

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before the Atomic Safety and Licensing Board

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

OBJECTIONS OF THE CITY OF CLEVELAND
TO BOARD'S ORDER ON OBJECTIONS TO
INTERROGATORIES AND DOCUMENT REQUESTS

Pursuant to Section 2.751a(d) of the Commission's Rules of Practice, the City of Cleveland (Cleveland) objects to the portions of the Board's Order on Objections to Interrogatories and Document Requests specified herein. By raising specific objections to a portion of that Order now, Cleveland does not waive its right to raise its objections to these and other portions of the Board's Order at an appropriate time.

Cleveland objects to certain of the Board's rulings with respect to The Cleveland Electric Illuminating Company's (CEI) Objections to Cleveland's Request for the Production of Documents, Objections of Applicants

Admitted
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other than CEI to Cleveland's Request for the Production of Documents, and Cleveland's Objections to Interrogatories and Request for Documents served on the City by Applicants.

A. CEI's Objections to Cleveland's Proposed Discovery

Document Request 16(d). In paragraph B.5 of its Order the Board sustained CEI's objection to producing certain documents pertaining to legislation and constitutional revision affecting the ability of electric utilities to own, finance, and construct facilities and to sell electricity. The Board held that the requested documents were not relevant because 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.

Absent any Parker v. Brown problem the requested documents are relevant under even the most restricted view of the scope of this proceeding as being an inquiry into structure and dominance. No examination of structure and dominance can be complete without an examination of the ability of other electric utilities which are actual or potential competitors of Applicants to own, finance and construct facilities and to sell electricity. This is particularly true in light of the Board's determination in Prehearing Conference Order #2 "not to limit discovery to the subject of dominance only."

Cleveland does not believe that Parker is applicable. Parker involved an attack on a California marketing program instituted pursuant to a California

statute intended to substitute centralized marketing plans for competition between growers and to maintain prices. A producer and packer of raisins challenged the validity of the program as violating the Sherman Act and the Commerce Clause and as inconsistent with and superseded by the Federal Agricultural Marketing Agreement Act of 1937.

The Supreme Court considered each of the arguments separately. With respect to the claim that the California prorate program violated the Sherman Act, the Court assumed that there would be such a violation if the program were organized and effected solely by means of contract, combination, or conspiracy of private persons. The Court at page 350-351 held that the program:

. . . derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

The Court also noted that the Sherman Act makes no mention of states as such, and gives no hint that it was intended to restrain state action or official action directed by the state. Here, we are not concerned with any action by the state or directed by the state. The documents requested pertain to activities by CEI. In this regard it is important to consider the Court's warning at page 351:

True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . .

As Cleveland pointed out in its Statement in Clarification filed pursuant to the Board's Order Requesting Clarification docketed June 28, 1974, dominance alone may not be sufficient to constitute a situation inconsistent with the antitrust laws, but dominance may be monopoly power which together with the purpose or intent to monopolize constitutes an evil at which the Sherman Act is aimed. Schine Chain Theaters, Inc. v. United States, 334 US 110, 92 L. ed 1245 (1948).

Documents showing that Applicants attempted to procure the passage of legislation or constitutional revision which would limit or restrain the ability of actual or potential competitors to own, finance and construct facilities and to sell electricity would be evidence of an intent to monopolize. Cf. United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (CA2, 1945), United States v. Griffith, 334 US 100, 92 L. ed 1236. For such purposes, the evidence would be admissible even if it would not itself be the basis for an action. The Supreme Court stated in United Mine Workers v. Pennington, 381 US 657 (1965) at 670-671 n. 3.

It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.

Parker v. Brown may insulate from the antitrust laws activities done pursuant to valid state legislative command. It does not insulate from the

antitrust laws the activities of Applicant which were not done at the direction of state legislative command and which are intended to preserve or extend monopoly power.

Document Request 16(f). The Board sustained CEI's objection to producing documents relating to elections in any municipality operating a distribution system on the grounds that Cleveland has failed to demonstrate relevance.

