UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

12-3-75

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
The Toledo Edison Company and	)	Docket Nos. 50-346A
The Cleveland Electric Illuminating	)	50-500A
Company	)	50-501A
(Davis-Besse Nuclear Power Station,	)	
Units 1, 2 and 3)	)	
	)	
The Cleveland Electric Illuminating	)	Docket Nos. 50-400A
Company, et al.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

ANSWER OF THE CITY OF CLEVELAND
TO APPLICANTS' STATEMENT OF
PROCEDURAL MATTERS TO BE CONSIDERED

On November 26, 1975, Applicants hand delivered to the parties a paper entitled "Applicants' Statement Of Procedural Matters To Be Considered." The purpose of Applicants' pleading apparently was to buttress their request "that the other parties specify, both with respect to their documentary and testimonial evidence, which Applicant(s) the evidence was directed against . . ." The Board granted the City of Cleveland (Cleveland) until December 3, 1975, to reply.

Applicants predicate their request on the fact that the parties have alleged that Applicants have engaged in a conspiracy. At page 2 of their pleading Applicants state "If conspiracy is indeed alleged in this case, the

charge is well camouflaged." Once again Applicants raise a hue and cry of being uninformed of the issues in these proceedings.[1] Although the Board has consistently repudiated such claims raised by Applicants, Cleveland is constrained once again to point out the early and consistent references to group action by Applicants which appear in the record of these proceedings.

On April 19, 1973, counsel for Cleveland wrote to Mr. Vogler expanding upon Cleveland's view of the need for antitrust review for Davis-Besse Unit No. 1. Counsel for the City specifically noted that Toledo Edison was involved in the anticompetitive conduct and by implication included all of Applicants.[2]

In August of 1973, Cleveland wrote to the Atomic Energy Commission charging that CEI and the other CAPCO members had effectively shut Cleveland out of CAPCO and had denied it access to economies of scale.[3] In the same letter, Cleveland noted that CAPCO operated in restraint of trade by making its membership available only to CEI and not to Cleveland.[4]

Again in its petition to intervene in the Perry proceeding filed February 13, 1974, at page 11, Cleveland alleged that the Applicants had acted jointly to foreclose competition by Cleveland.

1/ Apparently protesting that the issues are unclear has become standard trial strategy among Applicants in NRC antitrust proceedings. Similar protests have been raised by Alabama Power Company in the Farley case even after several months of testimony had been taken.

2/ Goldberg to Vogler, April 19, 1973, page 9. Copies were served on Messrs. Henry, Hauser and Churchill and on Mr. Karas for filing in record of proceedings.

3/ Perk to Atomic Energy Commission re: Docket Nos. 50-440A and 50-441A, page 6.

4/ Ibid., page 11.

During Prehearing Conference No. 2 on June 25, 1974, Applicants were further informed that the scope of the proceedings included the joint activities of all members of CAPCO and the activities of each Applicant individually. Mr. Charno pointed out that any limitations appearing in the Department's Davis-Besse advice letter meant only that the Department lacked sufficient evidence at the time the letter was written to recommend a hearing. Mr. Charno further stated that the Department did not limit its case to CEI and Cleveland and specifically referred to activities of Duquesne. Mr. Charno noted that Cleveland was simply bellweather.[5/]

Mr. Charno stated at transcript page 364:

> We do not know whether the other three Applicants who share a community of interest through CAPCO and through the benefits that CAPCO provides with those two that we have specifically named have participated in the creation of this situation, and we wish to have discovery sufficiently broad to determine whether this is indeed the case.

Mr. Popper appearing for the Staff referred to "what appears to be or is alleged to be a concerted denial of coordinated operations . . ."[6/]

Again in discussing the proposed definition of "entity", Mr. Popper noted that it should include "entities" located throughout the CCCT.[7/]

A similar problem arose with respect to whether only CEI should be considered the Applicant in these proceedings. Mr. Goldberg noted that "Applicants" should include all the CAPCO members because "they act in concert, they plan in concert, they are one." He further explained:[8/]

5/ Tr. 357-59, 363.
6/ Tr. 370.
7/ Tr. 373-376. See also Tr. 400.
8/ Tr. 415-417.

> When there is a denial to any outsiders of membership, when there is a denial of coordinated operation and development to anyone outside of CAPCO, it is the act of all of the members of CAPCO. (Emphasis added.)

Much of Prehearing Conference No. 2 was concerned with a set of proposed stipulations which Applicants advanced as a means of expediting the hearing process. Applicants' efforts failed in large part because Staff, the Department and Cleveland were unwilling to agree to Applicants' attempt to define the case solely in terms of CEI and Cleveland. Discussion with respect to the proposed stipulation put Applicants on notice that all of the CAPCO members were involved.

For example, when discussing Applicants' proposed stipulation regarding transmission facilities Mr. Charnoff stated:[9/]

> As to the other Applicants, of course, we don't know what entities we are talking about at the moment in terms of 'other entities.' (Emphasis added.)

Clearly Mr. Charnoff then knew this case concerned more than Cleveland and CEI.

