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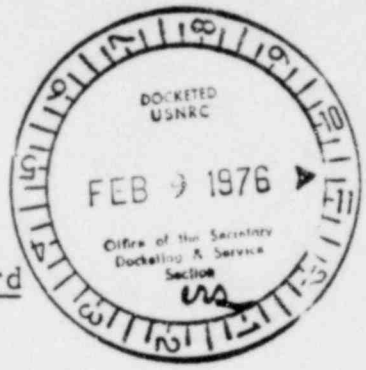

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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)	)	

MEMORANDUM AND ORDER OF THE BOARD
WITH RESPECT TO APPLICANTS' REQUEST
FOR CERTAIN PROCEDURAL RULINGS

By Statement of November 25, 1975, Applicants placed in written form their request that "other parties specify, both with respect to their documentary and testimonial evidence, which Applicant(s) the evidence was directed against, ..." The basis for this request was "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." (Emphasis added.) Applicants' Statement, ¶2. As is apparent from a careful perusal of their entire Statement, Applicants choose to cast this proceeding in terms of an attempt on behalf of the other parties to

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establish that Applicants engaged in an illegal "conspiracy."

Proceeding from the erroneous premise that "conspiracy" charges in these proceedings constitute the sole or the major elements of anticompetitive conduct allegedly leading to the creation or maintenance of a situation inconsistent with the antitrust laws, Applicants request us to require other parties to comply with criminal conspiracy law procedures relating to designation of evidence. For a variety of reasons the request, which we will treat as a motion for purposes of this ruling, must fail.

(1) Despite Applicants' efforts to characterize these proceedings as relating primarily to charges of conspiracy, the detailed pleadings setting forth the nature of the case filed by other parties on September 5, 1975 (two months in advance of Applicants' November 25, 1975 filing)* lend no support to such characterizations. Likewise, the detailed pretrial briefs of the parties filed November 26, 1975 are not in accord with Applicants' erroneous characterization of the nature of the case being presented against them.

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* The filing of a Statement of the Nature of the Case is not required by the Commission rules, but was extra relief afforded by the Board at the specific request of Applicants in order to provide a post-discovery outline of the nature of the evidence which would be used in support of the other parties' charges.

(a) The NRC Staff (Staff), in its reply to Applicants' Statement, specifically states:

> It should be noted that the Staff has not charged Applicants with a conspiracy in this proceeding.3/ Staff's Trial Brief and its earlier pleading, the "Nature of the Case to be Presented by NRC Staff" set forth clearly the legal and factual arguments planned to be made by the NRC Staff with respect to individual and group action. Thus, each Applicant has been advised of the nature of the evidence to be presented by the Staff in those instances where predatory practice evidence is planned to be utilized as to more than one Applicant, it has been so stated. Although Staff has not characterized the Applicants in this proceeding to be conspirators, the issues and the pleadings that have been filed in this matter clearly set forth the theory that Applicants collectively have the power to exclude and restrict competition in the CCCT area and have used that power. (Emphasis added.)
>
> 3/ Neither has the Board so characterized any of the charges against Applicants. See "Correction to Minutes of Conference Call of November 14, 1975" dated November 19, 1975.

(b) The Department of Justice (Justice), for its part, states:

> The vast preponderance of evidentiary material which the Department intends to place in the record will prove that Applicants engaged in violations of the antitrust laws which did not involve conspiracy.

To the extent that Justice does intend to prove an illegal conspiracy among Applicants, it has made no objection to specifying the Applicant against whom the evidence was directed provided Applicants subsequently are not permitted to object to Justice

efforts to connect specific evidence pertaining to an Applicant to concerted action by other Applicants.

(c) The City of Cleveland (City) in its reply of December 3, 1975 likewise points to its Statement of the Nature of the Case to be Presented as setting forth group actions and anticompetitive conduct which may violate the antitrust laws even though these acts would not constitute a "conspiracy." City, however, specifically does cite a conspiracy among Applicants (Answer of City at 6).*

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* "Cleveland's Statement Of The Nature Of The Case To Be Presented, at page 11, noted that the CAPCO companies conspired to exclude the Cities of Cleveland and Painesville from CAPCO. At page 12, Cleveland referred to the:

> concerted effort by the CAPCO companies to prevent municipalities from obtaining membership in CAPCO and thus gaining access to economies of scale and coordinated operations and development.

And at page 21, Cleveland noted:

> At the same time Applicants have conspired to preclude municipal electric systems from joining CAPCO and thus obtaining access to coordinated operations and development and the economies of scale.

Cleveland has further described the unlawful joint action of Applicants at pages 13-24 of its Prehearing Brief."

(2) To the extent a conspiracy is charged, Applicants have received ample notice of the

> date when any putative conspiracy began, what the purpose of the conspiracy might be, which of the Applicants comprised the confederates, and which of the many alleged anticompetitive practices are considered to have been performed in the furtherance of the 'conspiracy.'*

The City, the only party specifically charging conspiracy at this point, has identified the formation of CAPCO and the formation of ECAR as the beginning point in the conspiracy.

