February 25, 1976

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal 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' MOTION REQUESTING THE APPEAL BOARD TO DIRECT CERTIFICATION TO IT OF "MEMORANDUM AND ORDER OF THE BOARD WITH RESPECT TO APPLICANTS' REQUEST FOR CERTAIN PROCEDURAL RULINGS"

1. Pursuant to Section 2.718(i) of the Commission's Rules of Practice, 10 C.F.R. §2.718(i), Applicants respectfully move the Appeal Board to direct the Licensing Board to certify for review its decision in "Memorandum and Order of the Board with Respect to Applicants' Request for Certain Procedural Rulings," filed February 9, 1976. Applicants believe that the Licensing Board's Order contains numerous and significant errors of law, which, if allowed to stand, will not only be prejudicial to Applicants throughout the evidentiary

hearing, but also will be detrimental to the public interest, cause needless delay in the licensing of five nuclear power plants and result in unnecessary expense to the Applicants and the Commission.

2. On November 25, 1975, "Applicants' Statement of Procedural Matters to be Considered" was filed with the Licensing Board. That Statement requested certain specific rulings from the Licensing Board governing the manner in which evidence was to be received in the forthcoming antitrust hearings. Applicants' Statement was a clarification and amplification of an oral request made by Applicants' counsel during a conference call initiated by the Chairman of the Licensing Board on November 14, 1975. The Licensing Board heard oral argument on the request during the Eighth Prehearing Conference held on November 26, 1975. See Tr. 1437-1473. The NRC Staff, the Department of Justice, and the City of Cleveland filed separate written responses to Applicants' Statement on December 3, 1975. At the first day of hearing on December 8, 1975, the Licensing Board indicated that Applicants' request would "probably be denied, but [Applicants would] have to await [the Board's] opinion for a more explicit and express statements of the reasons therefore." Tr. 1507. On February 9, 1976, more than two months later and after 20 days of hearing during which time the

Staff had completed the presentation of its direct case, Applicants were finally apprised of the Licensing Board's position on the evidentiary question and learned for the first time of the basis for the unfavorable ruling.

3. The ruling requested by Applicants in their November 25 Statement was that "the other parties specify, both with respect to their documentary and testimonial evidence, which Applicant(s) the evidence was directed against * * * ." Statement at ¶1. As the Licensing Board correctly points out, this request was premised on "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." Statement at ¶2. As is discussed in greater detail below (see ¶¶ 11-24 infra), the Licensing Board's rejection of Applicants' requested procedural ruling demonstrates such a basic misunderstanding of Applicants' position and the applicable legal principles that control in such circumstances that the matter plainly deserves the immediate attention of the Appeal Board. The issue is a fundamental one which will certainly reoccur with increasing frequency in proceedings of this sort in the future. In view of the clear error committed by the Licensing Board and the

substantial impact that the challenged ruling is bound to have on the entire antitrust hearing process, we respectfully submit that there is more than sufficient justification for a direction to the Licensing Board to certify the question under Section 2.718(i).

4. The recognized fact that the Board's determination is by nature interlocutory provides no impediment to certification. Indeed, the review procedure under Section 2.718(i) is specifically designed to permit, as a discretionary matter, appellate consideration of just such interlocutory rulings in appropriate cases. See Toledo Edison Co. (Davis-Besse Nuclear Power Station) and Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-300, NRCI-75/11, 752, 759 (November 26, 1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2, ALAB-271, NRCI-75/5, 478, 482-83 (May 21, 1975). The standard for determining appropriatness depends essentially on whether Appeal Board intervention is necessary "to prevent detriment to the public interest or to avoid unnecessary delay or expense." Id. In this Board's Toledo Edison decision, supra, certification of the Special Master question was deemed appropriate because the issue presented was previously undecided, was likely to arise again, and was of such a character as to possibly require a new hearing if later determined to be

improper. Those same three factors are present in this instance and argue with equal force in favor of a direction for certification here.