Document Request 16(d) seeks evidence of CEI's intent to maintain or extend monopoly power through attempts to influence the legislation which would enable municipalities and others to engage in the electric utility business. Document Request 16(f) seeks similar evidence on a different level, i. e., attempts to influence the municipalities' activities pursuant to state constitutional or legislative authorization. Its relevance lies in the fact that to a large degree activities of a municipality in purchasing, constructing, enlarging, repairing or franchising an electric system to operate within the municipality must be submitted to a vote of the residents. Attempts by CEI to influence the vote against creation or enlargement of a municipal electric utility which would compete with CEI would be evidence of an intent to maintain or extend its monopoly. Moreover, if such municipal systems existed in CEI's operating area, a municipal electric pool for coordinated operations and development might be possible.

Document Request 16(g). The Board overruled CEI's objection to producing documents relating to litigation in opposition to the construction of competing generation or transmission facilities but limited the required response to

litigation initiated by CEI. Cleveland submits that equally relevant is litigation initiated by others in which CEI may not be a party of record but has a community of interest and aids and encourages a party of record or is the inspiration behind the litigation..

Document Request 18(a). The Board sustained CEI's objection to producing correspondence with EEI or any committee thereof and the National Association of Electric Companies and any electric utility relating to system construction, financing, ownership, operation of electric generation, transmission or distribution facilities by municipal and/or cooperative electric utilities, including acquisitions of electric utilities by CEI, or competition between such utilities and CEI for lack of relevance. The requested documents may evidence opposition by CEI to the creation or continued existence of competing electric utilities which would challenge CEI's monopoly power. Thus they would be evidence of an intent to preserve or extend monopoly power. Further, such documents as the EEI Prime Mover Committee Report are relevant to show the types of business relationships among the utilities which the industry itself believes are necessary or desirable.

Document Request 21(c). The Board sustained CEI's objection to turning over documents relating to the formation of National Electric Reliability Council, ECAR, and NAPSIC and their activities in setting reliability standards and similar standards to govern the relationships among electric utilities on the basis of relevance and burden. Standards set by these organizations have wide acceptance in the electric utility industry. When Cleveland went to the FPC in an attempt to force CEI to interconnect and

sell emergency power to Cleveland, CEI argued without objection from the FPC staff that Cleveland would be required to comply with ECAR standards. One means by which CEI can preserve and maintain its monopoly position is by joining with other electric utilities to establish industry standards designed to prevent smaller electric utilities from full participation in interconnection and coordinated operations and development. In an antitrust inquiry which the Board has framed largely in terms of structure, any activities of CEI designed to preserve its dominance are extremely relevant.

Document Request 23. In paragraph B. 16 of its Order the Board sustained CEI's objection to Document Request 23 except that discovery is permitted as to CAPCO and ECAR documents on the basis of relevancy. One of the relevant product markets for antitrust analysis in this proceeding is the regional power exchange market. The regional power exchange market includes power transactions for short term surplus sales, economy energy, maintenance energy, and seasonal diversity power exchange. Opportunity to engage in such transactions results in lower power costs to the participants. The regional power exchange market clearly is not limited to the CAPCO companies but includes all such opportunities which are available or potentially available to electric utilities operating in the CAPCO area. The documents requested go directly to the structure and activities of CEI in the regional power exchange market. No logical basis exists for limiting the regional power market to CAPCO and ECAR.

Document Request 25. In paragraph B. 17 of its Order the Board sustained CEI's objection to providing documents relating to the formation of a holding company on the grounds of relevance. Formation of a holding company by members of the CAPCO Group could reduce the already minimal access to alternate bulk power supplies that now exist. Documents showing CEI's reaction to the proposed holding company could provide evidence of its intent to prevent Cleveland from obtaining bulk power supply to alternatives.

Document Request 37(f). In paragraph B. 28 of its Order the Board sustained CEI's objection to furnishing reliability data with respect to generation on grounds of relevance but directed CEI to supply a summary analysis of transmission reliability. Generation reliability is equally as relevant to system reliability as is transmission reliability and CEI should be required to supply similar summary data with respect to generation reliability.

