RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
The Toledo Edison Company	)	
The Cleveland Electric Illuminating Company	)	Docket No. 50-346A
(Davis-Besse Nuclear Power Station)	)	
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A and 50-441A
(Perry Plant, Units 1 and 2)	)	

REPLY MEMORANDUM OF THE DEPARTMENT OF JUSTICE ON DOCUMENT DISCOVERY

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January 7, 1975

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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In the Matter of	)	
The Toledo Edison Company The Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station)	)	Docket No. 50-346A
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REPLY MEMORANDUM OF THE
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ON DOCUMENT DISCOVERY

The Department's Reply Memorandum is submitted pursuant to the December 23, 1974 Order and Notice of Oral Argument of the Atomic Safety and Licensing Board (hereinafter "Board") in the above-styled proceeding.

This Memorandum will address the following contentions set forth in Applicants' Motion for a Protective Order (hereinafter "Motion"), filed January 3, 1975:

(1) Applicants are not required to comply with the Joint Request, and

(2) Applicants' Motion is timely.

In addition, the Department will discuss the issue raised by the Board: whether the Board's decisions on the pending discovery motions are appealable.

I. APPLICANTS' CONTENTION THAT THEY ARE NOT REQUIRED TO COMPLY WITH THE JOINT REQUEST IS ERRONEOUS

Throughout Applicants' Motion, they cite cases (as well as a comment by the late Chairman Garfinkel in Midland case) for the proposition that courts generally do not require one who is to produce material to supply copies or to allow inspection of the requested materials at a site other than their own office.

None of the cases or authorities cited by Applicants deal with a situation comparable to the situation in which Applicants have placed themselves, that is, where the party at whom discovery is directed has willfully refused to comply with a discovery request. In order for Applicants to equate themselves with the parties in the various cases they cited, they would have to have made any objection to the Joint Request on or before September 9, 1974. That is not the case, and Applicants cannot place themselves in the shoes of parties raising timely objections to discovery requests. As pointed out in the Department's initial memorandum, Applicants' willful failure to produce opens them to the imposition of sanctions or requirements which in the absence of willful failure to comply might not be necessary or appropriate. 1/

Even if Applicants were in the position of having raised a timely objection, most of the authorities they have cited do not involve a request to allow inspection at a site other than the

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1/ Memorandum of the Department of Justice on Document Production, pp. 12-14.

office of the possessor of the documents. In the cases that do involve such a request, there were extenuating circumstances, which do not exist here, which prevented the court from ordering a change in inspection sites. Thus, in Niagra Duplicator Co. v. Shakelford, 160 F.2d 25 (D.C. Cir. 1947), the court found it impossible to separate the desired records from the company's other records. Here, Applicants have indicated that the files to be produced have already been segregated from other company files.

Similarly, in Lundberg v. Welles, 93 F. Supp. 359 (S.D.N.Y. 1950), the court found that the parties had agreed to use certain schedules derived from underlying records instead of the records themselves, that the custodian of the records had already provided extensive information, and that the records sought were only tenuously relevant.

In addition to the foregoing principles, the case law and Applicants' own pleadings 2/ establish the proposition that the party who chooses to proceed in a particular forum cannot complain about being required to bring documents into that forum. La Chemise La Coste v. General Mills, 53 F.R.D. 596 (D. Del. 1971); Bernstein v. N.V. Nederlandsche-Amerchaansche Stoomvaart-Maetschappij, 15 F.R.D. 32 (S.D.N.Y. 1953); 9 Wright and Miller, Federal Practice and Procedure §2112, pp. 405-406; 4 Moore, Federal Practice ¶26.70[1.-2], pp. 26-509. Applicants initiated this proceeding by applying to the

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2/ Motion, p. 12, n. 7.

Atomic Energy Commission for a license. The focus of the proceeding is whether Applicants will receive the Commission's permission to engage in a course of conduct which may have anti-competitive effects. They have no right to complain about bringing documents to the site of the forum.

Finally, Applicants have protested that the establishment of central document depositories is a very uncommon practice. The Department submits that it is common practice and, in fact, is the recommended procedure. The Manual For Complex Litigation, 3/ a manual prepared for trial judges who have before them complex cases, contains suggestions which experience has shown to help simplify and expedite complex cases. 4/ At pages 38-39 of the Manual, the following suggestion appears:

> The Federal Rules of Civil Procedure provide for inspection and copying of documents and other physical evidence at such time, place and in such manner as provided by the order of the court. In the ordinary case, documents are inspected at the office of the custodian or his counsel. Where voluminous documents may be inspected and copied by many parties, the development of centralized depositories is a major step forward in the orderly, efficient and economical processing of the complex case. Depositing the documents at one or more convenient locations in the custody of the parties or of an officer of the court does much to eliminate expensive, burdensome, time-consuming and wasteful efforts by many parties to study, copy and analyze documents in widely separated locations.

3/ Judicial Conference of the United States, Manual for Complex Litigation (Commerce Clearing House, ed. 1973).

4/ It should be noted that antitrust cases are defined in §0.22 (p. 3) of the Manual as being a type of case that is inherently complex.

* * *

> The expense of the document depository should ordinarily be borne by the party who maintains the depository and who benefits by being relieved of the obligation of making multiple production of the same documents, particularly in multidistrict cases. (Emphasis added.)

