duquesne's and CAPCO's 345,000 volt facilities appeared to make it infeasible for Pitcairn to become part of CAPCO.

Duquesne's reaction to Pitcairn's proposed CAPCO membership was not capricious or arbitrary. Sound technical and business considerations led Duquesne to the reasonable conclusion that Pitcairn would contribute no benefit to the pool.

Duquesne's judgment that Pitcairn's membership in CAPCO was not feasible was based on the following data and conclusions.

	Facilities to be Used in CAPCO Arrangement (1971 Projected)	Pitcairn (1969 Actual)
Installed generating capacity - mw	10,979	3.5
Firm power purchases - mw	100	0
Effective load carrying capability - mw	10,897	3.5
Peak Load - mw	8,909	1.7

Indicated reserve capacity available - mw	1,988	1.8
Size of smallest generating unit - mw	15	.3
Size of largest generating unit - mw	625	1.3

In 1969 the CAPCO Companies planned to have available in 1971 installed generating reserves totaling 1,988 mw. The maximum reserve of 1.8 mw indicated above as available from Pitcairn was approximately 0.09% of the CAPCO requirements. Duquesne believed it was not possible to determine the CAPCO requirements with a degree of accuracy that would recognize a variation of 0.09%. The availability of Pitcairn's very small amount of reserves would not have changed any plans or commitments of any of the CAPCO Companies in respect to reserve capacity. There simply was no value, therefore, in Pitcairn's 1.8 mw reserve to the CAPCO Companies.

In 1969 Duquesne anticipated that the operating reserve level for the CAPCO pool would be in excess of 800 mw. This capability was to be maintained by starting up or keeping in operation sufficient generating units to meet the load and the operating reserve requirements. Duquesne did not believe it would be possible to predict within 3 mw to 5 mw the expected CAPCO load for the next several hours or for the next day. The possible availability of 1.8 mw from Pitcairn would not change the operating order of any generating units.

Therefore Pitcairn's 1.8 mw reserve was of no value to the CAPCO Companies in terms of operating reserves.

The CAPCO Companies planned to schedule the outages of generating units for maintenance on a coordinated basis, so as to avoid an excessive amount of capacity out of service at the same time. By such mutual scheduling and accommodation, the amount of capacity required to replace that outage for maintenance would be reduced to a minimum. The CAPCO program was to include the maintenance scheduling of over 72 generating units, ranging in size from 15,000 kw to 625,000 kw. Injecting into such a program maintenance for Pitcairn's small generating units which ranged in size from 360 kw to 1360 kw, would neither have changed the order of CAPCO maintenance nor the total amount of capacity installed to allow for such maintenance. Thus, Pitcairn's proposed CAPCO membership had no potential benefit in terms of coordination of maintenance for the CAPCO pool members.

Associated with the joint capacity program, maintenance coordination and sharing of reserves, the CAPCO Memorandum of Understanding provided for interchange of capacity and energy as might be necessary to implement the CAPCO arrangements. Duquesne's expectation was that the requirements of the CAPCO Companies and the cost factors would be such that over a period of time the capacity and energy flows to any one Company would be offset by flows from that Company. With respect to Pitcairn, Duquesne believed that Pitcairn's available capacity was so small, and Pitcairn's generation costs so high, that no practical

use could be made of Pitcairn's available capacity and energy. Pitcairn was well aware of this as its own consulting engineers had told Pitcairn in 1967 that its high generation costs would preclude its participation in a power pool.

The CAPCO Memorandum of Understanding provided that the CAPCO Companies would be interconnected through 345,000 volt lines. Stepdown transformer capacity from 345,000 volts to a lower voltage and lower voltage lines were to be the responsibility of the individual companies. To provide a 345,000 volt line to Pitcairn would have been extremely expensive and there was a serious question, given Pitcairn's small amount of generating capacity, as to whether such a line could be effectively operated.

While a lower voltage line could have been installed from Pitcairn to the nearest point on the 345,000 volt network with transformer capacity at both ends, such a connection would have required (i) 2400 volt to 23,000 volt transformer capacity at Pitcairn, (ii) approximately 27 miles of 23,000 volt lines and (iii) 23,000 volt to 345,000 volt transformer at the 345,000 volt network terminal. The cost of such facilities would have been in excess of $1,500,000, which was economically prohibitive.

The foregoing demonstrates that Duquesne was completely justified in concluding that the technical problems of Pitcairn's participation in CAPCO were such as to render it infeasible and impracticable to include Pitcairn in CAPCO.

