January 12, 1976

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)	)	Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-440A 50-441A
THE TOLEDO EDISON COMPANY, ET AL., (Davis-Besse Nuclear Power Station, Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

RESPONSE OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY TO CITY OF CLEVELAND'S MOTION FOR REVIEW OF THE SPECIAL MASTER'S RULINGS ON THE PRIVILEGED DOCUMENT CLAIMS

1. By motion dated December 30, 1975, the City of Cleveland once again seeks review of the Special Master's rulings on the claims of privilege asserted in this proceeding by The Cleveland Electric Illuminating Company ("CEI"). Reference is made to the statement by the Appeal Board in ALAB-290 that the "parties' voluntary agreement" to be bound by the Master's decision did not operate to foreclose the Licensing Board "from exercising its discretion to review the 'Special Master's' discovery rulings sua sponte * * * " (Memorandum and Order, September 19, 1975, p. 4). From this

it is urged that the Appeal Board left open the possibility that a review of the determination on CEI's claims of privilege could, even at this late date, be undertaken by the Licensing Board in its discretion.

2. If the City is interpreting the above-quoted language by the Appeal Board as an invitation to this Board now to examine the Master's rulings, we seriously question the sincerity of the present motion. Plainly, the Appeal Board's reference to the discretionary authority of this Board was made in the context of a discussion concerning the "binding effect" of the parties' agreement upon those not participating in that agreement. In further explanation of its comments on this point in ALAB-290, the Appeal Board stated clearly in ALAB-300 (Memorandum and Order, November 26, 1975, p. 30) that the Licensing Board had not been deprived of its discretionary powers to review the Master's rulings sua sponte if it deemed such action appropriate. However, it noted that the Board had already declined to exercise this discretionary review authority after careful consideration of all the circumstances -- a decision in which the Appeal Board itself fully concurred.

3. The City argues here that the Board's recent disinclination to hold Applicants' Washington counsel to a March 29, 1974 "agreement" to conduct cross-examination through a single counsel provides a basis for reassessing its earlier

decision to hold the parties to their voluntary agreement "to be bound" by the Master's rulings.[1/] This position is not well taken. The Board's determination not to review the "privilege" controversy was made after full argument by both sides; it has been affirmed by the Appeal Board after extensive briefing and argument. The matter is presently before the U. S. Court of Appeals for the District of Columbia Circuit on the City's Petition for Review.[2/] No aspect of that entire question has even a superficial connection to this Board's considered judgment in a wholly different context regarding the separate matter of cross-examination of witnesses at the evidentiary hearing.[3/] Unlike the City's pending disqualification motion, no claim is made here that any of the privileged documents bears directly or indirectly on the cross-examination decision.

1/ While the City also makes reference to the fact that a single brief was not filed by Applicants in accordance with the March 29, 1974 statement, this point seems to exalt form over substance. Applicants filed a single Legal Prehearing Brief and, under separate cover, four separate Fact Prehearing Briefs addressed to the separate allegations against each Applicant. There was no repetition of argument; nor would Applicants have made any different presentation had they filed a "single brief" -- the five separately bound Prehearing Briefs would simply have been included under a single cover.

2/ See City of Cleveland v Nuclear Regulatory Commission, Docket No. 75-2115, filed November 17, 1975.

3/ We do not understand the City's present motion to take issue with this Board's ruling on the cross-examination question; in any event, such an objection would not withstand

(Cont'd p. 4)

4. There is thus no reason whatsoever for the Board now to re-examine its earlier determination not to review the Master's rulings on CEI's claims of privilege.