Document Request 51. In paragraph B. 37 of its Order the Board sustained in part CEI's objection to producing documents relevant to Yankee-Dixie on grounds of relevance. The Board did direct CEI to produce documents in the limited area of planning, policy and study documents. Since Yankee-Dixie is a potential competitor of CEI, any activities of CEI directed at defeating or delaying the construction of Yankee-Dixie facilities is evidence of an attempt to maintain or increase the monopoly power of CEI. Limiting discovery to planning, policy and study documents may prevent Cleveland from discovering documents, for example, correspondence, evidencing

CEI's opposition to Yankee-Dixie. Significantly, CEI has not argued that the search for Yankee-Dixie materials would be unduly burdensome.

Document Requests 56-62. In paragraph B.40 of its Order, the Board sustained CEI's objections to producing documents relating to advertising on the grounds of relevancy. One issue in this proceeding is whether CEI has acted to preserve or extend its dominant, monopoly position in the generation and transmission of electricity. One means by which CEI could act to preserve its monopoly is to cut off its competitor, Cleveland, from retail markets. Without sufficient retail markets, Cleveland cannot install large, economic generating units. It is bad enough that Cleveland must operate its system in isolation. But CEI has through advertising and through promotional practices sought to insure that Cleveland remains a small, isolated system, thereby reducing any threat that Cleveland may pose to CEI's monopoly.

Document Request 70. In paragraph B.41 of its Order the Board sustained CEI's objection to this discovery on the grounds that Cleveland had not shown good cause for discovery prior to September 1, 1965. The Board obviously overlooked the concluding clause of the request which requests "any other documents pertaining to efforts by the Company, its directors or officers to influence the budget for the City's electric system since January 1, 1960." Since Cleveland's request calls also for documents dated after the Board's cut-off date; the Board's rationale does not apply to the entire document request.

Cleveland asserts that it has indeed shown good cause for extending this inquiry back to 1960. The specific event referred to in the discovery relates directly to the ability of Cleveland to construct transmission lines and install generating capacity. In a case in which the Board has framed the issues largely in terms of structure and CEI's dominance, activities of CEI directly aimed at preserving its monopoly of transmission and generation is relevant and not remote. It bears directly on the anticompetitive situation presently existing.

Document Request 72. In paragraph B.41 of its Order the Board relies on the Noerr-Pennington doctrine to sustain in part CEI's objection to producing documents relating to Cleveland's Bond Ordinance. The Noerr-Pennington line of cases does not purport to deal with or limit discovery. Rather it holds that the right of access to the political process insulates from anti-trust liability the use of that access standing alone. It does not preclude the use of evidence of political activities to show intent or to show the "purpose and character of the particular transactions under scrutiny," United Mine Workers v. Pennington, supra. Moreover, activities legal by themselves may be a part of a course of conduct which is illegal. The Board has itself recognized the relevance of evidence relating to attempts to defeat the financing of the City's system. In the Farley case, the Board permitted discovery over similar Noerr-Pennington objections. (Alabama Power Company, AEC Docket Nos. 50-348A, 50-364A, Order Granting In Part and Denying In Part Motion to Compel Production, docketed November 1, 1973)

Document Request 74. In paragraph B.42 of its Order the Board sustained, in part, CEI's objection to Document Request 74 without stating the basis for its action. Cleveland believes the Board to be in error for the reasons given with respect to Document Request 72.

Document Request 76. In paragraph B.43 of its Order the Board sustained CEI's objection to discovery pertaining to CEI's opposition to Cleveland's 1938 Bond issue on the grounds of remoteness. This is, of course, relevant to structure in that the funds were to be used for enlargement and improvement of the City's electric system. Since the structure which exists today is the result of incremental additions to each of the existing systems it is relevant.

Inasmuch as CEI has admitted that it dominates generation and transmission in its service area, it is to be anticipated that CEI will assert as one defense that its dominance is simply the result of its own good business management and efficient operation. The documents requested could produce evidence to rebut that defense.