5. In this regard, we point out initially that the Davis-Besse and Perry consolidated case is the first antitrust proceeding involving a joint application to reach the hearing stage. Allegations have been made by three separate parties that the Applicants, both in their individual capacities and in their collective capacity, have engaged in practices which, when bundled together, demonstrate a situation inconsistent with the antitrust laws. The issue presented to the Licensing Board at the outset of the hearing by Applicants' requested procedural ruling is how evidence is to be received against the various Applicants in the face of such charges. This is a question of first impression before the Commission; its resolution will undoubtedly have a direct impact on all future antitrust proceedings involving more than one applicant -- which, given the economics of nuclear energy generation, could well mean all future antitrust proceedings under Section 105c. Compare Kansas Gas & Electric Co. and Kansas City Power & Light Co. (Wolf Creek Generating Station, Unit 1) Docket No. 50-482A.

6. Of equal importance to the certification decision is the fact that the misunderstandings and errors of

law committed by the Licensing Board in turning down Applicants' requested ruling make it likely that, if the hearing is permitted to go its full course in the present posture, a new hearing will ultimately have to be conducted within a proper procedural framework for receiving evidence. Applicants already have suffered prejudice from the Licensing Board's ruling, are presently being prejudiced by the ruling, and most certainly will continue to be prejudiced as long as the ruling is permitted to stand. Immediate review by this Appeal Board is therefore essential, not only to assure that Applicants receive fair treatment, but also to protect the public against the expense and waste of a long hearing conducted without adequate procedural safeguards.

7. The past and present prejudice suffered by Applicants is amply demonstrated by the lengths to which the Licensing Board has recently gone to brush aside Applicants' concern over the introduction of evidence (which on its face is directed only at one of them) as against all Applicants even though no independent showing has yet been made of any conspiracy, combination or contract among Applicants in restraint of trade. So as to preserve their position on the record with regard to their requested procedural ruling, Applicants have throughout the hearing made what has come to be called the "continuing objection" on behalf of those Applicants as

to which the particular evidence being introduced has no relationship. See Tr. 1575-77. The reasons for the continuing objection are those stated in the Applicants' November 25 Statement and raised before this Appeal Board on review. Compare Tr. 1564-65.

8. In response to a continuing objection made by Applicants' counsel on February 11, 1976, the Chairman of the Licensing Board inquired further as to the basis for the objection. Tr. 4798. In pursuing this inquiry the Licensing Board sua sponte articulated its own "agency theory" as a basis for letting in all the evidence against all the Applicants -- a theory which, surprisingly, it formulated after taking "a look at some things that have been submitted to the Board which have not been introduced into evidence, but which have come to our attention" Tr. 4802-03 (emphasis added).[1/] See also Tr. 4836-39 where the Board again referred to documents not part of the record. And the Board's penchant for going outside the record to rule on Applicants' "continuing objection" again surfaced at Tr. 5335-5336. No other party has even suggested that an agency relationship existed among

---

1/ Aside from the impropriety of looking to material outside the record, Applicants also take exception to the inference the Licensing Board was attempting to draw. In the Licensing Board's mind the extra-record material raised an inference that an employee of one of the Applicants was acting as an "agent" for all the Applicants and this somehow was indicative of unlawful collective action. Applicants completely deny that the extra-record material in any way supports that inference. But even if that were not so, as a matter of law, the establishment of an agency relationship is not conclusive of any unlawful activity under the antitrust laws. See, e.g., Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635 (9th Cir. 1969.

Applicants, and, indeed, the Department of Justice explicitly declined the Board's invitation to adopt such a theory. Tr. 5100-01.