> It is our contention, and we believe the evidence will amply demonstrate that the CAPCO companies from the very start -- when the very start was is difficult for us to ascertain in that we haven't had complete discovery on the formation of CAPCO and the formation of ECAR -- but from the very start the CAPCO companies . . . acted jointly to exclude public power groups . . .**

Tr. p. 1460-61. City further asserted that individual refusals of membership in CAPCO were pursuant to joint or concerted understandings among Applicants.

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* Applicants' Statement at 2. This Notice also complies with the relief envisioned by the Court in Krulewich v. United States, 336 U.S. 440 (1949) upon which Applicants place strong reliance.

** It was Applicants who represented that discovery limited to post 1965 dates would encompass CAPCO formation activities. Thus, they should not complain that they are insufficiently notified that the conspiracy originated at the start of CAPCO.

All parties other than Applicants have devoted extensive portions of their Trial Briefs and their Statements of the Nature of the Case to be Presented to explaining exactly which acts and actions they would rely upon to demonstrate the joint, as well as individual, exercise of market power, including boycotts, by Applicants. It is fallacious to suggest that Applicants have not been notified with great particularity of the allegations of anticompetitive conduct which make up the alleged situation inconsistent with the antitrust laws.

(3) During oral argument on this procedural question at the Eighth Prehearing Conference held November 26, 1975, the Board put a series of questions to counsel for Applicants relating to any distinctions between a "conspiracy" and a "combination" or an "agreement in restraint of trade." Tr. p. 1445; 1461-62. Applicants argued that for purposes of their request, there were no distinctions and, in essence, that the criminal law considerations relating to conspiracy should apply in these proceedings.*

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* Applicants appear to have overlooked the decision of the Supreme Court in Nash v. United States, 229 U.S. 373, 378 (1913) in which it is stated:

> Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing - that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under Rev. Stat., §5440, in Hyde v. United States, 225 U.S. 347, and Brown v. Elliott, 225 U.S. 392, have no bearing upon a statute that does not contain the requirement found in that section.

To us, it is apparent that Applicants were substantially incorrect as a matter of law and we so hold. United States v. Parke-Davis & Co., 362 U.S. 29 (1960)*; Klor's v. Broadway Hale Stores, 359 U.S. 207 (1945).**

Moreover, in the context of the antitrust laws:

> No formal agreement is necessary to constitute an unlawful conspiracy.***

Also,

> It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that defendants conformed to the arrangement.

United States v. Paramount Pictures, 334 U.S. 131, 142 (1948). Here we have both an allegation that the CAPCO agreement, as fashioned and implemented, constituted an express agreement in

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* "The Bausch & Lomb and Beech-Nut decisions cannot be read as merely limited to particular fact complexes justifying the inference of an agreement in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. The Sherman Act forbids combinations of traders to suppress competition." 362 U.S. at 44.

** "In the landmark case of Standard Oil Co. v. United States, 221 U.S. 1, this Court read §1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable." 359 U.S. at 211.

*** American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

restraint of trade coupled with an assertion that Applicants' parallel courses of action with respect to refusals to wheel or to permit coordinated operation or development except with each other resulted in restraints of trade and combinations to monopolize within the CAPCO area.*

Equally incorrect is Applicants' contention that their arguments relating to delineation of evidence in terms of criminal conspiracy should apply to monopoly situations. Responding to questions from the Board**, Applicants stated that it was incomprehensible to have a monopoly with five companies monopolizing

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* We do not hold that these allegations have been proven, for indeed Applicants have not had their turn in rebutting the Staff's evidence nor the charges levied by Justice and the City which are yet to be supported by the introduction of evidence. Our holding herein relates to the Applicants' unsupportable request for instructions governing the procedures in effect during the course of the hearings.

** THE BOARD: Do you draw any distinction between a conspiracy or combination and monopolization? Suppose the idea [is] the Applicants are monopolizing transmission or monopolizing generation within the CCCT territory?

APPLICANTS' COUNSEL: I would assume if it is monopolization we are talking about section 2, not section 1 and that would be against the individual Applicant in any event.

THE BOARD: Why, if they are charging these companies combined to monopolize transmission or generation within the CCCT territory?

APPLICANTS' COUNSEL: . . . it would be hard for me to understand how you have a monopoly because you have five of them doing that in that territory. That is contrary to the definition of monopoly . . .

Tr. p. 1448.

in a given territory and that such a situation would be contrary to the definition of monopoly. Tr. p. 1448, l. 15-25.

> But the monopoly concept goes to a single entity, which in a given relevant market is dominant, has monopoly power. Tr. p. 1449, l. 2-4.

Applicants further contend that if there was a joint monopoly, it was not actionable under Section 2.*

This entire line of argument on behalf of Applicants is so incorrect as to negate any necessity for prolonged analysis of their request. American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Griffith, 334 U.S. 100, 104-108 (1948); United States v. Paramount Pictures, 334 U.S. 131, 154, 155, 160, 165, 167-173 (1948).** The Issues in Controversy set forth so early in these proceedings clearly contemplate situations inconsistent with the antitrust laws resulting from monopolization and combinations or conspiracies to monopolize and the relevant market is postulated to be the combined CCCT territories.