E. Legal Prohibition Against Wholesaling Power.

Duquesne's inability to comply with the requests of Aspinwall and Sharpsburg boroughs to sell them power at a rate or in a manner different than that set forth in Duquesne's Rate "M" was not predatory or unlawful conduct but rather conduct required of Duquesne by Pennsylvania law. The inability of Duquesne to comply with the boroughs' requests was not a refusal to make available firm power for resale. Duquesne had long been selling power for resale to Etna and Sharpsburg pursuant to Duquesne's Rate "M." In reality what the boroughs were requesting was that Duquesne lower the price for the power sold to them. Of course Duquesne could not negotiate with individual customers over rates for service which were established by its tariffs and which it was bound to follow. Duquesne's unwillingness to unilaterally deviate from its tariffs to provide preferential treatment to certain customers cannot be viewed as violative of the federal antitrust laws. The request that Duquesne do so was, in fact, a request that it commit a criminal act.

Investor-owned public utilities in Pennsylvania are subject to a pervasive and comprehensive scheme of regulation, pursuant to the Pennsylvania Public Utility Law, 66 P.S. §§ 1101-1562, which is administered by the Pennsylvania Public Utility

Commission (the "PUC"). Except to the extent it is preempted by Federal laws and regulations, the PUC supervises and directs every aspect of the business undertaken by electric utilities such as Duquesne. As described in Part B of this Fact Brief, the Pennsylvania Public Utility Law gives Duquesne the exclusive right to provide retail electric service within its service area vis-a-vis other investor-owned utilities.

The policy of the Commonwealth of Pennsylvania in establishing this regulatory framework in order to limit and, indeed, eliminate competition among the suppliers of electric service was explicitly recognized and approved in Metropolitan Edison Co. v. P.U.C., 127 Pa. Super. 11, 191 A. 678 (1937), where the court stated:

> The policy of this state, relating to the regulation of public service companies, as set forth by legislative enactments and judicial interpretations thereof, has been that of regulated monopoly as opposed to unrestrained competition. Public utilities, if they rendered adequate service to the public, at reasonable rates, could expect to be protected from unfair and ruinous competition. The commission is the instrumentality of the legislature to act as its agent ... the commission is authorized to determine, in the exercise of its administrative function, when and to what extent an existing utility actually engaged in rendering a public service shall be protected from competition . . . 127 Pa. Super. at 20.

Similarly, the Pennsylvania Superior Court, in Painter v Pa. P.U.C., 194 Pa. Super. 548, 169 A.2d 113 (1961), quoted with approval the following language of the predecessor Commission of the PUC:

> "In the matter of the public supply of water, electricity and other public utilities, this commission, under the powers and authority vested in it ... has from the

beginning adopted and pursued a policy whereby unnecessary and useless competition should be prevented. This policy was adopted after careful consideration and is being carried out for the benefit and protection not only of the consumer but also of the Public Service Companies." 194 Pa. Super at 551.

The Commonwealth of Pennsylvania has created a system designed to protect utility companies from "ruinous competition" and designed to prevent "unnecessary and useless competition," while subjecting such utilities to restrictive and all-encompassing regulation.[13] It is in the light of this regulatory framework and of Pennsylvania law and public policy that Duquesne's behavior--which is only being challenged many years later by strangers to the situation--must be evaluated.

Boroughs, the most common type of municipality in Duquesne's service area, have the exclusive right to provide electricity within their borders. Pennsylvania law, 53 P.S. §47471,

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13 Unlike public utilities such as Duquesne, a Pennsylvania borough which is providing electricity within its border is not subject to any regulation whatsoever by the PUC. Since such a borough can prohibit a utility from competing with it within its borders, it possesses not just a monopoly but a completely unregulated monopoly. 53 P.S. § 47471. Sections C(2)-(4) of Duquesne's Pre-hearing Fact Brief demonstrate that the electric systems of Etna, Aspinwall and Sharpsburg were ultimately acquired by Duquesne because these boroughs abused their unregulated monopoly status by utilizing electric fund revenues to support the boroughs' general funds and maintain a low overall tax rate. To achieve this they neglected to undertake required utility plant maintenance, rehabilitation and expansion and also charged exorbitantly high electric service rates, all of which incited political unrest among their citizens and discredited the systems in the eyes of their customers.

