UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

Before Atomic Safety and Licensing 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 OF THE TOLEDO EDISON COMPANY AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY TO COALITION'S MOTION TO REOPEN SUSPENSION HEARINGS

1. At the conference of counsel in Cleveland on April 20, 1972, and at the public hearing, the Licensing Board directed each party to the proceeding to file proposed findings of fact and conclusions of law by the close of business on May 10, 1972 (Tr. 27-28,502). The Toledo Edison Company and The Cleveland Electric Illuminating Company ("Permittees") and the Regulatory Staff duly complied with the Licensing Board's request. Coalition for Safe Nuclear Power ("Coalition"), the sole remaining Intervenor herein, by its filing mailed on May 9, 1972, expressly declined to file any such proposed findings and conclusions. On the same date, Coalition moved the Licensing Board to reopen the suspension hearing.

2. The public hearing record contains substantial evidence relating to:

a) the environmental effects of continued construction of the Davis-Besse facility during the ongoing NEPA review, demonstrating that there will be little, if any, environmental effect and that any such effects are redressable;

b) the alternatives to the Davis-Besse facility and the design alternatives to each of the environmentally significant aspects of the design of the Davis-Besse plant demonstrating that continued construction will not foreclose subsequent adoption of any of such alternative design features; the record shows there are a large number of possible augments to the thermal and radioactivity effluent systems and to the nuclear safety systems. The record also shows that the present plant design satisfies applicable water quality criteria and AEC's proposed "as low as practicable" radiological release criteria;

c) the cost of abandonment of the Davis-Besse project demonstrating that if construction

were suspended now the cost of abandonment to the Permittees and to the public would be very substantial; the incremental investment to be made during the NEPA review period could not alter that conclusion and, relatively speaking, is not significant;

d) the incremental investment in the cooling tower and the radwaste treatment facilities during the NEPA review period is not significant; and

e) the cost of a suspension of construction pending completion of the NEPA review demonstrating that both the Permittees and the public would incur substantial costs from any such suspension and that the reliability of the power supply in the areas served by the Permittees would be seriously jeopardized by any such suspension.

Intervenors' failure to submit any proposed findings with respect to the record in the proceeding is a significant default by the Coalition and in effect waives Coalition's right to comment or take exception to the matters in the record. Section 2.754(a) of 10 CFR Part 2, "Rules of

Practice" provides:

> Failure to file proposed findings of fact, conclusions of law or briefs when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly.

3. The Licensing Board, as asserted by Intervenors, indeed, ruled as inadmissible much evidence with respect to the environmental effects of operation of the Davis-Besse facility. The Licensing Board correctly noted that such matters, were appropriate to the NEPA review itself and that this hearing was not convened to conduct a full NEPA review. The Licensing Board, accordingly, accepted evidence with respect to the environmental effects of continued construction but refused to accept evidence with respect to operation of the plant. The Licensing Board, however, accepted, indeed it encouraged the production of, testimony relating to the full range of alternatives to the Davis-Besse plant and to each of the design features of the plant which may be of environmental significance. As a result, there is a full and complete record showing that:

a) the economic and social cost of abandonment is already substantial and cannot be rendered nonsubstantial by a suspension of construction;

b) there is a large number of design alternatives to augment the present design to further protect the environment which may be considered in the full NEPA review and the availability of such alternatives will not be physically or economically foreclosed by continued construction; and

c) the availability of such a large number of possible augments to the present design, and the uncontradicted testimony showing that the thermal and radiological releases will meet applicable criteria, make it most unlikely that the possibility of environmental harm could outweigh the cost of abandonment. Furthermore, Permittees, on the record, waived any consideration by the Commission in the final NEPA review of the incremental investment to be made during the NEPA review period.

With respect to radiological accidents, in addition to the identification on the record of design alternatives all of which would not be foreclosed by continued construction, the Licensing Board should take notice that the Supreme

Court has specifically rejected the argument

> that the Commission cannot be counted on, when the time comes to make a definitive safety finding, wholly to exclude the consideration that PRDC will have made an enormous investment. Power Reactor Development Co. v. International Union 367 U.S. 396 (1961)

4. The Permittees were prepared, and indeed offered, to introduce testimony which would have demonstrated that operation of the plant would have no significant adverse effect on the environment. This information would have provided still another basis in the record for concluding that the environmental harm would be minimal and that abandonment is neither a likely prospect nor could it possibly outweigh the cost of abandonment.

5. Based on the record in the proceeding, the Licensing Board did not err, however, in limiting the testimony in the proceeding. It simply approached the issues in the proceeding in a manner which facilitated their consideration in a timely manner consistent with the time limitations imposed by the remand order of the Court of Appeals. This was clearly within the discretion of the Licensing Board and within the broad mandate of NEPA. As recently as April 14, 1972, the House Committee on Merchant Marine and Fisheries, which has legislative

oversight of NEPA and its implementation, said, NEPA

> is not adamant in stating just how such considerations [environmental considerations involved in licensing a nuclear plant] are to be developed. NEPA is not a procrustean bed against which agency programs must be measured and performance rigidly judged; it is rather a flexible tool designed to assist agency decision makers . . . (H. Rep. No. 92-991, p. 6)

The approach taken by the Licensing Board permitted the development of a sufficient record with which the Licensing Board could adequately consider the central issues in the proceeding.

6. Intervenors' Motion to reopen the hearings should be denied.

Respectfully submitted,

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Dated: May 15, 1972

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Reply of The Toledo Edison Company and The Cleveland Electric Illuminating Company to Coalition's Motion to Reopen Suspension Hearings" were served on the following, by deposit in the U. S. mail, on May 15, 1972:

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