

6-10-75

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

REPLY TO THE CITY OF CLEVELAND'S MOTION
TO STRIKE THE AFFIDAVIT OF DONALD H. HAUSER

1. On June 5, 1975, the City of Cleveland filed with the Licensing Board a motion to strike Donald H. Hauser's Affidavit in support of the claims of attorney-client and work product privilege asserted by The Cleveland Electric Illuminating Company in connection with a number of documents submitted to the Special Master for examination, in camera. This written motion followed by two days the Licensing Board's Memorandum and Order of June 3, 1975, denying a similar oral motion by the City to strike the Hauser Affidavit, and ruling that certain conclusory statements made therein -- i.e., as to the individuals considered by Mr. Hauser to be within the corporate "control group" and as to documents said to have been prepared "in response to requests for advice by counsel" -- should not be accepted by the Special Master as binding assertions.

2. In light of the Licensing Board's Memorandum and Order, a reply to the City's written motion to strike requires response only because it is so

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misleading. If the City's intent was to discredit Mr. Hauser, the paper filed shows a marked degree of bad judgment. Donald H. Hauser has been a legal officer of CEI for some 15 years. In that position, he has been primarily responsible for matters handled essentially by the CEI Legal Department, and has also been the individual to coordinate on legal matters handled for CEI by outside counsel. To suggest in such circumstances that he has insufficient first-hand knowledge to make the statements set forth in his Affidavit is the height of absurdity. The suggestion is even more ludicrous when it is remembered that the documents in question all came from Mr. Hauser's own working files, not from files located in the offices of other personnel at CEI.

3. The City takes issue with Mr. Hauser's identification of certain CEI personnel as being within the corporate "control group" (Motion, p. 3). While the Licensing Board has already ruled that such an assertion is not to be conclusive on the Special Master, we would point out that such a statement provides precisely the sort of information which Applicants' counsel advised the Licensing Board at the May 14 Prehearing Conference (Tr. 1142-1143) would be included in the Hauser Affidavit. We would note further that Mr. Hauser's opinion in this regard does not expand the interrogatory answers submitted by CEI to the Department of Justice. Those answers listed the corporate positions of each CEI employee identified therein; as a supplement to this listing, a CEI organization chart was furnished to the Special Master on April 29, 1975. Review of this independent material will support Mr. Hauser's statements as to those persons within the cognizable "control group", as that term has been defined by the applicable legal authorities.

4. The City's objection to the Hauser Affidavit as "expanding" CEI's claims of privilege is curious. CEI has continuously claimed only attorney-client and work product privileges with respect to its submitted documents. Those claims were made on December 16, 1974. ^{1/} Admittedly, certain documents subject to the claim of work product privilege were mistakenly not referenced in the charts--prepared by lawyers other than Mr. Hauser (see attached affidavit)--in response to the interrogatories pertaining to CEI's work product claims. This oversight, however, does not provide any legitimate reason to telescope CEI's claims. Clearly, claims of privilege are not made in response to another parties' interrogatories; they are--and in this case, they were--made at a much earlier stage. The Hauser Affidavit did not expand the basic claims. Nor is it clear why the City objects so strenuously about such interrogatory discrepancies; it propounded no interrogatories to CEI regarding claims of privilege, and it therefore is in no position to assert that it was somehow misled by answers served in response to someone else's interrogatories--answers that properly need not even have been served on the City.

5. As to the City's charge that Mr. Hauser is in no position to speak about certain documents because he had no contact with the written communication, except in some cases as distributee, this assertion reveals, perhaps better than any other, how disingenuous the City's motion is. While some 145 documents are shown in the appendix to the City's motion as falling

^{1/} See CEI Exhibit to "Applicants' Reply to Motions of The AEC Regulatory Staff, The Department of Justice, and The City of Cleveland to Produce Documents in Washington, D.C., and to Submit Additional Information in Response to Interrogatories"

within the above category (i.e., Hauser was not an author, assistant author, or addressee), 2/, only seven of these documents are referred to in the Hauser Affidavit. 3/ Clearly, Mr. Hauser was well qualified to comment on each of these seven documents: as to Documents Nos. 27, 99, 100, and 101, Mr. Hauser was in fact an addressee; as to Documents Nos. 96, 124, and 125, he was a distributee-the City conveniently failed to reflect any of this information in its Appendix.

6. In what appears to be a desperate effort by the City to attack Mr. Hauser's credibility, the motion makes reference to two instances where Mr. Hauser openly acknowledges that error was made. The first concerns Document No. 709; the second relates to Document No. 888. In both situations, however, the record was set straight by Mr. Hauser on his own initiative. To the extent that these documents are deemed relevant, therefore, they are indicative of his candor rather than reflective of any lack of candor on his part.

7. Nor is there any sound reason to fault Mr. Hauser on the basis of certain alleged "inconsistencies" between the interrogatory answers and the Hauser Affidavit. The City makes special reference to Documents Nos. 107, 108, 110-112, and 163. In connection with each of these communications, however,

2/ See listing in the City's Appendix for Documents Nos. 13-22, 26, 27, 33, 38, 44-45, 48, 51-55, 57-60, 63, 67-72, 74-77, 81, 83, 85, 87, 89-93, 96, 99-101, 124-125, 174-175, 508, 517, 541-550, 552-555, 571, 574-579, 581-584, 587, 590, 615, 719, 722-717, 848-853, 855, 3003, 3011, 3013, 3021, 3024, 3028-3031, 3034-3035, 3039-3040, 3047, 3054-3055, 3057-3059, 3060-3069, 3076-3077.

