UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	NRC Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	)	

NRC STAFF'S RESPONSE TO APPLICANT'S OBJECTIONS TO DISCOVERY REQUESTS AND MOTION FOR A PROTECTIVE ORDER

By Motion of December 11, 1978, Florida Power and Light Company (Applicant or FP&L) has objected to several discovery requests contained in the First Joint Request by the NRC Staff, the Department of Justice and the Intervenors (the Joint Request). In connection with these discovery requests, Applicant also has moved for the entry of a protective order. In accordance with the Licensing Board's Order of November 14, 1978, Staff hereby files its response to Applicant's motions. 1/

I. APPLICANT'S OBJECTIONS TO THE TIME PERIOD ENCOMPASSED IN THE JOINT REQUEST

Applicant has objected that 14 items of the Joint Request impose a "substantial and unreasonable search burden on the Company" 2/ by requiring searches for documents back as far as 1950. The Company, therefore, has requested an order limiting discovery to 1972, with provisions for earlier discovery upon motion by the party seeking production. 3/

1/ As a result of meetings held between Applicant, Intervenors, the Department of Justice and the Staff of the Nuclear Regulatory Commission, numerous potential objections to discovery requests have been resolved.

2/ Applicant's Objections to Discovery Requests and Motion for a Protective Order (Motion) at 4.

3/ Id. at 8-9.

Staff notes that only 14 of the 89 Joint Requests require a search past the general production date of 1965. [4/] Eight require a search to 1950; [5/] four require a search to 1955; [6/] and two require a search to 1960. [7/] The limited number of these requests demonstrate that the Staff has sought to limit its discovery where possible. Only these 14 items request a document search past the date ordered in South Dade, upon which the Applicant states it has already started its document search. [8/] Each request is based upon a belief that relevant material will be uncovered in a search back to the dates specified. And, as will be discussed, infra, Staff believes these requests are clearly within the scope of discovery.

A. SCOPE OF DISCOVERY

The scope of discovery in NRC proceedings is, of course, governed by 10 CFR §2.740(b)(1), Modeled after Federal Rule of Civil Procedure

4/ The 1965 date is set forth in Part C of the Joint Request, "Scope of Production." This is the same general cutoff date ordered by the Board in the South Dade proceeding.

In its Motion Applicant suggests the Staff and other parties are being inconsistent in setting 1965 as the relevant period for discovery and then requesting earlier dates as certain items. (Motion at 3.) But the Joint Request itself careful sets forth:

> "Each paragraph contained below, unless otherwise specified, refers to all documents made, sent, dated or received from January 1, 1965 to date..." (Joint Request at 6, Emphasis added).

The 14 earlier requests simply fall within this exception language. There is no inconsistency.

5/ Joint Request Nos. 24,25,29,30,33,41,56, and 76.

6/ Joint Request Nos. 2,8,26, and 48.

7/ Joint Request Nos. 12 and 39.

8/ Motion at 5.

26(b),[9] that regulation provides:

> Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ... It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added).

Thus, the controlling standard for determining whether a discovery request is within the scope of discovery is whether it is relevant to the subject matter in the proceeding. "Subject matter", however, includes not only those matters admitted in controversy at the prehearing conference,[10] but also "the existence description, nature, custody, condition and location" of documents and people.

Both the courts[11] and the Commission have recognized the need for "liberal discovery" under the relevancy standard. As the Appeal Board

9/ FED.R.CIV.P. 26(b) 28 USC; In fact, the Appeal Board has recognized that 10 CFR 2.740 is modeled after Rule 26. Commonwealth Edison Company (Zion Station, Units 1 & 2), ALAB-196, 7 AEC 457, 460 (1974).

10/ 10 CFR 2.740(b)(1); Allied-General Nuclear Services et al. (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977).

11/ See e.g., Detweiler Bros., Inc. v. John Graham & Co., 412 F. Supp. 416 (E.D. Wash. 1976); La Chemise Lacoste v. Alligator Co., Inc., 60 F.R.D. 164 (D. Del. 1973).

Since 10 CFR 2.740(b) is patterned after FRCP 26, it has been held that "the legal authorities and Federal court decisions involving Rule 26 illiminates, and provide proper guidelines for interpreting the discovery standards set forth in the Commission's rules." Allied-General Nuclear Services et al, supra at 492.

said in Commonwealth Edison Company:[12/]

> Licensing boards are afforded considerable discretion and latitude as to the manner in which they will apply the discovery rules. (cites omitted). But despite this discretion and latitude, we think that the "broad, liberal interpretation" given to the Federal Rules must similarly be accorded the Commission's discovery rules.

The Staff believes its 14 document requests which require searches past 1965 meet the test of "relevancy" under the broad, liberal interpretation which is due 10 CFR §2.740(b)(1). Neither the Federal Rules, the Commission's Regulations, nor any Commission decision limits the definition of "relevancy" to a time period. If a demonstration of relevance has been shown, discovery should follow.

However, both the Federal Rules and the Commission's Rules of Practice provide for limiting discovery, so as not to impose an unreasonable burden on the party subject to discovery. Section 2.740(b) prefaces the earlier quoted section on the "general" scope of discovery by stating: "Unless otherwise limited by the presiding officer in accordance with this section..." (emphasis added).

12/ Commonwealth Edison Company (Zion Station, Units 1 and), ALAB-196, 7 AEC 457, 461 (1974). See also Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-185, 7 AEC 240 (1974).

Presumably the emphasized language in §2.740(b) requires that any limiting of the "general" scope of discovery be in accordance with the standards required for a protective order under §2.740(c). [13/] Thus, whether a Protective Order or simply a Motion to Limit Discovery is sought, the Board's decision will be governed by the analysis set forth in §2.740(c). [14/] That analysis would allow for a limiting of the "general" scope of discovery upon a showing of "annoynance, embarassment, oppression, or undue burden or expense." [15/] It should be noted, similarly, that whether styled as a Motion for a Protective Order or Motion to Limit Discovery, the burden of limiting the general scope of discovery rests upon the party seeking to restrict discovery.

In ruling upon the instant motion, therefore, the Board must balance the relevancy of the 14 Joint Requests against the burden claimed by the Applicant. Only if the burden outweighs the possible relevancy of the request is an order limiting discovery--or a Protective Order--properly granted. In its Motion for a Protective Order in the instant case, FP&L has demonstrated neither the lack of relevance of the Joint Requests, nor an undue burden in producing those documents.

13/ 10 CFR §2.740(c) is the only relevant section for limiting discovery, other than those provisions dealing with "Trial production materials" in 2.740(b)(2), which are not at issue here.

14/ It is not clear in what form Applicant's Motion is stated. Although styled "Applicant's Objections to Discovery Requests and Motion for a Protective Order," it could be argued that pertains only to §IV of the Applicant's paper. On the other hand, Applicant's submission in §I "that discovery and evidence in this proceeding should be limited to the period beginning January 1, 1972" (Motion at 8) could also be interpreted as a Motion for a Protective Order. If so, it clearly lacks the allegation of "good cause" required in 10 CFR 2.740(c).

15/ 10 CFR §2.740(c). Applicant has found the need for a limiting order upon such a basis by claiming the search would be "unreasonable" (p. 4), "expensive and time consuming." (p. 5).

B. RELEVANCE OF DOCUMENTS REQUESTED

The Applicant has not attempted an item-by-item discussion of the relevance of the objected-to document requests.[16/] Rather, FP&L makes only broad statements as to the irrelevance of the requests, saying "(t)he burden of such a search would not be offset by the probative value of any documents produced;"[17/] that "documents authored more than a quarter of a century ago are of dubious relevance at best to issues in this proceeding;"[18/] and "When requests reach back more than a quarter of a century, their relevance cannot be assumed."[19/]

The simple claim that documents are irrelevant is not the same thing as demonstrating that irrelevance. And while it is true that the Commission's Rules of Practice do not allow the relevance of requests to be "assumed," the Appeal Board has instructed that a "broad, liberal interpretation" be given to 10 CFR 2.740 in order to give effect to its purpose.[20/] It is therefore equally erroneous to "assume" irrelevance.

16/ Notes 5-7, supra.

17/ Motion at 6.

18/ Id. at 7.

19/ Id. at 6.

20/ The Appeal Board has quoted with approval the Supreme Court's understanding of the purpose of modern discovery: "They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." Commonwealth Edison Co., supra, 7 AEC at 461, quoting United States v. Proctor & Gamble Co., 356 U.S. 677 (1958).

As discussed, supra, there is no time limit definition to relevant discovery. Documents "authored more than a quarter of a century ago" are as discoverable as those authored yesterday if relevant to the proceeding. There is nothing "dubious" about it.

The relevance to this proceeding of the 1950, 1955, and 1960 document requests is simple: the U.S. Circuit Court of Appeals decision in Gainesville Utilities Dept. v. Florida Power & Light Co.[21] In that decision, the Fifth Circuit reversed the trial court's refusal to grant judgment n.o.v. on the existence of a conspiracy to divide the wholesale power market between FP&L and Florida Power Corporation.[22] Documents and evidence introduced in that case reach back to the early 1950's. For example, in an affadavit filed by Florida Cities' attorney Robert A. Jablon in the South Dade proceeding,[23] a letter from W.C. Gilman, President of Florida Power Corporation, to Richard Simpson of Monticello, Fla., dated January 30, 1951 appears.[24] The letter is indicative, according to Mr. Jablon's affadavit, of material showing "various anti-competitive actions of Florida Power & Light Company, including refusals to transmit, refusals to sell wholesale power, conspiracy to divide territory for wholesale power service, and monopolization."[25]

21/ 573 F.2d 292 (5th Cir., 1978), cert. denied, ___U.S.___, 47 USLW 3329 (No. 78-476) (November 14, 1978).

22/ 573 F.2d at 299.

23/ Florida Power & Light Company (South Dade Nuclear Units), NRC Dkt. No. P-636-A, Robert Jablon affadavit attached to Florida Cities Petition to Intervene, April 14, 1976.

24/ Id., Document No. 14 in the Jablon affadavit.