9. The Board's references to material outside the record as a basis for sustaining its procedural ruling were particularly disturbing since the suggestion was made by the Board that such material provided a basis for the Board to question the "candor" of Applicants' position on the evidentiary procedural issue and prompted the Board to characterize that position as being "frivolous" and "quibbling." See Tr. 4802. Overreaching in such fashion is plainly unfair and prejudicial to Applicants. It can hardly be disputed that references to material not yet in evidence contravenes not only the requirements of the Administrative Procedure Act (see §§ 5(b); 7(d) & 8, 5 U.S.C. §§ 554(c)(2); 556(e) & 557 (1970)), but also that that such action is outside the proper limits of the Licensing Board's authority under the Commission's Rules of Practice. See Section 2.760(c), 10 C.F.R. §2.760(c). Unless this Appeal Board reviews the matters presented by the present motion now and articulates for the Licensing Board the proper procedures for receiving evidence against co-defendants in an antitrust proceeding under Sections 1 and 2 of the Sherman Act, the prejudice which Applicants are presently experiencing by the manner in which the Licensing Board overrules the "continuing objection" and cavalierly allows any and all evidence to come in against all Applicants -- without the slightest regard for

whether there can ever be established any unlawful concerted action among the companies -- is bound to continue.

10. The unfair impact on the hearing process that will inevitably result in the present circumstances was explained succinctly in the footnote at the bottom of page 6 of Applicants' November 25 Statement.

> [T]he 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. [Emphasis in original.]

Any antitrust proceeding is complicated; the present case, however, is more complex than most. To begin with there are three different charging parties who are putting forth three distinct direct cases. As is evident from their prehearing briefs, the legal theories each intends to advance differ in certain material respects. Nevertheless, all three opposing parties have indicated that they intend to rely on some evidence introduced during the case-in-chief of the other charging parties. On the Applicants' side there are five different parties, each of whom will present an independent affirmative case. There will presumably thereafter be afforded

to all parties a limited opportunity for the introduction of rebuttal evidence.

11. In this context, Applicants cannot help but conclude that, unless evidence is properly segregated at the time it is introduced, innocent parties are likely to be tarred in a "guilt-by-association" manner. It will, moreover, be next to impossible for the Licensing Board, at the close of such a jumbled record, to discern what evidence is probative of what activity by which Applicant. As matters now stand, an isolated transaction between one Applicant and its municipal customer, for example, which might have taken place some 10 years ago is being accepted into evidence against all other Applicants who are hearing of the matter for the first time. To sort out such a record at the end of the proceeding would take many long months -- if, indeed, it could be done at all -- thus resulting in an inordinate delay and expense which holds out no promise of arriving at a correct result. Applicants' proposed procedure would eliminate such unnecessary confusion without in any way suggesting a reduction in the amount or type of evidence that the other parties might wish to introduce.

11. The Licensing Board's rejection of the alternative procedure proposed is based on unsound logic which evidences an obvious misunderstanding of the procedural ruling

requested by Applicants. It is clearly not Applicants' desire "to cast this proceeding in terms of an attempt on behalf of the other parties to establish that Applicants engaged in an illegal 'conspiracy'", as the Licensing Board seems to suggest. See Memorandum and Order at 1-2.[2/] It hardly need be stated that Applicants will gladly accept a finding by the Board at any time that no charge of conspiracy is in this case. If that is the Licensing Board's present evaluation of the allegations, however, then Applicants are at a loss to understand why there is any opposition to the procedural ruling they requested. In such circumstances, the evidence introduced would necessarily relate only to the Applicant(s) against whom it is specifically directed, and not to any others.

12. The cause for confusion apparently arises from the fact that the Licensing Board, while not persuaded that a conspiracy has been alleged, concluded that the NRC Staff had made an allegation that Applicants had and are still engaged in concerted or collective action in the form of a combination or otherwise. See Order at 6-9; "Answer of NRC Staff to 'Applicants' Statement of Procedural Matters to be Considered'" at 2-4. This game of attaching different

---

2/ The Departmtne of Justice seems in accord with Applicants on this point. See "Response Of The Department Of Justice To Applicants' Statement Of Procedural Matters To Be Considered," at p. 2.

labels, however, changes only the form of the arrangement under scrutiny; it does not alter the legal rule controlling the receipt of evidence. In each case, the rationale of the decisions cited by Applicants in their November 25 Statement regarding which co-defendants the evidence comes in against (see p. 2; 5-7) has equal application to any form of concerted action, be it a contract, combination, or conspiracy.

