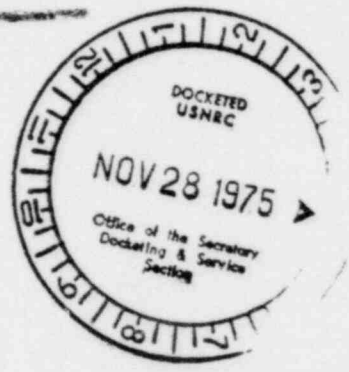
11-26-75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	NRC Docket No. 50-346A



ANSWER OF NRC STAFF TO APPLICANTS' MOTION FOR DETERMINATION THAT DAVIS-BESSE UNIT 1 IS GRANDFATHERED FOR PURPOSES OF OPERATION

On November 4, 1975, Applicants filed a motion asking the Licensing Board to conclude that it was within "the authority of the Commission to issue a license authorizing the operation of the Davis-Besse Nuclear Power Station, Unit 1 ... prior to the completion of the antitrust review presently in progress" as provided in Section 105(c)(8) of the Atomic Energy Act of 1954, as amended (the Act). 1/ By Order of November 7, 1975, the Board required responses to Applicants' Motion to be filed by November 28, 1975. Pursuant to that Order, the Staff herein submits its response. 2/

1/ On the same date, Applicants filed a motion with the Appeal Board requesting that it direct certification of this issue. The Appeal Board denied Applicants' Motion on November 5, 1975, in order to allow the Licensing Board to pass on the question after first obtaining the view of the other parties.

2/ It should be noted that a question similar to that raised by Applicants here was also presented to the Licensing Board in Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2) on October 6, 1975, in "Staff's Memorandum of Law on the Application of Section 105(c)(8) of the Atomic Energy Act of 1954, as amended, to the Issuance of Operating Licenses for the Farley Nuclear Plant."

Contrary to the Applicants' position, it is the view of the Staff that Section 105(c)(8) of the Act (the grandfather clause) does not permit the issuance of an operating license for the Davis-Besse Unit 1 prior to the initial decision of this Board. 3/ The language of the Act makes it clear that Section 105(c)(8) is applicable only to certain pending applications for construction permits and a very restricted class of operating license applications. Under the Act an operating license may be issued prior to completion of an antitrust review only when a construction permit was issued under Section 104(b) of the Act and someone intervened or sought to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations as provided for in Section 105(c)(3) of the Act.

Section 105(c)(8) states:

> (8) With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under Section 103, and with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: Provided, That any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect. (emphasis added)

3/ It cannot be said with certainty that the present fuel loading schedule will hold or that this proceeding will not be concluded, either by agency decision or by settlement, before Davis-Besse Unit 1 is in fact ready for fuel loading.

The above quoted Section clearly states that only those operating license applications covered by Section 105(c)(3) of the Act fall within the scope of the grandfather clause. Section 105(c)(3) states:

> (3) With .. ect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection 104b. prior to the enactment into law of this subsection, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdiction basis for such determination shall have the right, upon a written request to the Commission, to obtain an antitrust review under this Section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or the date of enactment into law of this subsection, whichever is later.

A fair reading of the foregoing passages from the Act makes it clear that the Davis-Besse Unit 1 operating license application is not covered by the "grandfather" clause. While it is generally unnecessary to resort to the legislative history of an act when its meaning is clear on its face, in this case the legislative history of the foregoing Section of the Act leaves no doubt that the language of the Act must be so read. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (concurring opinion).

With respect to applications for operating licenses, the legislative history shows that the intent of Section 105(c)(8) was to avoid delay caused by the antitrust review of those applications which (1) had received

a construction permit at the time the 1970 amendments were enacted and (2) fit within the standard set forth in Section 105(c)(3) of the Act. Only those operating license applications which met these criteria were to be subject to the grandfather clause. Prior to enactment of the 1970 amendments to the Act, Section 104(b) permitted the issuance of licenses for the "conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes." No antitrust review was required for applications issued under the former language of the Section. [See Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir. 1969)]. The Report of the Joint Committee on Atomic Energy, which accompanied the 1970 legislation, in commenting on Section 105(c)(8), indicated:

> Paragraph (8) endeavors to deal sensibly with those applications for a construction permit which, upon the enactment of the bill into law, would have to be converted to applications under section 103. In some cases, there might well be hardships caused by delays due to the new requirement for a potential antitrust review under revised subsection 105c. Paragraph (8) would authorize the Commission, after consultation with the Attorney General, to determine that the public interest would be served by the issuance of a permit containing conditions to assure that the results of a subsequently conducted antitrust review would be given full force and effect. Paragraph (8) similarly applies to applications for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3). [91st Cong. 2d Sess., Senate Report No. 91-1247, pp. 31-32].

In that same Report the ittee commented on Section 105(c)(3) as follows:

> Paragraph (3) provides that with respect to any Commission permit issued under subsection 104b, before enactment of the bill into law, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding to raise the prelicensing antitrust issue will have the right to obtain an antitrust review under this subsection; to do this, such person must make a written request to the Commission within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or the date of enactment into law of this subsection, whichever is later. It is the committee's intent that such potentially eligible intervenors must be persons who could have qualified as intervenors under the Commission's rules at the time of the initial attempt to intervene if prelicensing antitrust review were then properly for Commission consideration (91st Cong. 2nd Sess., Senate Report No. 91-1247, p. 30).

