November 7, 1975

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' RESPONSE TO THE CITY OF CLEVELAND'S MOTION TO REOPEN DISCOVERY

1. On October 31, 1975, the City of Cleveland filed yet another request with this Board to reopen discovery. This time reference is made to the direct expert testimony of Mr. Lentz, filed on behalf of all Applicants, and the direct expert testimony of Mr. Caruso, filed on behalf of The Cleveland Electric Illuminating Company ("CEI"), as a basis for undertaking another fishing expedition for documents falling within the City's overbroad and imprecise document requests.

2. Once again, Applicants remind this Board that this antitrust hearing stands as a very real obstacle to

commencing on schedule (second quarter of 1976) major construction of Perry Units 1 and 2 and fuel loading for the actual operation of Davis-Besse Unit 1. If Applicants must at this late date undertake another file search, especially one of the breadth suggested by the City's most recent document requests, the evidentiary hearing will be unavoidably disrupted, with the inevitable result that the antitrust review process which has already been extended for a prolonged period will experience further delays. No good reason has been set forth by the City in support of its present motion. This request to reopen discovery is, we suspect, just as the ones preceding it, but another ploy to accomplish further delay.

3. We cannot believe that this Board intended that its direction to the parties to file direct written expert testimony in advance of the evidentiary hearing would provide a legitimate basis for commencing another round of discovery. Applicants are amenable to exchanging with the other parties all studies referenced in the filed testimony of all expert witnesses 30 days in advance of the date each such witness is scheduled to testify. This should be adequate lead time to allow the parties to prepare their cross-examination. Further discovery of the sort requested by the City is both unwarranted and unnecessary.

4. With specific reference to the particulars of the City's motion, we find unpersuasive the City's professed surprise as to the nature of the expert testimony submitted by Mr. Lentz. Both the City's and the NRC Staff's September 5 filings make it abundantly clear that the matters discussed by Mr. Lentz are going to be part of the evidentiary hearing. Indeed, the City spent what appeared to be an inordinate amount of time during depositions asking questions, and receiving answers, which covered the entire subject of the formation and development of CAPCO and ECAR in the early 1960's, the relationship between the two, and their respective purposes and objectives. Additional documentary material was not requested at that time; nor did the City make any request of CEI for more material during the most recent round of discovery in Davis-Besse 2 and 3. Having explored this matter fully on depositions and chosen not to pursue it further with timely discovery, the City is now in no position suddenly to latch onto Mr. Lentz's filed expert testimony as an excuse to reopen discovery at this late date and launch another expansive search of Applicants' files.

5. Nor is there any more reason to pay attention to the City's document requests which are said to relate to Mr. Caruso's filed expert testimony. The City asserts that

the subject matter of that testimony -- i.e., the feasibility of the City constructing its own transmission lines -- introduces a "newly raised contention" (Motion, p. 10) into the proceeding. Reference need only be made to the City's September 5 filing, however, to disprove this statement. There the City stated (p. 9): "Cleveland may also offer evidence regarding the feasibility of constructing a competing transmission grid." That this was not intended as mere surplusage can be seen by reviewing the written testimony filed by the City's own expert, William R. Mayben. He specifically addresses the question whether the City "[c]ould * * * expect to construct its own transmission lines to effect interconnection with power supply utilities other than CE[illegible] * * *" (Mayben Testimony, p. 20).[1/]

6. Thus, for the City now to advise the Board that "until the filing of the testimony by Mr. Caruso the City had no reason to believe that CEI would present such an issue [i.e., the feasibility of the City constructing its own transmission lines]" (Motion, p. 8 emphasis added), is mystifying. Certainly, the City did not expect CEI to let the City's allegations go unanswered. It was the City who stated in its September 5 filing (p. 10) that "Cleveland

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1/ We also note in passing that this issue is treated in the written expert testimony filed by the NRC Staff and by the Department of Justice.

should be able to engage in power transactions with Painesville as well as with PASNY or the City of Richmond, Indiana." The Caruso expert testimony responds fully to that statement.

7. Moreover, a careful reading of Mr. Caruso's expert testimony provides no legitimate basis for allowing the City to conduct discovery for the documents referenced on pages 6 and 7 of its motion. This requested material has no meaningful relationship to the engineering and economic analysis discussed by Mr. Caruso. Here again the City is trying to take yet another broad sweep of CEI's files in a desperate effort to find something to back up the groundless charges it has made. CEI has been more than cooperative in complying with the City's earlier document requests. No good reason has yet been given why it should be put to the tremendous burden on the eve of the evidentiary hearing of undertaking yet another file search in response to these latest expansive requests.

