



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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|-------------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| The Toledo Edison Company and |) | Docket Nos. 50-346A |
| The Cleveland Electric Illuminating |) | 50-500A |
| Company |) | 50-501A |
| (Davis-Besse Nuclear Power Station, |) | |
| Units 1, 2 and 3) |) | |
| |) | |
| The Cleveland Electric Illuminating |) | Docket Nos. 50-440A |
| Company, et al. |) | 50-441A |
| (Perry Nuclear Power Plant, |) | |
| Units 1 and 2) |) | |

MOTION OF THE CITY OF CLEVELAND
TO REOPEN DISCOVERY

On October 25, 1975, Applicants filed the direct written testimony of Mr. Owen A. Lentz and Mr. Henry A. Caruso. The filed testimony of Messrs. Lentz and Caruso discusses in part matters into which the City of Cleveland (Cleveland) was denied discovery either in whole or in part by the Board's Order On Objections To Interrogatories And Document Requests. If Cleveland is to be able to fully assess this testimony and if the Board is to have a full record on these issues, Cleveland must be granted leave to obtain full discovery in these areas. Accordingly, Cleveland hereby moves to reopen discovery.

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MR. OWEN A. LENTZ

Mr. Lentz is the Executive Manager of the East Central Area Coordinating Agreement (ECAR) (Prepared Testimony, page 1). The purpose of his testimony is, as stated at page 2 of his prepared testimony:

"To describe the development of inter-connection and coordination arrangements in the electric utility industry, with special focus on those factors in the 1960's which stimulated the development of such arrangements."

Commencing on line 14, page 8 of his prepared testimony and continuing through line 6, page 15 of his prepared testimony, Mr. Lentz describes the status of the CAPCO companies in 1964, the formation of ECAR beginning in December of 1964, the purpose of ECAR, expansion of ECAR from 11 to 24 electric utilities, the construction of 345 Kv transmission to effectuate ECAR, the restriction of small electric utilities to "liason" participation, and the establishment of daily operating reserve criteria by ECAR.

On August 26, 1974, Cleveland submitted interrogatories and requests for the production of documents to CEI. Among those requests was #21(c) which requested:

"(c) Documents relating to the Northeastern Electric Reliability Council, ECAR, NAPSIC (Northeast Region), their formation and activities and Company's participation therein, including but not limited to and documents pertaining to the decisions setting qualifications for membership and full participation."

The Board in paragraph B. 14 of its Order of October 15, 1974 sustained Applicants objection to Cleveland's Document Request Number 21(c) on grounds of burden and relevance "as to all documents except those dealing

with membership in these groups and decisions setting qualifications for membership and full participation."

Also on August 26, 1974, in Document Request Number 7(c) addressed to the other Applicants, Cleveland requested the same materials requested in Document Request 21(c) above. In paragraph C.16 of its Order of October 15, 1974, the Board adopted its ruling in paragraph E.14 of that order.

The Board, in its October 15, 1974 Order, also established a cut-off date for all discovery of September 1, 1965.

By letter of October 28, 1975, the City of Cleveland informally requested Applicants to provide the City with copies of all documents relied upon by Mr. Lentz for his testimony relating to the formation of CAPCO and ECAR. On October 29, 1975, Mr. Reynolds, counsel for Applicants, responded to the City's request refusing to produce those documents on the grounds that the City had had ample opportunity for discovery.

Mr. Reynolds' contention that the City could have procured these documents earlier in the prehearing phase of this case is astonishing. At the prehearing conference of September 16, 1974, Applicants argued to the Board that discovery with respect to the formation and activities of ECAR was not relevant and should not be permitted. Thereafter, the Board sustained Applicants objections on those very grounds. Now Applicants have filed direct testimony relating to the very matters on which Cleveland was denied discovery because Applicants represented they were not relevant.^{1/}

^{1/} Tr. 673-677.

Further, at the September 16, 1974, prehearing conference, Applicants argued that the cut-off date for discovery should be September 14, 1967 but that a cut-off date of September 1, 1965 would surely include all relevant materials including all materials relating to the formation of CAPCO.^{2/} Now Applicants themselves file testimony dealing with the period beginning in 1964. Moreover, from discovery which was allowed, it became apparent that the original CAPCO group was formed in the early 1960's and that ECAR, about which Mr. Lentz testified, grew out of the original CAPCO group to deal with reliability and the present CAPCO grew out of the original CAPCO to provide economic benefits of coordination.