Document Requests 83, 84, 86, 87, 88. In paragraph B.44 of its Order the Board sustained CEI's objection to the above discovery of political activities of CEI including activities relating to the appointment of the Director of Public Utilities and the Executive Commissioner of Light and Power of the City. The Board did not give the reasons for its holding but presumably the Board relied on the Noerr-Pennington doctrine. The Noerr case clearly created an exception to the doctrine for activities which interfere with

business relationships of a party. This would be particularly applicable to the situation in which the political activities pertain to the business activities of the City acting in its proprietary capacity. The case of Whitten v. Paddock Pool, 424 F.2d 25 (CA1, 1970) is especially relevant to the request for documents relating to the appointment of officers in the City's utilities system. In Whitten v. Paddock the Court held that in dealing with the governmental unit acting in its proprietary capacity a party is subject to the same limitations as in its dealings with private parties. In the Farley case the Board permitted discovery over similiar Noerr-Pennington objections (Alabama Power Company, Docket Nos. 50-348A, 50-364A, Order Granting In Part and Denying In Part Motion To Compel Production, docketed November 1, 1973).

Document Request 77. In paragraph B.47 of its Order the Board sustained CEI's objection, in part, because the request for documents relating to the City of Cleveland's Electric Light System First Mortgage Revenue Bonds is broad. This request goes to the heart of Cleveland's ability to finance its system. The Board did not find it irrelevant. The request is not a broad, sweeping request but narrowed to a particular part of the City's financing.

Document Request 78. In paragraph B.46 of its Order the Board sustained CEI's objection since the document request refers to a pending civil action in the Federal District Court, the records of which are available to the City. It is precisely the documents in this case which are not of record that the City wants to discover, i. e., is CEI assisting or encouraging Mr. Nolan in

his civil action against the City. Discovery should be allowed for the same reasons that the Board allowed Discovery Request 75.

Document Request 113. In paragraph B.51 of its Order the Board sustained CEI's objection to producing daily diaries and appointment calendars. The City hereby narrows its request, to seek only those pages which reflect appointments or meetings with bond counsel for the city, the trustee of Cleveland's First Mortgage Revenue Bond Indenture or counsel for the trustee, or with any bankers in Cleveland for the purpose of discussing the ability of the City to finance its electric system.

B. Objections of Applicants - Toledo Edison Company, Pennsylvania Power Company, Ohio Edison Company, and Duquesne Light Company - to City's Proposed Discovery

Document Request 2(d). See discussion with regard to Document Request 16(d) in Part A, above.

Document Request 4(c). In paragraph C. 59 of its Order the Board sustained Applicants' objection on the grounds that Cleveland failed to demonstrate the relevance of the requested material. All of the Applicants in this proceeding have stipulated that they dominate transmission and generation in their respective service areas. Among other things, Cleveland will argue that in fact Applicants monopolize transmission and generation and have acted to perpetuate and enlarge their monopoly thus creating a situation inconsistent with the antitrust laws. In light of the Board's formulation of the issues in controversy to relate primarily to structure, it is important that Cleveland be permitted to inquire into matters relating to the growth and perpetuation of that structure.

Document Request 5. In paragraph C. 60 of its Order the Board sustained in part Applicants' objection. See Cleveland's discussion with respect to Document Request 18(a) in Part A, above.

Document Request 7(c). In paragraph C. 60 of its Order the Board sustained in part Applicants' objection. See discussion with respect to Document Request 21(c) in Part A, above.

Document Request 8. In paragraph C. 62 of its Order the Board sustained Applicants' objection. See discussion with respect to Document Request 25 in Part A, above.

Document Request 13. In paragraph C.67 of its Order the Board sustained in part Applicants' objection. See discussion with respect to Document Request 23 in Part A, above.

Document Request 14(e). In paragraph C.71 of its Order the Board sustained in part Applicants' objection. See discussion with respect to Document Request 37(f) in Part A, above.

Document Request 26(b), 26(c), 26(d). In paragraph C.79 of its Order the Board limited the required response to documents involving CAPCO members only. This request pertains to the availability of bulk power supply alternatives and transmission alternatives available to Cleveland and others in the wholesale and regional power exchange markets. There is no rationale justifying limiting a response to only items involving CAPCO members. Other entities exist which, if they joined in construction of generation or transmission facilities with Applicants, could become potential bulk power suppliers of the City of Cleveland. The very reasons which make it relevant to obtain these documents when CAPCO members are involved make it relevant to obtain the documents involving an Applicant and an electric utility not admitted to CAPCO.