25/ Id., Jablon affadavit at 3 (unnumbered).

While the Staff makes no representations as to the value of that particular letter or to Mr. Jablon's assertions of its use in the South Dade proceeding, the fact that a relevant 1951 letter was obtained through discovery in the Gainesville case, [26] suggests that further discovery into that time period is necessary in the instant proceeding. If such discovery was deemed relevant by the U.S. District Court in Gainesville, the Staff believes its limited request for similar discovery in the St. Lucie 2 proceeding is consistent with its responsibilities of investigating whether granting the proposed license would "create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." [27]

It is not an answer to the Gainesville-prompted requests that the "allegations were well-known by 1977, when the Board ruled on the South Dade discovery requests." [28] At the time of that ruling, the District Court jury had refused to find a conspiracy between FP&L and Florida Power Corporation and a motion for judgment n.o.v. had been denied. Thus, the parties could hardly have been expected to press the relevance of the Gainesville discovery period. However, with the decision of the Court of Appeals for the Fifth Circuit and the subsequent denial of certiorari by the Supreme Court, the Nuclear Regulatory Commission Staff could hardly overlook those allegations. Indeed, Section 105a of the Atomic Energy Act places independent authority in the Commission to "suspend, revoke or take such other action as it may deem necessary" [29]

26/ Id., Jablon affadavit at 3 (numbered).

27/ 42 USC §2135 c (5).

28/ Motion at 5, note 1 (unnumbered).

29/ 42 USC §2135a.

when there has been a finding of violation of the antitrust laws by a licensee.[30/]

The allegations growing out of the Gainesville case are certainly within the scope of the permissible Staff investigation in the instant proceeding. The NRC Staff has always maintained that its investigations are not limited to the time frame when the immediate unit under consideration was first proposed.[31/] To do so would be inconsistent with the prelicensing antitrust review process of Section 105c.

By authority of the Atomic Energy Act, the Commission is to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws specified in subsection 105a."[32/] Among the laws specified in subsection 105a is the Sherman

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30/ As the Board is aware, the Commission now has under advisement the Gainesville decision and what action it should take with regard to FP&L. The Staff has urged the Commission to consolidate any 105a proceeding with the instant case. Although there are other possible routes for dealing with the Gainesville matter, it should be noted that if the Commission adopts the Staff recommendation of consolidation, all of the material directly relevant to the Gainesville allegations would come into this proceeding. Much of that could probably be accomplished by granting the Joint Document requests now at issue; otherwise, should the Commission order consolidation and the parties enter discovery requests based on that 105a matter, the "early" discovery requests will necessarily be repeated.

31/ As the Applicant here has alleged. See Motion at 2.

32/ 42 USC §2135c(5).

Act.[33] It is, of course, necessary in showing a violation of Section 2 of the Sherman Act to demonstrate not only monopoly power but the willful acquisition of such power or willful maintenance of monopoly power.[34] It would be impossible to do so without an investigation of the past of the alleged monopolist. Thus, in NRC proceedings, it would be impossible to "make a finding" as to whether certain conduct was inconsistent with Section 2 of the Sherman Act without allowing an investigation into the past conduct of the Applicant.

For purposes of determining what relief is necessary, should a finding be made that a situation inconsistent with the antitrust laws would develop if the license were granted without appropriate conditions, the NRC Staff must also evaluate the effects of past anticompetitive practices or structure. It is impossible to evaluate effects in a vacuum. Only by studying the past situation and comparing it with the present can the "effects" of anticompetitive practices and structure be measured for purposes of developing constructive relief. At the same time, the Staff does not contend it has a "fishing license" to conduct discovery.[35] The limited number of pre-1965 document requests demonstrate an attempt to limit discovery to those areas relevant to the Gainesville matter.[36]

33/ 15 U.S.C. §1 et. seq.

34/ United States v. Grinnell Corporation, 384 U.S. 563, 570-571 (1966).

35/ Motion at 16.

36/ Also relevant is the SERC matter, as detailed in Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), LRP-77-24, 5 NRC 804 (1977).

The Applicant's suggestion of 1972 as the earliest date for discovery is objectionable for the reasons stated above. In fact, such a date would seriously impair the ability of some parties to formulate and present their case. For example, to limit discovery to 1972, "the year in which the Company first gave consideration to the construction of Unit No. 2 of the St. Lucie Plant as presently constituted", [37] would foreclose the allegation of denial of access to nuclear with respect to all other planned projects of the Applicant.

C. BURDEN ON THE APPLICANT

The other side of the Protective Order/Limiting Order equation calls for balancing the demonstrated relevance of the discovery against the burden which would be imposed upon the party against whom discovery is sought. It is the party resisting discovery who must demonstrate and carry the burden of showing "annoyance, embarassment, oppression or undue burden or expense." [38]

Again, FP&L has alleged undue burden without demonstrating that it actually exists. For example, the Applicant says this "massive task" would be "expensive and time consuming." [39] But it is unclear just why that would be true. Presumably, most of these documents would have already been

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37/ Motion at 2.

38/ 10 CFR 2.740(c).

39/ Motion at 6.

produced in preparation for the Gainesville case. Since the Joint Request contains only 14 items which seek discovery before the general 1965 date, 10 years difference in 14 categories is apparently the Applicant's definition of "massive."

Further, the Applicant gives us no means of evaluating whether, in fact, the 14 Joint Requests would be burdensome at all. Since we have not been instructed how the files are maintained, it is impossible to determine--from the material now before the Board--the time or expense that would be involved in meeting the requests. If, for example, FP&L's files are chronologically arranged, it would appear to be a relatively easy matter to "extend" the discovery request back 10 years. It may be that the Applicant's files are arranged in some other fashion, but the point is that cannot be assumed. Absent some demonstration and explanation of what the burden is, the Board cannot assume that it exists, simply on the assertions of the party seeking to limit discovery.

Some of the assertions of burden are difficult to reconcile with common sense. For example, Joint Request No. 2 requests "copies of annual reports issued to stockholders by Company for the years 1955-1977..." Unless these annual reports have been destroyed by fire, it is difficult to see the burden Applicant would have in locating and copying these reports. The "burden" is minimal.

These practical arguments aside, it is clear, as a legal matter, that merely the existence of "some burden" is not grounds for denying relevant discovery.[40/] Courts have held that the fact that production

40/ Hanover Shoe, Inc. v. United Shoe Machinery Corp. 207 F. Supp. 407 (N.D. Pa. 1962).

would be onerous or inconvenient is not per se grounds for denying a document request.[41] Under 10 CFR §2.740(c), the pertinent consideration is whether "justice requires" a limitation on discovery to prevent burdening an applicant. Mere size of the search or length of the relevant time period does not define burden; it is the demonstration of such hardsh' before the Board which is crucial.

However, the Applicant makes the argument that it performed "a substantial amount of work" in the South Dade proceeding and that its work, conducted "in reliance" on the Board's South Dade ruling, would have to be repeated if an earlier date is adopted.[42] Besides the fact the Applicant is inconsistent in its "reliance" on South Dade,[43] Staff contends that FP&L has no basis for placing such "reliance" in South Dade. It is true that the parties to the St. Lucie 2 proceeding have used the South Dade discovery procedures and matters in controversy as a basis to frame the issues and discovery in the instant proceeding. This is simply a matter of litigation efficiency, directed toward the goal of expediting the licensing process. However, the South Dade proceeding has been rendered moot by the cancellation of the planned units by FP&L.

41/ Rockaway Pix Theatre, Inc. v. Metro-Goldwyn-Mayer, Inc., 36 F.R.D. 15 (E.D.N.Y. 1964).

42/ Motion at 5.

43/ For example, he has not "relied" on the 1965 cutoff date set by the Board in that proceeding, but now rather requests a 1972 date.

Any discovery which FP&L will repeat in this proceeding from its earlier South Dade search is not a basis for limiting discovery which the Board might order here.

D. PROCEDURE FOR ANALYSIS

As has been discussed, the proper procedure for the Board to follow in ruling on FP&L's Motion for a Protective Order/Motion to Limit Discovery is to balance the shown relevancy of the documents against the demonstrated burden on the Applicant. The Staff believes it has shown both the relevance of the 14 Joint Requests and the lack of any demonstrated burden by FP&L, and therefore, the Motion of the Applicant should be denied.

However, FP&L has suggested another method of analysis. Referencing the Manual for Complex Litigation, [44/] Applicant would have the Board set a general discovery date of 1972, with earlier requests possible

44/ Motion at 9.

upon some showing in "isolated circumstances."[45] In one sense, this suggestion simply begs the issue. That is: where is the "general cut-off" date to be set: 1972, 1965, 1950, or some other year? But, closely read, this suggestion is also a means of shifting the burden to the party moving for discovery, rather than the party opposing discovery, as required by the Commission's Rules of Practice.

Under the Manual for Complex Litigation approach, as outlined by the Applicant on pages 8-9 of its Motion, "(t)he burden should be on the requesting party to set forth the reasons for each such exception (to the general cutoff date of 1972)." This is completely contrary to the provisions of 10 CFR 2.740, outlined earlier. That Commission Regulation, it will be recalled, follows Federal Rule of Civil Procedure 26 in allowing the discovery of "any matter, not privileged, which is relevant."[46] It is only upon a Motion for a Protective Order[47] or an order limiting the scope of discovery by the Board[48] that this scope is reduced. What the Applicant is proposing is to turn this scheme upon its head, asking the Board to grant an order which would require a party seeking relevant documents to obtain Board approval, while failing to set forth what standard must be utilized.[49] Staff opposes this attempt and perhaps states the obvious in saying that

45/ Motion at 8.

46/ 10 CFR 2.740(b)(1) (emphasis added).

47/ 10 CFR 2.740(c).

48/ 10 CFR 2.740(b).

49/ It is not clear from Applicant's Motion what showing the party seeking discovery in the "isolated circumstances" would have to show. The phrase "good cause" is mentioned. See Fed.R.Civ. P. 35(a). This would be a higher standard for a party seeking discovery than showing relevance, as set forth in 10 CFR §2.740(b)(1).

while the Board is held to follow the Commission's Rules of Practice, as set forth in 10 CFR, it has no responsibility to follow any scheme proposed in the Manual for Complex Litigation.

