

6-2-75 Rec. Filed



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

MEMORANDUM AND ORDER OF THE BOARD
WITH RESPECT TO SPECIAL MASTERS
RECEIPT OF AFFIDAVIT BY DONALD HAUSER
OF MAY 22, 1975 RELATING TO PRIVILEGED DOCUMENTS

On May 16 1975 the Board issued an order granting in part and denying in part Applicants' motion for leave to file an additional response on claims of privilege. By the terms of that order, Applicants were permitted to file an affidavit limited to a description of the authors and recipients of the documents for which privilege was claimed, their legal qualifications and their corporate positions. Applicants' disavowed any intent to submit legal argument in the text of the affidavit and the Board specifically rejected the inclusion of legal arguments in the affidavit.

Subsequently, the Board received an affidavit dated May 22, 1975 by Donald H. Hauser, Corporate Solicitor of Applicant Cleveland Electric Illuminating Company (CEI). The affidavit was

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66 pages in length and discussed virtually every document as to which privilege previously had been claimed. Applicant withdrew its claim of privilege with respect to a limited number of these documents.

On Friday, May 30 at 3:00 p.m., a conference telephone call initiated by counsel for the City of Cleveland (City) was accepted by the Chairman of the Board. All parties to these proceedings were represented on the conference call except for AMP-O which has not taken any position with respect to the privileged documents in controversy. The purpose of the telephone call was stated to be an oral motion to strike the Hauser affidavit on grounds that it exceeded the grant of authority contained in the Board's order of May 16, 1975. The City of Cleveland was joined in its objections by the Nuclear Regulatory Commission Staff (Staff) and by the Department of Justice (Justice). These parties contended that the affidavit contained substantially more information than Applicant CFI originally had stated to be available. Specific reference was made to certain of the documents which originally were listed as recipient unknown or author unknown and which, in the Hauser affidavit, were identified by author or recipient.

In addition, Justice joined by the Staff and the City objected to the affidavit's conclusory remarks relating to whether certain individuals were in the corporate "control group" and to the factual assertion that certain of the documents were prepared in response to lawyers' requests for advice.

The parties moving to oppose receipt of the affidavit stated that the motion was being made orally and by telephone conference call because of the tight time parameters imposed by the Board with respect to the completion of discovery. It was noted that the opposing parties were scheduled to commence depositions during the next week and that they desired the Master to complete his examination by then, if possible, in order that any documents found not to be privileged might be made available for purposes of witness deposition.

Counsel for Applicant CEI opposed the oral motion to strike and requested the Board to require that any such motion be filed in writing. Applicant CEI requested an opportunity to reply in writing.

The Chairman stated that he would not rule on the motion prior to consultation with other members of the Board. The Board now has had an opportunity to confer with respect to the City's motion.

The Board has decided on its own initiative and pursuant to the City's motion to direct the Master not to accept as fact, solely on the basis of the affidavit, Applicant CEI's contention with respect to whether the author or recipient of the documents for which privilege is claimed are members of a corporate "control group." The Master may determine that certain individuals are members of a "control group" if he deems such information to be relevant to his decision, but that determination shall be made on the basis of evidence of record apart from that submitted in the

Hauser affidavit. Similarly, the Master is directed not to accept as binding assertions in the Hauser affidavit that various documents were prepared in response to requests for advice by counsel. Such documents indeed may reveal on their face or the record may show that they were prepared pursuant to such request, and the Master then can apply appropriate legal criteria in determining whether any privilege exists. However, in permitting Applicant CEI to file its supplemental affidavit, it was not the intention of the Board to give Applicant CEI an opportunity to avoid any contest with respect to factual conclusions as to whether individuals either were members of the "control group" or were acting pursuant to direction of counsel.

We emphasize that while we are granting the joint oral motion of the City, Staff and Justice to limit, at least to this degree, we also issue this ruling independently and based upon our own review of the affidavit and the purpose for which we originally permitted to to be untimely filed. 10 CFR §2.730; 10 CFR §2.718; 10 CFR §2.757.

The City's oral motion to strike the affidavit in its entirety is denied but the City is granted leave to refile such motion in writing should it desire to do so. During the course of the conference call, counsel for Applicant CEI indicated that he would accept responsibility for an immediate reply to any written motion. Accordingly, should a motion to strike be filed, Applicants are directed to file their answer, by hand, within three days of the receipt of any such motion.

The Board indicated in the course of its May 16, 1975 Order permitting filing of the affidavit that it would not delay consideration by the Master of the documents for which privilege is claimed. Likewise, the Board will not allow the dispute with respect to whether the affidavit as submitted exceeded the scope of the authority to file to delay the Master's consideration. Accordingly, the Master will continue his review and may utilize the affidavit except as limited herein by Order of the Board.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING BOARD



Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 3rd day of June, 1975.

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NUCLEAR REGULATORY COMMISSION

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(Davis-Besse Nuclear Power)
Station, Unit No. 1; Perry)
Nuclear Power Plant, Units 1&2))

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
34th day of June 1975.

Henry A. Lawrence
Office of the Secretary of the Commission

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