Document Request 39. In paragraph C.83 of its Order the Board sustained in part Applicants' objection. See discussion with respect to Document Request 51 in Part A, above.

C. City's Objections to Applicants' Initial Interrogatories and Request for documents

Cleveland notes generally that in several of the paragraphs of part E of the Board's Order, the Board has sustained Cleveland's objections to interrogatories on the grounds that the City had represented that the same information would be provided in response to other interrogatories. That is in error. The material will be provided in response to document requests, not interrogatories.

Interrogatory 71. In paragraph E. 113 of its Order the Board overruled Cleveland's objection to stating in detail how it plans to finance purchase of an interest in the Davis-Besse, Beaver Valley, and Perry units if one of the remedies ordered in this matter is access. Cleveland strenuously renews its objection on grounds of relevance and that the discovery goes to remedies. Applicants, who have repeatedly refused to make any contentions in this proceeding, have never contended that their refusal to permit Cleveland to coordinate development, coordinate operations or have access to wheeling or nuclear generation was predicated upon allegations that Cleveland could not finance its share of such activities. Unless and until access is offered to Cleveland on a reasonable basis, its ability to finance an ownership share is irrelevant. What is relevant is that Applicants' anticompetitive activities have foreclosed the opportunity to Cleveland to have access to bulk power supply alternatives. A denial of access which forecloses to Cleveland the opportunity to consider bulk power supply

alternatives is no less anticompetitive because the City may find itself temporarily disabled from utilizing all of the alternatives. The existence of alternatives by itself alters the competitive situation.

Interrogatory 82(c). In paragraph E. 119 of the Board's Order, the Board overruled Cleveland's objection to identifying persons who have rendered services in connection with financing Cleveland's participation in CAPCO nuclear units. See the discussion with respect to Interrogatory 71 in Part C, above.

Interrogatories 83-94. In paragraphs E. 120 - E. 131 of the Board's Order, the Board overruled Cleveland's objections. Cleveland's petition has been ruled upon and found sufficient to permit intervention. The Board has formulated the matters in controversy. Discovery going back of Cleveland's petition to intervene will do nothing to advance this case to conclusion.

Document Request 49(a), 49(b), 49(c). In paragraph E. 135 of the Board's Order, the Board overruled Cleveland's objection. See discussion with respect to interrogatory 71 in Part C, above.

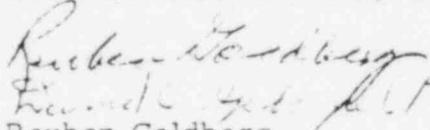
Document Request 50. In paragraph E. 136 of the Board's Order, the Board overruled Cleveland's objection. See discussion with respect to interrogatory 71 in Part C, above.

Document Requests 59, 60, 61, 62, 63, 65, 66, 67. In paragraph E. 138 of its order, the Board overruled Cleveland's objections. See discussion with respect to Interrogatories 83-94 in Part C, above.

Cleveland also objects to the establishment of September 1, 1965, as the earliest day for the production of documents. The situation inconsistent with the antitrust laws is the result of activities of Applicants which in part pre-date the formation of CAPCO. Moreover, there is no assurance that all of the documents pertaining to the formation of CAPCO will be included in the discovery period set by the Board.

Respectfully submitted,

CITY OF CLEVELAND, OHIO


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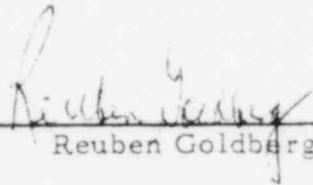
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October 21, 1974

Certificate of Service

I hereby certify that service of the foregoing "Objections of the City of Cleveland to Board's Order on Objections to Interrogatories and Document Requests" has been made on the following parties listed on the attachment hereto, this 21st day of October, 1974, by depositing copies thereof in the United States mail, postage prepaid.



Reuben Goldberg

Attachment

ATTACHMENT

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