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)	AEC Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 and 2)	AEC Docket No. 50-440A 50-441A

BRIEF OF AEC REGULATORY STAFF ON ITS MOTION TO COMPEL PRODUCTION AND DELIVERY OF DOCUMENTS

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January 2, 1975

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INTRODUCTION

On December 5, 1974, the Atomic Energy Commission Regulatory Staff (hereinafter "Staff"), pursuant to Rule 2.740(f) of the Commission's Rules of Practice, 10 C.F.R. §2.740, filed with the Atomic Safety and Licensing Board (hereinafter "Board") a "Motion For An Order Compelling Production And Delivery Of Documents Requested Of Applicants". On December 20, 1974, Staff filed a "Request For Oral Arguments" on its Motion to Compel. At the Board's request, this Brief is being submitted in support of said Motion to Compel and in advance of oral argument, scheduled for January 3, 1975.

I. FACTUAL BACKGROUND

On August 23, 1974, the Department and the AEC Regulatory Staff (hereinafter "Staff"), pursuant to the Commission's Rules 2.740, 2.740a and 2.741, filed the Joint Request for Interrogatories and for Production of Documents (hereinafter "Joint Request"), which was served on each of the five Applicants in this proceeding.

The Joint Request, among other things, requested each of the Applicants to do the following:

1. Serve certified copies of the requested documents upon the Department and the Staff at their respective offices (Joint Request, pp. 1-2);

2. Prepare a list showing the particular paragraph(s) of the Joint Request to which each document produced is responsive (Joint Request, p. 1); and

3. List and give certain information about documents which were no

longer in possession, custody or control of the Applicant (Schedule attached to Joint Request, pp. 2-3). 1/

On September 9, 1974, Applicants filed objections to the Joint Request. While the Applicants collectively objected to a number of different items appearing in the Joint Request including the production of documents, Applicants did not object to any of the items noted above--the items now in controversy.

On October 11, 1974, the Licensing Board issued its "Order on Objections to the Interrogatories and Document Requests" (hereinafter "Order"). Since none of the Applicants made any objection to complying with the three requests listed above, the Order did not address itself to these portions of the Joint Request.

On October 23, 1974, Applicants moved for a thirty day extension of time within which to produce documents and answer interrogatories "in order to assure a proper and complete document production" (Motion For Extension of Time, p. 2). Staff did not oppose that motion; said motion was granted by the Board.

On November 4, 1974, the Board issued the most recent revised schedule for the stages of this proceeding, which provided that November 30, 1974, was to be the date for completion of all documentary discovery and responses to interrogatories. 2/

1/ The Joint Request also asked Applicants to identify and describe documents for which privilege is claimed (Schedule attached to Joint Request, p. 9).

2/ Because November 30, 1974, was a Saturday, the actual date upon which discovery responses were made was December 2, 1974.

On December 3, 1974, Applicants hand delivered their responses to the Joint Request. Applicants (1) failed to produce and deliver certified copies of documents as requested in the Joint Request, (2) provided no testimony, as requested of documents no longer in the possession of Applicants; (3) provided no testimony showing which documents were produced in response to particular paragraphs of the Joint Request; (4) did not identify or describe those documents withheld as privileged as requested in the joint request and as required by paragraph 149 of the Board's "Order On Objections To Interrogatories And Document Requests" dated October 11, 1974.

Applicants stated that documents were available in five different cities in Ohio and Pennsylvania, at the respective offices of each. In addition, five persons located at or near those cities were listed as persons through which "access to the materials could be arranged". This was the first time that either the Staff or the Department was informed of this course by Applicants.

On December 5, 1974, Staff filed its Motion to Compel which cited the hereinabove noted acts of noncompliance with the Joint Request and the Licensing Board's October 11, 1974 Order. To avoid duplication, the details of the Motion to Compel will not be repeated herein. In addition, on December 9, 1974, the Department of Justice filed a similar motion and in addition moved to revise the time schedule.

On December 17, 1974, an informal prehearing conference was held with the Chairman of this Licensing Board during which the parties discussed discovery in light of the problems and the motions that had been filed.

By letter dated December 19, 1974 from Applicants' counsel addressed to the Chairman of this Board, Applicants responded to certain factual inquiries which developed at the conference. Although not expressly providing,the letter, Staff feels, also served to reject a possible compromise to the discovery issues which emerged as a result of the conference.

Accordingly, and in light of the serious consequences of Applicants' position on discovery, Staff filed, with the Board on December 20, 1974, a Request For Oral Argument on its December 5 motion.

II. APPLICANTS' NON-COMPLIANCE WITH THE COMMISSION'S RULES OF PRACTICE

Paragraph two of page 1 of the Joint Request provides as follows:

> Responses to the interrogatories and certified copies of the requested documents shall be served upon the AEC Regulatory Staff at the Office of the General Counsel, U. S. Atomic Energy Commission, Regulation, Washington, D. C., 20545 and upon the U.S. Department of Justice, Washington, D. C., 20545 (emphasis supplied).