provides that if a borough is providing electric service within its borders another utility may not introduce electric current into that borough without its consent. Furthermore, under Pennsylvania law, the borough is not subject to any regulation by the PUC with respect to electric service it provides within its borders. Boroughs may also provide electric service beyond their borders to adjacent areas. 53 P.S. §47471. However, if a borough does so, under 66 P.S. §§ 1141 and 1171 its rates and service in those areas will be subject to regulation by the PUC to the same extent that an investor-owned utility would be. Thus, a borough could provide such service only after it obtained PUC approval and a Certificate of Public Convenience. Furthermore, the issuance of such a Certificate could be objected to on the grounds that the existing service was adequate. By Act No. 57, Session of 1975, the Pennsylvania legislature required the filing of maps specifically delineating the service areas of investor-owned electric utilities and electric cooperatives. Because this Act does not modify or repeal any provisions of the Public Utility Law or the Borough Code, the complete legal barrier to competition between private utilities and boroughs with respect to retail electric service at any given location which exists in Pennsylvania and which is described above continues to exist. In this manner, Pennsylvania law prevents "ruinous competition."

As an investor-owned utility, Duquesne is required by law to file tariffs with the PUC which set forth its rules, regulations, practices, rates and types of service. 66 P.S. §1142.

Furthermore, Duquesne is legally obligated to adhere to these tariffs and provide service only in conformity to them. 66 P.S. § 1143. If Duquesne does not adhere to its tariffs, including its rules and regulations, by providing service other than in conformity with them, Duquesne and its officers are subject to criminal and civil penalties. 66 P.S. §§ 1491 and 1492.

As is the case in many states, Duquesne may amend its rules, regulations, practices and rates upon 60 days notice to the PUC. 66 P.S. § 1148. The amendments may become effective with no further action by the PUC. However, the PUC has the power (i) to order hearings with respect to any proposed amendments, either on its own motion or upon the complaint of another and (ii) to then set the rates and rules that Duquesne shall follow. 66 P.S. § 1148(b),(c). Historically, the PUC has seldom permitted a substantive tariff amendment proposed by Duquesne to become effective without substantial investigation and hearings. Since 1950 a total of 83 complaints have been filed against Duquesne in connection with 23 separate tariff amendment or rate-related proceedings, including 9 complaints/investigations by the PUC on its own motion, 21 complaints by local governmental agencies and 2 complaints by the United States Atomic Energy Commission. These complaints were all resolved by the PUC through adjudicatory hearings consuming a total of 283 days. The power of the PUC to determine the rules and regulations to be followed by Duquesne is not limited to those times when Duquesne is amending its tariff. The PUC has the power to amend Duquesne's tariffs

(including its rules and regulations) at any time, on its own motion or on the complaint of another. 66 P.S. §§ 1149, 1182, 1183.

Duquesne's opponents have alleged that during the 1960's Duquesne refused to sell firm wholesale power to the boroughs of Etna, Aspinwall, Sharpsburg and Pitcairn. Duquesne's tariff, to which it was legally obligated to adhere on pain of civil and/or criminal penalties, not only did not contain a rate other than Rate "M" which would permit it to wholesale power on a "firm power" basis to a municipal electric system, it contained a rule that prohibited such sales.

From 1960 to 1965, the period relevant with respect to Etna and Sharpsburg, Duquesne's Tariff Rule 18 stated:

> "18. RESALE. Electric energy supplied to customers shall not be resold, except when supplied to customers operating office buildings and buildings of similar character, in which event it may be resold by the customer to tenants, provided such tenants occupy the premises designated in the contract between the customer and the Company, and the rates charged such tenants by the customer correspond to the rates charged by the Company for a like and contemporaneous service."

Rule 18 was amended in 1965, the period relevant with respect to Aspinwall and Pitcairn, to read as follows:

> "18. REDISTRIBUTION. All electric energy shall be consumed by the customer to whom the Company furnishes such energy, except that (1) a customer

> operating a separate office building or separate apartment building, and (2) any other customer who, upon showing that special circumstances exist, obtains the written consent of the Company may redistribute electric energy to tenants of such customer, but only if such tenants are not required to make a specific payment for such energy. This rule shall not affect any practice undertaken prior to June 1, 1965."

Under both versions, Rule 18 prohibited the sale of firm wholesale power to municipalities. Rule 18 has existed in Duquesne's tariff in substantially the same form since 1916.

The legality of Rule 18 was specifically upheld by the PUC as recently as 1966 in Pennsylvania Public Utility Commission, et al. v. Duquesne Light, Complaint Docket Nos. 18106, 18107 and 18109 (1965-1966), 42 Pa. P.U.C. 706 (1966). This proceeding involved a specific challenge to Rule 18 by a party who had been refused firm wholesale power by Duquesne. It involved full adversary proceedings before the PUC, including four days of hearings, oral arguments as well as briefing. The PUC permitted an amicus curiae to intervene against Duquesne's position. The PUC upheld the reasonableness and legality of Rule 18 in both forms quoted above. Because of the importance of this decision, Duquesne takes the liberty of setting forth the PUC's rationale and decision at length below.

