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)	)	

MEMORANDUM OF THE DEPARTMENT OF JUSTICE ON DOCUMENT PRODUCTION SUBMITTED AT THE REQUEST OF THE ATOMIC SAFETY AND LICENSING BOARD

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January 2, 1975

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On December 23, 1974, the Atomic Safety and Licensing Board (hereinafter "Board") in the above-styled proceeding issued an Order and Notice of Oral Argument which requested that the parties submit briefs concerning document discovery in this proceeding. This Memorandum is submitted in response to that request.

BACKGROUND

On August 23, 1974, the Department of Justice (hereinafter "Department") and the AEC Regulatory Staff (hereinafter "Staff"), pursuant to the Commission's Rules 2.740, 2.740a and 2.741, filed the Joint Request for Interrogatories and for Production of Documents (hereinafter "Joint Request"), which was served on each of the five Applicants in this proceeding.

The Joint Request, among other things, requested each of the Applicants to do the following:

1. Serve certified copies of requested documents upon the Department and the Staff at their respective offices (Joint Request, pp. 1-2);

2. Prepare a list showing the particular paragraph(s) of the Joint Request to which each document produced is responsive (Joint Request, p. 1); and

3. List and give certain information about documents which were no longer in possession, custody or control of the Applicants (Schedule attached to Joint Request, pp. 2-3).

On September 9, 1974, Applicants filed objections to the Joint Request. While the Applicants collectively objected to a number of different items appearing in the Joint Request, they did not object to any of the items noted above--the items now in controversy.

On October 11, 1974, the Board issued its "Order on Objections to the Interrogatories and Document Requests" (hereinafter "Order"). Since none of the Applicants made any objection to complying with the three requests listed above, the Order did not address itself to these portions of the Joint Request.

In their individual responses to the Joint Request on December 2, 1974, Applicants did not supply any documents as requested or submit any of the descriptive lists noted above. 1/ This was the first time that the Department and Staff were informed

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1/ In addition, Applicants (1) did not serve signed papers as required by the Commission rules, (2) did not provide the required descriptive list of privileged documents, (3) withheld so-called confidential documents from production, and (4) filed answers to interrogatories which the Department objected to as evasive, incomplete and inconsistent with one another.

of the Applicants' decision not to comply with the Joint Request. While Applicants were in weekly contact with the Department and the Staff from the date the Joint Request was filed through the date documents were to be exchanged, at no time did they indicate that they had any difficulty complying with the Joint Request or that they did not intend to fully comply. 2/

On December 9, 1974, the Department filed its Motion to Compel which cited the above noted acts of noncompliance with the Joint Request. 3/ To avoid unnecessary duplication, the details of the Motion to Compel will not be repeated herein.

On December 6, 1974, Applicants filed an Application for Subpoenas and a Notice of Depositions. Because the Department believed that it could not meaningfully participate in the requested depositions without Applicant first supplying the requested information, on December 12, 1974, we filed a Motion to Quash or Modify Applicants' Subpoenas and to Enforce the Sequence and Timing of Discovery Ordered by the Licensing Board. 4/

2/ Applicants' conduct should be contrasted with that of the Department which made available a large quantity of documents of limited relevance which fell within the strict language of Applicants' discovery request. As Applicants noted at page 7 of their December 16 1974 filing, the Department secured Applicants' prior approval of a plan allowing inspection and copying of the pertinent files and, by letter of October 25, 1974, confirmed this agreement. This agreement was reached five weeks prior to the discovery exchange date.

3/ On December 5, 1974, the Staff filed a Motion for an Order Compelling Production and Delivery of Documents Requested of Applicants and on December 12, 1974, the City of Cleveland filed a Motion for an Order Directing that Documents Be Produced in Washington, D.C. for Inspection and Copying.

4/ A similar motion was filed by the City of Cleveland on December 17, 1974.