3/ In point of fact, Mr. Hauser intentionally confined his sworn statements only to those written communications which were specifically referenced in the attachments to the Department of Justice's Reply Brief of May 2, 1975. The other documents were not included in the Affidavit since no objection was made to them by the Department of Justice, the City, or anyone else.

the interrogatory responses and the Hauser Affidavit are entirely consistent--in both cases, the information provided was in effect that there are no known distributees of these particular documents.

8. The City also refers to Documents Nos. 113, 114, 115, 116, 117, and 118 as being described by Mr. Hauser in an "inconsistent" manner. As to these documents, however, the individuals identified as "distributees" in the interrogatory answers are all members of the same law firm--Guren, Merritt, Sogg & Cohen. In his Affidavit, Mr. Hauser treated these lawyers as co-authors of the questioned documents, rather than as distributees, since they collectively participated in the preparation of the documents under discussion. Plainly, no effort was made to remove the named individuals from the list of "distributees"; indeed, their names appear on the face of the document itself.

9. The remaining "inconsistencies" alluded to by the City can, to the extent that they have any validity, be easily explained. As pointed out in the attached Affidavit, the interrogatory responses were prepared by four lawyers who were not as intimately acquainted with the privileged material as was Mr. Hauser. While Mr. Hauser generally reviewed the extensive charts prepared by these attorneys, he did not focus on each and every document referenced therein. Accordingly, there were instances where the reviewing attorney had no independent knowledge of a document's distribution, and he could not ascertain from the document itself that the written communication had been distributed to others. Mr. Hauser, however, in preparing his Affidavit of May 22, 1975, did

focus directly on the specified documents discussed therein. He was intimately acquainted with these papers and, on the basis of first-hand knowledge, he was able to state in appropriate cases whether or not the document had, in fact, been distributed to members of the CEI legal staff or to outside counsel.

10. For the City to take issue with such candid statements is wholly unwarranted. Indeed, the "inconsistency" most often complained of by the City resulted from the fact that the Hauser Affidavit expanded (rather than contracted) the list of distributees identified in the interrogatory answers. 4/ A change in this direction in connection with a claim of attorney-client privilege hardly suggests any sort of effort by Mr. Hauser to slant facts in CEI's favor, as the City tries to imply. To the contrary, Mr. Hauser has undertaken in his Affidavit simply to set the record straight on the basis of his own independent knowledge as to the distribution of certain material.

11. It should be noted, moreover, that the information provided in the Hauser Affidavit is not nearly so "inconsistent" with the interrogatory answers as the City would have the Licensing Board believe. Thus, with regard to the documents described in the City's motion (pp. 9-10) as having been treated in an inconsistent manner on different occasions, some 41 of those documents are described in virtually identical terms in the interrogatory answers and the Hauser Affidavit; 5/ there clearly was no legitimate reason for the City to make reference to these documents in its two-column listing.

4/ Compare, for example the interrogatory answers and the corresponding discussion in the Hauser Affidavit relating to the following documents: Documents Nos. 147, 148, 164, 723, 2001, 2007, 2010, 2012, 2014, 2025, 2031, 2032, 2035, 2038, 2039, 2047, 2054, 2061, 2062-2065, 2074-2077, 2081, 2083-2089, 2093-2100, 2107-2113, and 2117-2135.

5/ Compare the interrogatory answers and the corresponding discussion in the Hauser Affidavit relating to the following documents: Documents Nos. 132, 137, 139-145, 193, 206, 218, 617, 642, 669-672, 674-677, 742, 743, 746, 754, 758, 760-762, 766, 769-774, 824, 829, 864, 894, and 897.

12. One further observation should be made. Where Mr. Hauser was unable to state whether a document subject to the claim of privilege had been distributed by persons other than himself, he made that fact clear. In Paragraph 6 of his Affidavit, for example, he was able to state only that "a copy of this document has not been distributed or given to any other person by me" (emphasis added). While the City seems to find even this statement objectionable, we would submit that there is no reason whatsoever to fault Mr. Hauser in this regard. As a lawyer under oath, he could say no more.

13. In the final analysis, it can easily be determined from a fair comparison of the interrogatory answers and the Hauser Affidavit that there is no legitimate reason for the City's motion to strike. CEI has submitted all of its documents to the Special Master for examination, in camera. Plainly, he is fully qualified to resolve the claims of privilege on the basis of the legal briefs and the other material before him. Those individuals associated with particular documents can be determined from the documents themselves, the answers to interrogatories and the Hauser Affidavit. The Licensing Board has already ruled that the latter document has only limited application to the final resolution of the claims. As so qualified, the Hauser Affidavit deserves consideration. It represents a careful, time-consuming and honest effort by the Corporate Solicitor of CEI to provide factual information to the Special Master that, of necessity, was known only to the affiant.

Respectfully submitted,
SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: June 10, 1975