> "By order dated May 27, 1965, and docketed at C. 18109, we instituted our own investigation into the fairness and lawfulness of the proposed revised rules, and concurrently therewith suspended the operation of proposed revised rules.
>
> * * *

"The determination of what is or is not reasonable is and must be left initially and primarily with the utility company in the exercise of its right, power, and duty to manage its own affairs. It would be expected to act generally upon the same principles which are regarded and adopted as sound in other pursuits. Very importantly, however, the action of the utility company is then subject to the supervision of this Commission, which must see that the public interest is fully protected and furthered.

* * *

"We shall now determine whether respondent's conditions for or limitations upon the furnishing of single point service for resale contained in existing Rule 18 are generally reasonable. Since 1916, at least, respondent's existing tariff Rule 18 has been in effect in substantially the same form. In substance, it forbids the resale of electric energy supplied to customers except when supplied to customers who operate office buildings and buildings of similar character. Where the exception applies, resale is limited to tenants occupying the same premises."

* * *

"In light of their historical background and inherent logic, we find that respondent's existing Rule 18 limiting resale and its companion Rule 32 implementing Rule 18 are reasonable.

"We now turn to respondent's proposed Rule 18 and its companion Rule 32, implementing proposed Rule 18, to determine whether the proposed further prohibition or limitation of resale and redistribution are generally reasonable.

* * *

"Historically, owners of office buildings and apartment buildings have engaged in the practices of resale or redistribution. However, in recent years developers and owners of new office and apartment buildings in respondent's service area have not engaged in the practice of redistribution, thereby continuing to furnish electric service along with various other services as an inseparable part of the rent package.

"This rule is designed to eliminate the practice of resale entirely, but to do so in an orderly fashion, not unnecessarily shocking and harmful to those who have been permitted heretofore to engage in such practice and have designed their buildings and invested their money accordingly.... We feel that the rule, as proposed, as it affects resale, is, in every pertinent respect (i.e. intent, purpose, designation, and manner of cutoff and eventual elimination of resale procedure) not only reasonable but also desirable.

* * *

"Redistribution of electric energy results in many of the same inequities and adverse effects on the company, the consumers, and the affected tenants as results from resale. Accordingly, to the extent that the practice of redistribution apparently will be unduly harmful to the various parties concerned, it is desirable that respondent limit or prohibit such practice. If the practice of redistribution should indicate growth to an extent that would have an appreciably adverse effect on the company, the individual consumers, and the affected tenants, it would then be necessary for respondent to prohibit redistribution in the same manner as resale is proposed to be prohibited ... .

* * *

"Respondent has convincingly established the facts which make it abundantly clear that it (respondent) has reached a stage of development where it must stop the growth of the resale practice and limit the growth of the practice of redistribution. Otherwise, respondent's revenue, income available for return and rate structure, as well as respondent's consumers and public generally, will be unduly and adversely affected.

"Respondent has convincingly demonstrated that the purpose to be accomplished by the rule and the manner in which it shall be accomplished is in accordance with and conforms to well-established principles. There is no trace of any intention to discriminate improperly or to achieve an improper objective.

* * *

"Respondent's rule and the basis of the rule conforms with the policy of this State relating to the regulation of public service companies as set forth in legislative enactments and judicial interpretations thereof. The policy is grounded in the concept of regulated monopoly,

as opposed to unrestrained competition, and is directed to the protection of the public utility company from unfair and ruinous competition. This Commission has been charged with the duty and given the power to see that public utility companies render adequate service to the public at reasonable rates and to determine, in the exercise of its administrative function, when and to what extent an existing utility engaged in rendering public service shall be protected from competition.

"As evidenced by the Pennsylvania Public Utility Law, as well as the federal laws and laws of our sister states, the public interest demands and has demanded that those common basic vital necessary services, which because of their very nature and character practically require a monopolistic distributor for the safe, efficient, and economical furnishing thereof, be governmentally controlled and regulated. Accordingly, while our immediate specific concern in these proceedings has been with the reasonableness of respondent's tariff rules particularly, our broader concern, stemming from our background, experience, and part played in the development of the Pennsylvania Public Utility Law particularly and administrative law generally, has been the effect on the public interest of an unregulated private profit enterprise trafficking in a necessary and vital public utility service in competition with a regulated public utility company.

"After careful and thorough review, consideration, and analysis of all the record facts and permissible inferences therefrom, along with the contentions of the parties as set forth in briefs and oral argument, we conclude that respondent's tariff rules here in question are lawful and reasonable."