E. EVIDENTIARY CONCERNS

A careful reading of Applicant's motion reveals a request that the Board limit "discovery and evidence" in this proceeding to a 1972 date.[50/] As discussed previously, the Staff does not believe this is a realistic proposal. But even should the Board rule that 1950, 1955 and 1960 are not proper discovery dates, in their limited context, this ruling should not effect the evidentiary presentation of material gained through other proceedings.

For example, documents the parties have obtained through the Gainesville proceeding, which are relevant in an evidentiary sense,[51/] to the matters at controversy in the instant proceeding, should not be precluded from admission merely because they are earlier documents. It would be error, the Staff believes, for the Board to rule now that all evidence prior to 1972 (or whatever date is finally selected) is irrelevant. Under the definition of Federal Rule of Evidence 401: "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." There will be time enough for the Board to rule on such evidence when proferred at the hearing. Therefore, any ruling the Board will make in response to Applicant's present motion should be limited in terms of discovery only, under the applicable provisions of 10 CFR 2.740.

50/ Motion at 8.

51/ Fed.R. Evid., Rules 401, 402, 28 U.S.C.

II. APPLICANT'S OBJECTIONS TO DISCOVERY PERTAINING TO LEGISLATIVE ACTIVITIES

Applicant objects to interrogatory 58 of the Joint Request which requires the production of documents relating to Applicant's legislative activities. It objects to this type of discovery on the basis of what is commonly referred to as the Noerr-Pennington doctrine.[52/] This doctrine confers immunity from liability under the antitrust laws for actions, regardless of their anticompetitive intent or purpose, which merely involve seeking to influence the executive, legislative or judicial branches of government. Contrary to Applicant's assertions, there are a number of reasons why interrogatory 58 is a permissible discovery request.

A. 10 CFR 2.740(b)(1) of the Commission's Rules of Practice

Applicant's contentions regarding the Noerr-Pennington doctrine are at best premature since discovery of the type of documents called for in this request would be permissible even though the documents themselves might not be admissible at trial. In this regard, the Federal Rules of Civil Procedure 28 U.S.C. §26(b)(1) states in pertinent part -

> "...It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Comparable wording is incorporated into the Commission's Rules of Practice 10 CFR 2.740(b)(1).

52/ United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railraod Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1960).

The South Dade Licensing Board recognized the distinction between permissible discovery and inadmissible evidence for Noerr-Pennington type documents when it held that a similar discovery request in that case was permissible: 53/

> We are not of course, at this stage ruling upon the ultimate admissibility of evidence. Rather, in accordance with 10 CFR §2.740(b)(1), the test we apply is whether "...the information sought appears reasonably calculated to lead to the discovery of admissible evidence." * This is also the test under Rule 26 of the Federal Rules of Civil Procedure. The Board observes that the interrogatories objected to on the basis of Noerr-Pennington seem to be designed to lead to the discovery of admissible evidence, even if the legislative conduct thus demonstrated may not be the basis of a finding of a violation of the antitrust laws. 54/

B. Exceptions To Noerr-Pennington

In addition to the above discussed rules of discovery, there are other reasons why the Noerr-Pennington doctrine would not preclude the Applicant from producing documents pursuant to interrogatory 58. There are several well established exceptions to this doctrine to include the fact that legislative acts and practices may be used to show the purpose and character of particular transactions, even though in some cases they can not be the basis for a finding of a violation of the antitrust laws. 55/

53/ It should be noted that Joint Request No. 60 in South Dade was identical to the original October 31, 1978 Joint Request No. 58 in St. Lucie Unit 2 (This October 31st request was subsequently revised by the December 11, 1970 memo of understanding between the parties.)

54/ Second Prehearing Conference Order, In the Matter of Florida Power & Light Co. (South Dade Nuclear Units), Dkt. No. P-636A, February 22, 1977). Attachment G.

55/ United Mine Workers v. Pennington 381 U.S. 657, 670 (1965).

Also, to the extent that the documents disclose that the legislative activities of Applicant fall within the "sham" exception to the Noerr-Pennington doctrine, then such activities can provide the basis for a finding that the Applicant has created or maintained a situation inconsistent with the antitrust laws. 56/

1. The Noerr-Pennington doctrine permits the introduction of evidence concerning the Applicant's legislative activities to show the purpose and character of the particular activities

In objecting to the production of legislative documents Applicant fails to recognize that although antitrust liability cannot be predicated on valid attempts to influence governmental actions, evidence of bonafide legislative activities is allowable in order to show "the purpose and character" of other activities. This was specifically made clear in footnote 3 of the Pennington decision where the Court points out that such evidence may be admissible "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." 57/ Since Pennington, other courts have applied this reasoning and have permitted the introduction of evidence as to "protected activities" in order to show the purpose and character of the activities in question. 58/

56/ Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 144 (1960).

57/ United Mine Workers v. Pennington 381 U.S. 657, 670.

58/ See, for example, Household Goods Carriers' Bureau v. Terrell, 417 F.2d 47 (5th Cir.), rehearing en banc, 452 F.2d 152 (1971); Hayes v. United Fireworks, 420 F.2d 836 (9th Cir., 1969).

This exception was specifically cited by the South Dade Licensing Board in overruling the Applicant's Noerr-Pennington arguments. There, the Licensing Board specifically found that:

> The Staff urges that the purpose and character of the applicant's activities are relevant, and that this would be a permissible showing under Pennington, supra. The Board can envision other unprotected products of this discovery. For example, we may be aided in establishing the appropriate relevant geographic and product markets for antitrust analysis in this proceeding. 59/

2. Sham activities

The Noerr-Pennington doctrine does not apply to "sham" attempts to influence governmental acts. This exception was first referred to in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 144 (1960) where the Court stated that:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

According to this exception, to the extent it may be established that Applicant has engaged in legislative activities to interfere with the business relationships of others, Applicant's actions are a legitimate area of discovery and Joint Request 58 is appropriate to examine this possibility.

59/ Florida Power & Light Co., supra, note 54 at p. 3 n.1.

Applicant argues at pp. 14-15 of its brief that discovery in this case should not be allowed under the "sham" exception since, according to Applicant, there has been no allegation by the parties in this proceeding. Applicant goes on to conclude that it would be more appropriate for the Board to defer the matter until the other parties in the case have made a prima facie showing that a sham exception may exist. Staff cannot agree with Applicant's analysis. The short answer to this contention is that discovery will aid the parties in determining whether Applicant's legislative efforts fall within the sham exception. By its very nature, sham activity would be of a clandestive type that often would not be apparent without first having access to the files of the Applicant. The South Dade Licensing Board recognized this need for taking discovery in order to determine whether Noerr-Pennington doctrine, or any of its exceptions, would apply in NRC antitrust litigation. As the Board stated:

> Moreover, it will not be possible until after discovery for the Board to determine whether the activities in question are entitled to the constitutional protection recognized by the Noerr-Pennington cases, or whether they fall within "sham" or other possible exceptions to the doctrine. 60/

60/ Florida Power & Light Co., supra, note 54 at 3.

3. Previous NRC decisions regarding Noerr-Pennington

In its discussion of the Noerr-Pennington doctrine, Applicant has contended that "NRC Licensing Boards have split in their decisions" regarding whether to accept discovery for this classification of documents. Staff believes that a close reading of the various decisions discloses that Licensing Boards have in fact been amenable to allowing Noerr-Pennington type discovery.

Initially Applicant cites an Order issued by the Licensing Board in the Davis-Besse proceeding.[61/] Staff submits that the language quoted by Applicant does not necessarily preclude Noerr-Pennington documents since in the next sentence the Board stated that, "The Board might consider whether such activities [legislative] were part of a broader program to create or maintain a situation inconsistent with the antitrust laws...."[62/] In addition, in the very next interrogatory the Board pointed out that it would allow discovery with respect to other political activity if a sufficient degree of relevancy could be demonstrated[63/] and in the following interrogatory it allowed discovery with respect to documents pertaining to the "sham" exception of the Noerr-Pennington rule.

61/ Order on Objections to Interrogatories and Document Requests, In the Matter of The Toledo Edison Company and the Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Unit 1), Dkt. Nos. 50-346A, 50-440A, October 11, 1974. Attachment A.

62/ Id. at 6.

63/ Id. at 7.

Applicant also cites a decision of the Consumers Board to support its argument.[64] Although in that case the Board had disallowed discovery of certain documents relating to the Applicant's political activities on the basis of relevancy,[65] an examination of the transcript discloses that the Board did in fact subsequently permit examination of a witness whose testimony was objected to on the basis of Noerr-Pennington.[66]

The third ruling cited by the Applicant is that of the Duke Board.[67] There the Board stated that it would consider discovery of political material and grant such requests upon the showing "of prerequisites required by law."[68] Staff believes that since the proper prerequisites will have been shown in this case, the Duke ruling stands in favor of granting the Joint Request.

Finally, the Applicant cites the decision of the Louisiana Board.[69] It is Staff's position that the well-reasoned opinion in Louisiana is

64/ Order Ruling on Applicant's Objections to Document Requests,.... In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), Dkt. Nos. 50-329A, 50-330A, November 28, 1972. Attachment B.

65/ Id. at 2 and 3.

66/ Record, 6 February 1974, at 5625 et seq., In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), Dkt. Nos. 50-329A, 50-330A. Attachment C.

67/ Prehearing Order Number Two of Atomic Safety and Licensing Board, In the Matter of Duke Power Company (Oconee Units 1, 2 & 3; McGuire Units 1 & 2) Dkt. Nos. 50-269A, et al, November 27, 1972. Attachment D.

68/ Id. at 3.

