

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

8/10/77

In the Matter of)	
)	
The Toledo Edison Company and)	
The Cleveland Electric Illuminating)	Docket Nos. 50-346A
Company)	50-500A
(Davis-Besse Nuclear Power Station,)	50-501A
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))	

MOTION TO STRIKE

Pursuant to Section 2.730 of the Commission's Rules of Practice (10 C.F.R. 2.730) the Department of Justice hereby moves the Atomic Safety and Licensing Appeal Board to strike the last sentence of footnote 9 on page 13 and all of Appendix B of Applicants' Reply Brief.

On August 4, 1977 Applicants in the above-styled proceeding filed their Reply Brief with this Atomic Safety and Licensing Appeal Board. Referred to in footnote 9 and attached as Appendix B of that Reply Brief are three documents which Applicants assert contradict the statement of the Department's witness Mr. Lewis that an affidavit prepared by him (NRC 127) was not prepared for then pending litigation (Tr. 5618-19).

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The Department moves to strike footnote 9 and Appendix B on the grounds that the documents constitute evidentiary materials, which materials should have been introduced prior to the close of the record when the Department would have had the opportunity for cross examination and the presentation of rebuttal documents or witnesses. To permit the introduction of these documents during the final briefing of this appeal will deny the Department its right of procedural due process.

Applicants have not shown good cause for their untimely introduction of evidentiary materials. See Locklin v. Switzer Brothers, Inc., 299 F.2d 160 (9th Cir. 1961), cert. den. 369 U.S. 861. Nor could they do so. All of the documents included in Appendix B were turned over to Applicants on November 27, 1974 (Response of Department of Justice to Applicants' First Request For Production of Documents and Answers to Interrogatories, at 9-11, items 34, 48 and 50) more than one year prior to Mr. Lewis' appearance at the hearing and more than two and one half years before Applicants' present submission to the Appeal Board. Applicants' had a full and fair opportunity to cross examine Mr. Lewis on the origins of his affidavit and to offer these documents into evidence. The Department specifically asked Mr. Lewis if he recalled why the affidavit was prepared (Tr. 5617), thus clearly opening the topic to cross examination. Nevertheless, Applicants, despite repeated reference to the affidavit (see, e.g., Tr. 5635, 5637 and 5643), failed to cross examine Mr. Lewis as to its origins or introduce the documents which they now present.

On their face the subject documents raise questions which directly affect their probative value. The documents do not indicate whether Mr. Ardery contacted Mr. Lewis and requested the affidavit or whether the affidavit was obtained from an independent source. They do not indicate what information was conveyed to Mr. Lewis if he was contacted by Mr. Ardery. These questions cannot be answered without introduction of additional evidence into the record.

For the foregoing reasons, the Department of Justice respectfully moves the Atomic Safety and Licensing Appeal Board to strike the last sentence of footnote 9 on page 13 and all of Appendix B of Applicants' Reply Brief.

Respectfully submitted,

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August 10, 1977

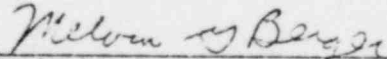
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CERTIFICATE OF SERVICE

I hereby certify that copies of MOTION TO STRIKE have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand this 10th day of August 1977.



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THE CLEVELAND ELECTRIC ILLUMINATING)	Docket No. 50-346A
COMPANY)	
(Davis-Besse Nuclear Power Station,)	
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THE CLEVELAND ELECTRIC ILLUMINATING)	
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THE TOLEDO EDISON COMPANY, ET AL.)	
(Davis-Besse Nuclear Power Station,)	Docket Nos. 50-500A
Units 2 and 3))	50-501A

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