On a subsequent appeal the PUC's order was reversed by the Superior Court, but only on the ground that the shopping center complainant in question was within one of the stated exceptions in Rule 18. The legality and reasonableness of Rule 18, and of the PUC reasoning with regard thereto, were not disturbed or questioned. Allegheny Center Associates v. Pa. P.U.C., 209 Pa. Super. 334, 228 A.2d 26 (1967).

The only portion of Duquesne's tariff that permitted it to sell power to a municipal electric system was Rate "M." (Appendix I). Rate "M" permitted -- indeed required -- Duquesne to sell power to a municipal electric system which had its own generating equipment for emergency purposes only. Duquesne never refused a request from Etna, Aspinwall, Sharpsburg or Pitcairn to sell them power under Rate "M." In fact it sold substantial amounts of Rate "M" power for resale to Sharpsburg and Etna, even though they were chronically delinquent in paying for such power. Duquesne was never requested by any of the referenced municipal systems to wheel power for them.

With respect to the alleged anticompetitive activities of Duquesne in dealing with the four boroughs, the description above of the Pennsylvania regulatory framework and Duquesne's unwavering adherence to its tariff makes it clear that, under Parker v. Brown, 317 U.S. 341 (1943), and its progeny, there has never been an antitrust violation.

Pennsylvania has created a comprehensive and pervasive scheme of regulation. In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), the Court of Appeals stated:

> "Our reading of Parker convinces us that valid governmental action confers antitrust immunity only when government determines that competition is not the summum bonum in a particular field and deliberately attempts to provide an alternate form of public regulation." 424 F.2d at 30.

Met. Ed. supra, and Painter, supra, demonstrate that the Commonwealth of Pennsylvania has made precisely that determination as to electric utilities. The constitutional considerations of federalism that were present in Parker require that a federal body defer to these state determinations in the application of antitrust laws.

Furthermore, under the tariffs that existed during the 1960's, Duquesne was under state compulsion and direction, by virtue of the criminal and civil penalties imposed by 66 P.S. §§ 1491 and 1492, to refuse the service requests allegedly made by the boroughs, whether they be for lower rates or for service other than that permitted under Rate "M." Duquesne was not merely authorized to refuse such requests, it was compelled to so refuse until its tariffs had been modified in the manner required by the statute.

The fact that Duquesne's tariff might have originated with it does not lessen the degree of state action and compulsion presented by such tariff. Parker, supra, makes this clear. The marketing practices involved there originated with the private raisin producers. It was these private producers who were charged, in the first instance, with the decision that competition should be eliminated. They, not the state, had to act first. In addition, as has been shown above, the PUC possesses, and has in fact frequently exercised its vast power to modify or amend Duquesne's tariffs. The power of the PUC included the authority to order Duquesne to provide service on the terms desired by the boroughs. Such power, in a comprehensive

scheme of regulation, is sufficient to invoke the Parker doctrine, Washington Gas Light Co. v. Virginia Electric Power Co., 438 F.2d 248 (4th Cir. 1971).

It cannot be over-emphasized that Duquesne does not operate under a passive, laissez-faire PUC. The PUC has not been a sleeping giant as far as Duquesne is concerned. On the contrary, it has been very active. Since 1950, as already noted, there have been at least 83 complaints or investigations before the PUC concerning Duquesne. The PUC has held 283 days of hearings in connection with these proceedings. Duquesne's entire tariff, including Rate "M," was the subject of an extensive investigation and adversary proceeding before the Pa. PUC in 1950 which involved 49 days of hearings, and again in 1953-1955, when 22 days of hearings were held. As with all PUC proceedings, wide public notice of it had been given. In its orders, the PUC examined the rate structure of Duquesne. Included in the tariffs as ordered by the PUC was Rate "M" and a predecessor of the presently existing Rule 18. The structure of Rate "M" was specifically approved and ordered by the PUC in these proceedings. The tariff, as a whole, emerged as the product of the PUC.

Thus, it can be truly said that Rule 18 and Rate "M" are the products of the PUC. They have emerged from proceedings in which there have been full adversary hearings and in which the Pa. PUC had full power to modify Duquesne's tariff as it

deemed necessary. Therefore, under Gas Light Co. of Columbus v. Georgia Power Company, 440 F.2d 1135 (5th Cir. 1971), adherence to the tariff cannot be construed as an anticompetitive practice.

