

Reg Files

SEP 2 1977

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Richard S. Salzman
Jerome E. Sharfman



In the Matter of)	
THE TOLEDO EDISON COMPANY AND)	
THE CLEVELAND ELECTRIC	)	Docket Nos
ILLUMINATING COMPANY	)	50-346A
(Davis-Besse Nuclear Power Station,	)	50-500A
Units 1, 2 and 3)	)	50-501A
THE CLEVELAND ELECTRIC)	
ILLUMINATING COMPANY, <u>et al.</u>	)	Docket Nos. 50-440A
(Perry Nuclear Power Plant,	)	50-441A
Units 1 and 2))	

Messrs. Reuben Goldberg and David C. Hjelmfelt,
Washington, D. C., and Malcolm Douglas and
Robert D. Hart, Cleveland, Ohio, for the
City of Cleveland.

Mr. Melvin G. Berger and Ms. Janet R. Urban
for the Department of Justice.

Mr. Roy P. Lessy, Jr. for the Nuclear Regulatory
Commission staff.

Messrs. William Bradford Reynolds and Robert E. Zahler,
Washington, D. C., for applicants Cleveland Electric
Illuminating Company, Toledo Edison Company, Duquesne
Light Company, Ohio Edison Company and Pennsylvania
Power Company.

MEMORANDUM AND ORDER

September 2, 1977

(ALAB-430)

The City of Cleveland and the Department of Justice
have each moved to strike a different appendix to applicants'
reply brief in this antitrust proceeding. We will discuss
each motion in turn.

8002 250 912

Anti
GD

The City of Cleveland seeks to strike Appendix A, a series of charts purportedly showing where the parties' initial briefs discuss certain findings in the decision below. There are extensive footnotes to the charts consisting of legal argument. The City contends that this appendix violates the 100 page limitation set by us for reply briefs in this case. The City is correct. The lengthy footnotes are plainly legal argument and, therefore, should have been in the body of the brief. The charts themselves are also argumentative in nature for they are explained by applicants as having been submitted for the purpose of demonstrating that the staff, the Justice Department and Cleveland have not gone beyond the "language" of the decision below in attempting to support their positions. ^{1/} That this proposition is controversial is shown by the staff's answering papers, which claim that the charts are incomplete in significant respects. We view Appendix A as simply an attempt by the applicants to exceed the page limitations which we set. We decline to

^{1/} Applicants also state that another purpose of the appendix was to demonstrate the failure of these parties to coordinate their positions on appeal. This purpose is hardly relevant to the merits of the appeal; nor is it relevant to any other issue now before us.

countenance it. Their contention that there may have been similarly improper appendices attached to other parties' briefs filed earlier is beside the point; they did not complain about those appendices at the time they were filed. We will therefore grant this motion to strike Appendix A and disregard any arguments made therein which are not also set forth in the body of the brief.

The Department of Justice moves to strike Appendix B to the reply brief. Its motion is supported by the staff. This appendix relates to an affidavit of Justice Department witness William M. Lewis, Jr., which was admitted into evidence at the hearing below. The appendix consists of several letters submitted for the purpose of showing that Mr. Lewis' testimony that the affidavit "was not prepared in connection with any then-pending litigation" (Tr. 5619), relied upon in the Justice Department's brief, was not true. In fact, if anything, the documents substantiate this testimony. They seem to show that his affidavit was prepared to assist the Department in determining what advice to give this Commission, pursuant to section 105c of the Atomic Energy Act, regarding whether activities under a license to construct the Beaver Valley power plant (not involved in this case) would create or maintain a situation inconsistent

with the antitrust laws. Advice of this nature is required by that section on each construction permit application. It is rendered whether or not a hearing is recommended by the Department. Indeed, Justice represents (and applicants do not deny) that it recommended against an antitrust hearing on Beaver Valley and that none was held.^{2/}

Still, we cannot permit Appendix B to become part of the record. That would be unfair because the Justice Department would not have the opportunity to present evidence explaining it or rebutting it. This might be prejudicial were some reviewing tribunal to interpret the bare documents differently than we do. If the letters in the appendix were newly discovered evidence and tended to show that significant testimony in the record was false, we might be sympathetic to a motion to reopen the hearing.^{3/} However, in this case, the applicants do not deny the Department's assertion that they had the Appendix B documents in their possession for over a year prior to the introduction of Mr. Lewis' affidavit at the hearing and for more than 2-1/2 years before the submission of Appendix B to this Board.

^{2/} While Appendix B does show that Mr. Lewis' recollection was faulty when he testified that he believed the affidavit was prepared in connection with the Zimmer plant (Tr. 5617), applicants have not shown why that mistake is of any consequence.

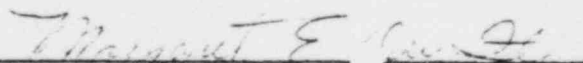
^{3/} No such motion has been made by the applicants.

