

August 30, 1974

UNITED STATES OF AMERICA
ATOMIC ENERGY 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))

THE CLEVELAND ELECTRIC ILLUMINATING)
COMPANY, ET AL.,)
(Perry Nuclear Power Plant,)
Units 1 and 2))

Docket Nos. 50-346A
50-440A
50-441A

APPLICANTS' RESPONSE TO AMP-OHIO'S REQUEST
FOR EXTENSION OF TIME TO RESPOND TO THE
MOTION FOR SUMMARY DISPOSITION

1. On August 16, 1974, American Municipal Power-Ohio, Inc. ("AMP-Ohio") filed with the Licensing Board a motion for an extension of time to answer Applicants' Motion for Summary Disposition from August 23, 1974, to and including May 12, 1975, a total of 262 days. In a conference call among counsel for all parties to this proceeding, initiated by Chairman Farmakides on August 22, 1974, each party was directed to reply to AMP-Ohio's motion, and to address additionally the question of what date would be appropriate as a deadline for AMP-Ohio's response to Applicants' Motion for Summary Disposition assuming arguendo that the Licensing Board refuses to grant the pending motion for more time.

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2. Applicants submit that AMP-Ohio's request for an additional 262 days to answer the Motion for Summary Disposition is ill-founded and should be denied. While we continue to believe that Section 2.730(c) of the Commission's Restructured Rules of Practice sets the time for AMP-Ohio's response, Applicants would not object to the Licensing Board extending AMP-Ohio's answering period to a date no later than September 30, 1974, as requested by the City of Cleveland.

3. AMP-Ohio relies on Section 2.749(a) of the Commission's Restructured Rules of Practice to maintain that it can defer filing its response until 2 days before May 14, 1975, the date set for the substantive hearing on matters ultimately determined to be in controversy. That regulatory directive, however, must be read in proper context; it clearly contemplates that the "two (2) days before the date of the hearing" requirement for responses is to have application only in those circumstances where the motion for summary disposition is filed, as permitted by Section 2.749(a), "ten (10) days before the time fixed for the hearing." In such a situation, the respondent, if served with a copy of the motion by mail, would, under normal motion procedures pursuant to Section 2.730(c) of the Commission's Restructured Rules of Practice, not be required to respond thereto until the date that the hearing

actually commenced (or perhaps even the following day).^{1/}
The Licensing Board would thus have no real opportunity to consider in advance whether the issues raised by the movant should be disposed of summarily without a hearing.

4. Accordingly, the Commission wisely chose to restrict to an 8-day period the time for answering summary disposition motions which are filed 10 days before a scheduled hearing. It would be contrary to the entire thrust of this sensible limitation on the general requirements for motion pleading (10 C.F.R. §2.730) now to read Section 2.749(a) in the manner urged by AMP-Ohio, as intending to enlarge, rather than contract, the time within which to file an answer.

5. Moreover, such an expansive reading of the Commission's regulation would largely undermine the essential purpose for the summary disposition procedure. It is, of course, generally recognized that a motion for summary decision is designed to remove from administrative adjudication, at the earliest opportunity, those matters as to which "there is no genuine issue as to any material fact and * * * the moving

^{1/} Pursuant to Section 2.730(c), responses to motions are to be filed 5 days after the service thereof, not including Saturdays, Sundays and holidays (10 C.F.R. §2.710). If service is by mail, Section 2.710 provides that "three (3) days shall be added to the prescribed period." Hence, the filing of a response to a motion for summary disposition filed 10 days before the hearing would, but for §2.749(a), not be required for a minimum of 10 days, and, if a holiday should fall within that period, the respondent would then have 11 days to file his answer.

party is entitled to a decision as a matter of law" (10 C.F.R. §2.749(d)).

6. To this end, the summary procedure permits the Licensing Board to cut off discovery directed to areas where no showing can be made that a genuine controversy exists; it serves to protect the parties and the Board from unnecessary time-consuming and expensive pretrial and trial proceedings relating to generalized allegations which have no real factual support or legal basis. The aim of the summary disposition procedure is to shorten the discovery and hearing process to the fullest extent permissible, or, if appropriate, to dispose summarily of the action altogether, and to do so as expeditiously as possible. Thus, AEC Appeal Boards have repeatedly encouraged the use of motions for summary disposition in environmental and safety hearings, as a way of eliminating in advance of the hearing the issues which involve no disputed facts and need not be heard. See In the Matter of Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, RAI-78-3 188, 194 (March 29, 1973); In the Matter of Duquesne Light Co., et al. (Beaver Valley Power Station, Unit 1), ALAB-109, RAI-73-4 243, 244-245 (April 2, 1973); In the Matter of Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, RAI-73-6 423, 424-425, 426 (June 19, 1973);

In the Matter of Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, at p. 19 (July 8, 1974).

