

6-16-75

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY 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

MINUTES OF CONFERENCE CALL WITH
BOARD CHAIRMAN ON MAY 30, 1975

On Friday, May 30, 1975, counsel for the City of Cleveland initiated a conference call at 3:00 p.m. Participants in the conference call were: Licensing Board Chairman Douglas V. Rigler; Mr. Gerald Charnoff, counsel for Applicants; Mr. Steven M. Charno, counsel for the Department of Justice; Mr. Roy P. Lessy, Jr., counsel for the Staff of the Nuclear Regulatory Commission; Mr. Richard M. Firestone, counsel for the State of Ohio; and Mr. David C. Hjelmfelt, counsel for the City of Cleveland.

Counsel for the City of Cleveland announced that the purpose of the conference call was to present an oral motion to strike the affidavit of Mr. Donald Hauser, filed pursuant to the Board's order of May 16, 1975. In support of the motion counsel stated that the affidavit went beyond the scope of the Board's order permitting

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the affidavit to be filed; that order was limited to allowing Mr. Hauser to state in affidavit form the facts previously put forth in Applicant's answers to interrogatories. Mr. Hjelmfelt stated that in comparing the affidavit with those answers he found places where statements of facts were changed or contradicted, where the affidavit went beyond the interrogatory answers, and where conclusions of law were drawn. He then listed several examples of statements in the affidavit which contradicted prior statements given in response to interrogatories or which went beyond the scope of the original statements.

Counsel for the City felt that the affidavit raised a whole new set of factual allegations. Mr. Hjelmfelt stated that to permit the parties to respond to the affidavit would delay the proceeding. Delay was among the reasons given for opposing Applicants' motion to file the affidavit during the May 14, 1975 Pre-hearing Conference. On the other hand, not to respond would be prejudicial to the rights of the City.

Mr. Charno stated that the Department of Justice joined in the motion.

Mr. Lessy stated that Staff also joined in the motion and felt that the affidavit was in reality a responsive pleading. He pointed to the statement of Mr. Hauser in paragraph 2 of the cover letter of the affidavit, "The facts provided in the enclosed Affidavit are supplemental to the materials filed with the Answer of the Cleveland Electric Illuminating Company to the interrogatories of the Department of Justice relating to claims of attorney-

client privilege and work product exclusion." Mr. Lessy indicated that they were not only supplemental and additional but in many respects were contradictory, and that this statement demonstrated that the affidavit went beyond the scope of the Board's order.

Mr. Charno stated that the affidavit contains legal conclusions in the nature of argument, for example stating who is in the control group without naming the person or position held. Such statements usurp the role of the Special Master.

Mr. Firestone indicated that Ohio would not take a position on these discovery matters and Chairman Rigler stated that he assumed that AMP-O did not have a position on this issue as well.

Mr. Hjelmfelt argued that the affidavit should be stricken because the alternative of permitting the parties to reply would endanger the time schedule of the consolidated proceedings. He noted that the deposition of CEI employees would begin in about one week and failure to obtain a ruling on the claims of privilege made by CEI prior to those depositions might result in an extension of the discovery period.

Mr. Charno stated that personnel from the Department of Justice assigned to this case were heavily committed to the ongoing depositions and had little time to devote to preparing a reply even if one were allowed; thus if the Hauser affidavit were not stricken the Department would need a lengthy period of time in which to reply.

Mr. Charnoff, counsel for Applicants, stated that he had not been informed of the subject matter of the conference call until a half hour before its commencement. He urged that Cleveland be

required to file a written motion and that Applicants be given the opportunity to reply also in writing. The written motion should fully set forth any problems found in the affidavit and not just cite examples. He further stated that Mr. Reynolds who had worked with Mr. Hauser in preparing the affidavit was out of town in the midst of depositions in this case. Mr. Charnoff indicated that only Mr. Reynolds was familiar with the affidavit and Charnoff had only examined it five minutes prior to the conference call. However based on his perusal of the document he feels that it is in accord with the footnote of the Board's order and sees no legal argument within it. Mr. Charnoff indicated that he did not know if there were any changes in the facts from the interrogatory answers or not. Applicants want a written motion and a written response thereto. They would be agreeable to an expedited schedule shorter than the normal five days plus three for mailing. Further, since only parts of the affidavit can be stricken, written objections should be filed to those parts.

Mr. Lessy noted that the Commission's rules provided that the Chairman could grant leave to make oral motion and he interpreted Mr. Hjelmfelt's actions as being a request for leave to file such an oral motion and the oral motion itself.

Mr. Charnoff stated that he did not dispute the Chairman's authority to permit oral motion but that this was not a motion made on the record during a hearing. He argued that this was a detailed motion to which Applicants should have an opportunity to prepare a response.

Mr. Lessy stated that it was unusual to grant a party a second opportunity to reply. He stated that in taking pains to insure procedural due process to the Applicants the Board threatened the right of the other parties to procedural due process. Mr. Lessy again referred to Mr. Hauser's statement that the affidavit supplemented the interrogatories as an admission against interest.

Mr. Charnoff maintained that there was no admission against interest in the word "supplemental" and that the cover letter should not be read in that way.

Mr. Lessy suggested that the Board order Applicants to submit a new affidavit.

