

Reg. Files

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of)
)
THE TOLEDO EDISON COMPANY AND)
THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY)
(Davis-Besse Nuclear Power Station,)
Units 1, 2 and 3)
)
THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY, ET AL.)
(Perry Nuclear Power Plant,)
Units 1 and 2)

Docket Nos. 50-346A
50-500A
50-501A

3-3-76

Docket Nos. 50-440A
50-441A

MEMORANDUM OF THE BOARD RELATING TO MOTION TO COMPEL
PRODUCTION OF CIVIL INVESTIGATIVE DEMAND DOCUMENTS

On May 1, 1975, in a separate proceeding, the Department of Justice (Department) issued a Civil Investigative Demand (CID) to the Cleveland Electric Illuminating Company (CEI) under the Antitrust Civil Process Act, 15 U.S.C. Section 1311-14. CEI produced the demanded documents on June 27, 1975. On October 31, 1975, the Department applied for a subpoena to CEI under 10 CFR 2.720 for some of the documents produced pursuant to the Demand.

Upon motion of CEI, the Board by Order of November 18, 1975, quashed the subpoena, but granted leave to the Department to proceed under Sections 2.741 and 2.740(f) which provide for the production of documents among parties.^{1/} We now address the Department's motion to compel production of documents filed November 21, 1975.

^{1/} See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-35, 4 AEC 711, 713, Sept. 21, 1971).

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Physical production of the documents is not required because the Department already has them as a result of the Demand. The Department considers the documents to be unavailable for use in this proceeding unless they are produced under NRC process because of the provisions of the Antitrust Civil Process Act. Tr. p. 5646.

The problem arises because, where documents produced under a Demand are in the possession of the Department's custodian for such documents,

...No material so produced shall be available for examination, without the consent of the person who produced such material, by an individual other than a duly authorized officer, member or employee of the Department of Justice.

(15 U.S.C. Section 1313(c))

Use of the material in this proceeding would, of course, permit examination by others. Section 1313(d) permits the use of Demand-produced documents:

(d) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged antitrust violation, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. * * * * *

CEI observes that this proceeding is before neither a court nor a grand jury. We are told that documents produced pursuant to Demand

under the Antitrust Civil Process Act are beyond the reach of NRC agency process. Our examination of the language of that Act discloses no intent to foreclose the production of documents turned over to the Department during the course of a civil investigation to federal agencies having independent reason to call for their production. Neither have Applicants pointed to anything in the legislative history of the Antitrust Civil Process Act which would give credible support to such an interpretation. Thus, as we approach the controversy with respect to CID documents, we find no legislative barrier, neither by reference to the terms of the Act itself nor from any expression of Congressional intent to foreclose production in federal agency proceedings.

The test for resolving this motion, as we see it, is whether the documents for which production is being sought are relevant to the proceedings before this Commission, and in this instance, whether they contain materials thought to be of probative value to the Board in reaching its decision.^{2/} Ordinarily, we would rely solely upon the relevance test set forth in Section 2.740. In this proceeding,

^{2/} Rule 2.740(b)(1) provides that: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding..." and that "It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 2.740(b)(1) closely parallels Rule 26(b)(1) of the Federal Rules of Civil Procedure.

however, we require a higher standard of probative value because the Department made application for production after the termination date for discovery established by this Board. Thus, to the extent, if any, that the Department would seek to enlarge or prolong the ample discovery period allocated by this Board, we would require a showing of good cause, i.e., that documents not previously produced are specifically thought to offer meaningful support of the Department's position with respect to the Issues in Controversy in this proceeding.^{3/} The Department's request for production probably would be denied as untimely if it were made, not for the purpose of obtaining documents to be introduced into evidence, but for the purpose of conducting depositions and seeking additional materials which might be of probative value. Here, however, it is apparent that the Department already possesses and is familiar with the content of the documents for which production is sought. We are informed that production at this time is sought for the express purpose of obtaining documents, the contents of which already are known but which the Department considers to be unavailable absent Commission process because the documents come to its attention as a result of a CID. Tr. p. 5646.

To hold that documents produced to the Department pursuant to the Antitrust Civil Process Act thereafter are not reachable by the

^{3/} These issues were set by the Board on July 25, 1974, at the commencement of the discovery period. The discovery period extended through August 1975.