13. The short of the matter is that if a party charges (a) that an individual Applicant is guilty of violating Section 1 of the Sherman Act by contracting, combining, or conspiring with a non-Applicant, evidence in support of that charge should ipse dixit come in against that Applicant alone; (b) that all Applicants are guilty of violating Section 1 of the Sherman Act by contracting, combining, or conspiring among themselves, evidence in support of that charge should come in against each individual Applicant who can be shown by the particular evidence in question to have participated in the challenged action, but no others, subject to the right of the introducing party later to move for the admission of the evidence against all other Applicants who had not initially been liked directly to the evidence once the allegation of unlawful contract, combination, or conspiracy among all Applicants is independently established; (c) that an individual Applicant is

guilty of violating Section 2 of the Sherman Act by actual monopolization or by attempting to monopolize trade or commerce, such evidence should come in against that Applicant alone; or (d) that all Applicants are guilty of violating Section 2 of the Sherman Act by actual monopolization through combination or conspiracy among themselves or by combining or conspiring among themselves to monopolize trade or commerce, such evidence should come in as described in part (b) above. The law plainly requires these procedures, and the Licensing Board's rejection of Applicants' request that they be followed in the present proceeding is clear error.

14. Section 1 of the Sherman Act, 15 U.S.C. §1 (1970), declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade * * * ." Because the Licensing Board attached significance to the formalistic differences between a conspiracy and a combination for purposes of the present procedural ruling, it faulted Applicants' proposal as being apposite only in criminal conspiracy cases but inapposite to allegations of combination in an NRC antitrust proceeding. See Order at 6-9; 13. This argument is ill-conceived. The touchstone for finding a Section 1 violation is concerted activity, which has been broadly defined to be "an agreement between

the parties, but the agreement can be tacit as well as express." Moore v. Jas. H. Matthews & Co., 473 F.2d 328, 330 (9th Cir. 1973), citing Theatre Enterprises v. Paramount Film Distributing Corp., 346 U. S. 537 (1954). To the extent that the cases cited by the Licensing Board at page 7, and at the footnote on the bottom of page 6 of their Memorandum and Order, are meant simply to stand for the proposition that the concept of a tacit understanding is within the scope of Section 1 prohibited concerted activity, Applicants have no real quarrel with the Licensing Board. But if the Licensing Board means more, if its citation to American Tobacco and Paramoun' es, for example, is meant to imply that a tacit agreement is somehow beyond the scope of what Applicants generically refer to as a Section 1 conspiracy in their November 25 Statement, then Applicants must take issue, for those cases stand for no such proposition.

15. Admittedly, concerted activity can take many forms. Conspiracy as that term is used in Section 1 is typically defined to be:

> a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means * * * . Lamb Enterprises Inc. v. Toledo Blade Co., 461 F.2d 506, 518 (6th Cir. 1972) (private antitrust action).

See also United States v. Addyston Pipe & Steel Co., 85 F. 271, 293 (6th Cir. 1898), aff'd, 175 U. S. 211 (1899); Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465 (1921); United States v. National Retail Lumber Dealers Ass'n, 40 F. Supp. 448, 456 (D. Colo. 1941); United States v. Hutcheson, 32 F. Supp. 600, 602 (E.D. Mo. 1940). In comparison, a combination is more simply defined as a union of two or more persons, the underlying connection being a contract or agreement. See Union Pacific Coal Co. v. United States, 173 F. 737 (8th Cir. 1909); Kintner, An Antitrust Primer 27 (1964). But in both cases the common denominator is the underlying agreement and purpose to act in concert.