3/ Cont'd
scrutiny. At the time that the March 29, 1974 filing was made, Applicants, and indeed all the parties, viewed this antitrust proceeding as embracing only the isolated "situation" within the geographic market of the City of Cleveland. The City's petition to intervene and the Department of Justice's advice letters spoke only in terms of alleged anticompetititve practices by CEI vis-a-vis the Municipal Electric Light Plant ("MELP") of the City of Cleveland. To the extent that any of the other Applicants was involved, it was only insofar as its activities toward MELP may have impacted on the "situation" in the Cleveland geographic market. It was with the understanding that the antitrust hearing in Davis-Besse and Perry would be so confined that Applicants' Washington counsel stated in the March 29, 1974 filing that cross-examination would be through a single counsel. Since that filing, however, a very broad statement of issues and matters in controversy was framed over Applicants' strong objection; the ongoing antitrust hearing was consolidated with the antitrust hearing scheduled to commence in Davis-Besse 2 and 3 -- thereby incorporating into this proceeding the Department of Justice's Davis-Besse 2 and 3 advice letter containing new allegations against some of the other Applicants which had no relationship whatsoever to the City of Cleveland and which were being raised for the first time; and finally on September 5, 1975, the opposing parties advised Applicants -- again for the first time -- that they intended to present evidence in the consolidated proceeding of alleged anticompetitive conduct by each Applicant not just as to MELP but as to other electric entities located in that Applicant's particular service area in an effort to establish five separate "situations" inconsistent with Section 2 of the Sherman Act.

Accordingly, by the commencement of the evidentiary hearing, Applicants were confronted with a materially different case than had been contemplated at the time of the March 29, 1974 "agreement" as to cross-examination. It was apparent that each Applicant had different, and even potentially conflicting, interests to be protected at the hearing which could not be represented adequately by a single counsel operating at all times on behalf of all Applicants together. By contrast, the parties' agreement "to be bound" by the Master's rulings was made under circumstances that have remained unchanged throughout the proceeding.

Indeed, there is serious question whether, in the absence of special circumstances, it would in any event be free to do so in light of the City's pending Petition for Review. The issue which the City now asks this Board to reconsider is presently in the U. S. Court of Appeals for the District of Columbia Circuit. As provided in 28 U.S.C. §2349(a):

> The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals * * * has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency. [Emphasis added.]

Accordingly, the City's Petition for Review has, in similar fashion to a Notice of Appeal filed in response to a district court decision, removed from the agency the matter of the reviewability of the Master's privilege rulings and lodged that issue exclusively in the court of appeals. Any further evaluation of the question by this Board must await a decision by that tribunal. See Starnes v McGuire, 512 F.2d 918, 924 n.6 (D. C. Cir. 1974) (en banc); Reserve Mining Co. v Environmental Protection Agency, 514 F.2d 492, 541 (8th Cir. 1975).

5. Such a conclusion is not only legally sound; it is the most equitable result in the circumstances of the present

motion. As to the agreement "to be bound," CEI has already turned over to the City certain documents in reliance thereon which it continues to believe, contrary to the Master's rulings, are entitled to protection from disclosure as privileged communications. Thus, the City has derived full benefit from its agreement. As was pointed out both by this Board and the Appeal Board, it would be unfair to allow the City in such circumstances to ignore its responsibilities and commitments under the same agreement. However, no such argument can be made with regard to Applicants' March 29, 1974 "agreement" with respect to cross-examination. The City has not acted to its detriment in reliance thereon. Nor will it be prejudiced in any way if Applicants continue to conduct cross-examination through their respective independent counsel. The Board has already stated clearly on several occasions that it does not intend to allow duplicative cross-examination; it is plainly in a position to assure that the parties adhere to this admonition. Applicants have made every effort thus far to coordinate their respective roles in the evidentiary hearing to the fullest extent possible, and they will continue to do so. To date, where a second counsel representing one of the Applicants has deemed it necessary to cross-examine a witness already subjected to cross-examination by counsel for another Applicant, his questions have been non-repetitive and

to the point. There is no reason to anticipate any departure from this practice.

6. For all of the above reasons, the December 30, 1975 motion of the City of Cleveland for review of the Special Master's rulings on CEI's claims of privilege should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm Bradford Reynolds
Gerald Charnoff
Robert E. Zahler

Dated: January 12, 1976.

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	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Response Of The Cleveland Electric Illuminating Company To City Of Cleveland's Motion For Review Of The Special Master's Rulings On The Privileged Document Claims" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to those persons in the Washington, D. C. area and by mailing a copy, postage prepaid, to all others, all on this 12th day of January, 1976.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds

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