It is Staff's position that the legislative history of the Act as discussed above leaves no room for doubt that the Davis-Besse Unit 1 operating license cannot be issued prior to the completion of the antitrust review under the authority granted by Section 105(c)(8). Accordingly, on the basis of the foregoing discussion it is Staff's position that Applicants' motion must be denied.

Although the Davis-Besse Unit 1 operating license application is not subject to the "grandfather" clause of the Act there is available an alternative form of relief which would permit the issuance of the operating license prior to the completion of antitrust review. The Staff refers the Board to the two Commission decisions concerning the Waterford application [In the

Matter of Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), 6 AEC 48 and 6 AEC 619 (1973)].

In its first decision, the Commission denied the Applicant's motion for the issuance of a construction permit prior to a prelicensing antitrust review. Although Waterford involved a construction permit the Staff believes that the rationale is equally applicable to operating licenses. In Waterford the Commission stated:

> ...As for applicant's Alternative Motion, the Commission believes that section 105c of the Atomic Energy Act would not support the issuance of a construction permit at this time prior to a prelicensing review, without the agreement of all parties involved. Accordingly, applicant's Alternative Motion is denied. [emphasis added] [6 AEC 48 at 50, n.2 (1973)].

Upon a Motion for Reconsideration the Commission affirmed its denial of the applicant's motion for issuance of the construction permit.

> ...Applicant further moved for reconsideration of our denial of its Motion for an Order Directing that the Issuance of a Construction Permit not be Delayed by Antitrust Considerations. We adhere to the view that section 105c would not support the issuance of a construction permit prior to a prelicensing antitrust review, without the agreement of all the parties involved...[6 AEC 619 at 621-22 (1973)].

In accordance with the foregoing Commission position,[4/] it would appear that a "grandfathered" operating license for Davis-Besse Unit 1 could be issued by the Commission only upon stipulation of all parties to the proceeding for post-licensing antitrust review. [5/]

4/ It should be noted that the Commission, in stating that post-licensing review was available, did not indicate that it was suggesting that such an approach was appropriate in every situation.

5/ This stipulation would, of course, be limited to the question of the impact of the prelicensing antitrust review and assumes that questions concerning the health, safety, and environmental matters are resolved so that a license would otherwise issue.

The Staff has suggested this alternative course of action to the parties and indicated its willingness to enter into such a stipulation with respect to Davis-Besse Unit 1 at the appropriate time and upon appropriate conditions.[6/] To date the Staff has been unable to obtain such a stipulation.

Applicants have also included in their motion a due process argument which, when examined, proves to be entirely without merit. They argue that while they require more time to prepare "a vigorous and full defense" in this proceeding, they cannot request the necessary additional time because of "plant schedules" and "financial costs", and hence they are being denied due process. (Applicants' Motion, p. 14)

Applicants' decision not to ask for additional time for preparation of their defense because of their desire to meet existing schedules and/or keep costs down is their choice. As such it should not be used as a basis for grandfathering the Davis-Besse Unit 1 operating license or for a finding that Applicant's have been denied due process. Applicants have a right to request additional time if they need it, and their failure to do so reflects on no one but themselves and their abilities to prepare for a hearing based on issues set by the Board in July,1974.

6/ Prior to August 14, 1974, the Staff met with Counsel for Applicants and discussed (1) settlement, (2) limitation of issues, (3) limitation of parties, (4) post-licensing antitrust review, and (5) stipulations of fact.

Although the Applicants have alleged delay in this matter, an examination of the record shows that those allegations are unsupported by the facts. At the time the advice letter from the Department of Justice concerning Davis-Besse Unit 1 was received by the Commission (AEC), there was pending before the Federal Power Commission the question of interconnection between CEI and the City of Cleveland. The Staff believed that the resolution of that issue by the FPC could materially aid the AEC in the resolution of the dispute between CEI and the City. Therefore Staff, while noting that an antitrust hearing was required, recommended to the AEC that since a construction permit had been granted under Section 105(c)(8) of the Act, the antitrust hearing should be held in abeyance until the FPC decided the interconnection question.[7/] By following this procedure, the Staff noted that the record in the FPC proceeding and the conclusions reached therein would be available to assist the AEC in considering the antitrust contentions raised in this matter. This procedure would also obviate any duplication of effort. It is significant to note that Applicants did not object to this procedure. During this period Staff made an effort to resolve the issues including numerous meetings with the parties and on March 1, 1973 held a meeting with all the parties herein. On March 9, 1973 the FPC denied the City's request for a rehearing and on April 3, 1973 the Staff filed a supplemental pleading recommending to the AEC that this matter be noticed for an antitrust hearing.

7/ "Answer of AEC Regulatory Staff to Petition of the City of Cleveland to Intervene for a Hearing," February 7, 1972.

