

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

REQUEST FOR ORAL ARGUMENT BY
AEC REGULATORY STAFF ON ITS' MOTION
TO COMPEL PRODUCTION AND DELIVERY OF DOCUMENTS
AND ANSWER TO APPLICANTS' REPLY TO STAFF'S MOTION

The Atomic Energy Commission Regulatory Staff (hereinafter "Staff") pursuant to Rule 2.730(d) of the Commission's Rules of Practice, 10 CFR §2.730(d) respectfully requests oral argument on its "Motion For An Order Compelling Production And Delivery Of Documents Requested Of Applicants" filed by Staff on December 5, 1974. This request to have full arguments heard on the record is being made because of the serious consequences, as set forth hereunder, of applicants' disregard of (i) the Commission's Rules of Practice, (ii) this Board's Order "On Objections To Interrogatories And Document Requests", and (iii) the express provisions of the August 23, 1974 "Joint Request of the AEC Regulatory Staff and the U. S. Department of Justice for Interrogatories and for Production of Documents" ("the joint request"). Applicants'

8002 130 728 M

conduct will seriously and materially delay the Board's Schedule, foreclose the possibility of any truncation of this hearing, and undermine the hearing process in this matter.

BACKGROUND

On August 23, 1974, the Department of Justice and the AEC Regulatory Staff filed the Joint request.

On September 9, 1974, applicants filed "Applicants' Objections to the Joint Request of the AEC Staff and the Department of Justice... for Production of Documents." Applicants included in that filing certain objections to the production of documents but did not object to the specific request for the production and delivery of certified copies of all documents requested to both Staff and the Department of Justice.

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). 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. 1/

1/ 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 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) refused to perform certain activities related to document production, and (3) supplied unnotarized, evasive and incomplete answers to interrogatories propounded in the Joint Request. Consequently, Staff filed its December 5, 1974 "Motion ... For An Order Compelling Production And Delivery Of Documents Requested By Applicants" which motion is presently awaiting disposition by the Licensing Board.

UNCONSCIONABLE DELAY

Applicants indicate that they have had "a relatively short time period" (Applicants Reply To Motions Of The AEC Regulatory Staff... To Produce Documents dated December 6, 1974, p. 3) with which to meet their obligations on discovery. This position is incredulous as almost four months have elapsed since the joint request was issued. Not once during that period did applicants indicate to the Board or Staff that (i) the time allotted to produce documents was insufficient, or (ii) that they had no intention of complying with the express provisions of the joint request.

Instead, one day late,^{2/} applicants hand-delivered piecemeal, un-

2/ Applicants hand delivered answers to the joint request on December 3, 1974, dated December 2, 1974, the latter being final date for completion of documentary discovery pursuant to this Board's Order of November 4, 1974.

notarized responses containing no documents and the statement that documents were available in five different cities in Ohio and Pennsylvania, listing the names of five persons through whom "access to this material can be arranged."

Further (i) no identification or description was made of documents withheld as privileged pursuant to the Board's Order, (ii) no listing was prepared showing documents no longer in the possession of applicants as requested, (iii) no listing was prepared showing which documents were produced in response to particular paragraphs of the Joint Request.

APPLICANTS' NON-COMPLIANCE WITH COMMISSION RULES

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 filed objections to the Joint Request. A subsequent pre-hearing conference was held on discovery.

The Board considered and ruled in detail on objections and other matters pertaining to discovery. Applicants, however, 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. Staff proposes to demonstrate to the Board during oral argument, examples of Commission licensing proceedings where production and delivery of certified copies of requested documents have been produced when requested. In such proceedings, various applicants produced and delivered a very large number of documents as requested.

In addition, the Commission's Rules of Practice are expressly structured, for the very purpose of avoiding untimely objections on discovery, to require all objections to the scope and manner of dis-

covery to be made within 30 days after service of the request. It is Staff's position that for applicants to object in the form of a failure to produce and deliver any documents almost four months after the joint request constitutes both an unconscionable delay and a disregard of the Commission's Rules of Practice. In light of statements made by applicants expressing their desire to expedite this proceeding, it is difficult to understand their current position with regard to discovery. If, for example, applicants had expressed their refusal to produce and deliver documents as requested in August, September, October, or even November, both Staff and the Board could have effectively dealt with the issue of situs of documents produced without materially delaying and/or derailing the hearing schedule.

If applicants position were to be sustained now, in addition to the time spent in arguing the issue, Staff, and the Department of Justice may be required to spend many additional months in five cities in Ohio and Pennsylvania, reviewing, screening, and xeroxing documents, thus prohibiting the orderly, efficient and economical processing of this case. It is the position of the regulatory Staff that this Board cannot permit applicants at this stage in the proceedings to place the burden of time, personnel, and expense on Staff and the Department of Justice.