In light of the proposed testimony of Mr. Lentz it is apparent that the materials sought by Cleveland are relevant to an assessment of Mr. Lentz's testimony and to an understanding of the issues in this proceeding. Further, Mr. Lentz's testimony deals with matters pre-dating the September 1, 1965 date for discovery. Accordingly, Cleveland is now entitled to a full response to its Document Requests 21(c) directed to CEI and 7(c) directed to the other Applicants. For this discovery, the cut-off date should be January 1, 1960.

MR. HENRY E. CARUSO

Mr. Henry E. Caruso is an expert witness and employee of CEI. The thrust of Mr. Caruso's testimony is that the City of Cleveland could

2/ Tr. 564-596, 655-658.

in fact construct transmission lines across the CEI system to obtain power supply alternatives. At page 12 of Mr. Caruso's testimony, he states that he made certain studies with respect to the feasibility of construction of transmission lines by Cleveland. On September 28, 1975, Cleveland made an informal request for a copy of Mr. Caruso's study and his work papers. By letter of October 29, 1975, Applicants refused to produce the materials requested by Cleveland.

Failure to produce a copy of the study and work papers now prior to Mr. Caruso's appearance to testify can only cause unwarranted delay during the trial. It is obvious that Mr. Caruso cannot properly be cross-examined unless Cleveland obtains a copy of the study and is given reasonable time to analyze the study. If the study is not made available until Mr. Caruso testifies, then Mr. Caruso will have to be recalled for cross-examination or the hearing will have to be recessed. In light of Applicants' vociferous objections to anything that might delay these proceedings, it is difficult to understand why Applicants now wish to cause delay themselves.

Starting at line 23, page 21, of Mr. Caruso's prepared testimony are the following questions and answers:

Q. Based on your study and analysis, do you have an opinion as to whether the Division of Light and Power could effectively avoid dependency upon CEI's system by constructing its own transmission line facilities?

A. I do.

Q. What is that opinion?

- A. I believe it was and is feasible for the City of Cleveland to build a transmission facility that would provide it access to power sources other than CEI, thereby eliminating any need to depend solely upon the facilities of CEI.

In its Document Request to CEI of August 26, 1974, Cleveland made the following requests:

16. Documents, including minutes of the meetings of the Board of Directors and the Executive Committee of the Company; documents prepared in advance of meetings (e. g., agenda, memos in summary or critique of plans, costs, proposals or status of negotiations), and letters and memoranda to or from Company officers relating to:

x x x

- (d) Legislation and constitutional revision affecting the ability of electric utilities to own, finance and construct facilities to sell electricity.
- (f) Elections in any municipality operating an electric distribution system;
- (g) Litigation, actual and considered, before courts or agencies in opposition to the construction of competing generation or transmission facilities;

x x x

18. Correspondence between the Company and Edison Electric Institute or any committee thereof; National Association of Electric Companies, and any electric utilities; and documents referring to these entities relating to:
- (a) System construction, financing, ownership, operation of electric generation, transmission or distribution facilities by any municipality and/or electric coopera-

tive utility, including acquisitions of any such utility by the Company, or competition between any such utility and the Company.

58. Documents (including records of expenditures) regarding any advertisements, public relations campaigns, or other means employed by Company to secure support for its views in or in connection with any municipal election in Cleveland.
59. Breakdown and description of nature of expenditures made under Company's public relations budget from 1965 to date.
70. Documents pertaining to attempts by CEI to have the City Council remove approximately \$10 million from the City's Light Plant budget for construction of 75,000 Kv of capacity and \$5 million for interconnection of the municipal power plants of Cleveland, Painesville and Orrville in 1960 and 1961, including the activities and statements of Mr. Lee C. Howley before the City Planning Commission, and 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.
81. Weekly reports submitted to Mr. Lee Howley by the Government Affairs Department of the Company.
87. A list of all disbursements of the Committee of Subscriptions of the Company.
88. Documents showing all amounts collected from officers and employees on the Treasurer's payroll for political purposes, including the amounts collected, the amounts listed in the receipts given therefor and the disbursements made from the political fund established.

Applicants objections to the foregoing Document Request were sustained in whole or in part in paragraphs B. 5, B. 6, B. 7, B. 12, B. 40, B. 41, B. 44 and B. 47 of the Board's Order of October 15, 1974.

