

9-9-74

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
The Toledo Edison Company)	
The Cleveland Electric Illuminating Company)	Docket No. 50-346A
(Davis-Besse Nuclear Power Station))	
The Cleveland Electric Illuminating Company, et al.)	Docket Nos. 50-440A
(Perry Plant, Units 1 and 2))	and 50-611A

MOTION BY THE DEPARTMENT OF JUSTICE
FOR A PROTECTIVE ORDER

Pursuant to Section 2.740(c) of the Commission's Rules of Practice (10 C.F.R. §2.740(c)), the Department of Justice hereby moves the Atomic Safety and Licensing Board ("Licensing Board") for a protective order limiting the scope of discovery against the Department as to certain matters. On August 26, 1974, the Department was served with Applicants' Initial Interrogatories and Request for Documents for the Department of Justice and the AEC Regulatory Staff ("Discovery Request"). The Department's objections to the Discovery Request are set out below.

I

The Department objects to the definition of the Department of Justice contained in Applicants' Discovery Request. This definition, which refers to "the Department of Justice, any department or subdivision thereof, and any person employed by,

8002191004 M

or acting for or on behalf of, the Attorney General or the Department of Justice," is unduly burdensome in terms of the file search it would entail. A literal interpretation of this language would require a document search in every office and division of the Department of Justice in Washington and throughout the country. Below-signed counsel for the Department believe in good faith that all documents relating to the competitive conduct of the Applicants are located within certain specific Departmental files. Counsel, after inquiry, are unaware of the existence of any document responsive to the Applicants' Discovery Request located in other than the files of the Public Counsel & Legislative Section of the Antitrust Division in Washington, D.C., the Cleveland Field Office of the Antitrust Division in Cleveland, Ohio, and the general files of the Department in Washington, D.C., relating to the matters handled by these two offices.

The Department, therefore, requests that the Licensing Board issue a protective order which provides that the Department be required only to search the aforesaid Departmental files in order to fully comply with the Applicants' Discovery Request. The Department would, of course, agree that if, at any time during this proceeding, it becomes aware of documents responsive to the Applicants' Discovery Request which are not contained in the aforesaid files, such documents will be immediately made available in response to the Discovery Request in conformity with the Commission's Rules of Practice and any orders relating to discovery in this proceeding.

II

Those portions of the Discovery Request relating to documents are not limited by a statement of any chronological scope of production. While Items 2, 4, and 7 require only documents specifically relating to the Davis-Besse and Perry advice letters, Items 8 and 9 could be argued to require the production of every document in the possession, custody or control of the Department of Justice relating to the Applicants' operations or activities, regardless of the date on which that document was prepared, sent or received. The sweeping nature of this request would require an extensive document search by the Department which would yield little, if anything, of relevance in this proceeding. The Department, therefore, requests that the Licensing Board issue a protective order specifying that the Applicants' documentary discovery against the Department requires only production of documents made, sent or received by the Department from the first day of the year in which the inquiry related to the Davis-Besse proceeding was begun until the date of request (i.e., January 1, 1971 to August 26, 1974).

III

Item 5 of the Discovery Request asks the Department to "describe in detail each activity engaged in by the Applicants . . . which DOJ . . . allege[s], or will allege, to be inconsistent with the antitrust laws . . ." and requires the Department to specify in detail the nature and time period of each activity and whether it was engaged in singly or in concert with others.

Clearly, it is not possible at this time for the Department to specify each of the Applicant's activities which creates or has created an inconsistency with the antitrust laws. Pursuant to Section 105 of the Atomic Energy Act, as amended, the Department is required to furnish antitrust advice to the Commission concerning each application for a license under the Act. Prior to rendering such advice on the Davis-Besse and Perry applications, the Department conducted inquiries in which, among other things, it corresponded with smaller utilities located in or adjacent to the service areas of the Applicants. The product of these inquiries was a number of allegations concerning the Applicants' competitive conduct vis-a-vis the smaller utilities. These allegations were then discussed with the Applicants who did not, in the Department's view, refute them. The Department, therefore, advised the Commission that our inquiry had uncovered allegations which required that an antitrust hearing be held on the Perry application in order to determine whether a situation inconsistent with the antitrust laws would be created or maintained by the unconditioned granting of the subject license.

