November 25, 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	)	Docket No. 50-346A
(Davis-Besse Nuclear Power Station, Unit 1)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket Nos. 50-440A
(Perry Nuclear Power Plant, Units 1 and 2)	)	50-441A
	)	
THE TOLEDO EDISON COMPANY, ET AL.	)	
(Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

APPLICANTS' STATEMENT OF
PROCEDURAL MATTERS TO BE CONSIDERED

1. In a conference call initiated by the Chairman of the Licensing Board on November 14, 1975, the Eighth Prehearing Conference was set for November 26, 1975. In conjunction with this scheduling, counsel for Applicants was requested to identify preliminarily the procedural matters he intended to raise at that conference. Counsel responded that he planned to request a ruling from the Board "[r]equiring that the other parties specify, both with respect to their documentary and testimonial evidence, which Applicant(s) the evidence was directed against, * * *."

2. The request for that ruling was premised in

large measure upon the concern of Applicants' counsel that allegations of predatory practices directed against only one Applicant not be used indirectly as evidence of intent against any of the other Applicants unless and until their complicity in some overall conspiracy has been established. This principle is well established by law. See, e.g., Glasser v United States, 315 U.S. 60, 74-75 (1942); Oltman v Miller, 407 F.2d 376, 378 (7th Cir. 1969); United States v Bentvena, 314 F.2d 916, 949 (2d Cir. 1963). There clearly is no basis at this stage to draw any inference of conspiracy. The filing of a joint application for a nuclear permit or license does not allow such an inference; nor does participation in the CAPCO pool arrangement. See Kline v Coldwell, Banker & Co., 508 F.2d 226, 231 (9th Cir. 1974); Metropolitan Bag & Paper Distribution Association v FTC, 240 F.2d 341, 344 (2d Cir.), certiorari denied, 355 U.S. 817 (1957); Phelps Dodge Refining Corp. v FTC, 139 F.2d 393, 396 (2d Cir. 1943).

3. If conspiracy is indeed alleged in this case, the charge is well camouflaged. Applicants have yet to be advised, for example, of the date when any putative conspiracy began, what the purpose of that conspiracy might be, which of the Applicants comprise the confederates, and which of the many alleged anticompetitive practices are considered to have been performed in furtherance of the "conspiracy."

Without knowledge of the commencement date, Applicants will have no way of knowing which of the alleged practices fall within the time-frame of the so-called conspiracy. See, e.g., Harms v. United States, 272 F.2d 478, 482 (4th Cir. 1959); Steiner v. Twentieth Century-Fox Film Corporation, 232 F.2d 190, 192 (9th Cir. 1956); Hall v United States, 109 F.2d 976, 984 (10th Cir. 1940). Without identification of the purposes of the alleged conspiracy, Applicants cannot ascertain which of the alleged acts may have been committed in furtherance thereof. United States v Nixon, 94 S. Ct. 3090, 3104 (1974); United States v Rodriguez, 509 F.2d 1342 (5th Cir. 1975); Steiner v Twentieth Century-Fox Film Corp., 232 F.2d 190, 192 (9th Cir. 1956); Hoffman v Halden, 268 F.2d 280, 295 (9th Cir. 1959); Neff v World Publishing Co., 349 F.2d 235, 257 (8th Cir. 1965). Perhaps most important, without a designation of the specific acts of each Applicant which are to be relied upon to establish its complicity, the individual Applicants will be hamstrung in their efforts to counter a charge of participation in the conspiracy. Such a precarious condition runs sharply contrary to the universally accepted proposition that

> There must be alleged certain acts of each of the alleged conspirators which would connect him or it with the conspiracy * * * Each of the defendants, therefore, has a right to know what he or it is alleged to have done which made him or it a part of the conspiracy ....

> Vermilion Foam Products v General Electric, 386 F. Supp. 255, 259 (E.D. Mich. 1974), quoting United States v. North Coast Transportation Co., 7 F. R. D. 491, 493 (W.D. Wash. 1974).

See United States v Aeroquip Corp., 284 F. Supp. 114, 117 (E.D. Mich. 1968).