Again at transcript page 479, Board member Brebbia made it clear to Mr. Charnoff that the stipulations could not be limited to the City of Cleveland and the City of Painesville.

Mr. Charnoff pursuing his attempt to limit the definition of "other electric entities" stated at some length that if the definition sought by the other parties was adopted the case would be expanded way beyond Cleveland and AMPO.[10/]

9/ Tr. 450.
10/ Tr. 490.

Similarly during arguments on objections to discovery[11] requests it was again made clear that all of the Applicants were involved in these proceedings, not CEI alone. In fact, Mr. Reynolds argued against certain discovery requests of the Department and Staff on the very grounds that they would look at the activities of the other Applicants.[12]

Once again during the argument on discovery Mr. Charno clarified the position of the Department:[13]

> I'm afraid I have to take objection with Applicants' contention that CEI alone is charged with some kind of anticompetitive conduct under the letters. They have been making the assertion repeatedly that the issue is very, very limited to a question of CEI, and the City of Cleveland, and a review of the letters makes it clear at the very outset that that is not true. We have discussed anticompetitive conduct by virtually every other Applicant in those letters. In some cases we said that standing alone it did not warrant hearing. In some cases we said it appears as if this is likely to be resolved.
>
> For example, we have refusals to wheel, detailed in the Beaver Valley letter. We are aware of and have not included in the letters refusal to allow access to the CAPCO pool, other than the one to the City of Cleveland. We do not believe that the letter restricts us as to the introduction of evidence or precludes us from entering into discovery to secure evidence. We believe we are restricted solely by the statement of issues placed in the record by the Board, and that the Department of Justice's letters are not limiting, but even if they were limiting, the contention that only CEI's activities are under scrutiny is blatantly false on the basis of those three letters.

11/ September 16, 1974.
12/ Tr. 562.
13/ Tr. 570-571.

A review of the interrogatories served on Applicants by Staff and Justice and joined in by Cleveland is instructive. Joint Interrogatory Nos. 3, 4 and 5 inquired into each Applicants' practices with respect to wheeling. DOJ Interrogatory No. 1 requested information relating to each Applicants' relationships with electric utilities requesting interconnection arrangements. Cleveland's document request Nos. 2, 6, 7, 23 and 29, among others, to Applicants other than CEI dealt with the relationships of those parties to electric entities in their service areas.

Cleveland's Statement Of The Nature Of The Case To Be Presented[14/], at page 11, noted that the CAPCO companies conspired to exclude the Cities of Cleveland and Painesville from CAPCO. At page 12, Cleveland referred to the:

> concerted effort by the CAPCO companies to prevent municipalities from obtaining membership in CAPCO and thus gaining access to economies of scale and coordinated operations and development.

And at page 21, Cleveland noted:

> At the same time Applicants have conspired to preclude municipal electric systems from joining CAPCO and thus obtaining access to coordinated operations and development and the economies of scale.

Cleveland has further described the unlawful joint action of Applicants at pages 13-24 of its Prehearing Brief.

For Applicants now to argue that they are uninformed of the issues is no more than the most transparent of trial tactics. Indeed, Applicants' current pleading represents nothing more than a falling out among conspir-

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14/ Filed September 5, 1975.

ators following a steady retreat from one untenable trial tactic to the next. In the beginning Applicants sought to limit the case to the relationship between Cleveland and CEI thus isolating the other Applicants from the fray. When that tactic failed Applicants attempted to limit the case to the single issue of the refusal of CEI to wheel PASNY power. Now that that attempt to protect the other Applicants from antitrust inquiry has failed each of the Applicants has undertaken to proceed with separate counsel to isolate itself from what it hopes is its more tainted brethren. Even now Applicants hope to minimize the damage by arguing that license conditions should be imposed as though each Applicant stood alone before the Board.[15/]

Applicants have also jumped on the suddenly discovered conspiracy allegation as a basis for avoiding their solemn agreement of March 29, 1974, that cross-examination would be conducted by one attorney for Applicants. Applicants argue that the case has changed since March 29, 1974, and it would be unjust to require them to keep their agreement.[16/] The only thing that has changed is that Applicants' tactic of limiting the case to Cleveland and CEI has failed. Applicants gambled on a narrow trial strategy and lost. Now they want out of their agreement. To paraphrase Applicants'[17/]

15/ Pages 7-8 of Applicants' Statement.

16/ Elsewhere in these proceedings Applicants have argued that they did not know what this case was about until September 5, 1975. Apparently they had no difficulty making the agreement when they did not know what the case was about. Perhaps even on March 29, 1974, they did not expect to keep their agreement. Of course Applicants have also argued the converse that they did know what the case was about in March, 1974, and that the case has changed.

17/ Applicants' Reply To Motions Seeking Certification To The Appeal Board Of The Special Master's Rulings On Claims Of Privilege, page 4 and page 8.

It is too late in the day for Applicants now to be permitted to restructure their express agreement in the manner being suggested in the face of the explicit and express agreement among counsel. Cleveland having been held at Applicants' insistance to an agreement it never made now urges that Applicants be held to an agreement they admittedly did make.