The Department does not believe that prior to rendering its advice letter it must have conducted exhaustive investigations and secured complete evidentiary support for all of the allegations mentioned in the advice letter which appear to raise antitrust questions. Only after discovery has been completed will the Department be in a position to enumerate each of Applicants' activities which is an element of a situation inconsistent with the antitrust laws and to supply the requested details concerning

such activities. It is essential to the proper development of evidence in this proceeding that the Department not be estopped from presenting later-obtained evidence concerning facts which it is not now in a position to specify in a detailed manner. The Department, therefore, requests that the Licensing Board issue a protective order which makes clear that the Department will be required to answer Item 5 with only such information as is in its possession on October 31, 1974. The Department is agreeable to being placed under a positive obligation to modify or supplement its initial response to this interrogatory at the time statements on ultimate issues are due to be heard on January 10, 1975.

This position is in accord with the generally recognized requirement that a party is required to answer interrogatories only with the information in its possession and that those answers should be updated as additional information becomes available. 4A Moore, Federal Practice ¶ 33.25, 33.26; 2A Barron & Holtzoff, Federal Practice and Procedure §§768 and 777.1. See also Section 2.740(e) of the Commission's Rules of Practice (10 C.F.R. §2.740(e)).

IV

Item 6 of the Discovery Requests asks the Department to specify its contentions concerning nexus with respect to each activity the Department has listed in response to Item 5. Clearly, if it is premature to require a detailed statement of activities inconsistent with the antitrust laws prior to an assessment of the materials obtained through discovery, it is doubly premature to require highly specific statements of nexus concerning

those activities which have not yet been identified. Further, the Department has not yet undertaken the preparation of studies and expert testimony which would delineate and make specific our contentions concerning nexus. Such an analysis should be completed by the date on which the Department is required to file its written testimony. Therefore, the Department requests that the Licensing Board include in the requested protective order a provision which allows the Department to make an initial tentative answer on October 31, 1974, concerning its contentions regarding nexus with respect to those activities preliminarily identified in response to Item 5. The Department would assume a positive obligation to modify or supplement this initial response by a more detailed answer on February 20, 1975.

V

The Department objects to Item 10 of the Discovery Request because we have not yet formulated any conditions which we will seek to have imposed on the subject licenses. 1/ As previously indicated, the Department is not now in possession of all relevant evidentiary material relating to the Applicants' activities and has not yet conducted studies which would define the impact of these activities on the competitive situation. Prior to the formulation of a specific position by the Department on

1/ Since, both prior and subsequent to the Perry advice letter, the Department has engaged in discussions with the Applicants concerning the possible settlement of some of the issues raised in this proceeding, the above statement should not be taken to mean that the Department has given no consideration whatever to the question of the areas in which relief might be appropriate.

the merits, let alone a determination on the merits by the Licensing Board, an interrogatory going to the specific and detailed relief which would be appropriate in this proceeding is clearly premature. The Department, therefore, requests that the Licensing Board include in the protective order a provision indicating that discovery may not be had on this issue at this time.

VI

The Department also objects to Items 12 and 13 of the Discovery Request as premature. The Department informed the Commission in its Perry advice letter (Part III, paragraph 3, page 4) that it had been informed by Painesville that unless the City "can secure either access or interconnection and coordination, it will be unable to remain a viable competitor." In the Perry advice letter (Part III, paragraph 5, page 4), we also noted that the City of Cleveland had alleged that "without coordination, including wheeling, reserve sharing, and joint planning of and participation in large-scale generating units, it cannot continue to compete with CEI."

In each case, the Department specifically identified the information as an allegation coming from a third party. In effect, although it did not have sufficient evidence to say with certainty that the allegations were meritorious, the Department advised the Commission that the allegations appeared to be serious, not frivolous, and that a hearing would be necessary to resolve the issues raised. The Department will not be in a position to

formally state its views on the merits until it has had the opportunity to evaluate the materials received in response to our discovery requests of the Applicants, and to have the benefit of study of some of these materials by experts.

The Department, therefore, requests that the Licensing Board include in the requested protective order a provision allowing the Department to make initial, tentative answers to these interrogatories on October 31 and to modify or supplement these initial responses with more detailed answers on February 20, 1975.

VII

The Department objects to Item 15 for the same reasons set forth in relation to Item 6 and seeks a similar order from the Licensing Board.

VIII

The Department objects to Item 16 for the reasons set forth in relation to Item 10. In the Perry advice letter (Part III, paragraph 11, page 7), the Department noted ". . . the Department is not convinced that CEI is fully prepared to commit itself to grant access to either coordination or large-scale nuclear generation in a manner which would be free of anticompetitive effect." (emphasis supplied). There, the Department evaluated a specific proposal and indicated that the Applicant was not willing to grant access in a manner free from anticompetitive effect. Such an evaluation is a far cry from the Applicants' present request that the Department specify a pro-competitive method of providing access. Therefore, the Department seeks a protective order from

the Licensing Board of the same nature as requested with respect to Item 10.