4. Adherence to this principle is imperative here. Mere interdependence does not convert knowingly parallel behavior into a conspiracy. See Northern California Pharmaceutical Ass'n v United States, 306 F.2d 378, 388-89 (9th Cir.), certiorari denied, 371 U.S. 862 (1962); Bogosian v Gulf Oil Corporation, 393 F. Supp. 1046, 1052 (E.D. Pa. 1975). If the Department, the Staff and the City are to prevail on any sort of conspiracy theory, it must necessarily be through use of circumstantial evidence. Applicants suspect that the allegations of predatory retail and wholesale practices which have been charged against each Applicant individually will be seized upon as that circumstantial evidence. In considering what evidentiary guidelines are appropriate in such circumstances, this Board would do well to heed the counsel of the district court in Overseas Motors, Inc. v Import Motors Limited, Inc., 375 F. Supp. 499 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (6th Cir. 1975) that where as here a

> Case is based entirely on such circumstantial evidence, the court must be especially vigilant

> to insure that liberal modes of proof do not become the pretext for unfounded speculation. 375 F. Supp. at 531.

5. This admonition parallels that of Mr. Justice Jackson, concurring in Krulewitch v United States, 336 U.S. 440 (1949), whose sensitivity to the plight of those whose unenviable task it was to refute charges of conspiracy was articulated in terms strikingly apposite here:

> When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy is often proved by evidence that is admissible only upon assumption that conspiracy existed. 336 U.S. at 453 (emphasis added).

Moreover, this solicitude was not confined to the criminal defendant: "[t]he interchangeable use of conspiracy doctrine in civil as well as penal proceedings opens it to the danger, absent in the case of many crimes, that a court having in

mind only the civil sanctions will approve lax practices which later are imported into criminal proceeding." Id. at 451-52.

6. Guarding against the danger identified by Mr. Justice Jackson in Krulewitch and mindful of the settled principle that acts and statements of one alleged co-conspirator cannot be imputed to another until the existence of a conspiracy, and each alleged confederate's participation therein, is established, this Board should at the outset articulate firm procedural rules regarding the introduction of documentary and testimonial evidence. The Department, the Staff and the City should be required to specify the particular Applicant against whom the evidence is sought to be admitted. Such evidence will then come in only against that Applicant subject to the right "later to move for the admission of said evidence as against all the [Applicants] once [the parties] succeeded in establishing their allegations of conspiracy from independent evidence." Rutledge v Electric Hose & Rubber Co., 329 F. Supp. 1267, 1274 (C.D. Cal. 1971).[1/] As in Rutledge, it would be incumbent upon the party alleging con-

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1/ We submit that the alternative procedure of admitting evidence of individual acts as against all Applicants subject to some subsequent showing of a conspiracy is an inadequate safeguard against the danger that conspiracy will be impermissibly inferred on the basis of an amorphous totality of the evidence without proper recognition of the failure of the other parties to show the complicity of all Applicants.

spiracy to establish its existence from independent evidence, rather than rely upon the possibility that, at the close of a protracted evidentiary hearing, a finding of conspiracy would be rendered based upon the "totality of evidence" approach. Thus, the factors of motive,[2] opportunity,[3] and consistency of overt acts[4] would have to be separately established and so identified to the Board to support a conspiracy claim.

7. That this is the most sensible way to proceed here becomes obvious when one focuses on the overriding purpose of this antitrust hearing. This Board is being asked to impose conditions on permits and licenses for these nuclear plants. To the extent that the Department, the Staff and the City have advanced different allegations against each Applicant, this Board would be remiss to proceed on the assumption that a single set of standard license conditions might be

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2/ First National Bank of Arizona v Cities Service Co., 391 U.S. 253, rehearing denied, 393 U.S. 901 (1968); Scranton Construction Co., Inc. v Litton Industries Leasing Corp., 494 F.2d 778, 782 (9th Cir. 1974), cert. denied, 419 U.S. 1105 (1975); Overseas Motors, Inc. v Import Motors, Ltd., 375 F. Supp. 499, 534 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (6th Cir. 1975).

3/ Overseas Motors, Inc. v Import Motors, Ltd., supra, at 532; Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F. Supp. 1003, 1012 (D. D.C. 1974).

4/ Norfolk Monument Co. v Woodlawn Memorial Gardens, 394 U.S. 700 (1969); State of North Carolina v Chas. Pfizer & Co., Inc., 384 F. Supp. 265, 284 (E.D. N.C. 1974); Overseas Motors, Inc. v Import Motors, Ltd., supra, at 534-35.

appropriate under any circumstances. Each set of allegations should be viewed independently. While Applicants do not believe that license conditions are appropriate for any of them, in the unlikely event that this Board should disagree as to some (or even all) Applicants, the proper procedure would be to issue a separate set of license conditions tailored to whatever case is made out against each Applicant. See Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit 1), Docket No. 50-482A (compare 39 Fed. Reg. 44269 with 39 Fed. Reg. 44272).

Respectfully submitted,

CHAW, PITTMAN, POTTS & TROWBRIDGE

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

Dated: November 25, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Statement Of Procedural Matters To Be Considered" 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 25th day of November, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

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