Section 2.741(d)*of the Commission's Rules provides in pertinent part:

> The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (days) after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested unless the request is objected to, in which case the reasons for objection shall be stated. (emphasis supplied).

On September 4, 1974, Applicants as previously discussed filed objections to the Joint Request but did not object at any time to the specific request for the production and delivery of certified copies of requested documents to Staff and the Department of Justice.

In "Applicants' Reply To Motions Of The AEC Regulatory Staff... To Produce Documents..." dated December 16, 1974 Applicants, without citing any Commission rule, any Commission case, or any judicial or administrative decision, argue that "related activities" in the above quoted language in 10 CFR §2.741(d) does not include the right to require production, copying, and delivery of documents as requested.

Such an attempted delimitation of the phrase "related activities" is without precedent in Commission regulations or Commission practice. As a matter of practice in antitrust proceedings before the Commission, various Applicants have produced and delivered a very large number of documents as requested.

A. TIMELY OBJECTIONS AS TO THE PLACE OF DISCOVERY MAY BE MADE UNDER THE COMMISSION'S RULES

Pursuant to 10 CFR §2.740(c) a party or person from whom discovery is sought may move for a Protective Order if it feels compliance with discovery requests will subject it to undue burden or expense. That provision expressly provides for such a motion based on a claim "(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place..."

Here, Applicants have filed no timely motion for such a protective order.

B. UNDER THESE CIRCUMSTANCES THE CASE LAW SUPPORTS THE VIEW THAT APPLICANTS HAVE WAIVED THEIR RIGHTS TO OBJECT

The general rule is set forth in 8 Wright and Miller, Federal Practice and Procedure (1970) §2035 p. 262-263.

> Ordinarly the [protective] order must be obtained before the date set for the discovery, and failure to move at that time will be held to preclude objection later.

The principle that timely objections to discovery be made or waived has been applied to antitrust cases and has been recognized in decisions of the A.E.C.

In Peitzman v. City of Ilmo, 141 F. 2d 956 (D.C.A. 8th 1940) cert. den. 323 U.S. 718, defendants alleged that notices to take depositions were improper for a number of reasons, including the argument that subpoenas duces tecum did not require the production of documents at the place of deposition. The U. S. Court of Appeals stated that the requirement for the production of documents did not invalidate the notice of deposition, but if defendants considered the requirement for document production too broad, they had a right to object. The court held:

> If there were any errors or irregularities in the notice [of deposition] they were waived by failing to serve written objections on the party giving the notice. 3/

3/ 141 F. 2d at 961.

Accordingly, the Court of Appeals upheld the default judgement against defendants when they failed to comply with the Court's order on depositions and failed to seek a protective order. Similarly, in Wong Ho v. Dulles, 261 F. 2d 456 (C.A. 9th 1958), the Circuit Court of Appeals for the ninth circuit held that it was not error for the trial court to admit a deposition taken in Hong Kong by the government though appellant (a California resident) was not represented at the taking of the deposition, when appellent had not moved for a protective order against taking the deposition in Hong Kong at the time the notice was served. The court held:

> By his [appellant's] inaction in failing to timely move for a protective order, appellant had waived his rights of cross-examination. 4/

In Collins v. Wayland 139 F. 2d 677 (C.C.A. 9th 1944), cert. den. 322 U.S. 744, the Court of Appeals upheld dismissal of plaintiff's action where plaintiff, an Oregon resident, twice failed to appear in Arizona for a deposition to be taken by defendant, an Arizona resident. The Court stated:

> If he [plaintiff] wished to be relieved from going to Arizona, he could and should have sought such relief by motion reasonably made... Instead, he disregarded the notice and the court's order and willfully failed to comply with either (emphasis added). 5/

4/ 261 F. 2d at 457.

5/ 139 F. 2d at 678.

In Marriott Homes, Inc. v. Hanson, 50 F.R.D. 396 (D.C. Mo. 1970) the court held that failure of a party or his attorneys to give reasonable notice of their inability to comply with the notice of taking deposition or to seek a protective order vacating the notice violated the duty to make discovery and constituted willful failure to attend deposition.

Not only is the trend clear [6/] in judicial decisions, but the Atomic Energy Commission has applied the concept of waiver to a failure to file objections and has ruled that failure to file timely objections to a hearing examiner's decision constitutes a waiver of the objections. In the Matter of X-Ray Engineering Company, 1 A.E.C. Reports 553 (1960), the Hearing Examiner held in his Intermediate Decision, and contrary to Staff's position, that certain radiation surveys conducted by the Licensee were inadequate. Because of this, the Hearing Examiner's Order required that prior to conducting further radiographic operations, licensee must maintain at each site a calibrated radiation survey instrument. The Staff filed no exceptions to the Decision and to this holding of the Hearing Examiner. However, in its reply to exceptions filed by the licensee, the Staff urged that the Examiner erred on its holding on the survey instrument.