Applicants argue at page 2 that the filing of a joint application for a nuclear license or permit and participation in CAPCO does not provide a basis for drawing any inference of conspiracy. The cases cited by Applicants in support of the proposition are inapposite. The cited cases all deal with trade associations such as EEI is. They do not concern a sophisticated power pool such as CAPCO. CAPCO is far different from a trade association. The CAPCO companies have jointly obligated themselves to spend in excess of $1 billion dollars. They plan their systems as a single system. They jointly finance construction of transmission lines. The capacity in new units is allocated among them on the basis of a complex formula which takes into account the load growth of each system. Thus, changes in load growth on any system will impact on the other Applicants. The cases cited by Applicants car have no relevance to whether membership in CAPCO by itself shows participation in a conspiracy.

In this regard the case of Phelps Dodge Refining Corporation v. FTC, 139 F. 2d 393, 396-97 (1943) is instructive wherein the court said:

> . . . The issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Grant-

> ed that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to disassociate himself from them is a ratification of what they are doing. He becomes one of the principles in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put.

Without undertaking a case by case, line by line refutation of Applicants' Statement, Cleveland would note that the cases cited by Applicants generally support the proposition for which cited only if one draws broad inferences. It would be a mistake to believe the cases are directly on point. For example, the Steiner case cited at page 3 merely holds that the overt act must follow the agreement of the conspirators.

Kline, Metropolitan Bag and Phelps Dodge cited at page 2 all deal with trade associations totally unlike CAPCO.

Applicants have relied heavily upon criminal cases which can have only slight relevance to a civil action tried before an administrative agency.[18/] The only procedural issue for Applicants to raise here arises by virtue of the rule that extrajudicial statements of co-conspirators are admissible against other conspirators as an exception to the hearsay rule only when made during the course of the conspiracy. Rules of evidence are substantially different in administrative hearings from the rules applicable to criminal and/or jury trials.

18/ Wigmore has stated that "any attempt to apply strictly the jury trial rules of evidence to an administrative tribunal is a historical anomaly, predestined to probable futility and failure." 1 Wigmore, Evidence, § 4(b) 1940.

The standard for admissibility of evidence in Nuclear Regulatory Commission proceedings is stated at 10 C.F.R., § 2.743(c):

> Only relevant, material and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded as far as practicable.

The Commission's standard for admissibility is derived from the Administrative Procedures Act:[19/]

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

The Supreme Court has recognized the principle of broad admissibility of evidence in the administrative process stating in Universal Camera Corp. v. NLRB, 340 U.S. 474, (1951) at 497:

> However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything logically probative of some matter to be proved.

Professor Davis has pointed out that receipt of any evidence including hearsay cannot be error in administrative proceedings.[20/] In his view the concern of administrative tribunals should be not with the "somewhat artificial question of what evidence should be admitted or excluded" but rather with the "highly practical question of what weight should be given to particular evidence."[21/]

19/ 5 U.S.C., 556(d).
20/ Davis, Administrative Law Text, §14.05.
21/ Ibid., §14.01.

The Commission itself has ruled that broad rules of admissibility should apply:

> There is of course, a line of authority which might be construed as limiting the use which may be made of hearsay testimony in administrative proceedings. But the judicial limitations would apply solely to the weight which could be accorded to such evidence and not to its admissibility . . .[22/]

The question then is not whether certain materials should be admitted under some rigid application of the hearsay rule but what weight will be assigned to such evidence when the Board weighs its affect against the Applicants.

We are left then with only the practical problem of how Applicants are to deal with the evidence as it is presented. This is a problem best left to Applicants themselves to work out. The Board itself need not impose more strict rules of evidence merely to convenience Applicants in the conduct of their defense.

Even the practical problem for Applicants disappear if they are held to their agreement that only one attorney will cross-examine for Applicants. In this regard the language of the Court in United States v. Bentvena, 319 F. 2d 916, 936, 937 (1963)[23/] is helpful:

22/ In the Matter of Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78 (November 10, 1972), 5 Atomic Energy Commission Reports 319 at 333.

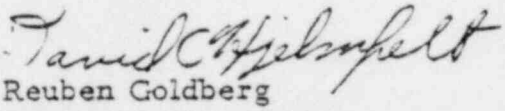
23/ Erroneously cited by Applicants as 314 F. 2d 916. Bentvena is a criminal case which would impose a higher standard than that applicable to this proceeding.

> An accused's right to select his own counsel, however cannot be insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfer with the fair administration of justice.
>
> * * *
>
> . . . an appellant must show some conflict of interest between himself and other defendants represented by his attorney before he can claim successfully that the joint representation deprived him of his right to counsel.

Applicants have made no showing at all of conflict of interest which would entitle them to escape their agreement to cross-examine by a single counsel even if this were a criminal trial.

WHEREFORE, Cleveland prays that the relief sought by Applicants be denied and that Applicants be limited to cross-examining by a single counsel.

Respectfully submitted,



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December 3, 1975

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Answer Of The City Of Cleveland To Applicants' Statement Of Procedural Matters To Be Considered, has been made on the following parties listed on the attachment hereto this 3rd day of December, 1975, by depositing copies thereof in the United States mail, first class or air mail, postage prepaid, or by hand delivery.

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