16. That the courts have used and continue to use the concepts of conspiracy and combination interchangeably is clear by a simple perusal of Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U. S. 207 (1945). See Order at 7. In that case Mr. Justice Black, writing for a unanimous court, characterized the plaintiff's claim to be that the defendants "have conspired to restrain and monopolize commerce in violation of §§ 1 and 2 of the Sherman Act * * *" (359 U.S. at 208), and in particular "have conspired among themselves and with Broadway-Hale * * * ." Id. at 209 (emphasis added). Yet later in the opinion, Mr. Justice Black summarized plaintiff's complaint to contain an allegation of " a wide combination

consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom * * * ." Id. at 212-13 (emphasis added).

17. The Licensing Board's reliance on United States v. Parke, Davis & Co., 362 U. S. 29 (1960), to suggest that the manner in which the particular arrangement is characterized might make a difference in the present context is clearly misplaced. See Order at 7. That case, and the line of cases specifically relied on by the Supreme Court in its Parke, Davis decision, merely stand for the proposition that there is actionable concerted activity made out under Section 1 of the Sherman Act if the principal actor secures the cooperation of others by coercion. In Parke, Davis the Court interpreted its prior decision in Beech-Nut to hold

> that the nonexistence of contracts covering the practices was irrelevant since "[t]he specific facts found show suppression of the freedom of competition by methods in which the Company secures the co-operation of its distributors and customers, which are quite as effectual as agreements expressed or implied intended to accomplish the same purpose." [FTC v. Beech-Nut Packing Co., 257 U. S. 441, 455 (1922)]. 362 U.S. at 41.

See also Albrecht v. Herald Co., 390 U. S. 145, 149 (1968) ("combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination").

The fact that the Court chose in that context to label such concerted activity a combination and not a conspiracy, however, is immaterial to a resolution of the procedural matter which Applicants are raising here regarding the receipt of evidence in this proceeding. The basis of the requested procedural ruling is that until concerted activity among the Applicants is established -- whatever form that concerted activity is claimed to have taken -- the evidence introduced by the charging party should be admitted only against the Applicant who is directly implicated by the testimony or document, and not against any others.

18. For the Licensing Board even to suggest that Parke, Davis somehow argues against such a result is particularly unpersuasive in light of the fact that here there has never been any allegation that the Applicants have conspired or combined among themselves in a manner declared unlawful by Parke, Davis or its progeny. Such a charge would have to take the form of asserting that one or more Applicants secured the cooperation of one or more additional Applicants for an unlawful purpose or for unlawful activity through coercive methods. None of the charging parties has indicated that it will attempt to make such a showing. Moreover, even if such activity had been alleged, the whole theory of Applicants' requested procedural ruling is that evidence directed to such

an allegation come in against only one Applicant until the combination by coercion is independently established. Nothing in Parke, Davis quarrels with such an approach.

19. The Licensing Board, however, has reached a contrary conclusion prmarily in reliance on the erroneous assumption that Applicants' request for a procedural ruling is bottomed on what the Board chooses to refer to as "criminal law" conspiracy cases. See Order at 6. This is a hollow basis for denying Applicants' request. It can hardly be disputed that if criminal proceedings require such procedures to protect against "a hodgepodge of acts and statements by others which [the defendant] may never have authorized or intended or even known about," Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion), similar protection is equally necessary in a civil antitrust suit or an NRC antitrust proceeding. See Flintkote Co. v. Lysfjord, 246 F.2d 368, 378 n.4 (9th Cir. 1957) (Mr. Justice Jackson's conclusions in Krulewitch "are every bit as applicable to a defendant charged with an antitrust violation in a civil private treble damage action.") And a quick look at civil antitrust proceedings finds that such procedures are routinely required by the courts. In Standard Oil Co. v. Moore, 251 F.2d 188 (9th Cir. 1957) (private antitrust action), the court held:

> [E]vidence concerning the acts and extrajudicial declarations of one member of an asserted agreement,

> combination, or conspiracy are not to be considered as against other alleged members unless there is independent evidence establishing, prima facie, that such others were members of the conspiracy. Id. at 218-19 [emphasis added].