7. AMP-Ohio's construction of Section 2.749(a) would necessarily have the effect of precluding such expeditious consideration of the present motion for summary disposition. Instead, before entertaining AMP-Ohio's response to Applicants' Motion, the Licensing Board would have to await the completion of all pretrial discovery, the subsequent filing of each party's statement on the ultimate issues to be heard, the preparation of written testimony, and the submission of pretrial briefs. But, so to defer consideration of matters which are now deemed ripe for early disposition would effectively defeat a major objective of the summary procedures. It would foreclose any possibility of eliminating altogether, or at least narrowing considerably, the pretrial discovery process as it relates to AMP-Ohio's claims. Clearly, the Commission did not intend for its summary procedures to be so compromised.

8. This is particularly apparent in the present context, where the motion for summary disposition is based on the argument that no nexus exists between AMP-Ohio's contentions in its petition to intervene and activities under the licenses being sought by Applicants. As pointed out by the Licensing Board

in its Final Memorandum and Order of April 15, 1974 (p. 10, n. 14), the Commission has explicitly directed that the summary procedures be invoked at any time to dispose of the nexus issue in antitrust proceedings under the Atomic Energy Act.

Thus, the Commission stated in one of its Waterford decisions:^{2/}

The hearing issues cannot and should not be divorced from the overriding requirement that there be a reasonable nexus between the alleged anticompetitive practices and the activities under the particular license. This is a primary and predominant question which must pervade the proceeding. We remind the Board and the parties that if it becomes apparent at any point that no meaningful nexus can be shown, all or part of the proceeding should be summarily disposed of. This can be done under the provisions of 10 C.F.R. 2.749 or by any other appropriate means. [Emphasis added.]

The underlying reason for this reminder is manifest. As the Commission observed in the same opinion (ibid.): "If activities relating to a facility have no substantial connection with alleged anticompetitive practices, there is no need for a hearing as to such practices or proposed forms of relief from them."^{3/}

^{2/} Memorandum and Order of September 28, 1973, in In the Matter of Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), Docket No. 50-328A, CLI-73-25, RAI-73-9-619, at p. 621.

^{3/} It is noteworthy that the Licensing Board in Waterford did subsequently entertain a motion for summary disposition as to all of the issues raised in the proceeding, and, after receiving timely responses thereto (filed well before the day preceding the eve of the scheduled hearing date), ruled on the motion. See Memorandum and Order With Respect To Staff's Motion For Summary Disposition, LBP-74-23, RAI-74-4 698 (April 12, 1974).

9. It is, therefore, plain that AMP-Ohio's request for an additional 262 days within which to answer Applicants' Motion for Summary Disposition should be denied. No authority whatsoever has been cited by AMP-Ohio to support its position. Not only does its undue emphasis on the "two (2) day" requirement in Section 2.749(a) run counter to the clear intent of the Commission, as expressed implicitly in the regulation and explicitly in Waterford; it also is wholly inconsistent with the judicial counterpart to Section 2.749(a), i.e., Rule 56 of the Federal Rules of Civil Procedure, which the Commission, in its 1972 revisions of the summary disposition procedures, intended "to track more closely." Commission's Statement of Considerations Accompanying Issuance of its Restructured Rules of Practice, 37 Fed. Reg. 15127 (July 28, 1972). It hardly need be stated that the judicial procedure for disposing of summary judgment motions filed under Rule 56, Fed. R. Civ. P., does not contemplate a deferral of respondents' answers thereto until the day before the time fixed for the trial.

10. Accordingly, Applicants continue to believe that the general requirements for motion pleading, as set forth in Section 2.730(c) of the Commission's Restructured Rules of Practice, control the time when AMP-Ohio's response to Applicants' Motion for Summary Disposition should be filed. Since the 5-day period prescribed therein has elapsed during the pendency of

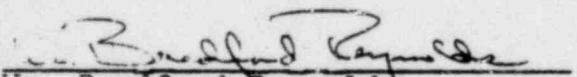
AMP-Ohio's present motion, AMP-Ohio could, consistent with 10 C.F.R. §2.730(c), appropriately be given an additional 5 days to respond from the date that the Licensing Board rules on the present request for an extension of time. Nor would Applicants have any objection, in light of the existing schedule for the filing of written objections to interrogatories and requests for documents, to allowing AMP-Ohio until September 30, 1974 (the date mentioned by the City of Cleveland in its filing of August 20, 1974) as the outside date for answering Applicants' Summary Disposition Motion.

11. AMP-Ohio would thus have a total of 45 days from the date it received Applicants' Motion to formulate a response. This should be more than ample time, especially since AMP-Ohio has necessarily had the nexus question under constant consideration since the outset of this proceeding -- as a result of requests for clarification of its nexus position made both by Applicants and the Licensing Board -- and has indicated that it has engaged in repeated conversations with its Consulting Engineers, O'Brien & Gere Engineers, Inc., regarding this issue.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By:


Wm. Bradford Reynolds
Gerald Charnoff
Counsel for Applicants

Dated: August 30, 1974.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Response to AMP-Ohio's Motion For Extension Of Time To Respond To The Motion For Summary Disposition" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to each such person in the Washington, D. C. area and by mailing copies, postage prepaid, to the others, all on this 30th day of August, 1974.

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Wm. Bradford Reynolds

Dated: August 30, 1974.

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