On December 16, 1974, Applicants filed their Reply to the Motions of the AEC Regulatory Staff, the Department and the City of Cleveland noted above. 5/ Applicant argued in this reply that its noncompliance was justified on the grounds that (1) production as requested is not required under Rule 2.741 of the Commission's Rules of Practice, and (2) if it is, such production would be burdensome.

On December 17, 1974, as ordered by the Board, an informal conference among the parties was held to discuss some of the problems which have occurred in the discovery phase of this proceeding. At this meeting, the Department made a compromise offer for document production by Applicants. 6/

Following this meeting, Applicants informed the Department on December 19, 1974 that approximately 1,208,000 document pages were responsive to the Joint Request. 7/ Applicants have rejected the Department's compromise in that they continue to refuse to remove any of the requested documents from their various offices

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5/ In this response, Applicants, for the first time, submitted descriptive lists of privileged documents and indicated that all confidential documents would be treated in the manner outlined in the Board's October 11, 1974 Order.

6/ At this conference, the Department also offered to resubmit interrogatories to which objectionable answers were received within 15 days of the date of the Board's Order resolving the questions raised by the various pending motions.

7/ The volume of material alleged to be responsive to the Joint Request should be compared with the volume of production of other electric utilities which have received even broader discovery requests in similar proceedings: Duke Power Company produced about 100,000 document pages; Alabama Power Company, approximately 10,000 pages; and Consumers Power Company, about 25,000 pages.

on the purported grounds that these documents are "active, working files . . . relevant to day-to-day business operations . . . ."

By conference telephone call of December 20, the Board requested that the parties submit briefs outlining their positions with respect to the procedure which should now be followed in this phase of discovery. This request was repeated in the Board's December 23, 1974 Order.

PRODUCTION REQUESTED BY THE DEPARTMENT

The Department requests the following relief, which we believe to be reasonable and fair and to eliminate the burden of which Applicants complain:

(1) Applicants shall deliver all documents responsive to the Joint Request to the office of their attorney in Washington, D.C. in installments, so that only a small portion of the files of any one Company is removed from the premises of said Company at any one time;

(2) These installments shall consist of 15 file drawers each week until all material responsive to the Joint Request, including cross-referenced material now contained in files responsive to the City of Cleveland's discovery request, has been delivered;

(3) Applicants shall pay the cost of transporting these documents;

(4) The Department will be allowed to inspect and copy these documents only at the office of Applicants' attorney, so that, pursuant to Applicants' request, no documents will be removed from those premises;

(5) Applicants will pay all costs of reproduction for the first 12,000 document pages copies by the Department, but thereafter, the Department shall fully compensate Applicants for all costs of reproduction of documents it wishes copied by supplying paper, ink and labor; 8/

(6) The Department shall have the right to reinspect and copy documents previously inspected in Washington at the Applicants' respective offices, in order to eliminate the prejudice inherent in a system involving inspection in installments; and

(7) Applicants shall provide the descriptive lists called for in the Joint Request.

DISCUSSION

The Department believes that this requested production is appropriate on several grounds:

(1) Rule 2.741 of the Commission's Rules of Practice, 10 C.F.R. §2.741, permits production of documents in the manner requested;

(2) Applicants are now estopped from objecting to the production sought since they did not object within the time limit set by the Commission's Rules;

8/ The Department, in comparing Applicants' production in this proceeding with that in other Commission proceedings, is forced to conclude that Applicants have produced tens of thousands of unresponsive and totally irrelevant documents. The Department is therefore willing to pay for reproduction of any documents over 12,000 pages. The 12,000 pages indicated represents only about one per cent of the total material produced. If Applicants are of the opinion that the material they have produced is truly responsive to the Joint Request, then they should be only too happy to bear only one per cent of the cost of reproduction, while the Department bears the other 99 per cent.

(3) Even if Applicants can properly raise objections to the request, the production requested is not unduly burdensome;

(4) Even if aspects of the requested production are burdensome, a blanket objection to such production should not be sustained; and

(5) Even if the production sought is burdensome, Applicants' noncompliance has been willful and obstructionist and, therefore, the production should be ordered.