See also South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 788 (6th Cir. 1970) (private antitrust action; while not necessary to totally exclude such evidence it should be admitted conditionally); Flintkote Co. v. Lysfjord, 246 F.2d 368, 378-79 (9th Cir. 1957) (private antitrust action; permissible "to allow evidence to be introduced, subject to its being connected up at a later time"); Pennington v. United Mine Workers of America, 325 F.2d 804, 817 (6th Cir. 1963) rev'd on other grounds, 381 U.S. 657 (1965) (cross-claim for antitrust violation; "no error in admitting the statements before presenting a prima facie case of alleged conspiracy, provided that the admission in evidence is conditional upon such proof of the conspiracy being later introduced"); Viking Theatre Corp. v. Paramount Film Distributing Corp., 1961 Trade Cas. ¶70,051, at 78,214 (E.D. Pa. 1960), aff'd, 320 F.2d 285 (3d Cir. 1963) (private antitrust action; evidence will be admitted, but "will, of course, be tentative and entirely conditional upon the requirements for vicarious admissions of this sort being shown at the earliest time reasonably possible thereafter"); cf. United States v.

Aeroquip Corp., 284 F. Supp. 114, 115 (E.D. Mich. 1968) (criminal antitrust action; decision on motion "to connect all evidence as to all defendants which the court has heretofore admitted as to various defendants only").

20. Not only did the Licensing Board fail to take into account these many precedents (in addition to criminal conspiracy cases) which fully support Applicants' position; it also refused to accept that the procedural rule announced in those cases could in proper circumstances be applied in the context of a claim of unlawful monopolization. See Order at 8-9. This is plainly erroneous. Under Section 2 of the Sherman Act, in addition to the offense of unilateral monopoly where Applicants' requested procedural ruling is clearly applicable, there are two distinct offenses included within the concept of a joint monopoly, each with separate and distinct elements necessary to support the charge. It is unclear which of the two offenses the Licensing Board had in mind from a reading of its cryptic discussion regarding the monopoly allegation; but in either event, the procedural ruling requested by Applicants would be fully applicable.

21. If, for example, the Licensing Board's reference to joint monopoly was intended to relate to the offense of actual monopolization by conspiracy or combination, it almost goes without stating that the contemplated situation

is one which requires an application of Applicants' requested procedural ruling. To establish such a charge it is necessary to prove the elements for monopolization, i.e., monopoly power and either exercise of that power or acquisition of that power unlawfully, plus the extra element of collective action, i.e., "the existence of a combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent." American Tobacco Co. v. United States, 328 U.S. 781, 785-86 (1946); United States v. Chas. Pfizer & Co., 217 F. Supp. 199, 203 (S.D.N.Y. 1963) (where defendants are charged collectively with actual monopolization, the charge must be supported by an allegation of unanimity of action). Thus, the charge of actual monopolization by conspiracy or combination, unlike the other conspiracy prohibitions of the Sherman Act, requires proof of an underlying illegal act (i.e., monopolization) as well as proof of the conspiracy. In short, it is not the conspiracy alone that is declared illegal in this context; there must also be separate proof of the substantive offense. It is difficult to imagine a more appropriate situation for adherence to the procedure urged here by Applicants which would permit evidence of monopolization by one Applicant to come in against that Applicant alone, but not against any other Applicant unless and until the requisite unlawful conspiracy or combination is first

independently established. The law supports such a result, notions of fundamental fairness to all participants in the hearing favor proceeding in this manner, and the practicalities of developing a manageable record on which meaningful findings can ultimately be based sustain the same position. The Licensing Board's casual dismissal of Applicants' proposal without giving these considerations the kind of careful attention they deserve aptly demonstrates how completely the Board failed to appreciate the nature and significance of the matter before it. Review by this Appeal Board through the vehicle of a direction of certification is therefore fully warranted in this instance.