Finally, the alleged anticompetitive practice (failure to sell firm wholesale power) involved situations in which the hypothetically-injured parties could have obtained relief from the PUC. The PUC had the power to alter Duquesne's rates under Rate "M" or to order Duquesne to provide any new type of service which the boroughs might have desired. Furthermore, under 66 P.S. § 1391, the boroughs had the right to initiate a petition to the PUC to cause this to be done. Indeed, one borough, Sharpsburg, did initiate such a proceeding before the PUC in April 1963 at Complaint Docket No. 17849. However, Sharpsburg decided not to pursue that remedy to completion and, instead, withdrew its complaint. In Business Aides, Inc. v. The Chesapeake and Potomac Telephone Co. of Virginia, 480 F.2d 754 (4th Cir. 1973), the court stated:

> "The SCC was equally available to BAI [the plaintiff] in seeking to obtain a change in the operative tariffs. Under the circumstances of the instant case, we conclude that this public utility was not required to seek revision of its tariff for the convenience of its customer." 480 F.2d 754 at 758.

Duquesne's alleged refusals to sell wholesale power do not constitute anticompetitive acts. Indeed, in light of the

regulatory framework and the administrative relief available to the boroughs it cannot be said that Duquesne refused the boroughs anything at all. If the boroughs believed Duquesne's unwillingness unlawfully to deviate from its tariff to confer preferential treatment on them was unreasonable or contrary to the public interest, a simple and straightforward administrative remedy in the form of a PUC proceeding was available to them.

Because some of Duquesne's dealings with Pitcairn occurred later than those with Etna, Sharpsburg and Aspinwall, certain distinctions arise. The same elements of state regulation set forth earlier in this section of this Pre-Hearing Narrative Statement were applicable to the early stages of the discussions between Duquesne and the Borough of Pitcairn in the mid-1960's. Duquesne's Rule 18, which prohibited the sale of power for resale, was a legal bar to Duquesne's granting Pitcairn's request for firm wholesale power other than under the terms of Rate "M." Rule 18 had been sustained by the PUC in May, 1966 and was not challenged in a subsequent appellate court decision in 1967. During this time period Duquesne was justified in following the applicable law of Pennsylvania in refusing to sell power for resale to Pitcairn except under Rate "M". It must be recalled that the essence of the disagreement between Pitcairn and Duquesne was not whether Duquesne would provide Pitcairn with power for resale, but what price would be charged. Duquesne, of course, could not alter the prices established by its PUC approved tariffs.

By the latter part of the 1960's the regulatory framework governing wholesale power sales was undergoing evolutionary change. Thus, the latter stages of the discussions between Duquesne and Pitcairn took place in a period of expanding federal regulatory jurisdiction over the type of transactions Pitcairn was proposing. Pitcairn, on July 16, 1970, filed a complaint with the FPC asking that the FPC order Duquesne to establish an interconnection between Pitcairn and Duquesne and to sell power to Pitcairn. Later in 1970 Pitcairn added a request to the FPC for an emergency interconnection on the basis of alleged serious operating difficulties with one of its generators. In November, 1970 Duquesne and Pitcairn met with representatives of the FPC, and an amicable agreement was worked out under which Duquesne agreed to establish an emergency interconnection with Pitcairn and supply power. Duquesne had, of course, been offering to do this for years pursuant to Rate "M" of its tariff. Because it now appeared to Duquesne that the FPC would assert and exercise jurisdiction over the complaint of the borough and that, as a result, state regulation and Duquesne's state-promulgated tariff which prohibited wholesale sales would no longer control, Duquesne therefore agreed to explore the possibility of a permanent interconnection with and firm wholesale power sales to Pitcairn.

During the ensuing months Duquesne continued to provide power to Pitcairn while attempting to reach an overall agreement with Pitcairn terminating the borough's antitrust

suit and the FPC proceedings.[14] On October 13, 1971 final agreement was reached and Pitcairn and Duquesne entered into a settlement agreement terminating the legal proceedings and obligating Duquesne to sell firm power for resale to Pitcairn pursuant to a contract filed with the FPC. Subsequently, Pitcairn unilaterally decided to cease operation of its generating equipment. Duquesne has faithfully complied with all the terms of its agreement to sell power to Pitcairn, supplying over 20,000,000 kwh through 1974.

Duquesne's conduct with respect to Pitcairn was consistent with its prior dealings with Aspinwall, Etna and Sharpsburg. Duquesne refused to deviate from its published tariff until it became clear that federal regulation was pre-empting state regulation of the area of controversy with Pitcairn. When Duquesne perceived that it was no longer legally prohibited from selling wholesale power to Pitcairn and Pitcairn had an arguable legal right to such power, it entered into good faith negotiations to resolve its problems with the borough and provide such service.