(4) Applicants' request for procedural relief was filed on the very eve of hearing. It was apparent that the most immediate

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* See Tr. p. 1448, l. 9-10 for further illustration that Applicants misunderstood the applicability of Section 2 to joint monopolization of a relevant market.

** "In this connection there is a suggestion that one result of the conspiracy was a geographical division of territory among the five majors. We mention it not to intimate that it is true but only to indicate the appropriate extent of the inquiry concerning the effect of the conspiracy in theatre ownership by the five majors." 334 U.S. at 172 under discussion of monopoly.

consequence of our failure to grant the requested relief pending more comprehensive consideration would be that each Applicant's individual counsel might have to remain in attendance in order to guard against allegations of anticompetitive conduct which could be imputed to his particular client. See Tr. p. 1454-55. In light of our preliminary determination that the request lacked merit, this consequence did not seem so burdensome as to require deferral of hearings pending further review of the question by the Board. Indeed, although we were sensitive to the considerable expense which some Applicants apparently intended to incur by having individual counsel as well as group counsel present during the course of the hearings, this expense pales in comparison to the expenses attendant upon delay in completing these proceedings. Applicants have impressed upon us the need for expedition not only because of the necessity of meeting future power needs in the CCCT area but because construction costs for these units continue to increase on an almost daily basis. Thus, even in the event the Board were to have agreed with Applicants upon mature consideration of their request, Applicants would be far less prejudiced by having the hearings commence promptly with having multiple counsel in attendance than by having the hearings postponed. With that consideration in mind, we commenced hearings on December 8, 1975.

In the interval between the commencement of hearings and the issuance of this decision, the Board has had an opportunity to

observe the trial procedures adopted by Applicants and we are able from actual experience to understand the degree to which participation by multiple counsel is necessary or has been utilized by the various parties. With respect to fact witnesses, we have permitted counsel for each Applicant to question the witness, but multiple examination has not proved necessary for many of these witnesses. To the extent that more than one Applicant has questions for a witness, there nonetheless has been opportunity to consolidate this questioning among two or more counsel.* Further, we have observed that Applicants' counsel are able to make a fair evaluation of the necessity of attending the testimony of any given witness. In fact, counsel for certain Applicants have not been present for substantial portions of the hearings.

We also have observed that at the completion of its case, the Staff had adhered substantially to the outline presented in its Statement of the Nature of the Case and in its Trial Brief. Thus, we are unable to ascertain any basis for Applicants to claim that they were surprised or were uninformed as to the nature of the evidence introduced. Moreover, we have before us now the CAPCO memorandum of understanding which, in its implementation, all parties charge to be a basis of joint, concerted, anticompetitive

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* We have, of course, inherent authority to prevent duplicative and repititious cross-examination. 10 CFR Section 2.718(e); Section 2.757(b)(c)(d).

conduct. Also, we now have before us evidence of what the Staff asserts to be the exercise of joint market power in the relevant markets designated by the Staff. Finally, understanding as they must the other parties' contentions that the CAPCO group from its outset had substantial market power and that that market power was exercised by members of the group in an anticompetitive fashion, sufficient notice has been provided as to the other parties' basis for charging that the conduct of one Applicant can be chargeable against other CAPCO members dedicated to the alleged exclusionary objectives of the group.

In conclusion, we hold:

(1) That it is Applicants alone who seek to characterize the case being made against them as essentially one of "conspiracy." This error originated as early as telephone conference call of November 14, 1975.* The Board, however, immediately corrected Applicants in their misapprehension that the Board made any characterization as to the nature of these proceedings.**

(2) To the extent that "conspiracy" has been singled out as an element in the "situation" alleged in these proceedings, Applicants have received more than adequate notice of what acts and practices other parties contend contributed to the conspiracy

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* "He [the Chairman] added that this proceeding involves a joint applicant for a nuclear facility [and it therefore was a general conspiracy case], . . ."

** Correction dated November 19, 1975 to minutes of conference call of November 14, 1975.

and the circumstances surrounding the formation of the conspiracy.

(3) Our conclusions with respect to the adequacy of notice have been borne out by our observations of the conduct of these proceedings during the first several weeks thereof.

(4) Applicants are in error as a matter of law with respect to a substantial portion of the argument they presented in support of the relief they request. The errors of law are so fundamental and so extensive with respect to contentions of essential similarity between "conspiracy" and all other forms of joint action or restraints of trade, and "conspiracy" and monopolization or combinations to monopolize as to render prolonged discussion unrewarding and unnecessary. See citations in Section 3, infra.

For all the foregoing grounds, Applicants' Motion is hereby denied.

ATOMIC SAFETY AND LICENSING BOARD

John M. Frysiak, Member

Ivan W. Smith, Member

Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 9th day of February 1976.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
9th day of Feb 1976.

Peggy A. Downing
Office of the Secretary of the Commission

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NUCLEAR REGULATORY COMMISSION

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

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