I. Rule 2.741 clearly permits production of copies of documents at the Department's offices in the manner set forth in the Joint Request. Far from this being a "novel" interpretation of the Commission's Rules as Applicants contend, 9/ transportation of an Applicant's documents to Washington in a Commission antitrust proceeding is the standard practice. Alabama Power Company and Georgia Power Company both served copies of requested documents directly upon the Department. Consumers Power Company and Duke Power Company made requested documents available for inspection in Washington at the offices of their attorneys. 10/ It is clear that it is the Applicants' interpretation of the rules, not that of the Department, which is unique.

9/ Applicants' Reply to Motions of the AEC REgulatory Staff, Department of Justice, and the City of Cleveland, page 5, December 16, 1974.

10/ The Department was allowed to remove selected documents produced by Consumers and Duke from the attorneys' offices for copying. Here the Department has acquiesced to Applicants' claim that such documents must remain in their attorney's offices.

II. Applicants are now estopped from objecting to production of documents pursuant to the Joint Request since they did not object within the time limit set by Rule 2.741. Rule 2.740(f) specifically requires Applicants to comply fully with all discovery requests to which they do not object in a timely fashion. Applicants did not object during the time period set by Rule 2.741 and the Board's orders to those portions of the Joint Request now in issue. Now, almost four months after the point when it was appropriate for them to raise such objections, Applicants are apparently contending that they can justify their failure to comply by raising untimely objections to the scope of the Joint Request. It is clear that the Commission's Rules would be wholly ineffectual if they could be evaded in this manner. Clearly, such an evasion of the requirement for timely objections could not occur during discovery conducted in a Federal District Court. See Rule 34(b), Federal Rules of Civil Procedure; Kholos v. Cutler, 10 F.R.D. 588 (D. Mass. 1950).

III. The production requested by the Department will not be unduly burdensome. Whatever the merits of Applicants' claims that compliance with the Joint Request would be unduly burdensome for them, there can be no doubt that the document production requested above entails a relatively insignificant burden.

Applicants' claim of burden seems to be based on their argument that the 1,200,000 documents "responsive" to the Joint Request (as well as an additional 1,100,000 documents discoverable by the City of Cleveland) are used by the Applicants on a daily

basis and cannot be removed from their offices for any period of time, no matter how reasonable in length. Applicants proceed to argue that they would therefore have to duplicate each of these documents in order to allow inspection and copying at any location other than their offices. Applicants' arguments are without basis in fact or law.

Under the production procedure requested by the Department, Applicants would be deprived of any one of their files for a two-week period: one week for transportation to and from Washington and one week for inspection. We submit that few, if any, of the documents in question would need to be duplicated if they were taken from Applicants' offices for this limited period. Further, any minor inconvenience such a removal might occasion must be borne by Applicants when necessary to permit adequate discovery. See Service Liquor Distributors Inc. v. Calvert Distillers Corp., 16 F.R.D. 507 (S.D.N.Y. 1954).

The overall burden on Applicants would be minimal. It would merely entail paying the cost of transportation for these documents and the cost of copying, at most, only one per cent of the documents which they would have the Board believe are responsive to the Joint Request. When one compares this burden with that the Department is willing to undertake, paying the cost of reproducting as much as 99 per cent of the documents and performing the initial screening for Applicants, one cannot reasonably argue that Applicants' burden would be other than de minimis. The case law concerning discovery under the Federal Rules of Civil Procedure clearly indicates that the fact that production of documents

would entail some burden in terms of expense or inconvenience does not preclude the ordering of compliance with a discovery request. Frasier v. Twentieth Century-Fox Film Corp., 119 F. Supp. 495 (D. Neb. 1954), Michel v. Meier, 8 F.R.D. 464, 477 (W.D. Pa. 1948); Hirshhorn v. Mine Safety Appliances Co., 8 F.R.D. 11, 23 (W.D. Pa. 1948). This position has been accepted in Commission antitrust proceedings. As the Atomic Safety and Licensing Appeal Board stated: 11/

> But it is equally obvious that a claim of undue burden . . . must be founded on much more than that some expense or inconvenience may have to be incurred in responding to the discovery.