F. City of Cleveland.

In August, 1973 the City of Cleveland sent to each of the CAPCO Companies a proposal for its membership in CAPCO.

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14 From the date of the emergency interconnection in December, 1970 until the effective date of the FPC contract, Duquesne provided 2,600,000 kwh of power to Pitcairn. Duquesne was later paid for this power at the FPC contract rate.

Because the proposal was very incomplete and because the problems suggested by it were very complicated, no answer was made immediately. On December 10, 1973, Duquesne informed Cleveland that it perceived serious disadvantages and no advantages if Cleveland joined CAPCO. Duquesne pointed out in its response to the request that Cleveland would not be a workable addition to a voluntary group in which non-cooperation by any single member could frustrate joint action and work substantial hardships on the other members. Duquesne also expressed concern as to serious technical obstacles to Cleveland's proposed membership due to its relatively small generating capacity and because its transmission and distribution characteristics were dissimilar from those of the CAPCO Companies. Duquesne suggested to Cleveland that Cleveland might best be able to meet its stated objectives through some arrangement with CEI. Indeed, Cleveland's suggested basis for its participation in CAPCO was inconsistent with the arrangements that had already been implemented under CAPCO after years of negotiation and effort.

Duquesne's response to the request of Cleveland for CAPCO membership was made independently of the action of the other CAPCO Companies. Duquesne did not enter into an agreement with the other companies to refuse Cleveland membership in CAPCO. Indeed, Duquesne's response was not a refusal of membership and cannot properly be so characterized. While Duquesne's position was that Cleveland could most easily obtain that which it desired by some arrangement with CEI, it never foreclosed the possibility

of Cleveland joining CAPCO if it could demonstrate that Duquesne's concerns were unwarranted or could be overcome. To this day, Duquesne does not know how Cleveland proposed to avoid such problems since Cleveland never responded to Duquesne's answer to its proposal to join CAPCO. Prior to its receipt of its August, 1973 letter referred to above, Duquesne had never had any communication with Cleveland and has had no significant knowledge of Cleveland's plant, its operation, or its relationship to the Cleveland Electric Illuminating Company.

Duquesne does not compete, and never has competed, with Cleveland in the sale of electric energy. The two systems are separated by a substantial distance and are not interconnected. Cleveland has never requested Duquesne to sell power to it or to wheel power to or from it.

G. Conclusion.

Duquesne has rever unlawfully refused to sell power for resale to municipal power systems. For years it sold power for resale to three systems under the only provision in its tariff permitting such sales. When it became evident that the FPC would assert jurisdiction over such sales and that such jurisdiction could be exercised to require such sales under the Federal Power Act, Duquesne agreed to sell firm wholesale power to the only municipal system in its service area under an FPC-approved tariff.

Duquesne has never unlawfully excluded, or agreed to exclude, any municipal power system from membership in CAPCO. Both

Pitcairn and Cleveland had small, unreliable and inefficient systems which Duquesne believed could contribute nothing to CAPCO.

There is absolutely no reason or justification, in law or logic, to impose any license conditions upon Duquesne. The only municipal power system in its service area has not intervened in these proceedings and needs no assistance in the operation of its system as it is interconnected with Duquesne and is receiving all of its power requirements from Duquesne under an FPC-approved sales contract. Duquesne's current policy is to sell wholesale power to municipal systems lawfully entitled to purchase such power. No municipal power system has ever asked Duquesne to wheel power for it.

Duquesne has never wronged the City of Cleveland. Therefore, Duquesne most emphatically believes that the City of Cleveland is entitled neither to relief from Duquesne nor to benefit from license conditions imposed against Duquesne. Duquesne has never been asked to sell power to Cleveland or to wheel power for it. Duquesne does not now compete, and never has competed, with Cleveland in the sale of power. The only contact that Duquesne has had directly with Cleveland was to tell it that it saw serious disadvantages to Cleveland's proposed CAPCO membership--a view that Cleveland never saw fit to try to persuade Duquesne was incorrect. Duquesne believes that it would be fundamentally unfair to it, its shareholders and other investors and the public it serves to burden it with restrictions or conditions designed to

ameliorate any problems of a municipal power system such as Cleveland's located a long distance from Duquesne's service area, especially where Duquesne has never committed any act that contributed to any such problems.

Respectfully submitted,

David McNeil Olds

David McNeil Olds

William S. Lerach

William S. Lerach

Joseph A. Rieser, Jr.