6/ See Also Stephens v. Sioux City & New Orleans Barge Lines, Inc. 30 F.R.D. 397 (D.C. Mo. 1962) (Motion to quash deposition not seasonably made after failure to appear); Gore v. Maritime Overseas Corp. 256 F. Supp. 104 (D.C. Pa. 1966) (waiver of right of cross-examination in deposition by not objecting to the notice of deposition...not moving for order that the deposition not be taken in accordance with the notice.

The licensee objected to the Commission's consideration of Staff's argument charging that as an exception to the Intermediate Decision, it was untimely made. With respect to this issue, the Commission ruled:

> We must sustain Licensee's objection in view of the requirement of timely filing of exceptions under our rules and in the absence of any compelling reasons for the Commission to consider the matter on its own motion. 6a/

III. APPLICANTS' BURDEN IS NOT UNDUE BURDEN DO TO THE NATURE OF THIS HEARING AND THE DELAY CAUSED BY APPLICANTS

In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2) RAI 73-5 p. 322, ALAB-122, (May 16, 1973), the Appeals Board, in an antitrust proceeding, reviewed two decisions by the Licensing Board.

This ruling concerned subpoenas duces tecum obtained by Applicant and directed to twenty-one Michigan municipalities not parties to the proceeding. The subpoenas sought the production, from the period 1960-1973 of a substantial number of documents relating to "virtually all facets of the marketing operations conducted by these municipal electric systems. 7/ The municipals moved to quash the subpoenas on three grounds, including "undue burden". Although in that proceeding, the parties were apparently able to reach an understanding limiting the document requests and interrogatories, the Appeal Board did present its views on the municipals' objections to discovery on the basis of undue burden:

> The concern expressed in ALAB-118 respecting the burden which might possibly be imposed upon appellants should not be taken, however, as an approval of the posture which appellants assumed

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6a/ 1 A.E.C. Reports at 554.

7/ In RAI-73-5, p. 323 (June 15, 1973).

> before the Board below on the burden question. From the outset, appellants steadfastly maintained that compliance with any portion of the discovery requests would entail an undue burden -- a position adhered to even after the Licensing Board has substantially reduced the scope of the discovery. But, as should have been perfectly apparent, some of the documents could have been furnished, and some of the interrogatories answered, without the imposition of any significant burden. In this connection, it is obvious, of course, that compliance with a discovery request invariably will require some exertion of effort. But it is equally obvious that a claim of undue burden (even if advanced by a non-party to the litigation) must be founded on much more than that some expense or inconvenience may have to be incurred in responding to the discovery. 8/

Staff submits that the Appeal Board's rationale in Consumers' is equally applicable to the present proceeding. Indeed, Applicants have here also broadly asserted "undue burden" with respect to all of the document requests of CEI, and the fifteen document requests of each of the other four Applicants without regard to the amount of information that is required to be produced in any of these requests. Thus, for example, request 1 of the Joint Request calls only for a certified copy of the

8/ RAI 73-5, p. 325 (June 15, 1973) n. 14.

Company's certificate of incorporation and by-laws and any amendments thereto. Request 2 of CEI and five of each of the other Applicants calls for annual reports issued to stockholders by Company for the years 1968-1974. Request 6 of CEI and four of each of the other Applicants calls for a narrative history of the Company. Other requests call for company organization charts, maps of generating and transmission systems, as well as various studies of different aspects of the Company's operation. Many of the document requests can be fulfilled by the production of one or two pieces of paper or reports or maps that are very readily accessible. What type of burden is involved in serving copies of annual reports or certificates of incorporation? The answer is clearly no burden at all.

Applicants have thus apparently used the burden argument broadly in an attempt to delay or deny the government's discovery in this proceeding. In this respect the Consumers' opinion is particularly instructive:

> We think that it is the manifest obligation of persons against whom discovery is sought to refrain from asserting a blanket claim of burdensomeness which neither is nor can be substantiated. In the future, a licensing board confronted with an all-encompassing indiscriminate claim of burden will be justified in rejecting the claim in its entirety upon a finding of lack of merit with respect to as least one of the discovery items. Further, the Board need not consider whether a response to a particular item burdensome unless, with respect to that item, specific reasons for the claim are assgined. (Emphasis added.)