69/ Memorandum and Order with Respect to Objections on Discovery Requests and Interrogatories, In the Matter of Louisiana Power and Light Co. (Waterford, Unit 3), Dkt. No. 50-382A, April 19, 1974. Attachment E.

persuasive as to why discovery should be granted in this case. There the Board granted discovery with respect to certain legislative information. As in the instant case, the Applicant argued that such discovery was precluded by the Noerr-Pennington doctrine. The Board stated:

> First, Rule 26 of the Federal Rules of Civil Procedure and the AEC Rules and Regulations permit discovery calculated to lead to the production of admissible evidence even though the actual subject matter of the discovery may itself be ruled inadmissible at the time of the hearing. Thus, it remains to be seen whether the information sought by these interrogatories will lead to the production of admissible evidence even if the Board upholds Applicant's contentions with respect to the applicability of the Noerr-Pennington doctrine.
>
> Second, the doctrine and the extent of the doctrine's coverage cannot be tested in a specific context without the proper development of evidentiary facts. That is to say, that although Applicant might claim extensive immunity based on the asserted applicability of the doctrine, the immunity ultimately determined to be available may be substantially narrower than that claimed. Without the development of a factual basis upon which to consider the doctrine, there is no way for the trier of facts to gauge the scope of the immunity.
>
> Third, we note that it cannot be ascertained presently which activities Applicant itself may claim to be immunized by the doctrine; and surely, the other parties are entitled to know the factual basis upon which Applicant will argue the applicability of the doctrine. It would be most unfair if a party, merely by citing the catch phrase "Noerr-Pennington" could thereby relief itself of the responsibility of producing data in response to discovery which data might be outside of the scope of the doctrine. In short, there must be a way to test claims of privilege based on the doctrine, and the only way to make such a test valid is through the production of data of the type sought through these interrogatories.

A case which the Applicant has failed to refer to but which was one of the more recent NRC Licensing Board decisions where Noerr-Pennington discovery has been allowed occurred is the Alabama proceeding. [70] The most recent decision regarding Noerr-Pennington is the above referred to South Dade decision. [71] Staff believes that the reasoning employed by the Louisiana, Alabama, and South Dade Boards is conclusive in overruling the Applicants' arguments in the present matter and mandate a positive finding with respect to interrogatory 58 of the Joint Request.

Applicant attempts to distinguish earlier NRC decisions regarding the Noerr-Pennington documents by contending that the decision in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), 46 U.S.L.W. 4371 (April 25, 1978) somehow makes a difference with respect to access to discovery documents. Staff does not see how Bellotti has any effect upon the rationale employed by the previously referred to NRC Licensing Board rulings for allowing discovery. Bellotti merely stands for the proposition that the First Amendment rights of freedom of speech which apply to private individuals also apply to such entities as commercial corporations.

70/ Order Granting In Part and Denying In Part Motion to Compel Production, In the Matter of Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), Dkt. Nos. 50-348A, November 1, 1973. Attachment F.

71/ Second Prehearing Conference Order, In the Matter of Florida Power & Light Company (South Dade Nuclear Units), Dkt. No. P-636A, February 22, 1977. Attachment G.

One other area which Applicant has tried to emphasize in its arguments concerns the alleged "chilling effect" upon the exercise of constitutionally protected rights if Noerr-Pennington type documents are allowed discovery. The Licensing Board in Alabama found such a defense by an Applicant to be unpersuasive [72/] and Staff sees no distinction here.

III. APPLICANT'S OBJECTIONS RELATING TO OVERBROAD REQUESTS

At page 25 of its brief, Applicant objects to Joint Requests Nos. 79-82 on the basis that these interrogatories are overly broad and extend to subjects which are not relevant to this proceeding. Applicant first objects on the basis that these interrogatories are unnecessary. Specifically, it contends that even though these interrogatories are relevant to the fuel supply question, such information is unnecessary since the fuel supply subject is sufficiently covered by Joint Requests 54 and 55 (plus several interrogatories contained in Florida Cities' requests). Second, Applicant objects on the basis that the requested information pertains to a proceeding which is pending before the Federal Energy Regulatory Commission. And third, Applicant contends that providing this information would substantially lengthen and complicate the discovery process in this proceeding.

Staff disagrees that all the information necessary with respect to the fuel supply question can be obtained solely from Joint Requests 54

72/ Those cases cited by Applicant regarding a "chilling effect" appear to involve more extreme situations than are present in this case. For example, Applicant cites at page 12 in support of the "chilling effect" NAACP v. Alabama 357 U.S. 449 (1958). In that case the Court stated at 462: "Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank and file members has exposed those members to economic reprisal, loss of employment, threat of physical coersion, and other manifestations of public hostility." Staff does not believe that disclosure of the information requested by the Joint Interrogatories reaches this standard.

and 55. Document requests 54-55 may not provide information in sufficient detail to establish the competitive situation with respect to natural gas. Among other things, Joint Requests 79-82 are necessary to provide copies of contracts and documents pertaining to pricing and availability of gas supply.

Another important reason why Joint Requests 54 and 55 are not sufficient is that, contrary to Applicant's assertion, we are interested in more than just the question of fuel availability. Staff seeks to know whether Applicant has conspired with others to monopolize the gas supply in the State of Florida or whether it has unfairly acted alone or in concert with others to curtail the gas supply of smaller utilities. Joint Requests 79-82 are designed to provide this type of information.

Staff disagrees that discovery for Joint Requests 79-82 would substantially lengthen and complicate the discovery process in this proceeding. Since, as Applicant concedes, these discovery requests have already been the subject of discovery in a FERC proceeding, the search for these documents by Applicant should not be an undue burden.

Applicants' objection that the natural gas question should not be handled in this forum because it is already the subject of a FERC proceeding is unfounded. There is no element of primary jurisdiction involved here concerning the antitrust aspects of the natural gas question which would preclude the NRC from acting upon this matter.

IV. APPLICANTS' REQUEST FOR A PROTECTIVE ORDER

Applicant contends that much of the discovery information in this proceeding is of a confidential nature which is entitled to a general protective order. It has furnished a proposed protective order which in effect allows Applicant, in its sole discretion, to designate any discovery information as confidential. Staff does not quarrel with the fact that there might be some discovery materials which are entitled to confidential treatment. However, we cannot envision the necessity for the blanket type of protection which Applicant at this time seeks.

Staff believes that 10 CFR §2.740(c) regarding protective orders applies when a party seeks protection for certain specific documents for confidentiality,[73/] but not for an unlimited power to allow for all documents to be marked confidential at the discretion of the requesting party. The party who seeks the protection has the burden of showing why the documents should be confidential and not vice versa. Under Applicant's proposed arrangement, the roles are reversed and other parties will have the burden of demonstrating why specific documents should not be confidential. Staff believes this arrangement subverts both the letter and spirit of 10 CFR §2.740(c) which provides that a protective order will only be granted to a requesting party "for good cause shown."

Staff does not believe that Applicant has shown that a blanket protective order is warranted with respect to all those materials over which it can potentially claim confidentiality. Applicant's blanket protective order is even broader than a requested protective order which

73/ See 10 CFR 2.790(b)(1), as referenced by 10 CFR 2.740(c)(6), allowing the withholding of "a document or a part."

was rejected by an NRC Licensing Board in the Stanislaus proceeding.[74] There the Applicant requested an order requiring that intervenors give advance notice and an opportunity for objection before using documents produced in that proceeding for other purposes. In denying this request, the Licensing Board ruled that

> PGE has not attempted to list or describe with specifity any documents whose use in other fora would unreasonably compromise trade secrets or other identified competitively sensitive information. No good cause has been shown requiring the entry of a protective order for prior notice of other use of documents, and such a requirement would impose a substantial burden on the other parties.[75]

Just as in the Stanislaus proceeding, the Applicant here has not attempted to list and describe which documents should have confidential treatment. Under our rules this burden is demanded of the party who requests confidentiality. Even assuming the Staff could accept the shift of burden implicit in Applicant's proposed Protective Order for "proprietary", confidential, and trade secret information,[76] there are specific problems with the Order as drafted.

74/ Order Regarding PG&E's Motion for Notice on Notice of Use of Documents, In the Matter of Pacific Gas & Electric Co., (Stanislaus Nuclear Project, Unit 1), Dkt. No. P-564A (June 15, 1978).

75/ Id., p. 3.

76/ Proposed Motion at 1.

Paragraph one of the proposed Order states: "This order shall govern all answers, documents and other discovery materials produced by the parties..," etc. While it may be assumed the Order is designed only to apply during the discovery phase of the proceeding, [77] that is not clearly stated in this paragraph. This ambiguity and inconsistency is a recurring problem in the order, as proposed. As will be discussed, infra, the Staff is reluctant to add as an issue to the prehearing phase of this proceeding the meaning of the terms of the Protective Order.

Paragraph five of the proposed Order states: "with respect to the government parties to this proceeding, Staff attorneys and their regularly employed consultants shall not be prohibited by this Section 5 from access..." (emphasis added). Because of the peculiar wording of this caveat to paragraph five, NRC Staff counsel would be unable to show discovery documents marked as confidential to any of their technical support people. On the one hand, Staff counsel's retained experts may not be hired on a "regularly employed" basis. On the other hand, the technical Staff of the NRC, which serves the dual role of advisor and client, may not be properly classified as "consultants."

The Staff sees several problems with paragraph six. In the first place, it is drafted so ambiguously that the Staff is not sure whether it falls within paragraph six's provisions, or has been completely dealt with in paragraph five. If within paragraph six, the Staff would object

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77/ Cf. Motion at 30; Paragraph 15 of Proposed Protective Order.

that this restriction prevents it from showing marked documents to fact witnesses. Such disclosure may be necessary, for example, to refresh recollections and thereby obtain information sought.

Perhaps the most serious objection of the Staff is to paragraph 10, which provides: "No person shall make use of any confidential information obtained pursuant to discovery in this proceeding other than for purposes of this proceeding." By its literal terms, this provision would present the NRC from using information obtained in the St. Lucie 2 discovery process in subsequent cases dealing with that license, the licensee, or other related matters.