8. While the above reasons provide more than a sufficient basis to deny the City's motion, we also note that much of the material now sought by the City pertains to alleged legislative and judicial activities of CEI. Such material is plainly protected under the Noerr-Pennington Doctrine; thus, as to the documents in this category, there is yet another reason to look unfavorably on the City's motion.

See, e.g., In the Matter of Duke Power Company, NRC Docket Nos. 50-269A, 50-270A, 50-287A, 50-369A and 50-370A, Prehearing Order No. 2 dated November 27, 1972; In the Matter of Consumers Power Company, NRC Docket Nos. 50-329A, 50-330A, Order dated November 28, 1972. The Noerr-Pennington Doctrine has been afforded broad application to immunize from the antitrust laws a wide range of practices designed to influence the decisions of legislative or executive officials at all levels of government.[2/] Likewise, it has been applied broadly to efforts to influence administrative and judicial proceedings.[3/] Also held to be within its protection were

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2/ See, e.g., Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (state governor and legislature); United Mine Workers of America v Pennington, 381 U.S. 657 (1965) (Secretary of Labor and TVA); A.B.T. Sightseeing Tours, Inc. v Gray Line New York Tours Corp., 242 F. Supp. 305, 369-70 (S.D.N.Y. 1965) (legislative bodies and administrative agencies of New York City); Sun Valley Disposal Co. v Silver State Disposal, Inc., 420 F.2d 341 (9th Cir. 1969) (state and county legislative bodies).

3/ See, e.g., California Motor Transport Co. v Trucking Unlimited, 404 U.S. 508 (1972); Central Savings & Loan Association of Chariton, Iowa v Federal Home Loan Bank Board, 422 F.2d 504 (8th Cir. 1970) (solicitation of federal agency for purposes of obtaining favorable regulations which result in economic or competitive advantage); Semke v Enid Automobile Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) (solicitation of State Motor Vehicle Commission to enjoin acts of competitor violative of state statute); Edward B. Marks Music Corp. v Colorado Magnetics, Inc., 497 F.2d 285, 290 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975) (utilization of courts to enforce copyright); Household Goods Carriers' Bureau v Terrell, 452 F.2d 152 (5th Cir. 1971) (solicitation of federal agency to keep competitor's mileage guide from the market); George Benz & Sons v Twin City Milk Producers Ass'n, 299 F. Supp. 679 (D. Minn. 1969) (solicitation for action fixing prices favorable to defendants but harmful to plaintiff before Department of Agriculture).

efforts to influence the outcome of a vote by the citizens of Washington State on an "anti-litter' initiative, Rogers v Federal Trade Commission, 492 F.2d 228 (9th Cir. 1974). And, the Doctrine was given similar force in connection with efforts before a city council both to gain a franchise and subsequently to obtain legislation blocking a similar franchise to a competitor. Lamb Enterprises, Inc. v Toledo Blade Co., 461 F.2d 506 (6th Cir.), certiorari denied, 409 U.S. 1001 (1972).

9. It therefore can serve no useful purpose to afford the City last-minute discovery on CEI's activities in the areas subject to Noerr-Pennington protection. These are not matters that can legitimately be aired in the hearing. Activities of the sort described above have consistently been recognized as protected under the First Amendment, and thus not subject to antitrust scrutiny. The underlying rationale was succinctly stated by the Supreme Court of the United States in California Motor Transport Co. v Trucking Unlimited, supra, 404 U.S. at 510-511, in the following terms:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

10. For all of the foregoing reasons, Applicants respectfully submit that the City's motion to reopen discovery should be denied. The request is plainly out of time; it is premised on the filing of certain expert testimony, which testimony provides no good cause to commence another round of discovery at this late date; and, at least as to the CEI documents sought by the City, much of the material is clearly outside the scope of this antitrust inquiry under the Noerr-Pennington Doctrine. In addition, the City's present request is framed in such broad, conclusory terms that any attempt to comply would impose on Applicants generally, and on CEI in particular, an intolerable burden, especially at a time when every effort is being devoted to preparing for the evidentiary hearing. Such a result is not only undesirable in terms of its disruptive impact on the hearing; it also is unsound in light of the extensive document production already completed in this proceeding. The City's motion suggests no good reason to believe that another large-scale search will produce any material not already available to it that could affect the outcome of this proceeding.

Respectfully submitted,
SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
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Counsel for Applicants

Dated: November 7, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Response To The City Of Cleveland's Motion To Reopen Discovery" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to those persons in the Washington, D. C. area and by mailing a copy, postage prepaid, to all others, all on this 7th day of November, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

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