Following additional pleading, the Commission on January 21, 1974 issued its "Memorandum and Order" in this matter. The record shows that since January 21, 1974, Applicants have contributed substantially to delay in this proceeding. An example concerns the Applicants' conduct of the discovery request made by the Staff on August 23, 1974. The Staff and the Department of Justice in connection with their joint discovery requested that the Applicants serve certain documents upon the Staff and the Department of Justice at their respective offices in Washington, D.C.

On September 9, 1974, Applicants filed objections to the Joint Request but did not object to delivery in Washington. On October 11, 1974, the Board issued its "Order on Objections to Interrogatories and Document Requests." On October 23, 1974, Applicants moved for a thirty day extension of time within which to produce the documents "in order to assure a proper and complete document production". [Motion for Extension of Time, p. 2] Again, no objection was made to delivery in Washington. This extension was granted on November 4, 1974, when the Board revised the previously set schedule [8/] and provided that November 30, 1974, was the date for completion of all documentary discovery. On December 3, 1974, Applicants hand delivered their Responses to the Joint Request. In disregard of the express language of the Joint Request and the Board's Order, Applicants' responses simply stated that the documents were located in Cleveland, Toledo, Akron, New Castle, and Pittsburgh, and access could be had in those cities. This response came as a complete surprise to the Staff and Department of Justice

8/ See Attachment for the schedule as it appeared in Prehearing Conference Order No. 2 dated July 25, 1974, which set May 14, 1975, as the date for commencement of hearing.

since Applicants had not previously objected to delivering documents in Washington. Applicants' response also did not list documents nor did it identify the documents pursuant to which a privilege had been asserted, contrary to the Board's Order. The Applicants' failure to comply with the Joint Request and the Board's Order was particularly objectionable because Applicants were given the additional 30 days they requested to "assure a proper and complete document production". The Applicants' conduct in this instance contributed at least a six month delay to this proceeding. 9/

The record further shows that Applicants have repeatedly asked for extensions of time to meet prehearing schedules set by the Board. As a result, the Board had to postpone the initial commencement date of the hearing to December 1, 1975. On November 14, 1975, Applicants once again requested additional time to file their pretrial brief. Applicants also requested that the hearing not begin until December 11, 1975. Accordingly, as we interpret the record of this proceeding, we see no basis for the Applicants' argument that due process has been denied because of procedural matters entirely out of their control. The record here is clear that Applicants have themselves contributed substantially to any delays which may have occurred and cannot now cry out for relief which cannot be supported under the law.

9/ Id.

Respectfully submitted,

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Jack R. Goldberg,
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of November 1975.

supported with ample good cause. In addition, any party not filing a response to a Board Order or one required by the Rules will be deemed to have waived all rights in regard thereto. A continuing failure to thus participate in the proceeding will lead to an order to show cause why that party should not be dismissed from the proceeding.

F. Schedule

All Parties, except AMP-O, have submitted proposed schedules for the future milestones in this proceeding. After considering these proposals and the discussion at the Second Prehearing Conference, the Board sets the following schedule:[18/]

Final Date:	For:
August 1, 1974	Discovery begins.
August 26, 1974	Discovery requests (other than admissions).
September 9, 1974	Written objections to discovery requests.
September 13, 1974	Hearing on objections, if needed.

18/ Cleveland's motion dated July 17, 1974, for leave to file an untimely, supplemental brief in support of its proposed schedule is hereby denied in view of our earlier rulings on such "supplementary" filings. As stated, absent a showing of substantial good cause -- not found here -- rulings will be strictly adhered to.

December 15, 1974	Completion of all pretrial discovery.
January 10, 1975	Statements on ultimate issues to be heard.
January 20, 1975	Responses to Statements on ultimate issues.
January 25, 1975	Prehearing Conference No. 3
February 20, 1975	Written Testimony (Justice, Staff, Intervenors)
March 12, 1975	Written Testimony, Applicant
April 2, 1975	Filing of any Motions for Summary Disposition.
April 14, 1975	Filing of any responses to Motions for Summary Disposition.
April 18, 1975	Prehearing Conference No. 4
April 30, 1975	Filing of Pre-trial Briefs
May 14, 1975	Hearing Commences

30 days following final hearing date.	Filing of rebuttal testimony.
20 days following filing of rebuttal testimony.	Hearing on reubttal.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING BOARD

John H. Brebbia, Member

George R. Hall, Member

John B. Farmakides, Chairman

Issued at Bethesda, Maryland,

this 25th day of July 1974

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	NRC Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING	)	50-500A
COMPANY	)	50-501A
(Davis-Besse Nuclear Power Station,	)	
Units 1, 2 & 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING	)	NRC Docket Nos. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER OF NRC STAFF TO APPLICANTS' MOTION FOR DETERMINATION THAT DAVIS-BESSE UNIT 1 IS GRANDFATHERED FOR PURPOSES OF OPERATION, dated November 26, 1975, in the captioned matter, have been served upon the following persons by hand delivery to those persons in the Washington, D.C. area and by mail to all others via the United States mail, first class or airmail, this 26th day of November 1975:

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