It is now clear, for the first time, that Applicants will contend at the hearing that the City of Cleveland has not been denied access to coordinated operations and development because Cleveland could have constructed the necessary transmission. Cleveland's requests for the production of documents, set out above, all are intended to discover evidence going to the real ability of Cleveland to construct such transmission and to discover evidence of CEI's many activities designed to prevent Cleveland from constructing transmission lines. It would be manifestly unfair to permit CEI to raise the defense that Cleveland could itself construct transmission while at the same time prohibiting Cleveland from having discovery relevant to that very issue.

Cleveland was unable to raise this matter at an earlier date because until the filing of testimony by Mr. Caruso the City had no reason to believe that CEI would present such an issue. In fact, counsel for Applicants studiously avoided framing issues to be raised by Applicants. Thus, Cleveland could not be aware of this issue until October 25, 1975, when Applicants testimony was filed.

Cleveland anticipates that Applicants may object to further discovery on grounds that it will delay these proceedings. Such delay, as may be occasioned, must be laid at the very doorstep of the Applicants who strenuously objected to this discovery a year ago on grounds of relevance and

burden. Now Applicants offer testimony which deals with the very issues which they contended were irrelevant in September, 1974.

It may also be expected that Applicants will claim that certain of the documents sought to be obtained are protected by the Noerr-Pennington Doctrine. While Cleveland believes the Noerr-Pennington Doctrine is relevant only where the ultimate issue is the existence of a violation of the antitrust laws and thus has no relevance to this proceeding which concerns only the existence of a situation inconsistent with the antitrust laws, Cleveland will show that assuming arguendo applicability of Noerr-Pennington to this case, the doctrine is not a shield to the discovery sought by Cleveland.

The Noerr-Pennington Doctrine is not a rule limiting discovery. Rather, it is a rule which states that in certain limited circumstances evidence of political activity or judicial activity cannot be the basis of a finding of a violation of the antitrust laws. Thus, under certain narrow circumstances such evidence may be inadmissible because it is not relevant. In these proceedings, the requested documents are clearly relevant. Moreover, while it is not necessary to show that materials sought during discovery will be admissible, good cause exists to believe that evidence thus obtained would not be subject to exclusion under Noerr-Pennington.

First, Noerr-Pennington is not applicable to attempts to influence the conduct of a governmental body engaged in proprietary or commercial affairs. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F2d 25 (1st Cir. 1970), cert. denied 400 US 850; see also, Hecht v. Pro-Football, Inc., 444 F2d 931 (1971), cert. denied 404 US 1047. Attempts

of CEI directors, officers or employees to dissuade the City Council from approving a budget for the Division of Light and Power to provide funds for construction of transmission lines would clearly be a matter within the proprietary functions of the City of Cleveland. It would also be clearly applicable to CEI's contention that the City was able to construct transmission lines.

Another limitation to the Noerr-Pennington Doctrine is found in footnote 3 to Pennington (381 US 657 (1965)). Under footnote 3 it is clear that evidence otherwise not relevant under Noerr-Pennington may be admitted if it is probative and not unduly prejudicial if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. Evidence of CEI political activities aimed at preventing Cleveland from obtaining power supply options through interconnections with others have a clear connection to CEI's newly raised contention that Cleveland at all times relevant had the ability to construct transmission lines necessary to obtaining power supply options.

Cleveland reserves the right to object to the introduction of the testimony of Messrs. Lentz and Caruso at such time as it is offered into evidence.

WHEREFORE, Cleveland prays that discovery be reopened, that Cleveland be granted additional discovery, that CEI be required to respond fully to Document Requests 21(c), 16(d), 16(f), 16(g), 18(a), 58, 59, 70, 81, 87 and 88 and that Applicants other than CEI be required to respond to Document Request 7(c), that Applicants be required to produce a copy of the

study referred to by Mr. Caruso and his work papers; that Applicants be required to furnish copies of documents relied upon by Mr. Lentz in describing the formation of CAPCO and ECAR and that the Board establish a cut-off date of January 1, 1960 for the production of documents.

Respectfully submitted,

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October 31, 1975

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion Of The City Of Cleveland To Reopen Discovery, has been made on the following parties listed on the attachment hereto this 31st day of October, 1975, by depositing copies thereof in the United States mail, first class or air mail, postage prepaid.

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David C. Hjelmfelt

Attachment



ATTACHMENT

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