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Attorneys for Duquesne Light Company

December 1, 1975

APPENDIX I

Duquesne's Rate "M" Tariff, in the form promulgated by the PUC in 1951, is set forth below. The terms for this service did not change during the relevant time period. Rate "M" was the only rate schedule in Duquesne's Tariff which permitted it to sell power to a municipal electric system for resale.

RATE "M" - EMERGENCY MUNICIPAL SERVICE

AVAILABILITY

Available, for emergency purposes only, to any municipal corporation operating its own electric generating station to supply customers within its corporate limits.

RATE

Energy Charge

3 cents per kilowatt-hour.

Minimum Annual Charge

First	200 kv-a or less of Demand for	$4,800.00	
Next	300 kv-a of Demand at	18.00	per kv-a.
Excess over	500 kv-a of Demand at	12.00	per kv-a.

Billing

Bills will be rendered monthly on the basis of the energy consumed during the month or 1/12 of the Minimum Annual Charge for the Billing Year extending from September 1 through August 31, whichever is the greater. Billings for the later months of the Billing Year or a charge based upon the energy charge for all kilowatt-hours used during the year, whichever is greater. Where service is rendered during only a portion of the Billing Year, the Minimum Annual Charge will be on a pro rata basis.

TERM

Contract shall be written for a term of not less than three (3) years.

SPECIAL TERMS AND CONDITIONS

Electric service shall be delivered only to the municipal electric generating station from which place it shall be distributed by the municipality. Service will be provided only after appropriate franchise rights have been granted to the Company extending at least to the expiration of the contract term.

The Contract Demand shall represent the maximum electrical capacity in kilovolt-amperes that the Company shall be required by the contract to make available to the customer at any time.

The Measured Demand shall be determined in accordance with the Company's standard practice and, except in unusual cases, shall be based on the fifteen minute kilowatt demand.

The Minimum Annual Charge shall be based on the Contract Demand provided, however, that if the customer creates a Measured Demand in excess of the Contract Demand, the Minimum Annual Charge, and the monthly payments thereof, shall thereafter be based on the highest Measured Demand previously established during the life of the contract.

APPENDIX II

The current Pitcairn rate schedule provides:

DUQUESNE LIGHT COMPANY

RATE SCHEDULE FPC - 11

FIRST REVISED APPENDIX I

TERMS AND CHARGES
MUNICPAL RESALE SERVICE
FOR PITCAIRN

AVAILABILITY

Available to serve the municipality of Pitcairn purchasing electric service from the Company for resale at retail, subject to the terms and conditions herein.

Service: 60 Hertz, Alternating Current, Unregulated, for use other than parallel operation.

1. Monthly Rate

Capacity Charge

First 200 kilowatts or less of Demand	$520.00
Next 500 kilowatts of Demand at	$ 1.60 per kilowatt
Additional kilowatts of Demand at	$ 1.05 per kilowatt

Energy Charge

First 100 kilowatt-hours per kilowatt of Demand at	1.05 cents per kilowatt-hour
Additional kilowatt-hours at	.85 cents per kilowatt-hour

Minimum Charge

The minimum charge shall be $1.10 per kilowatt of the Billing Demand.

Bills rendered under this schedule are subject to the following fuel cost adjustment:

Whenever the cost of fossil fuel consumed by the Company or for its account is greater than or less than .246 cents per kilowatt-hour, there shall be added to or subtracted from each bill for service to a customer an amount determined by multiplying (a) the number of kilowatt-hours consumed by the customer during the period for which the bill is rendered, by (b) the fuel adjustment, rounded to the nearest thousandth of a cent, determined as hereafter prescribed.

The fuel adjustment shall be determined each billing month according to the formula:

$$A = (C - B) \times \frac{F}{G} \times \frac{G}{S} \times \frac{1}{1 - T}$$

in which the symbols have the meanings as follows:

A is the fuel adjustment to be applied upon bills rendered during a billing month.

C is the amount recorded in fuel Account 151 of the Uniform System of Accounts for a three-month period ending the second calendar month preceding the billing month, divided by the number of kilowatt-hours produced from such fuel.

B is the base fossil fuel cost of .2464 cents per kilowatt-hour.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A
THE TOLEDO EDISON COMPANY, et al. (Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

CERTIFICATE OF SERVICE

I hereby certify that copies of PRE-HEARING ~~NARRATIVE~~ FACT BRIEF ~~STATEMENT~~ OF DUQUESNE LIGHT COMPANY, PARTIAL LIST OF EXHIBITS OF DUQUESNE LIGHT COMPANY, and PARTIAL LIST OF WITNESSES OF DUQUESNE LIGHT COMPANY have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, air mail or by hand delivery, this 1st day of December, 1975.

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