September 9, 1974

UNITED STATES OF AMERICA
ATOMIC ENERGY 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 Nos. 50-346A 50-440A
	)	50-441A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.,	)	
	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

APPLICANTS' OBJECTIONS TO THE JOINT REQUEST OF THE AEC STAFF AND THE DEPARTMENT OF JUSTICE FOR ANSWERS TO INTERROGATORIES AND FOR PRODUCTION OF DOCUMENTS

Pursuant to Section 2.740 of the Atomic Energy Commission's Restructured Rules of Practice and Prehearing Conference Order No. 2, dated July 25, 1974, Applicants hereby raise the following objections to the "Joint Request of the AEC Regulatory Staff and the U. S. Department of Justice for Interrogatories and for Production of Documents by Applicants" (hereinafter "Joint Statement") on the grounds stated. These objections are not intended, and should not be construed, as a waiver by Applicants of any rights they have in connection with the unresolved procedural issues in this proceeding, specifically the issues relating to the jurisdiction and scope of this proceeding, and all such rights are hereby explicitly reserved.

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1. Definition No. 1.[1/]

Applicants raise a general objection to the definition of the term "Company" as it appears in each Joint Request insofar as it includes "subsidiaries or affiliates" of the "Company" to whom the Joint Request is addressed. Section 2.741(a) of the Commission's Restructured Rules of Practice explicitly limits requests for information served "on any other party" to those materials "which are in the possession, custody or control of the party upon whom the request is served * * * ." Thus, to the extent that the Joint Request is seeking production by Applicants of documents in the possession, custody or control of "subsidiaries or affiliates" of Applicants, such request is improper under the Commission's rules.

Moreover, to sweep into the Joint Request by use of an overbroad definition entities other than Applicants greatly exaggerates the already burdensome nature of the Joint Request. Such other companies are not parties to this proceeding and as such should not be forced to engage in a file search of the nature envisioned by the Joint Request unless some substantial basis is shown as to the need for such a search

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1/ The "Definition" section of the separate Joint Requests addressed to each of the five Applicants varied only insofar as a different Applicant was named in each definition of the term "Company." The numbered paragraphs, the terms defined, and the definitional language used in that section were otherwise consistent in each document.

and a more detailed specification of the materials sought is made, as required under the Commission's rules dealing with the issuance of subpoenas duces tecum to persons not parties to a proceeding (10 C.F.R. §2.720).

Finally, to the extent that the Joint Reqeust is intended to reach only those materials relating to such affiliated companies which are within the possession, custody and control of the respective Applicants, the effort is objectionable on grounds of remoteness and burdensomeness. Under this interpretation, each Applicant would have to search its files to determine whether it had any document therein which, for example, relates to requests for emergency or maintenance support under Document Request No. 20 addressed to The Cleveland Electric Illuminating Company ("CEI") and under Document Request E1 addressed to each of the other four Applicants. This type of search would be virtually impossible to accomplish without considerable delay, and, equally important, would have no reasonable relationship to the issues in this proceeding.

Accordingly, Applicants request that the definition of the term "Company" as used in the Joint Request be restricted to the named Applicant, "predecessor companies and any entities providing electric service at wholesale or retail, the properties or assets of which have been acquired by the [named Applicant]."

2. Definition No. 3.

Applicants also raise a general objection to the definition of the term "Electric Utility" as being far too broad to serve any meaningful purpose in this proceeding. No geographic limitation whatsoever is contained in the definition, so that dealings of any sort which any of the Applicants might have had with "electric entities" located in areas of the United States far removed from the Combined CAPCO Company Territories ("CCCT") would presumably be dragged into the discovery process.

Furthermore, the definition includes not only those described entities which actually own or control electric power facilities, but also any other such entity which so much as "proposes to own or control" electric power facilities. To hold Applicants to the burden of undertaking a file search for documents pertaining to all entities with which they have had some dealing that might, at one time or another, have had under consideration a proposal to own or control electric power facilities is unduly burdensome in the extreme. More likely than not, Applicants would not even be aware of such a proposal.

This definition goes well beyond the definitions of "electric entities" used by the Licensing Board in its Order Requesting Clarification of June 28, 1974 (p. 4) and in Prehearing Conference Order No. 2 of July 25, 1974 (ft. 10), both

of which were restricted as to relevant geographic area and as to actual ownership and control of electric power facilities. Applicants request that the definition of "Electric Utility" in the Joint Request be similarly restricted, with the relevant geographic area being limited to the CCCT.

3. Scope of Production.

Applicants object to the scope of production as contemplated in the Joint Request in the following two respects:

(a) The Joint Request designates January 1, 1964 as the starting date for purposes of discovery in this proceeding. To require Applicants to conduct a file search for documents which are ten years old is unduly burdensome and wholly unnecessary to resolve the matters in dispute in the present inquiry. This is not a general antitrust case, such as might be brought in a District Court, requiring review of all aspects of Applicants' behavior over an extended period; it is a very narrow hearing under Section 105 of the Atomic Energy Act to ascertain only the anticompetitive impact, if any, of proposed nuclear plants scheduled to come on the line some five years hence. No useful purpose can be served by forcing Applicants to conduct an exhaustive examination of stale files which cannot possibly contain information relevant to the present proceeding.

Accordingly, Applicants request that the discovery contemplated in the Joint Request be limited to the period from

January 1, 1967 to date. It is within this time frame that the Applicants became members of CAPCO and that planning commenced for the construction of the nuclear plants involved here.

(b) Applicants request that no production of documents be required with respect to documents on file and available to the public in the office of the Federal Power Commission, the Securities and Exchange Commission, the Atomic Energy Commission, the Ohio Public Service Commission, the Pennsylvania Public Service Commission, or any other State or Federal regulatory body or office, and further, that no production be required of documents previously furnished to the AEC Staff and the Department of Justice and which are available.