Mr. Charnoff replied that the present affidavit complies with the limitations contained in the Board's order.

Chairman Rigler then addressed a series of questions to Mr. Hjelmfelt:

Q. How would Cleveland be prejudiced by the Master's consideration of the present affidavit?

A. The present affidavit changes the facts which the parties addressed in their brief. An important function of the brief is to apply the law to the facts and the briefs submitted were tailored to the facts in the interrogatory answers. In its briefs Cleveland has applied the rules of law to the facts alleged by the Applicants.

Q. How would the new recitations change these principles of law?

A. The rules of law would not change but the result of their application would.

Q. Assuming that a discrepancy exists between the facts asserted in the affidavit and those in the interrogatory answers should the Master be precluded from having all of the information before him and indeed isn't there a duty upon the parties to supplement their answers with new information or to correct answers which they later find out were erroneous? How would the parties be prejudiced if the answers are changed if they are truthful?

A. Certainly the Master should have all the facts available but there is no basis on which to assume that the facts in the affidavit are more likely to be true.

Mr. Lessy then interjected that the affidavit contained arguments responsive to the briefs, for example in defining the control group and are not merely statements of fact.

Mr. Hjelmfelt then responded that there must be a time when pleadings and responses finally cease. If the Applicants had been expeditious since December, 1974 the parties would not be in the bind now of upcoming depositions and a July 1 deadline. Applicants have known since December that they were required to prove their claim.

Chairman Rigler then indicated that he was still troubled with the argument as to how the parties would be prejudiced if the legal criteria for the Master has been set forth previously in the parties' briefs. If for example the affidavit sets forth the author of a document that had not been indicated previously, how would this affect the Master who is reviewing the documents themselves as well.

Mr. Hjelmfelt responded that Cleveland should have the opportunity to address itself to the arguments and applications of the law to the new facts put forth by the Applicants. While counsel may hope that the Master will correctly apply the law, it would be prejudicial to require Cleveland to rely on the Master unaided by the analysis Cleveland would offer.

Mr. Charnoff then repeated that he did not know if the affidavit contained changes in facts but that he did not recall much application of the law to the facts in the original brief in any case. He indicated he had no objection if specific problems were filed with the Master. Any changes in the facts only arise as more digging is done.

The Chairman then stated his preliminary thoughts. With respect to Mr. Charno's arguments that the affidavit contains conclusions of law, for example regarding control group, the Chairman agreed and would instruct the Master to disregard those statements. With regard to statements that the documents were responses to requests for advice that others had drafted, the Chairman felt that the affidavit went beyond the scope of the Board's order. The Chairman wished to consult with the Board but believes that the Board will advise the Master to disregard all such assertions. Further, the Chairman stated that if other parties wished to file written motions to strike the affidavit in whole or in part with written responses thereto, should they prevail any delay resulting thereby would be chargeable to the Applicants.

Mr. Charnoff responded that the footnote to the Board's order included discussion of who was in a control group. He indicated

it is hoped that the previous statements by Chairman Rigler were just preliminary conclusions. The assertions of control by Mr. Hauser could be accepted or rejected by the Master and were not legal conclusions.

Chairman Rigler indicated that he was unsure how quickly he could reach the other Board members. In response to Mr. Lessy's suggestion he indicated he would advise the Master that the affidavit was subject to contest. He did not know the Master's schedule but his considerations will not be held up. Chairman Rigler then asked if anyone contemplated filing a motion based on the affidavit.

Mr. Hjelmfelt responded that he felt compelled to file such a motion and expected it to be detailed as a brief.

Mr. Charnoff replied to the Chairman that based on past experience he assumed that the Applicants would reply to such a motion.

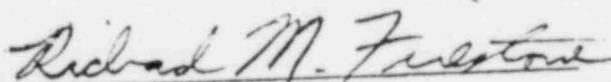
In response to the Chairman all of the parties indicated that they doubted oral argument would be necessary.

The Chairman then indicated that he would issue an order if the Board agreed. Mr. Charnoff sought to reserve any rights he may have to object to the oral procedure which was followed and his lack of notice and preparation. Mr. Hjelmfelt indicated that none of the parties had learned of his proposal earlier than that morning and that each was reached as quickly as possible. Mr. Charnoff responded that he was not attempting to claim prejudice or that the parties were ganging up against the Applicants, but just indicating that he had no first-hand knowledge with which to deal with the problems discussed.

The Chairman indicated that any order may be followed by exceptions thereto and reminded Mr. Charnoff that the Board had deferred to the Applicants despite being moved by the arguments against allowing the affidavit at the last Pre-hearing Conference. Mr. Charnoff responded that he did not want his silence to indicate a waiver of any kind.

In conclusion, the Chairman indicated that he would not delay the Master's consideration of all the materials before him. He indicated his feeling that since the briefs already submitted set forth the legal criteria for the Master in detail, the concerns of the parties over the affidavit may well be groundless.

Respectfully submitted,



Richard M. Firestone
Assistant Attorney General
State of Ohio

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Minutes of Conference Call with Board Chairman on May 30, 1975" in the above-captioned matter have been served upon all parties listed on the Attachment hereto by deposit in the United States mail, postage prepaid, this 9th day of June, 1975.


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