IX

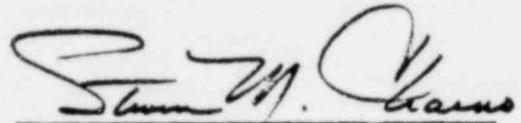
Lastly, the Department objects to Items 3, 4, 7, 8 and 9 of the Discovery Request insofar as a response thereto would include production of (1) documents which have been supplied to the Department by Applicants, (2) correspondence between the Department and Applicants, and (3) materials that have been filed with the Licensing Board in this proceeding.

Documents which have been supplied to the Department by Applicants include (1) materials requested by the Department and submitted by the Applicants which relate to the Department's anti-trust review of the Davis-Besse, Beaver Valley and Perry applications before this Commission, (2) materials produced by the Applicants pursuant to Civil Investigative Demand Numbers 1220, 1223 and 1225, (3) materials relating to Cleveland v. Cleveland Electric Illuminating Co., Federal Power Commission Docket Numbers 7631, 7633, and 7713, (4) materials relating to Cleveland v. Federal Power Commission in the United States Court of Appeals for the District of Columbia, Docket No. 73-1282, and (5) correspondence between The Cleveland Electric Illuminating Company and the City of Cleveland.

There would appear to be no sound reason for requesting production of the hereinbefore noted categories of materials since Applicants obviously already have these materials in their possession. The Department, therefore, requests that the Licensing

Board include in the requested protective order a directive that the Department need not supply copies of documents submitted to the Department by one or more of the Applicants.

Respectfully submitted,



Steven M. Charno



Melvin G. Berger

Attorneys, Antitrust Division
Department of Justice

Dated: September 9, 1974

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
The Toledo Edison Company)	
The Cleveland Electric Illuminating Company)	Docket No. 50-346A
(Davis-Besse Nuclear Power Station))	
The Cleveland Electric Illuminating Company, et al.)	Docket Nos. 50-440A and 50-441A
(Perry Plant, Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of MOTION BY THE DEPARTMENT OF JUSTICE FOR A PROTECTIVE ORDER have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class or airmail, this 9th day of September 1974.

Melvin G. Berger
Attorney, Department of
Justice
Antitrust Division

ATTACHMENT

John B. Farmakides, Esq.
Chairman
Atomic Safety and Licensing
Board
U.S. Atomic Energy Commission
Washington, D.C. 20545

John H. Brebbia, Esq.
Atomic Safety and Licensing
Board
Alston, Miller & Gaines
1776 K Street, N.W.
Washington, D.C. 20006

Dr. George R. Hall
Atomic Safety and Licensing
Board
U.S. Atomic Energy Commission
Washington, D.C. 20545

Atomic Safety and Licensing
Board Panel
U.S. Atomic Energy Commission
Washington, D.C. 20545

Frank W. Karas
Chief, Public Proceedings
Staff
Office of the Secretary
U.S. Atomic Energy Commission
Washington, D.C. 20545

Abraham Braitman
Office of Antitrust and
Indemnity
U.S. Atomic Energy Commission
Washington, D.C. 20545

Herbert R. Whitting, Esq.
Robert D. Hart, Esq.
Law Department
City Hall
Cleveland, Ohio 44114

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
1700 Pennsylvania Avenue, N.W.
Suite 550
Washington, D.C. 20006

Benjamin H. Vogler, Esq.
Robert J. Verdisco, Esq.
Andrew F. Popper, Esq.
Office of the General Counsel
U.S. Atomic Energy Commission
Washington, D.C. 20545

Gerald Charnoff, Esq.
William Bradford Reynolds, Esq.
Shaw, Pittman, Potts &
Trowbridge
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Lee C. Howley, Esq.
Vice President & General Counsel
The Cleveland Electric
Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

Donald H. Hauser, Esq.
Corporate Solicitor
The Cleveland Electric
Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

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

Chris Schraff, Esq.
Office of Attorney General
State of Ohio
State House
Columbus, Ohio 43215

C. Raymond Marvin, Esq.
Deborah M. Powell, Esq.
Antitrust Section
8 East Long Street
Columbus, Ohio 43215

Leslie Henry, Esq.
Fuller, Henry, Hodge &
Snyder
300 Madison Avenue
Toledo, Ohio 43604

John R. White, Esq.
Executive Vice President
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

David M. Olds, Esq.
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Mr. Raymond Kudukis
Director of Utilities
City of Cleveland
1201 Lakeside Avenue
Cleveland, Ohio 44114

Wallace L. Duncan, Esq.
Jon T. Brown, Esq.
Duncan, Brown, Weinberg
& Palmer
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

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