22. Nor would there be any less reason to direct certification if the Licensing Board's reference to the joint monopoly situation were taken to mean the second offense alluded to above, i.e., that of "combin[ing] or conspir[ing] with any other person or persons, to monopolize * * * commerce." It should be noted in passing that Applicants seriously doubt that the Licensing Board intended its discussion to be so interpreted, since the Board's remarks in this area were directed only to monopoly allegations which were within the "Issues in Controversy" (Order at 9). Not insignificantly, neither the "Issues in Controversy", nor the charging parties' September 5 filings setting forth the nature of the cases to

be presented, nor their prehearing briefs, include such an allegation. Combining or conspiring to monopolize is an "attempt" crime. It requires an unsuccessful attempt to achieve monopoly power, a specific intent to monopolize, and concerted activity by two or more people. See generally Schoenberg Farms, Inc. v. Denver Milk Products, Inc., 231 F. Supp. 266 (D. Colo. 1964). Not only has no party given any indication that it intends to make such a showing, but, indeed, the Department of Justice has explicitly disavowed any such theory as part of its case, stating during oral argument on this point:

> MR. CHARNO: As I said, we do not consider that a conspiracy to monopolize, but rather a group boycott.
>
> In other words, it would be a Section 1 violation rather than a Section 2 violation. There are separate aspects of monopolization that each of them [the Applicants] engage in, which we don't believe should be carried over and above any impact upon the other members. Tr. 1466.

23. Even assuming that such a charge of combining or conspiring to monopolize was a proper matter for litigation in this proceeding, however, the fact remains that Applicants' requested procedural ruling would be as appropos in that context as in the other monopoly situation already discussed. From a procedural point of view, the Section 2 charge of attempt to monopolize by combination or conspiracy is analogous to the Section 1 charge. Not until unlawful collection action

is shown is there any basis for admitting into evidence against all Applicants the acts and statements of a single Applicant. This is particularly true when an attempt crime is being alleged because in such situations the evidence is likely to be more circumstantial than might otherwise be the case.

24. For all of these reasons, Applicants submit that prompt review by the Appeal Board of the Licensing Board's erroneous treatment of the requested procedural ruling on this fundamental evidentiary question is imperative. We would only add that the actual and potential prejudice to Applicants is not, as the Licensing Board seems to suggest, tied in any significant way to the question of what advance notice Applicants may or may not have received of the charges against them.[3/] See Order at 5-6; 11; 12. To analyze the matter on such terms misses the mark entirely. The issue here is not whether Applicants have been informed of the charges in a timely manner, but whether

---

3/ While Applicants have in the past taken exception to the limited notice they have received during this proceeding of the charges being alleged against them by the other side, that contention is clearly not the basis for Applicants' requested procedural ruling. At some appropriate time in the future Applicants anticipate putting the entire notice question before the Appeal Board, but for present purposes Applicants' reference to the "inadequate notice of charges" is made only for the limited purpose of demonstrating the very practical difficulties confronting Applicants in the hearing in trying to evaluate and object to evidence now being received against all of them, without ever being informed of the nature or type of concerted activity under scrutiny, when it is alleged to have commenced, who the alleged participants were and what sorts of conduct are thought to be in furtherance thereof.

the evidence introduced is sufficiently probative of concerted activity to make a prima facie showing of when the unlawful conspiracy or combination commenced, what the purposes of the alleged conspiracy or combination were, and which acts of which Applicants independently establish that Applicant's complicity in the conspiracy or combination. In the absence of an independent showing of this sort, Applicants submit that the Licensing Board is in error in permitting evidence of individual acts by one Applicant to be admitted indiscriminately against all Applicants. Thus far, there is insufficient evidence of record to sustain a finding of prima facie concerted activity. Ncr do Applicants read the Licensing Board's Order at pages 11-12 as any indication that the Board is of the opinion that the NRC Staff has made a showing as to the date, purposes, or independent acts of each Applicant sufficient to support the conclusion of unlawful collective or concerted activity among Applicants. It is precisely because the present proceeding is in such a posture that the procedure requested by Applicants should be followed.