APPLICANTS BURDEN

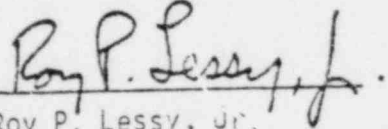
Applicants real argument in their December 16 reply is the familiar "burden" argument. Applicants claim that "hundreds of thousands"

of documents have been "collected" over relatively short time periods. This Board must decide whether applicants' conduct, manner, and timing precludes their reliance on the burden argument. Staff is of the view that in order to preserve (i) the integrity of the Commission's Rules, (ii) the Congressional mandate of expeditious prelicensing antitrust review, (iii) full compliance with Orders of Atomic Safety and Licensing Boards and (iv) the orderly conduct of Licensing Hearing in general, that this Board should not permit applicants to successfully utilize a burden argument at this stage of this proceeding.

A brief more fully setting forth the position of Staff will be filed no later than January 2, 1975.

For the reasons stated Staff respectfully requests oral argument on its December 5th "Motion To Compel Production And Delivery of Documents" at the earliest possible date.

Respectfully submitted,


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

Dated: December 20, 1974

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)

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

AEC Dkt. Nos. 50-346A
50-440A
50-441A

CERTIFICATE OF SERVICE

I hereby certify that copies of REQUEST FOR ORAL ARGUMENT BY AEC REGULATORY STAFF ON ITS' MOTION TO COMPEL PRODUCTION AND DELIVERY OF DOCUMENTS AND ANSWER TO APPLICANTS' REPLY TO STAFF'S MOTION, dated December 20, 1974, in the captioned matter, have been served upon the following by deposit in the United States mail, first class, or air mail, this 20th day of December 1974:

John B. Farmakides, Esq., Chairman
Atomic Safety and Licensing Board
U. S. Atomic Energy Commission
Washington, D. C. 20545

John H. Brebbia, Esq.
Atomic Safety and Licensing Board
Alston, Miller & Gaines
1776 K Street, N. W.
Washington, D. C. 20006

Douglas Rigler
Hollabaugh & Jacobs
Suite 817
Barr Building
910 17th Street, N. W.
Washington, D. C. 20006

Atomic Safety and Licensing
Board Panel
U. S. Atomic Energy Commission
Washington, D. C. 20545

Docketing and Service Section
Office of the Secretary
U. S. Atomic Energy Commission
Washington, D. C. 20545

John Lansdale, Esq.
Cox, Langford & Brown
21 Dupont Circle, N. W.
Washington, D. C. 20036

Joseph J. Saunders, Esq.
Steven Charno, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Frank R. Clokey, Esq.
Special Assistant Attorney General
Room 219, Towne House Apartments
Harrisburg, Pennsylvania 17105

Herbert R. Whiting, Director
Robert D. Hart, Esq.
Department of Law
1201 Lakeside Avenue
Cleveland, Ohio 44114

John C. Engle, President
AMP-O, Inc.
Municipal Building
20 High Street
Hamilton, Ohio 45012

George B. Crosby
Director of Utilities
Piqua, Ohio 45350

Donald H. Hauser, Esq.
Managing Attorney
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Leslie Henry, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

John R. White, Esq.
Executive Vice President
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

Wallace L. Duncan, Esq.
Jon T. Brown, Esq.
Duncan, Brown, Weinberg & Palmer
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20005

David McNeil Olds
Reed, Smith, Shaw & McClay
Union Trust Building
Pittsburgh, Pennsylvania 15230

Dwight C. Pettay, Jr.
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

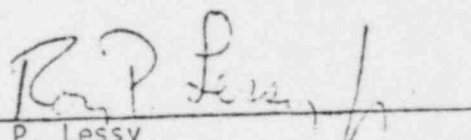
George Chuplis
Commissioner of Light & Power
City of Cleveland
1201 Lakeside Avenue
Cleveland, Ohio 44114

Deborah Powell Highsmith
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Christopher R. Schraff, Esq.
Assistant Attorney General
Environmental Law Section
361 East Broad Street, 8th Floor
Columbus, Ohio 43215

Mr. Raymond Kudukis, Director
of Public Utilities
City of Cleveland
1201 Lakeside Avenue
Cleveland, Ohio 44114

Gerald Charnoff, Esq.
Brad Reynolds, Esq.
Shaw, Pittman, Potts & Trowbridge
910-17th Street, N.W.
Washington, D. C. 20006


Roy P. Leszy
Counsel for AEC Regulatory Staff