In administering the similar provision of Rule 34 of the Federal Rules of Civil Procedure, courts have held that when the information is available to a party other than through discovery, resort to the discovery process will not be permitted. See Reid v. Harper R. Brothers, 17 F.R.D. 281 (S.D. N.Y. 1955).

4. Document Request No. 23c (No. 15c).[2/]

Applicants object to this request for all documents containing the slightest mention of any sort of effect that membership in CAPCO has had on any conceivable aspect (no

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2/ The reference to request "No. 23c" relates to the Joint Request made of CEI. The parenthetical reference to "No. 15c" relates to the corresponding and identically worded request appearing in the Joint Requests separately addressed to each Applicant other than CEI.

matter how remote from the issues at hand) of each Applicant's business or operations.

Literally construed, this request would require the production of virtually every scrap of paper or record in each of the Applicants' files since becoming a member of CAPCO. No attempt has been made to identify the category of documents being sought with reasonable particularity, as required by Section 2.741(a) and (c) of the Commission's Restructured Rules of Practice; thus, the request can only be viewed as an attempt to engage in an impermissible fishing expedition at Applicants' expense. See 10 C.F.R. Part 2, App. A, VI(a), which explicitly provides that "In no event should the parties be permitted to conduct a 'fishing expediton' or to delay the proceeding."

It is clear that the vast majority of documents swept within this expansive request can have no possible relevance to the issues in this proceeding. Particularly as to all Applicants other than CEI, no conceivable relationship can be shown to exist between the effect that CAPCO membership has had on their respective businesses and operations in the areas they service and the claims of anticompetitive conduct which this Board has been asked to review. No allegation has been made in this proceeding by the Department of Justice, the AEC Staff, or, the Intervenors that even remotely suggests that

there exists an actual or potential "anticompetitive situation" in the respective service areas of these other four Applicants, or that the business and operations of these other Applicants in their respective service areas bears in any way on the claimed anticompetitive situation in the City of Cleveland. Indeed, the Perry Advice Letter explicitly removes all possibility of any such implication, stating (p. 3): "The competitive situation outlined in the Department's Advice Letter dated April 20, 1973, on the Beaver Valley facility [which recommended that there was no reason for an antitrust hearing] appears to be unchanged with respect to all but one of the Applicants, CEI."

To the extent that this Joint Request is actually seeking production of documents relevant to the scope of this inquiry, it must be recast so as to give Applicants some definitional framework within which to comply. As it now stands, it is framed in such broad, general terms as to make compliance excessively burdensome and vexatious in light of the purpose to be served. Until there is provided a more precise designation of the documents being sought, together with a showing of some relevance between the items requested and the issues in this proceeding, it is Applicants' position that no such production should be required.

5. Interrogatory No. 2.[3/]

Applicants object to this interrogatory, which requests a definition of the geographic and product markets and submarkets on which the Applicants intend to rely, as calling for precisely the sort of statement of legal contentions and conclusions which the courts have traditionally protected from the discovery process under Rule 33(b) of the Federal Rules of Civil Procedure. See United States v. Maryland and Virginia Milk Producers Association, 22 F.R.D. 300, 302 (D. D.C. 1958), where the court declared: "It is not the purpose of discovery to ascertain what arguments the opposing party intends to use in support of his contentions." And see United States v. Glaxo Group Limited et al., 302 F. Supp. 1, 18 (D. D.C. 1969); Fisherman & Merchants' Bank v. Burin, 11 F.R.D. 142 (S.D. Cal. 1951).

This principle has particular application with regard to this interrogatory. Clearly, it is not the Applicants' burden in the present proceeding to define the relevant markets for purposes of antitrust review; that burden rests with the parties claiming that the proposed nuclear plants will create or maintain a situation inconsistent with the antitrust laws. To attempt through interrogatories to shift that burden at the outset of the proceeding to the parties defending

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3/ This interrogatory appears in identical form as "No. 2" in all of the Joint Requests served on the five Applicants.

against charges of anticompetitive conduct is an impermissible use of the discovery process.

6. Interrogatories Nos. 8 and 9.[4/]

For the reason stated as Applicants' objection to Interrogatory No. 2, CEI objects to these interrogatories, which request statements of its legal position as to the existence of legal impediments on a municipally-owned electric utility which would limit or preclude its (a) ownership of nuclear facilities, (b) purchase of unit power from nuclear facilities, or (c) sale of electric power within the franchised areas of other electric utilities. See United States v. Maryland and Virginia Milk Producers Association, supra.

7. In conclusion, Applicants state that they obviously have not had an opportunity to make even a perfunctory examination of their files to ascertain which documents therein are subject to production under the Joint Request. It is likely that some individual documents within the broad categories requested are entitled to protection from discovery on the ground that they contain matter of a privileged and confidential nature which is legally protected from disclosure. Applicants reserve the right to assert the appropriate claim of privilege as to

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4/ These interrogatories appear only in the Joint Request addressed to CEI.

specific documents which are entitled to such legal protection as those documents are found in the course of Applicants' respective file searches, and the foregoing general objections to the Joint Request are not intended, and should not be construed, as a waiver of such right.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Gerald Charnoff
Counsel for Applicants

Dated: September 9, 1974.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Objections To The Joint Request Of The AEC Staff And The Department Of Justice For Answers To Interrogatories And For Production Of Documents" were served upon each of the persons listed on the attached Service List by U. S. Mail, postage prepaid, on this 9th day of September, 1974.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

Dated: September 9, 1974.

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