Department in federal agency proceedings would create an irrational and absurd result. The effect of such a holding would be to confer immunity in the agency forum upon a producing party with respect to those documents merely because the party was fortunate enough to have received a Civil Investigative Demand. The federal agencies' abilities to discharge their statutory obligations would be frustrated in that significant documents of probative value would be excluded from consideration by the agency and the public interest would be subverted by the Department's inability to build a complete record with respect to its position.

Although we make this decision in the context of an NRC anti-trust proceeding, our reasoning will become even more apparent if we apply Applicants' argument to documents of probative value in a license proceeding relating to the safety of a nuclear plant. Applicants' contention is that documents produced to the Department pursuant to CID request thereafter would be shielded or immunized from use by the Department in NRC proceedings notwithstanding the presence in those documents of information which might disclose safety-related defects of the plant.^{4/} This argument is untenable. We do not

^{4/} We recognize that the Department is not ordinarily a party to license proceedings in which safety and environmental concerns are the only issues in controversy. Nonetheless, the mere suggestion that the Antitrust Civil Process Act prevents Commission consideration of such documents illustrates in a safety context the mischief which could result if we should adopt Applicants' rationale.

believe that Congress even remotely contemplated such a result, and we would not accept this result absent an express Congressional directive forbidding production or use of the documents.

We conclude:

(1) That the Antitrust Civil Process Act establishes no inherent barrier to the use of NRC process to obtain documents relevant in NRC proceedings;

(2) That the Department's request for these documents, though filed pursuant to a discovery request, in actuality is made for the purpose of obtaining documents for direct evidentiary use in these proceedings;

(3) That the Department is able to evaluate whether it wishes to present these documents in evidence because it already has been able to analyze their content;

(4) That there is representation of relevance by Department;

(5) That we can permit production of these documents pursuant to Rule 2.740 because, even viewing production as discovery related, it would not violate the spirit or intent of our discovery date cut-off rule.

(a) No additional burden is placed upon Applicants since no file search is necessary. The documents already are in the possession of the Department.

(b) No surprise with respect to hearing preparation can be claimed by Applicants since:

- 1) We have not enlarged upon any of the issues in controversy nor the specific Statement of the Nature of Claims to be Asserted which we are using to control the introduction of evidence in these proceedings;
- 2) The documents came from Applicants' own files and therefore the contents should have been known to them in any event;
- 3) The Department's first notice to Applicants that it intended to utilize the CID documents in this proceeding occurred well prior November 10, 1975, the date by which we required all parties to list documents they intended to introduce into evidence in these proceedings. Thus, Applicants were placed on timely notice that if the Department were successful in its motion to compel production, the documents would be utilized by the Department in support of its case.


In the interval since the motion to compel production first was made, the hearings have proceeded for more than two months. Issues

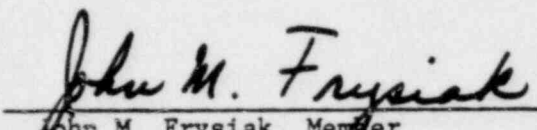
have become refined and all parties have been made aware of the Board's intent not to permit repetitious and cumulative introduction of evidence. See Rule 2.757(b). Accordingly, the Department no longer may desire to introduce many of the documents for which production is being sought. We would discourage the introduction into evidence of documents which, while otherwise relevant, do nothing more than duplicate materials already in the record. Therefore, although we announce our intent to grant the Motion to Compel Production, we direct the Department to review documents listed on the schedules attached to that motion and to designate those documents which it presently intends to attempt to introduce into evidence. Because the Department already has had extensive discovery and access to voluminous materials of Applicants apart from documents covered by the Civil Investigative Demand, we anticipate that a substantial reduction of the documents requested may be achieved. Upon receipt of the revised list of CID documents for which production is sought, it is our intent immediately to sign the production order. The submission of the revised list will be taken as a representation by the Department that introduction of the documents will not burden the record in cumulative and repetitious fashion and that the

documents are asserted to be of significant probative value in these proceedings.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD


Ivan W. Smith, Member


John M. Frysiak, Member


Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 1st day of March 1976.


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NUCLEAR REGULATORY COMMISSION

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| |) | |
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| 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
20 day of March 1976.



Office of the Secretary of the Commission

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| (Davis-Besse Units 2 and 3) |) | 50-501A |

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