IV. Applicants have raised objections based on blanket and undescriminate claims of burdensomeness to the discovery requests of the Department, the Staff and the City of Cleveland. The law with respect to the appropriateness of such objections was made perfectly clear by an Atomic Safety and Licensing Appeal Board in an opinion on interlocutory appeal from the antitrust proceeding involving Consumers Power Company's Midland Units. 11/ There, the Appeals Board stated:

> The concern expressed in ALAB-118 respecting the burden which might possibly be imposed upon appellants should not be taken, however, as an approval of the posture which appellants assumed before the Board below on the burden question. From the outset, appellants steadfastly maintained that compliance with any portion of the discovery requests would entail an undue burden -- a position adhered to even after the Licensing Board had substantially reduced

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11/ In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-122, at p. 9, footnote 14.

> the scope of the discovery. But, as should have been perfectly apparent, some of the documents could have been furnished, and some of the interrogatories answered, without the imposition of any significant burden. In this connection, it is obvious, of course, that compliance with a discovery request invariably will require some exertion of effort. But it is equally obvious that a claim of undue burden (even if advanced by a non-party to the litigation) must be founded on much more than that some expense or inconvenience may have to be incurred in responding to the discovery.
>
> We think that it is the manifest obligation of persons against whom discovery is sought to refrain from asserting a blanket claim of burdensomeness which neither is nor can be substantiated. In the future, a licensing board confronted with an all-encompassing indiscriminate claim of burden will be justified in rejecting the claim in its entirety upon a finding of lack of merit with respect to at least one of the discovery items. Further, the board need not consider whether a response to a particular item would be burdensome unless, with respect to that item, specific reasons for the claim are assigned.

Applicants have skirted their "obligation" to refrain from asserting blanket claims of burdensomeness which neither are nor can be substantiated. Applicants in this proceeding assert their burden objection with respect to all of the Department's twnety-five document requests directed to CEI, and with respect to the fifteen document requests of each of the other four Applicants, without regard to the amount of information that is required to be produced in any of these requests. Thus, for example, Request 1 of the Joint Request to each Applicant calls only for a certified copy of the Company's certificate of incorporation and by-laws and any amendments thereto. Request 2 of CEI and Request 5 of each of the other Applicants calls for annual reports issued to stockholders by the Company for the

years 1968-1974. Request 6 of CEI and Request 4 of each of the other Applicants calls for a narrative history of their companies. Other requests call for company organization charts, maps of generating and transmission systems, as well as various studies of different aspects of the companies' operation. Many of the document requests can be fulfilled by the production of materials that are brief and readily accessible.

Despite the admonitions of the Appeals Board, Applicants have raised sweeping burden objections which thusfar have delayed and frustrated discovery in this proceeding. The last paragraph of the Appeal Board's decision is particularly relevant in fashioning an appropriate response:

> In the future, a licensing board confronted with an all-encompassing indiscriminate claim of burden will be justified in rejecting the claim in its entirety upon a finding of lack of merit with respect to at least one of the discovery items. (Emphasis added.)

V. Even if the production requested were found to entail some burden to be borne by Applicants, their prior noncompliance provides a more than adequate basis on which to order the production sought herein. Under the Federal Rules of Civil Procedure, a party refuses to obey a production order when he fails to comply with it. Societe Internationale Pour Particepations Industrelles Et Commercales, S.A. v. Rogers, 357 U.S. 197 (1958). Not only have Applicants failed to comply, but also their noncompliance is willful within the meaning of the Federal Rules. The overwhelming weight of authority holds that a willful failure to comply involves any conscious or intentional failure to act, as

