

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



In the Matter of )  
TOLEDO EDISON COMPANY and )  
CLEVELAND ELECTRIC ILLUMINATING )  
COMPANY )  
(Davis-Besse Nuclear Power Station, )  
Unit 1) )

Docket No. 50-346A

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

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

ORDER OF THE BOARD GRANTING IN PART AND  
DENYING IN PART APPLICANTS' MOTION FOR LEAVE  
TO FILE RESPONSE ON CLAIMS OF PRIVILEGE

(1) By Motion dated May 13, 1975, Applicants requested leave to file on or before May 23, 1975 "a response to the referenced Reply Briefs, which will include affidavits by those individuals at Duquesne and CEI responsible for the documents subject to claims of privilege." During the fifth prehearing conference of May 14, 1975, oral argument was heard on the above Motion. The Department of Justice and the City of Cleveland took the position that the Motion should be denied because it was untimely, it would delay the resolution on claims of privilege by the Special Master, and Applicants had had ample opportunity to present and support their claims by filings made pursuant to the previously established briefing schedule.

(2) Applicants argued that a response was desirable for the purpose of incorporating in affidavit form facts previously

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set forth in Applicants' Answers to Interrogatories. Applicants contend that in the Answers to Interrogatories they had in part met the evidentiary burden of demonstrating relevant restrictions on the control and circulation of documents for which privilege is claimed. Applicants specifically disavowed any intent to argue legal issues in the event the Board permitted a response to be filed.

(3) The Board considers Justice and City's objections to be well taken to the extent that they resist additional argument to the Special Master and upon their claim that Applicants have had ample opportunity to brief the privilege issue in pleadings submitted according to the established briefing schedule. Accordingly, no further response in the nature of argument will be permitted. At the same time, the Board, after consultation with the Special Master, is of the opinion that an affidavit limited to the precise and specific factual items outlined by Applicants' counsel at the fifth prehearing conference may be of assistance to the Special Master. We see no prejudice to Justice or the City by permitting this type of limited affidavit particularly when we weigh the importance of the proper resolution of the privilege issue against the objections posed. Accordingly, we will permit Applicants to file on or before May 23 an affidavit limited as set forth by Applicants' counsel on pages 1142-43 of the transcript.\*

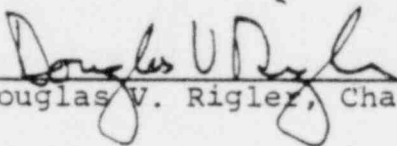
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\* Footnote on following page.

(4) The Board indicated at the hearing that it would not delay consideration of the briefs and the documents by the Special Master pending receipt of any response which might be permitted. Accordingly, the Special Master has and will continue his review of documents in the interval between the fifth pre-hearing conference and May 23, 1975.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING BOARD

  
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Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland,  
this 16th day of May, 1975.

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\* "... the affidavit would go just to the points that would be -- that the people who are listed there are attorneys, that the people who are there are in the corporate positions, who are in control; that is the nature of the affidavit.

It wouldn't argue legal issues again as to what the legal principles are."

See also, Tr. p. 1140; Tr. pp. 1143-44.