For example, paragraph 10 would prevent the Staff from using information gained in this proceeding in a 105a [78/] action against Florida Power & Light Company, even if relevant to the matter under litigation. This would be a clearly unacceptable restriction of the Staff's responsibilities. It might be reemphasized that at the present time, a 105a matter involving the Applicant is pending before the Commission. Should the Commission order that matter to proceed in a separate proceeding, the information the Staff receives in the instant case would certainly be relevant and pertinent to a 105a matter. [79/]

78/ 42 U.S.C. 2135a.

79/ See note 30 and text accompanying.

The Staff finds objectionable the additional requests and special handling procedure which would be required by the proposed Order. For example, paragraph four requires that trial briefs filed with the Board comply with the sealed envelope procedure of that provision of the Protective Order. The Staff believes this will seriously encumber the hearing process.[80/] More importantly, it is the NRC Staff's position that--to the largest extent possible--hearings on NRC license applications should be open to the public. If there is a significant need to restrict public access to certain documents the Board can make appropriate orders. In preparing a brief for the Board the parties should not be restricted in the presentation of documents which substantiate their allegations.[81/]

Furthermore, Staff would note that the procedures dictated in the proposed order have the potential of lengthening the discovery phase of this proceeding. By the terms of the Protective Order, the parties will be forced to argue before the Board many issues: the proper "classification" of a document (par. 13); an independent expert's "need to know" (par. 6); as well as ambiguities in terms of the Protective Order (e.g., pars. 5,6).

The Staff respectfully submits that it would be a more efficient use of the Board's--and all parties'--time if the Applicant would simply move the Board for a Protective Order on those selected documents which

80/ As worded, even the briefs would have to be enclosed in sealed envelopes if they "comprise or contain material marked as confidential, or information taken therefrom..."

81/ The Staff is also concerned that the restrictive provisions of the proposed order will make it impossible to create an adequate record to preserve all matters for appeal.

it feels most sensitive and requiring a Protective Order. Certainly, it is more logical to spend time before the Board arguing over the terms of a relevant document than such abstract factors as the definition of "outside counsel" or "regularly employed consultants."

CONCLUSION

For the above stated reasons, Staff urges the Licensing Board to take the following action with respect to Applicant's objections to the Joint Request:

1. Deny Applicant's objection to the 14 Joint Requests which seek discovery to dates earlier than 1965, and order that such discovery may be had, without reference to evidentiary restrictions;

2. Deny Applicant's objections based upon the Noerr-Pennington doctrine and order discovery under the terms of Joint Request 58;

3. Deny Applicant's objections of overbreadth with regard to Joint Requests 79-82 and order production in light of the need shown;

4. Deny Applicant's proposed Protective Order as contrary to the Commission's Rules of Practice; ambiguous as written; and potentially burdensome; and

5. Grant all other relief deemed appropriate to move this proceeding forward.

Respectfully submitted,

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Lee Scott Dewey
Counsel for NRC Staff

Fredric D. Chanania
Fredric D. Chanania
Counsel for NRC Staff

David J. Evans
David J. Evans
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 22nd day of December 1978.

Attachment A

Shipman Englaman CC

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
The Toledo Edison Company and	)	Docket Nos. 50-346A
The Cleveland Electric Illumina-	)	50-440A
ting Company	)	50-441A
(Davis-Besse Nuclear Power	)	
Station, Unit 1)	)	
	)	
The Cleveland Electric Illumina-	)	
ting Company, et al.	)	
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

definitions
B.3

ORDER ON OBJECTIONS
TO INTERROGATORIES AND DOCUMENT REQUESTS

A. Preliminary

Pursuant to schedule set for motions on discovery, each of the parties[1/] objected on various grounds to various interrogatories and document requests filed pursuant to 10 CFR 2.740(b) and 2.741 by other parties. Specifically, (a) Applicant, Cleveland Electric Illuminating Company (CEI), objected to the interrogatories and document requests of the City of Cleveland (City), (b) Applicants (Toledo Edison Company, Pennsylvania Power Company, Ohio Edison and Duquesne Light Company) objected to City's interrogatories and document requests, (c) Applicants

1/ Except American Municipal Power-Ohio (AMP-O)

or director, and all public utilities or electrical supply or construction companies as to which the CEI director serves as an officer or director.

5. CEI objects to document request 16(d) relating to legislation and constitutional revision affecting the ability of electric utilities to own, finance and construct facilities and to sell electricity. CEI contends that these documents are irrelevant to the proceedings and that it would be placed under a severe burden to conduct a search for such documents. The objection is sustained on the basis that CEI's activities, if any, in the areas of legislation or constitutional revision do not possess the requisite degree of relevance to these proceedings. Assuming that CEI did undertake legislative activities directed to the enactment of statutes which would affect the competitive position of the City, these activities nonetheless would not constitute antitrust violations in and of themselves. The Board might consider whether such activities were part of a broader program to create or maintain a situation inconsistent with the antitrust laws, but under the doctrine of Parker v. Brown, 317 US 341, (1942), legislative judgments with respect to legislative structure may not be considered as antitrust violations even though they have an effect upon commerce.

6. CEI objects to document request 16(f) which calls for materials relating to municipal elections claiming burden, and further claiming that political activities are immunized from antitrust attack. CEI contends that the Noerr Doctrine prevents discovery relating to political matters. The Board does not agree that the blanket assertion of the Noerr Doctrine precludes all such discovery, and on that basis the objection would be overruled. However, the City thus far has failed to demonstrate the relevance of the information sought under this request to the issues admitted in this proceeding and on that basis the objection is sustained. In the event relevance is clearly demonstrated, the Board may reconsider its ruling.

7. CEI objects to document request 16(g) pertaining to litigation documents because it calls for privileged materials and is unduly broad. CEI also claims that certain activities covered by this request may be immunized from antitrust challenge since they would not fall within the "sham" lawsuit exception as set forth in California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508 (1972). The City cited an example of one lawsuit which it contends has anticompetitive overtones. The City further indicated that it would be difficult, without discovery, to gauge the number of lawsuits to determine whether the "sham" exception applied. The Board agrees that it is impossible to determine if the "sham" exception applies

without permitting the discovering party to ascertain the extent of such litigation. Also, with respect to Applicant's claim that the request is unduly broad, we note that it is limited to litigation in opposition to the construction of competing generation or transmission facilities. Accordingly the objection is overruled with regard to litigation that may have been initiated by CEI and discovery is permitted thereto except where CEI asserts an "attorney-client" privilege which shall be handled in accordance with the provisions of Section H below. The objection of CEI is sustained with respect to litigation that may have been initiated by other entities.

8. CEI objects to document request 16(i) calling for information regarding labor union negotiations on the basis that this information is irrelevant to any issue in this proceeding. The objection is sustained.

9. CEI objects to document request 16(j) which seeks fossil fuel supply contracts, on the basis that the information is irrelevant and confidential. As to confidentiality, data otherwise discoverable may not be withheld from attorneys, or economic and technical advisors employed by a party even though the reques does involve information considered by a party to be confidential business information. However, the Board will assist the parties in protecting arguably confidential business information from

CONFIDENTIAL DATA

ATTACHMENT B

F7

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
CONSUMERS POWER COMPANY	)	
	)	50-330A
(Midland Plant, Units 1 and 2)	)	

ORDER RULING ON APPLICANT'S OBJECTIONS TO DOCUMENT REQUESTS, THE DEPARTMENT OF JUSTICE'S MOTION TO COMPEL THE PRODUCTION OF FOUR CATEGORIES OF DOCUMENTS, AND APPLICANT'S MOTION FOR PROTECTIVE ORDERS

Before ruling on the specific matters raised by the parties, a brief statement by this Board dealing with the appropriate scope of discovery would be apropos. The Department of Justice is given 180 days during which to obtain facts from which it can draw conclusions for transmittal to the Atomic Energy Commission in the form of a "Letter of Advice". The Commission's Rules of Practice contemplate that the Board in the first prehearing conference will reach agreement with the parties as to the relevant matters in controversy and will set them forth in the prehearing conference Order. Under Section 2.740 of the Restructured Rules, discovery with regard to such relevant matters in controversy may be had by the parties. It is not the purpose of discovery to explore matters not

in controversy. With these principles in mind, we now turn to the specific items before us.

Applicant's first objection is to request no. 2 -- file indexes and documents describing Applicant's filing system. Unless we take the position that all of Applicant's files are relevant to the matters in controversy, a position we do not take, then this request calls for irrelevant material. The Department of Justice argues that the data requested will enable it to locate relevant material. We do not agree. With the issues clearly drawn, the Department should be able to frame requests appropriately limited to relevant material. Accordingly, Applicant's objection to this request is sustained.

Applicant next objects to requests for documents relating to Applicant's political activities (Request 3(e)). The Department argues that under the guise of appropriate political activities, the Applicant may have practiced a mere sham to engage in forbidden activities. Whether or not Applicant has engaged in unfair practices through political maneuvers is a matter not relevant to the issues in controversy; more particularly, issues pertaining to

coordination. Under the Commission's Notice of Antitrust Hearing, dated April 11, 1972, this Board may not address itself to matters not in controversy. Consequently, we agree with Applicant's arguments concerning the invalidity of the request. The objection is sustained.

The next matter relates to request no. 4, calling for minutes of pooling and coordination committee meetings. All parties agree that the requested documents include many which are irrelevant. The Department of Justice argues that it cannot tell what is relevant without examining all of the files. This type of argument, if carried to its logical conclusion, would give the Department of Justice access to all of Applicant's documents, a procedure forbidden by Section 2.740. The request is hereby limited to those documents which deal with Applicant's power to grant or deny access to coordination, and those documents dealing with the use of this power against smaller utility systems. As so limited, Applicant is required to produce the documents.

Applicant objects to the production of documents relating to its gas operations on the ground that they are not relevant. Possibly, Applicant may have used its gas operations to

MR. VERDISCO: No questions, your Honor.

CHAIRMAN GARFINKEL: Mr. Watson?

MR. WATSON: No questions, your Honor.

CHAIRMAN GARFINKEL: Mr. Jablon?

MR. JABLON: No questions, your Honor.

