

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

Before Atomic Safety and Licensing Appeal Board

In the Matter of

THE TOLEDO EDISON COMPANY

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

(Davis-Besse Nuclear Power Station)

Docket No. 50-346

REPLY BY THE TOLEDO EDISON COMPANY
AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
TO EXCEPTIONS TO INITIAL DECISION
FILED BY COALITION FOR SAFE NUCLEAR POWER
AND BY THE REGULATORY STAFF

A. Exceptions by the Regulatory Staff

1. The Regulatory Staff's exceptions to the Initial Decision issued on May 19, 1972, are based upon the Licensing Board's ruling that no evidence would be admitted concerning environmental effects of plant operation. The Staff was concerned that the record did not include such evidence because,

"Should the full NEPA cost-benefit

balance be close, it is possible

that the removal of one cost factor

from the equation would indicate a

different decision" AEC Regulatory

Staff Brief in Support of Exceptions, p. 3.

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The Staff's fears have already been set to rest by the Initial Decision and their exceptions should therefore be denied.

2. The Licensing Board in its Initial Decision has assumed that the cost-benefit balance might be close by assuming "every conceivable environmental finding," including those "unfavorable to plant operation." Initial Decision, para. 7. Notwithstanding these assumptions, the Licensing Board found that the cost of abandonment was already so substantial "that a reasonable or prudent man would conclude that these irretrievable costs [the incremental costs of continuing construction during the NEPA review period] would not affect in any significant manner the eventual decisions reached in the NEPA review." Initial Decision, para. 66. In addition, the wide range of alternatives available to further reduce environmental impacts, the Licensing Board found, assures that abandonment cannot be considered likely. Initial Decision, paras. 36-46.

3. Adoption by the Appeal Board of the three modifications suggested in Exceptions to Initial Decision Submitted by The Toledo Edison Company and The Cleveland Electric Illuminating Company, filed May 24, 1972, would further quiet the concerns of the Regulatory Staff. Permittees' offer to waive consideration of the incremental investment resulting from construction during the NEPA review period in the cost-benefit evaluation to be developed in the full NEPA review,

the Davis-Besse facility's ability to meet the numerical dose limits of proposed Appendix I to 10 CFR Part 50 without any additional equipment, and the certification of the Ohio Water Pollution Control Board that there is reasonable assurance that the Davis-Besse facility will comply with applicable water quality standards, all add support to the conclusion that abandonment is an unlikely event.

4. One final point must be made. The Court of Appeals has expressed concern that events prior to the completion of the final NEPA review should not affect the outcome of that review. The Staff's desire for "some preliminary estimate of the full NEPA cost-benefit balance," Brief, p. 4, if granted, could well affect the final outcome of the NEPA review more than would the additional investment to be made in the Davis-Besse plant during the NEPA review period.

B. Exceptions by Coalition for Safe Nuclear Power

5. In a filing dated May 23, 1972, the Coalition for Safe Nuclear Power filed exceptions to the Initial Decision. These exceptions raise basically four issues. None have any merit.

- a) The foreclosure of inquiry into the alternative of plant abandonment by excluding testimony relating to operational effects (Exceptions 1, 3);

- b) Participation of the Regulatory Staff as a party to the suspension hearing (Exceptions 2, 4(3));
- c) The Licensing Board's alleged failure to allow the Coalition to cross-examine each witness on the completion of direct examination (Exception 4(1)); and
- d) The alleged denial "on numerous occasions" that Permittees' witnesses had prepared testimony which they had previously sworn was theirs (Exception 4(2)).

6. Coalition's argument that consideration of the likelihood of abandonment of the Davis-Besse project was foreclosed by the Licensing Board's exclusion of evidence relating to plant operation is answered by Permittees' reply to the Regulatory Staff's exceptions. See paras. 1-4 above.

7. The Coalition's claim that it was denied due process by the participation of the Regulatory Staff in the hearing is ludicrous. Initially, the Coalition's failure to cite anything more specific than the Fifth Amendment should be noted. The Commission's Rules of Practice suggest that such legal contentions should at least be supported by a brief. 10 CFR §2.762. The separation of functions requirements for adjudicatory hearings are carefully spelled out in

the Administrative Procedure Act, 5 U.S.C. §554(d). Clearly, participation by the Regulatory Staff as a party to the hearing is in accord with these rules.

8. The contention that the Coalition was denied a fair hearing because it allegedly could not cross-examine each witness as his direct testimony was completed is also frivolous. An administrative hearing is not an 18th Century common law maze designed to bury substance under form or to trap the unwary in a web of procedural snares. Instead, it should be a forum for eliciting a record of reliable, probative and substantial evidence. The Coalition was given full and adequate opportunity to cross-examine all of the Permittees' and all of the Regulatory Staff's witnesses. There has been no showing that it was denied a fair hearing and the exception fails to "[include] the citation of authorities in support thereof," 10 CFR §2.762(a).

9. The Coalition's final allegation, that Permittees' witnesses on "numerous occasions" denied that they had prepared testimony which they had previously sworn was theirs, is equally frivolous. The Coalition, it should be noted, neglected to supply any references to these "numerous occasions," despite the requirement of 10 CFR §2.762(a) that exceptions "shall precisely specify the portions of the record relied upon." Permittees' prepared testimony was sponsored into evidence by four witnesses who stated which of its sections they were

primarily responsible for. Tr. 52-53. One of these witnesses relied on information supplied to them by others. This objection in and of itself would be merely groundless. It becomes preposterous in view of the fact that these other persons were present in the hearing room, were identified, and were available for cross-examination. See e.g. Tr. 60, 210, 224. The testimony was obviously a composite document. Witnesses were present to testify to every statement it contained. The Coalition obviously suffered no prejudice.

Respectfully submitted,

By



Gerald Charnoff
Jay E. Silberg

Counsel for The Toledo Edison
Company and The Cleveland
Electric Illuminating Company

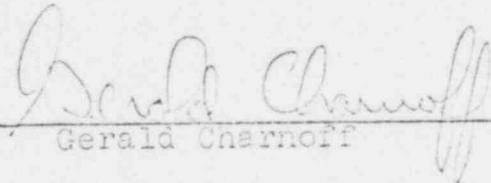
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Martin Malsch, Esq. (6)
Office of General Counsel
U. S. Atomic Energy Commission
Washington, D. C. 20545

Jerome S. Kalur, Esq.
Jamison, Ulrich, Burkhalter
& Hesser
1425 National City Bank Building
Cleveland, Ohio 44114

SHAW, PITTMAN, POTTS & TROWBRIDGE

By


Gerald Charnoff