II. APPLICANTS' MOTION FOR A PROTECTIVE ORDER IS NOT TIMELY

Applicants have argued that despite the fact that their request for a protective order was filed one month after the date upon which the discovery exchange was to take place, and almost four months after the time for objections had passed, their Motion is timely. The sole authority for this proposition is 4A Moore, Federal Practice ¶34.19(2) which states that "the 1970 amendment (in the Federal Rules) deleting the requirement that application for protective orders be timely, makes it plain that such relief could be sought in opposition to a motion (to compel discovery) under Rule 37(a)." Neither Moore nor Applicants cite any authority in support of this speculation.

A conflicting, and more widely accepted, view of the effect of the 1970 amendment is expressed at 8 Wright and Miller, Federal Practice and Procedure §2035, pp. 262-263:

> Prior to 1970 the protective order rule required that an application for an order be made "seasonably." This requirement was not included when the rule was made Rule 26(c) but undoubtedly the courts will consider the timeliness of a motion under the amended rule, and will, as in the past, look to all of the circumstances in determining whether the motion is timely. Ordinarily the order must be obtained before the date set for the discovery, and failure to move at that time will be held to preclude objection later, but it may be that this rule will not be applied if there was no opportunity to move for a

> protective order. A party may not remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper. If he desires not to appear or not to respond he must seek a protective order, but if there are extenuating circumstances that explain his failure, the court may take these into account in determing what sanctions to impose.

Unlike the erroneous inference contained in Moore, the interpretation of the Federal Rules found in Wright and Miller has been adopted in subsequent cases. In Baker v. Standard Industries, Inc., 55 F.R.D. 178 (D.P.R. 1972), the court held that a motion for a protective order must be seasonably made, and denied such a motion made two days before the scheduled discovery date. Applicants' Motion was made one month after the scheduled discovery date. See also, de Dalmady v. Price Waterhouse & Co., 62 F.R.D. 157 (D.P.R. 1972). In Krantz v. United States, 56 F.R.D. 555 (W.D. Va. 1972), the court also recognized the fact that the timeliness of objections to discovery is both relevant and important. The court in Krantz, in finding good cause for delay in seeking a protective order, emphasized the fact that the party seeking the discovery already possessed most, if not all, of the information requested; and was promptly notified of the other party's alleged inability to comply, but refused to meet with him to resolve the problems. Here, the Department is not in possession of the information being sought. Applicants did not promptly notify anyone of the problem they allege exists, nor did they attempt to negotiate any type of compromise.

The Board has raised the question of what the Department would consider to have been a timely motion for a protective order in this proceeding. Orderly procedure would suggest that Applicants' Motion should have been made at the time their other objections were due under the rules, namely on September 9, 1974. Clearly the latest conceivable date upon which Applicants' Motion would have been timely was the date upon which the discovery exchange was due, namely December 2, 1974. To permit Applicants to sit back for another month after the date of the discovery exchange before moving for a protective order would make a travesty of the rules for the conduct of these proceedings.

We would note in conclusion on this point that the transcript of the September 16, 1974 Prehearing Conference (particularly, pages 621-632) clearly indicates that Applicants at that early date believed that there were potentially rooms full of material which might be producible to the City of Cleveland. Applicants made no similar protestations concerning the Joint Request at that time.

III. APPEAL OF THE BOARD'S DECISIONS

At the January 3, 1975 hearing, the Board requested the Department's view on the appealability of any decision by the Board on the various discovery motions. The Department believes that Section 2.730(f) of the Commission's Rules, 10 C.F.R. 2.730(f), precludes any appeal of any Board decision on the pending motions, absent certification for appeal by the Board.

Even if this section of the Rules would not apply in the present situation, the Department submits that such a decision would not be appealable because of the prohibition of interlocutory review in the Administrative Procedure Act, 5 U.S.C. §704, which is applicable to all agency actions taken by the Atomic Energy Commission under the Atomic Energy Act. Siegel v. Atomic Energy Commission, 400 F.2d 778 (D.C. Cir. 1968).

Conclusion

It is well established that in considering Applicants' Motion, the Board must consider the hardship it will impose on the nonmoving parties. General Dynamics Corp. v. Self Mfg. Co., 481 F.2d 1204 (8th Cir. 1973). There seems to be little dispute that production in Washington, D.C. would minimize the burden on all the parties seeking discovery, and would cut the time necessary to complete discovery in this proceeding in half.

Further, the Board must consider the nature of Applicants' conduct which has created the present problem. It is submitted that the equities involved in this question lie entirely on the side of the Department, the AEC Staff and the City of Cleveland. Applicants' obstructionist tactics have precipitated this problem and must weigh heavily in determining the ultimate resolution.

For the foregoing reasons, the Department of Justice urges the Board to grant the Department's Motion to Compel, as modified, and to deny Applicants' Motion for a Protective Order.

Respectfully submitted,

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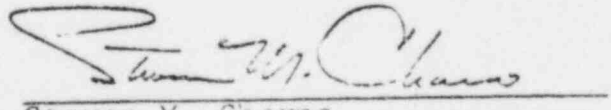
CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY MEMORANDUM OF THE DEPARTMENT OF JUSTICE ON DOCUMENT DISCOVERY have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class or airmail, this 7th day of January 1975.



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