

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Michael C. Farrar, Member
Richard S. Salzman, Member



In the Matter of

THE TOLEDO EDISON COMPANY, et al.

(Davis-Besse Nuclear Power Station,
Unit 1)

Docket No. 50-346A

Messrs. Gerald Charnoff and Wm. Bradford Reynolds,
Washington, D. C., for the applicants, The Toledo
Edison Company, et al.

MEMORANDUM AND ORDER

November 5, 1975

(ALAB - 297)

Yesterday, the applicants filed a motion with the Licensing Board seeking an affirmative determination that Unit 1 of the Davis-Besse facility may be licensed for operation prior to the completion of this on-going anti-trust proceeding.^{1/} In the alternative, the Licensing

^{1/} Construction of this plant has been allowed to continue, notwithstanding the pendency of an antitrust review, pursuant to the "grandfather" clause in the antitrust provisions of the Atomic Energy Act. Section 105c(8), 42 U.S.C. 2135(c)(8). The question which the applicants wish to have resolved is whether operation is similarly "grandfathered" should the plant be ready before the anti-trust proceeding has been completed (according to the applicants, a contingency not unlikely to materialize).

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Board was asked to certify promptly the question to us for decision.

Simultaneously with the filing of that motion, the applicants moved before us for an immediate direction to the Licensing Board to certify the question. The provisions of 10 CFR 2.718(i), as well as our decision in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, NRCI-75/5 478 (May 21, 1975), were invoked. Section 2.718(i) expressly authorizes the Commission, and thus this Board as its delegate, to direct certification of a question raised in a proceeding still pending before a licensing board. In ALAB-271, we expressly held that a party to the proceeding is entitled to request us to exercise that authority. NRCI-75/5 at 482-83. See also our prior memorandum and order in this case, ALAB-290, NRCI-75/9 ____ (September 19, 1975); Seabrook, supra, ALAB-295, NRCI-75/10 ____ (October 28, 1975).^{2/}

Although there thus can be no doubt respecting our power to grant the relief sought of us by the applicants, we nonetheless believe it would be inappropriate to direct certification at this time. There may well be merit to

^{2/} In asking for a certification direction, applicants also referred to 10 CFR 2.785(d). That section is concerned, however, with the certification of questions by an appeal board to the Commission. It is, therefore, inapposite here.

the applicants' insistence that the question which they have raised is worthy of definitive resolution at an early date; indeed by its very nature the question obviously must be decided at an interlocutory stage of the antitrust proceeding or not at all. But it has not been satisfactorily explained to us why we must step in before the Licensing Board has passed upon the question (after having first obtained the views of the other litigants).

As observed in Seabrook, ALAB-271, supra, "if at all, the need to reach down for an issue is more likely to surface after, and not before, the Licensing Board has itself spoken on the issue." NRCI-75/5 at 482. That observation fully applies here. For one thing, upon its own examination of the question the Licensing Board may decide it in the applicants' favor; if this should come to pass, the applicants will no longer require our intervention (although, to be sure, some other party to the proceeding might then wish us to invoke our certification jurisdiction). And should the Licensing Board instead reject the applicants' position that completion of the antitrust review is not an absolute condition precedent to the issuance of an operating license for the Davis-Besse facility, we would have the

benefit of that Board's reasoning in making our own determination (1) whether there is sufficient warrant for our stepping into the controversy; and (2) if so, what answer should be given by us to the question.

In short, as a general rule we will not avail ourselves of our Section 2.718(i) certification authority unless and until the Licensing Board has been afforded at least a reasonable opportunity to decide itself the question sought to be certified. An exception to that rule will be made only in the most compelling circumstances (such as the presence of an emergency situation giving rise to a manifest need for an almost immediate final determination of the question). Perceiving the existence of no such circumstances in the present case, we deny the certification request as premature. It may, of course, be later renewed in the event that the Licensing Board (1) rules against the applicants on the merits of the question raised by their motion now pending before that Board; and (2) then declines to refer that ruling to us under 10 CFR 2.730(f). In this connection, we assume that the Licensing Board will render its ruling as soon as practicable following its receipt of the responses of the other parties to the applicants' motion.

Motion to direct certification denied without prejudice
to its renewal in accordance with the terms of this order.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo

Margaret E. Du Flo
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

THE TOLEDO EDISON COMPANY, ET AL.)

CLEVELAND ELECTRIC ILLUMINATING)

COMPANY)

(Davis-Besse Nuclear Power)

Station, Unit No. 1; Perry)

Nuclear Power Plant, Units 1&2))

Docket No.(s) 50-346A

50-440A

50-441A

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

6th day of July 1975.

Regina A. Durkin
Office of the Secretary of the Commission

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NUCLEAR REGULATORY COMMISSION

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)	
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(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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