25. Applicants find little to be encouraged about in the Licensing Board's Memorandum and Order. In almost every respect the Licensing Board either misunderstood Applicants' position or committed an error of law. It had been hoped and expected that the Licensing Board would take greater

care in disposing of this question than is reflected in its abrupt dismissal of the matter with the sweeping statement that "prolonged discussion" would be "unrewarding and unnnecessary." See Order at 13. Applicants now believe that they have no other recourse but to ask that this Appeal Board direct certification of the Licensing Board decision and give the matter the immediate considered attention that it plainly deserves, both to avoid irrevocable prejudice to Applicants, and to remove the risk of a possible duplicative hearing under proper procedures sometime in the future.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____

Wm. Bradford Reynolds
Gerald Charnoff
Robert E. Zahler

Counsel for Applicants

Dated: February 25, 1976.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal 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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion Requesting The Appeal Board To Direct Certification To It Of 'Memorandum And Order Of The Board With Respect To Applicants' Request For Certain Procedural Rulings'" 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 February, 1976.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal 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

SERVICE LIST

Alan S. Rosenthal, Esq.
Chairman, Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Michael C. Farrar, Esq.
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Richard S. Salzman, Esq.
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Alan P. Buchmann, Esq.
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

Douglas V. Rigler, Esq.
Chairman, Atomic Safety and Licensing Board
Foley, Lardner, Hollabaugh and Jacobs
Chanin Building - Suite 206
815 Connecticut Avenue, N.W.
Washington, D. C. 20006

Ivan W. Smith, Esq.
Atomic Safety and Licensing Board Pane
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

John M. Frysiak, Esq.
Atomic Safety and Licensing Board Pane
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board Pane
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20006

Benjamin H. Vogler, Esq.
Roy P. Lessy, Jr., Esq.
Jack R. Goldberg, Esq.
Office of the Executive
Legal Director
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Joseph J. Saunders, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

Steven M. Charno, Esq.
Melvin G. Berger, Esq.
Janet R. Urban, Esq.
Antitrust Division
Department of Justice
P. O. Box 7513
Washington, D. C. 20044

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
Goldberg, Fieldman & Hjelmfelt
Suite 550
1700 Pennsylvania Ave., NW
Washington, D. C. 20006

James B. Davis, Esq.
Director of Law
Robert D. Hart, Esq.
1st Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

Frank R. Clokey, Esq.
Special Assistant
Attorney General
Room 219
Towne House Apartments
Harrisburg, PA 17105

Donald H. Hauser, Esq.
Victor A. Greenslade, Jr., Esq.
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Russell J. Spetrino, Esq.
Thomas A. Kayuha, Esq.
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

Leslie Henry, Esq.
Michael M. Briley, Esq.
Roger P. Klee, Esq.
Paul M. Smart, Esq.
Fuller, Henry, Hodge & Snyder
P. O. Box 2088
Toledo, Ohio 43603

Terence H. Benbow, Esq.
A. Edward Grashof, Esq.
Steven A. Berger, Esq.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, PA 15219

David Olds, Esq.
William S. Lerach, Esq.
Reed Smith Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, PA 15230

Lee A. Rau, Esq.
Joseph A. Rieser, Jr., Esq.
Reed Smith Shaw & McClay
Madison Buidling - Rm. 404
1155 15th Street, N.W.
Washington, D. C. 20005

Edward A. Matto, Esq.
Richard M. Firestone, Esq.
Karen H. Adkins, Esq.
Antitrust Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43215

Christopher R. Schraff, Esq.
Assistant Attorney General
Environmental Law Section
361 E. Broad Street, 8th Floor
Columbus, Ohio 43215

James R. Edgerly, Esq.
Secretary and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, PA 16103

John Lansdale, Esq.
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D. C. 20036