A. A CLAIM OF UNDUE BURDEN MUST BE WEIGHED IN TERMS OF NEED. IN ANTITRUST PROCEEDINGS, BROAD DISCOVERY IS BOTH REQUIRED AND PERMITTED

A claim of "undue burden" must be weighed on terms of the need of the moving party for the information requested. In antitrust proceedings, broad discovery is both required and generally permitted. Thus, the claim of undue burden is very infrequently sustained in such an action.

In U.S. v. R.J. Reynolds Tobacco Co., 268 F. Supp. 769 (D.C. N.J. 1966) the government brought an action under Section 1 of the Sherman Act and Section 7 of the Clayton Act to challenge a merger. The government moved for production and inspection of documents including documents gathered in the offices of defendant's counsel. Defendant's objected, inter alia on the grounds of burden. The government argued that the requested documents were not unduly burdensome in view of their importance to a full and fair trial. The court based its decision on the government's request in light of the nature of the proceeding and essentially granted the government's motion after weighing the claim of undue burden against "the importance of the information sought." 9/

In U.S. v. American Optical Co., 39 F.R.D. 590 (D.C. Col. 1966), the government brought a civil antitrust action under Section 1 and 2 of the Sherman Act against two defendants. One such defendant served a subpoenas duces tecum calling for the production of various documents by officers of competitors who were not parties to the proceeding. A non-party

9/ 268 F. Supp. at 774.

moved to quash the subpoena on grounds that the production requested would be unduly oppressive and burdensome because it would necessitate the examination of large quantities of documents, requiring a great deal of time and expense. The Court held as follows:

> The fact that production of documents may involve inconvenience and expense was not sufficient reason for refusing discovery that was otherwise appropriate. 10/

Similarly in Keco Industry Inc. v. Stearns Electric Corp., 285 F. Supp. 912 (D.C. Wis. 1968), a case for damages for loss of profits, the court held, after examining discovery requests in light of the nature of the proceeding, that defendant was entitled to examine and copy "all contracts purchase orders, invoices and records of shipment pertaining to plaintiff's products" even though it involved removing from storage and carting to the place of inspection of some 100,000 files gathered over a period of five years.

In Rockaway Pix Theatre, Inc. v. Metro-Goldywn-Mayer, Inc., 36 FRD 15 (D.C. N.Y. 1964), a private antitrust action, the Court held: 11/

> All sources of information should be made available regardless of expense and the mere fact that production would be onerous or inconvenient is not, per se, grounds for denial of motion for inspection.

10/ 268 F. Supp. at 774. Service Liquor Distributors, Inc. v. Calvert Distillers Corp. 16 F.R.D., 344 (D.C. S.D. N.Y. 1954); 4 Moore Federal Practice, para. 34.19(2) at p. 2476, (2nd ed. 1963).

11/ Citing Michel v. Mercer, 8 F.R.D. 464 (D.C. W.D. Pa. 1948) and Locks Enterprises, Inc. v. U.S. Butterfield Theatres, Inc. 13 F.R.D. 5 (E.D. Mich. 1952).

IV. Time and Remedy

A. Remedy

1. For all of the reasons set forth herein, and in Staff's previous two pleadings including (a) the serious consequences of Applicants' disregard of (i) the Commission's Rules of Practice, (ii) this Board's Order "On Objections To Interrogatories And Document Requests", (b) the unconscionable delay caused by Applicant's failure to disclose their posture on discovery until December 2, 1974, (four months after the Joint Request was filed, as set forth in detail in Staff's Request For Oral Argument dated December 20, 1974), (c) the effect of Applicants posture on discovery on (i) the orderly conduct of licensing hearings in general and (ii) the Congressional mandate for expeditious prelicensing antitrust review, Staff feels that the appropriate relief is that Staff's motion be granted and that Applicants be ordered to serve certified copies of the requested documents and otherwise fully comply with the joint request and this Board's October 11, 1974 Order.

2. In the event this Board is unwilling to so order, Staff is prepared to reluctantly accept the delivery of all documents requested by Staff (including the small percentage of cross-referenced materials) to the office of Applicants' counsel in Washington, D. C.

B. Time

Set forth below are the necessary minimum adjustments to the Board's schedule which Staff feels must be made to accomodate the Board's ruling.

Ruling	Minimum Schedule Delay
Production and Delivery of Certified Copies	45 calendar days after delivery
Central Depository in Washington, D. C. at Office of Applicants' Counsel	90-120 days (delivery to be scheduled)
Motion Denied. Staff and Department Must Travel To Five Cities	6+ months

Respectfully submitted,

Roy P. Lessy, Jr.

Roy P. Lessy, Jr.
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland
this 2nd day of January 1975.

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ATOMIC ENERGY COMMISSION

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THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of BRIEF OF AEC REGULATORY STAFF ON ITS MOTION TO COMPEL PRODUCTION AND DELIVERY OF DOCUMENTS, dated January 2, 1975, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail, this 2nd day of January 1975:

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