CHAIRMAN GARFINKEL: The witness is excused, and we want to thank the witness for his time. The Board is hopeful that the witness does not take it personally that certain of the previous testimony in writing was stricken.

THE WITNESS: No, sir, I certainly do not.

CHAIRMAN GARFINKEL: Okay. You're excused.

(Witness excused.)

Now the Board is prepared at this time to make a ruling with respect to the motion to quash the subpoena, and with that, we will take a two-minute recess and we'll be right back.

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ATTACHMENT C (Brief recess.) 2/6/74 TRANSCRIPT CONSUMERS POWER CO.

CHAIRMAN GARFINKEL: We'll be back on the record.

Not to keep anybody in suspense, the motion to quash itself is going to be denied. However, there's going to be substantial limitations.

Now we will go into the analysis.

The first analysis that the Board wishes to make is, number one, we will deal with the subpoena itself in this respect.

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The subpoena is directed to an individual. Therefore, the only information that the Joint Intervenors are entitled to, if they are entitled to anything, is information in the possession of this particular witness, and only information in the possession of this witness.

With respect to the question of -- and that will be as of the date of the subpoena.

With respect to the question of the First Amendment, it is true that no one can challenge an individual's beliefs, an individual's right to petition the legislature, an individual's right with respect to freedom of the press. That guarantee is basically a guarantee against action by either the Federal Government or the State Government through the Fourteenth Amendment. It's a perfect right.

However, it is not an absolute right, and the courts have made it clear that the First Amendment does not give absolute rights with respect to conduct. That is, conduct is subject to inquiry where it does violate a public policy of the government.

The classic example is you cannot yell "Fire" in a crowded movie, and things like that. If the action violates the antitrust laws, the First Amendment does not bar inquiry into that question.

Now there is a right for this Board to see data and hear information regarding certain conduct, especially

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under the Noerr, Pennington doctrine which relates to the question of a sham, if it was truly a sham.

Now with respect to the question of discovery as against the subpoena, the Applicant has made the point that this is merely a subterfuge for obtaining discovery at a time when discovery was closed.

There is a difference between discovery and a subpoena at trial. Discovery merely seeks relevant material in order to adduce evidence that would be admissible at a trial, but that does not bar an individual from ignoring the discovery method or the discovery mode and seeking the production of documents that are admissible in evidence at a trial.

However, it bars him from two things:

It bars him from inspecting and making copies of that and seeking further information. The documents do not leave the possession of the party who is producing the documents. If the documents are in the courtroom, they are truly under the possession of the individual subpoenaed. They may be shown, but if they are not used, actually being admitted into evidence, they must be forthwith returned.

And in many situations, a party does not like to use the discovery method because he does not want to tip his case, so therefore, one party may seek the subpoena route at trial and gamble that the information will be furnished right then and there.

eb9

Now the Board did not issue an order that specifies every exact bit of evidence will be identified and summarized for the benefit of opposing Counsel prior to trial. That was not the case. There is clear indication in the transcript of the prehearing conferences that there may be a time when witnesses will have to be identified at the trial and testimony be taken at that time.

Now let's get to the particular issue in question.

The Board did issue a ruling with respect to the question of petitioning the legislature and what-have-you, political activity, as not being relevant to the issues in this case, and those issues were specifically indicated at a prehearing conference, and the Board ruled that political activity was not within the issues of this proceeding originally.

However, the question of the 25-percent provision has come to issue in this proceeding. Mr. Brand is, of course, the party that initiated it. The Board did ask some questions with regard to the 25-percent rule, and the Board does deem the 25-percent matter as being within the issue of

ml 4C

coordination and the competitive effect of coordination.

brb 1

Consequently, if the Board is going to face the issue of the 25 percent provision in an official decision somewhere along the way, or even if it ignores it and makes a finding that it is not relevant; nevertheless it's going to be faced with that issue. Therefore, we think we should allow some inquiry with respect to the 25 percent issue.

The Board wishes the parties to understand that if this is a change in the Board's position of prior rulings, than we have changed our position with regard to the 25 percent and political activity.

Now, with respect to the 25 percent and the political activity, let's get to the actual subpoena. But, before I do, I would like to ask one question:

Was the amount of money for transportation and what have you furnished together with the subpoena?

MR. JAELON: No, it was not, your Honor.

We spoke to Mr. Watson and I think we made an arrangement -- maybe Mr. Pollock can better speak to it -- that they will accept service and that there would be mutuality.

But let Mr. Pollock speak to the questinn, because he spoke to Mr. Watson.

MR. POLLOCK: Yes, that is correct.

I spoke to Mr. Watson. He agreed to accept service of the subpoena for Mr. Land, subject to our accepting

service of his subpoenas to our people, should he make them.

Now, we contemplate, of course, paying Mr. Land for his day in court and his transportation, should he be produced. But by this we save the bookkeeping that would have been involved had the notion been quashed. So we stand ready to give our just proceeds when it is deemed necessary, your Honor.

MR. WATSON: We have no objection to that.

CHAIRMAN GARFINKEL: All right.

Because, automatically, outside of the Federal government personnel, a subpoena is defective without the submission of the fees with the subpoena.

MR.WATSON: We don't intend to add a Section 8, your Honor, as long as we lost under 7.

CHAIRMAN GARFINKEL: My colleague Dr. Leeds wants me to emphasize that if it's treated as overruling our prior ruling, our prior ruling is only being overruled -- our prior ruling only with respect to the 25 percent and political activity with the 25 percent. Period. Nothing else. The ruling stays into effect with anything else.

Now, with respect to the subpoena, the subpoena must stand on its own. It may not stand in connection with any application. That is, all that a party receiving a subpoena has to do is rely on the four pages of the documents involved in the schedule of the subpoena -- the four corners

of the page, that is.

On the attachment to the subpoena duces tecum, Article 4 and Article 5 are totally defective, because it was not limited in any way to the 25 percent rule, and therefore no compliance is required, clearly, with 4 and 5.

With respect to 1, 2, and 3, since it's the Board's discretion with respect to a subpoena duces tecum at the trial, and only because we are interested in adducing admissible evidence, as against discovery evidence, and taking into account the fact that the witness that was called by the Joint Intervenors -- or by the Department of Justice, rather. Wasn't it the Department of Justice? I think it was Mr. Brand's witness.

MR. BAHNAN: Mr. Brush.

CHAIRMAN GARFINKEL: Yes.

--who testified he found nothing wrong with the activities of the Applicant in regard to the 25 percent, we will allow only the production of documents which in any way relate or indicate activities that foreclose a change in the 25 percent rule, or activities which disclose an attempt to maintain the 25 percent rule.

Now, with respect to the Board's indication that this subpoena was limited only to Mr. Land in his individual capacity, this Board will not entertain a subpoena against Consumers Power for the same information, unless Mr. Land,

on oral examination, under oath before this Board, clearly indicates to this Board that the activities that he engaged in is the type of activities which would come within the scope of Noerr Pennington case of a sham.

Now, with that ruling, the Board expects Mr. Land to be produced under the conditions outlined here; and it's a question now of whether the Joint Intervenors are still desirous of calling Mr. Land as limited herein.

And the Board would like to be apprised by tomorrow morning whether the Joint Intervenors are still desirous of calling Mr. Land, and when we may expect Mr. Land to be present, assuming you don't appeal, Mr. Watson, this Board's ruling on the subpoena.

MR. WATSON: Mr. Chairman, I find nothing in the Board's order in that particular regard that disturbs me greatly.

However, Mr. Ross is presently out of the country and will not be here until late tonight; and I would ask for three of four more hours from the Board -- say, through lunch tomorrow -- so that we may have a chance to apprise him of the Board's ruling today, because I would assume the Board does not plan to issue a written order, but that the transcript will suffice for the order.

CHAIRMAN GARFINKEL: Yes.

MR. WATSON: Therefore he won't have a chance to

examine it until lunchtime tomorrow.

MR. JAFFON: No objection.

CHAIRMAN GARFINKEL: All right. There's no objection to that.

All exceptions, of course, to the Board's ruling are herewith made a part of the record; and no exception has to be noted specifically.

If anybody feels they were adversely treated, their exception is automatically noted.

The only thing is, if you do take an appeal, we'd like to know that.

MR. WATSON: You'll be among the first to know, your Honor.

CHAIRMAN GARFINKEL: Okay.

You're the only one, when I say "you", Mr. Watson. Your client is the only one who can make an appeal. For every other party it's an interlocutory ruling.

MR. WATSON: Mr. Land is a non-party.

CHAIRMAN GARFINKEL: That's right.

And any subpoena, of course, is a subpoena that may be appealed, because it's the type of thing that involves enforcement by the Commission.

But to any other party that's interlocutory, and they have no right of appeal at this time.

MR. WATSON: Thank you, sir.

MR. JABLON: As a convenience, I was just going to pose that, if it is acceptable to the Board, we have ironed out our difficulties with regard to the admission of our documents, except for two particular exhibits which Mr. Pollock will argue tomorrow.

Would it be acceptable, just to that we know when he can be here and we can be here, if we move our other exhibits into evidence and the deposition material, say, at two o'clock tomorrow?

CHAIRMAN GARFINKEL: Well, tomorrow we have one witness who may take all day, and we've reserved, if necessary, Friday or on notice. That is, if we finish early we'll phone you and call you in. Therefore, Mr. Pollock does not have to stay around tomorrow.

MR. JABLON: Okay.

I appreciate it.

CHAIRMAN GARFINKEL: We'll have it. We'll reserve Friday, if necessary, to make sure we get everything in, Mr. Jablon.

MR. JABLON: I would not want to convene the Board specially. I'd be perfectly happy -- Ijust wanted to do this at a time convenient to the parties.

If it suited the parties' convenience, I would just as soon do it when Mr. Aymond comes. I just preferred not to have to have Mr. Pollock sitting --

arb 6

CHAIRMAN GARFINKEL: We have to get rid of the witness of the Regulatory Staff. If that could be finished at an early time, then immediately we will request that either you, if you are here tomorrow morning, or we will call Mr. Pollock to advise him that we have the time and we can do it, say, tomorrow afternoon or Friday.