Applicants' assertion that they were not aware of the existence of the letters in their own files until well after the close of the hearing below neither excuses nor justifies their unauthorized attempt to supplement the record by appending the documents to their appellate brief.

For the reasons stated, the motions to strike Appendices A and B of applicants' reply brief are granted.^{4/}

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD



Margaret E. Du Flo
Secretary to the
Appeal Board

^{4/} In addition to Appendix B, the Justice Department would have us strike the last sentence in footnote 9 on page 13 of the body of the reply brief. Although we decline to take that action, it should be noted that the sentence in question contains argumentation based exclusively upon the contents of Appendix B. In view of our determination respecting that appendix, the sentence obviously will not serve to advance applicants' cause.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)		
)		
THE TOLEDO EDISON COMPANY, ET AL.)	)	Docket No.(s)	50-346A
CLEVELAND ELECTRIC ILLUMINATING )	)		50-440A
COMPANY )	)		50-441A
	)		50-500A
(Davis-Besse Nuclear Power )	)		50-501A
Station, Unit No. 1; Perry))		
Nuclear Power Plant, Units 1&2)))		

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
24 day of Sept 1977.

PA Bursley
Office of the Secretary of the Commission

POOR
ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
TOLEDO EDISON COMPANY, ET AL.	)	Docket No.(s) 50-346A
(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

SERVICE LIST

Douglas Rigler, Esq., Chairman
Foley, Lardner, Hollibaugh & Jacobs
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Joseph Rutberg, Esq.
Antitrust Counsel
Counsel for NRC Staff
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

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

Office of Antitrust & Indemnity
Office of Nuclear Reactor Regulation
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

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

Benjamin H. Vogler, Esq.
Roy P. Lessy, Jr., Esq.
Antitrust Counsel
Counsel for NRC Staff
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

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

Ronald W. Hauser, Esq.
Victor E. Greenblatt, Jr., Esq.
Cleveland Electric Illuminating
Company
P. O. Box 5000
Cleveland, Ohio 44101

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

Joseph J. Saunders, Esq., Chief
Public Counsel and Legislative
Section
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

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

POOR
ORIGINAL

Gerald Charnoff, Esq.
Shaw, Pittman, Potts, Trowbridge
and Madden
910 -17th Street, N. W.
Washington, D. C. 20006

Lee C. Howley, Esq., Vice President
and General Counsel
Cleveland Electric Illuminating
Company
P. O. Box 5000
Cleveland, Ohio 44101

David C. Hjelmsfelt, Esq.
Michael Oldak, Esq.
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Reuben Goldberg, Esq.
Arnold Fieldman, Esq.
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Steven M. Charno, Esq.
Melvin C. Berger, Esq.
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Honorable Thomas E. Kauper
Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

John C. Engle, President
AMP-O, Inc.
Municipal Building
20 High Street
Hamilton, Ohio 45012

Honorable Richard M. Firestone
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Honorable William J. Brown
Attorney General
State of Ohio
Columbus, Ohio 43215

Honorable Edward A. Matko
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Honorable Deborah P. Highsmith
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Michael R. Gallagher, Esq.
Gallagher, Sharp, Fulton,
Norman and Mollison
630 Bulkeley Building
Cleveland, Ohio 44115

Duncan, Brown, Weinberg & Palmer
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

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

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

Mr. George B. Crosby
Director of Utilities
Piqua, Ohio 45350

William M. Lewis, Jr.
W. M. Lewis & Associates
P. O. Box 1383
Portsmouth, Ohio 45662

Robert D. Hart, Esq.
Assistant Law Director
City Hall
Cleveland, Ohio 44114

Anthony G. Anvelasit, Jr., Esq.
Antitrust Division
Department of Justice
P. O. Box 7513
Washington, D. C. 20547

POOR
ORIGINAL

Susan B. Cyphert, Esq.
Antitrust Division
Department of Justice
727 New Federal Building
2140 East Ninth Street
Cleveland, Ohio 44199

David M. Olds, Esq.
Reed, Smith, Shaw and McClay
P. O. Box 2009
Pittsburgh, Pennsylvania 15230

Thomas A. Kayuha, Esq.
47 North Main Street
Akron, Ohio 44308

Perry Public Library
3753 Main Street
Perry, Ohio 44081

Director
Ida Rupp Public Library
301 Madison Street
Fort Clinton, Ohio 43452

Joseph A. Rieser, Jr., Esq.
Lee A. Rau, Esq.
Reed, Smith, Shaw & McClay
Madison Building, Suite 404
Washington, D. C. 20005

Terence H. Benbow, Esq.
A. Edward Grashof, Esq.
Winthrop, Scimson, Putnam
and Roberts
40 Wall Street
New York, New York 10005

Janet R. Urban, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

POOR
ORIGINAL