But clearly, we're going to get it in before we put on the case of the Applicant.

MR. JABLON: I appreciate that coursesy very much, your Honor.

CHAIRMAN GARFINKEL: Very well.

With that, we are in recess until tomorrow morning at 9:00 a.m..

(Whereupon, at 5:35 p.m., the hearing in the above-entitled matter was recessed, to reconvene at 9:00 a.m., Thursday, 7 February 1974, in the same place.)

ATTACHMENT D

369A 370A

FF

11/27/72

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	Docket Nos. 50-269A
	)	50-270A
DUKE POWER COMPANY	)	50-287A
	)	50-369A
(Oconee Units 1, 2, and 3;	)	50-370A
McGuire Units 1 and 2)	)	

PREHEARING ORDER NUMBER TWO
OF ATOMIC SAFETY & LICENSING BOARD

A second prehearing conference was held before this Board, pursuant to Notice dated November 3, 1972, on November 17, 1972 at Washington, D. C. Counsel for all parties were present and the following action is taken:

A. DISCOVERY

1. In view of the representations by counsel for long periods of time desired for completion of discovery IT IS ORDERED THAT each of the parties shall report, bi-monthly, to the Board, the number of documents that have been produced, the number of responses to requests that have been completed, and the number of requests remaining to be completed, commencing December 15, 1972.

B. APPLICANTS OBJECTIONS AND MOTIONS TO LIMIT JOINT REQUEST FOR DOCUMENT PRODUCTION AND FOR PROTECTIVE ORDERS

2. By motion dated October 12, 1972, answered by the Department of Justice on October 25, 1972, and, by permission, replied to by applicant on November 10, 1972; applicant sought relief from specified portions of the Joint Document Request filed September 6, 1972 by the Justice Department and the intervenors. After hearing extensive argument and endeavoring to secure agreement of the parties, the following disposition is made of said joint requests which for convenience are listed under the headings adopted by applicant in its motion:

(a) "1. Applicant's Filing System"

Joint Request #2 is limited to the production of a document showing the present method of filing documents.

(b) "2. Applicant's Political Activity"

Applicant's objection to joint requests number 4(f), 4(h) and 4(l); 6(f)(3), 6(i) and 6(p); 16, 37 and 38 are sustained

without prejudice to a renewal thereof on the showing of prerequisites required by law.

(c) "3. State-Ordered Territorial Arrangements" Applicant's objection to joint-request 6(e) is sustained except as to documents indicating that territorial divisions properly negotiated in regard to retail sales were used to create territorial divisions in wholesale sales.

(d) "4. Municipal and State Elections" Applicant's objection to joint request 16 is sustained without prejudice to a renewal thereof on the showing of prerequisites required by law.

(e) "5. Request for All Documents in Certain Files" Applicant's objections to joint requests 13 and 17 are sustained, except insofar as items contained in the wholesale customer files which refer to, or relate to, the ability to compete at retail or to the

ATTACHMENT E - Hoyer / Dewey / Lanberg / Shapar / Engelhardt

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
LOUISIANA POWER & LIGHT COMPANY	)	Docket No. 50-382A
	)	
(Waterford Steam Generating Station, Unit No. 3)	)	

MEMORANDUM AND ORDER WITH RESPECT TO OBJECTIONS ON DISCOVERY REQUESTS AND INTERROGATORIES

I. INTRODUCTION

The parties to this proceeding have filed their first requests for the production of documents and interrogatories and various objections have been presented to this Board with relief requested.[1/] The Board has considered all these

1/ Position of Louisiana Power & Light Company with Respect to, and Objections to, Requests by Joint Discoverers, March 11, 1974; (Atomic Energy Commission, Regulatory) Staff's Motion in Opposition to Certain Discovery Requests by Applicant, the Intervenors and the Department of Justice, March 11, 1974; Objection of Louisiana Municipal Association Utilities Group to Joint Interrogatories to Joint Interrogatories to Intervenors, March 4, 1974; Motion (by Cajun Electric Power Cooperative, Inc.) to Limit Discovery, March 11, 1974. Objections (by the Cities of Lafayette and Plaquemine) Pursuant to Order of Board, March 11, 1974. These parties will hereafter be referred to respectively as: Applicant, Staff, LMA, Cajun, and Cities. The latter four parties and the Department of Justice (Justice) are the Joint Discoverers.

Nos. 13, 14 and 15 - Applicant's objections to these requests are overruled without prejudice to their renewal when stipulated facts are available.

Nos. 16 and 17 - To the extent that the information herein sought is of a trade-secret nature, the Protective Order, detailed heretofore is applicable. The objections are overruled.

Interrogatories

Nos. 1-4 - The objections to these interrogatories are overruled, except that Nos. 2 and 4 are limited to documents which otherwise would have to be produced.

Nos. 5-7 and 15-18 - The objections to these interrogatories are overruled except that answers shall be for the time period since January 1, 1960.

Nos. 20-24 - These interrogatories are objected to on grounds that they are subject to the "Noerr-Pennington privilege and the First Amendment to the U.S. Constitution." In addition, interrogatory 20 is objected to as irrelevant and immaterial which objection is overruled.

Applicant's objection based on the Noerr-Pennington doctrine is overruled. This doctrine, broadly stated, holds that joint activities arguably subject to the restraints of the antitrust laws and particularly to Section 1 of the Sherman Act, may not be proscribed or sanctioned when these joint activities are directed to influencing legislative or administrative agency action. The basis for the non-application of the antitrust law to these activities rests in the constitutional guarantee of the right of free assembly and the right jointly to petition for redress of grievances.

It may well prove that activities within the ostensible scope of these interrogatories ultimately are shielded from claim of antitrust law violation by virtue of the applicability of the Noerr-Pennington doctrine. In overruling this objection, the Board does not foreclose any argument Applicant may wish to make at the time of hearing with respect to the protection to be afforded these activities. The fact of the activity, if any, is, however, subject to discovery.

No First Amendment threat is perceived in receiving evidence as to the occurence of joint legislative or judicial activities. Indeed, consistent with the First Amendment, such activities should not be hidden from scrutiny.

First, Rule 26 of the Federal Rules of Civil Procedure and the AEC Rules and Regulations permit discovery calculated to lead to the production of admissible evidence even though the actual subject matter of the discovery may itself be ruled inadmissible at the time of hearing. Thus, it remains to be seen whether the information sought be these interrogatories will lead to the production of admissible evidence even if the Board upholds Applicant's contentions with respect to the applicability of the Noerr-Pennington doctrine.

Second, the doctrine and the extent of the doctrine's coverage cannot be tested in a specific context without the proper development of evidentiary facts. That is to say, that although Applicant might claim extensive immunity based on the asserted applicability of the doctrine, the immunity ultimately determined to be available may be substantially

narrower than that claimed. Without the development of a factual basis upon which to consider the doctrine, there is no way for the trier of facts to gauge the scope of the immunity.

Third, we note that it cannot be ascertained presently which activities Applicant itself may claim to be immunized by the doctrine; and, surely, the other parties are entitled to know the factual basis upon which Applicant will argue the applicability of the doctrine. It would be most unfair if a party, merely by citing the catch phrase "Noerr-Pennington" could thereby relieve itself of the responsibility of producing data in response to discovery which data might be outside of the scope of the doctrine. In short, there must be a way to test claims of privilege based on the doctrine, and the only way to make such a test valid is through the production of data of the type sought through these interrogatories.

Finally, we note an exception to the Noerr-Pennington doctrine based on "sham" actions or actions not taken in good faith before governmental regulatory agencies. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). One test of whether joint activities before governmental agencies are taken in earnest or in sham is their frequency and the substance of the positions advanced. If Applicant successfully resists producing information as sought in these interrogatories, there will be no basis upon which other parties can attack the asserted non-applicability of the antitrust laws.

No. 25 and 26 - These objections are sustained.

No. 27 - The objection is overruled.

No. 30 - This interrogatory is objected to on grounds that it calls for a legal conclusion. The objection is overruled. United States v. Continental Can Co., Inc., 22 FRD, 241, 1 FR Serv 2d 33,333 (S.D.N.Y 1958), 4 Moore, Federal Practice ¶26.56[3], (2d ed. 1974).

Exhibit F

Barclay/Rogers/Kilduff
FF

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
ALABAMA POWER COMPANY	)	Docket Nos. 50-348A
(Joseph M. Farley Nuclear	)	50-364A
Plant-Units 1 and 2)	)	

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL PRODUCTION

The Joint Discoverers, by Motion dated October 1, 1973, have moved to compel the production by Applicant of certain documentary material demanded in the "Amended Joint Discoverers' Second Joint Request for the Production of Documents," also dated October 1, 1973. The documents requested in the nine paragraphs of the Amended Request can be generally placed in the following categories, taking the least complicated first, with our discussion and rulings following thereafter.

A. Paragraph 9 seeks documents "necessary to identify each category" of Applicant's operations that Applicant contends is subject to "pervasive regulation" by the state or Federal Government.

These documents are sought to establish the "factual context" to which Applicant's claim (that it is subject to pervasive governmental regulation) relates. The motion to compel production of these documents is denied. Discovery on the support for Applicant's claim of "pervasive" regulation or seeking instances where Applicant may have made inconsistent statements is more properly made, at least initially, by

specific interrogatories rather than a non-specific request for documents, particularly where, as here, the regulatory statutes, regulations and decisions (which are the ultimate source of information as to what is and is not regulated) are equally available to the Applicant and to the Joint Discoverers.

B. Paragraphs 2, 3 and 4 demand documentation relating to certain activities of the Applicant or its affiliated companies with regard to the customer-supplier relationship between competitors of Applicant and their government-owned suppliers or customers. The motion to compel production of these documents is granted. Applicant has objected to these requests, citing the so-called Noerr-Pennington doctrine, which we shall discuss in detail in Section C below. Suffice it to say here that we agree with the Joint Discoverers when they point out that whatever applicability that doctrine may have insofar as attempts to influence governmental policy are concerned, it has little or no applicability when applied to proprietary, or commercial affairs of a governmental body, where the public as customer or supplier is presumed to act in a manner consistent with maximizing competition. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970).

C. Paragraph 1 demands documents relating to Applicant's, or the Southern Company's (the Applicant's parent corporation), efforts to influence or affect certain specified items of legislation by the state and federal legislatures,

and/or administrative regulations. Paragraphs 5, 6, 7 and 8 demand similar documentation relating, it appears, to similar activity of Applicant, or its affiliated companies, to influence or affect other positions taken by other governmental bodies or courts, in their capacities as such.

These paragraphs are very strongly resisted by Applicant on several grounds, the most serious being that the evidence toward which the requests are obviously directed is not relevant to the issues to be decided; since, among other things, the doctrine enunciated by the Supreme Court in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965), the so-called Noerr-Pennington doctrine, prohibits "antitrust scrutiny" of efforts to influence governmental activity. (Applicant's Objections, hereinafter "Objections," October 11, 1973, p. 3).

While we recognize, of course, the teaching of the Noerr and Pennington cases, and their progeny, of the principle that certain conduct relating to the actual or attempted influencing of governmental action is protected from antitrust prosecution (and presumably from being the subject of an adverse finding under the statute we are charged with construing, Section 105(c) of the Atomic Energy Act, as amended), we are not prepared to say that all activity in this area is protected from scrutiny or that documentary material relating thereto is protected from discovery. That,

in our view, would amount to the creation of a privilege more pervasive than the attorney-client or doctor-patient privilege. We regard as frivolous Applicant's further argument that, should it be required to produce the documents in question, it will have a "chilling effect" on Applicant's First Amendment right of petitioning its government.

The language of Noerr and Pennington, followed by California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), and United States v. Otter Tail Power Co., 360 F. Supp. 451 (D. Minn. 1973), and others, makes it clear that the "doctrine" has no clearly defined outlines, and exceptions to its applications do exist. We see no basis, therefore, for completely prohibiting discovery into the area by the Joint Discoverers. Any evidence which is to be offered must in any event pass muster under the Noerr doctrine (and its exceptions), as well as under the more general tests of admissibility before it will be received in evidence in this proceeding.

In granting this motion to compel, however, we are given pause by the feeling that we are very near to the fine line between what constitutes a "fishing expedition" and legitimate discovery, but if we are to err, we must err on the side of liberality in discovery, particularly since the statute we are charged with interpreting has never been applied to a factual situation.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD

By: Michael L. Glaser
Michael L. Glaser

By: Carl W. Schwarz
Carl W. Schwarz

By: Walter W. K. Bennett
Walter W. K. Bennett

Dated: November 1, 1973

ATTACHMENT G

Class I

Dewey/Chapman/Jones/FF
Ruthberg

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Corrections or modifications by March 4

Before the Atomic Safety and Licensing Board

In the Matter of)
)
FLORIDA POWER AND LIGHT COMPANY) Docket No. P-636A
(South Dade Nuclear Units))

SECOND PREHEARING CONFERENCE ORDER

On January 31, 1977 the Board conducted the second prehearing conference in this proceeding to consider objections to discovery requests. During the prehearing conference certain rulings on objections were made and additional rulings are set forth below.

Time Period

The relevant period for litigation in this proceeding and for discovery begins January 1, 1965. Requests for exceptions to this period will be entertained by the Board but only to the extent that information to be produced from prior to January 1, 1965 relates substantially to events or situations after that date. Requests for exceptions must be factually specific and are to be made to the Board by March 15, 1977. Requests for exceptions filed after March 15, must set forth a good reason for late filing.

Legislative Activities

Applicants object to Interrogatory No. 60 of the Joint Request and to Interrogatories 21(e) and 26(5) and (6) of the Florida Cities' Request to Applicants, relating to Applicants' legislative activities on the basis of the Noerr-Pennington doctrine* and on the basis of excessive breadth.

Similarly, Applicants have requested discovery against Cities concerning their respective legislative activities.** Cities do not object to interrogatories to them concerning legislative activities but insist upon parity with Applicants in this respect. Applicants and Cooperatives have agreed in their Memorandum of Understanding dated February 8, 1977 with respect to Cooperatives' legislative activities (Interrogatories to Cooperatives Nos. 177 and 178).

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*See p. 7 et seq. of Applicants' Objections to discovery citing Eastern Railroad Pres. Conf. v. Noerr Motor Freight Co., 365 U.S. 127 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

**Applicants' Interrogatories to Cities Nos. 234-239, 269-275, and 293.

We are not, of course, at this stage ruling upon the ultimate admissibility of evidence. Rather, in accordance with 10 CFR §2.740(b)(1), the test we must apply is whether "... the information sought appears reasonably calculated to lead to the discovery of admissible evidence."* This is also the test under Rule 26 of the Federal Rules of Civil Procedure. The Board observes that the interrogatories objected to on the basis of Noerr-Pennington seem to be designed to lead to the discovery of admissible evidence, even if the ~~legislative~~ conduct thus demonstrated ~~may not~~ be the basis of a finding of a violation of the antitrust laws. Moreover, it will not be possible until after discovery for the Board to determine whether the activities in question are entitled to the constitutional protection recognized by the Noerr-Pennington cases,** or

*The Staff urges that the purpose and character of the Applicants' activities are relevant, and that this would be a permissible showing under Pennington, supra. The Board can envision other unprotected products of this discovery. For example, we may be aided in establishing the appropriate relevant geographic and product markets for antitrust analysis in this proceeding.

**In addition to Noerr and Pennington, supra, see California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, (1972) and Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) and 417 U.S. 901 (1974).

whether they may fall within "sham" or other possible exceptions to the doctrine.

Therefore the Board overrules the following objections to interrogatories relating to legislative activities based upon Noerr-Pennington because we see as a reasonably expected result the discovery of admissible evidence:

1. The Board overrules Applicant's objection to Joint Request Interrogatory No. 60 to the extent that it depends upon Noerr-Pennington. However the Board sustains a portion of Applicant's objection to the breadth of the interrogatory. Documents pertaining to legislation "... possibly affecting competition between electric utilities in the State of Florida." could embrace all of Applicant's considerations and activities with respect to legislation, and is too broad. The Board grants leave to refile this request on or before March 1, 1977. The Board overrules the objection to that portion of Interrogatory No. 60 relating to proposed legislation to allow small systems to participate in joint ventures.

2. The Applicant's Noerr-Pennington objections to Cities' Interrogatory No. 21(e) (as modified) are overruled. We sustain a portion of Applicant's objection to this interrogatory based upon breadth. Instead of requiring production of data about legislation and constitutional revision "affecting" the ability of electric utilities to own, finance, and construct facilities and to sell electricity, we limit production to data pertaining to legislation or constitutional revision directly related to those abilities.

3. Applicant's objections to Cities' Interrogatories No. 26(5) and (6) are overruled except to the extent that 26(5) relates to the Board's request to the parties to negotiate concerning the issue of tax subsidization of utilities. (See Tr. 177 and "Tax Advantages" below).

4. Cities' reservations concerning parity with Applicants in producing data relative to legislative activities (Cities Objections to Applicants' Discovery Against Cities, p. 10) have been satisfied by the foregoing rulings."

Discovery of Legal Opinions and Positions

The Board assured the parties that complete disclosure of legal opinions and positions on the issues will be made before the evidentiary hearing, and requested the parties to confer in an effort to agree to mutually acceptable stages of disclosure, and to a report with recommendations by March 15, 1977. (Tr. 155, 156 and 159) Therefore the Board defers ruling on interrogatories and request for documents pertaining to the legal opinions and positions.

Tax Advantages

Many interrogatories and requests are concerned with relative tax advantages and disadvantages and the benefits of operating in the public sector compared to the private sector. All parties have agreed to negotiate toward a simplification of this issue with the objective that an abbreviated factual record in support of the differing positions may be made. The Board requests that the parties report to it on the results of their negotiations on or before March 15. (Tr. 177)

Work Product

Applicant's objection to Joint Request Interrogatory 87(d) is overruled. In replying to Interrogatory 87(d) the Applicant may avoid disclosing the mental impressions, conclusions, opinions, or legal theories of its representatives concerning these proceedings. Applicants may seek the assistance of the Board toward this end.

Applicant's Objections to "Fishing"

Applicant's objections to Cities' Interrogatories 17 and 20(a) and (e) are sustained.

Acquisition Procedures

The Board defers ruling upon the Cities' objections to Applicant's interrogatories regarding procedures necessary to acquire a municipal electric power system and the legal theories surrounding the antitrust significance of acquisitions of this nature (Nos. 168, 188-192) pending further negotiations between Cities and Applicant and a report to the Board by March 15, 1977. (Tr. 187)

Participation in South Dade

Cities' objections to Applicant's interrogatories Nos. 105 to 108 are in general overruled. However, with respect to No. 108(b) the Board requests Cities and

Applicants to include this subject in their negotiation in the manner anticipated in connection with 168 and 188-192 and report to the Board on or before March 15.

Cooperatives' Objections

The Cooperatives' objections to interrogatories which may produce trade secrets (51-53, 55, 60 and 121) are overruled. However Cooperatives may request a protective order (10 CFR §2.740(c) and §2.790) on or before March 15.

The Cooperatives' objections predicated upon general relevancy considerations (p. 15 Cooperatives' Objections) have now been satisfied by the First Additional Memorandum of Understanding Between Applicants and Cooperatives dated February 8, 1977.

All recommendations to the Board for corrections and modifications of this order are to be filed by March 4, 1977.

IT IS SO ORDERED.

Ivan W. Smith, Chairman

Daniel M. Head, Member

John M. Frysiak, Member

Issued at Bethesda, Maryland
this 22nd day of February, 1977.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	NRC Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF'S RESPONSE TO APPLICANT'S OBJECTIONS TO DISCOVERY REQUESTS AND MOTION FOR A PROTECTIVE ORDER in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 22nd day of December, 1978.

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