distinguished from an accidental or involuntary noncompliance and no wrongful intent need be shown. Robinson v. Transamerica Ins. Co., 368 F.2d 37 (10th Cir. 1966); Patterson v. C.I.T. Corp., 352 F.2d 333 (10th Cir. 1965); United States v. Continental Casualty Co., 303 F.2d 91 (4th Cir. 1962). Although failure to comply is alone a sufficient basis to impose sanctions (and, therefore, burden) on the noncomplying party, 12/ the Supreme Court in Societe, supra, indicated that the degree of willfulness or the party's good faith in attempting to comply are to be considered in determining the severity of the burden to be imposed.

It is submitted that Applicants have not made a good faith effort to comply with the Joint Request. Initially, they refused to serve signed responses, provide descriptive lists of privileged documents, or allow inspection of allegedly confidential documents despite the Commission's Rules and the Board's October 11, 1974 Order. They submitted evasive and incomplete answers to interrogatories. They refused to supply copies of the requested documents and descriptive lists concerning responsiveness and missing documents listed in the Joint Request. They made no objection to any of the above items within the time required by the Commission's Rules. Indeed, notwithstanding frequent contact between counsel

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12/ B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411 (5th Cir. 1964); Hunter v. International Systems & Controls Corp., 56 F.R.D. 617 (W.D. Mo. 1972); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971); Independent Productions Corp. v. Loew's Inc., 30 F.R.D. 377 (S.D.N.Y. 1962).

for the Applicants and the Department up to the date document discovery was due, they made no mention of their intention not to comply.

The case law under the Federal Rules is clear that willful failure to comply with discovery requests may appropriately be met by remedies varying in severity from dismissal of an action or entry of default judgment 13/ to the awarding of expenses incurred in compliance. 14/ The Department here is not seeking the imposition of any such extreme burden upon Applicants. We ask the Board only to require the Applicants to make production sought in the Joint Request, as modified above.

SUGGESTED TIME SCHEDULE

The Department proposes that the following time schedule be ordered in this proceeding:

(1) Fifteen days after the Board issues its order on the presently-pending motion, the Department resubmit its interrogatories to Applicants'

(2) Fifteen days after such submission, Applicants respond;

(3) Applicants produce 15 file drawers per week at the office of their attorney in Washington, D.C., for as long as it takes to produce all documents which are responsive to the Joint Request (approximately 130 days); and

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13/ Grace v. Fisher, 355 F.2d 21 (2d Cir. 1966); Bourgeois v. El Paso Natural Gas Co., 257 F.2d 807 (2d Cir. 1958); Michigan Window Cleaning Co. v. Martino, 173 F.2d 466 (6th Cir. 1949).

14/ Haney v. Woodward & Lothrop, Inc., 330 F.2d 940 (4th Cir. 1964); Underwood v. Maloney, 16 F.R.D. 3 (E.D. Pa. 1954).

(4) The Department be allowed an additional 20-day period for organization and any necessary reinspection of documents at the Applicants' offices.

We believe that the production procedure we have requested will result in the most expeditious possible disposition of documentary discovery, since it will enable the Department personnel concerned with this matter to devote almost all of their uncommitted time to document screening. Thus, even if a Department attorney must spend part of one day or a few days a week on other matters, he could still review substantial amounts of documents in one week's time. If a government attorney were required to go to each of the five cities at which the documents are located, he could probably do so only upon those occasions when he could schedule an entire week for inspection. 15/ Thus, an attorney who had a commitment in Washington for a day or less during any particular week might be unable to review any documents for the entire week. If the documents were in town, he would be able to spend four days reviewing. In addition, the Department would be able to assign additional part-time staff to help conduct the screening. We estimate that, if production were to be made only at Applicants' respective offices, inspection would require an additional 120 days.

15/ Those who administer government travel regulations do not look with favor on repeated "junkets" of short duration.

For the foregoing reasons, the Department urges the Board to order the document production procedure set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of MEMORANDUM OF THE DEPARTMENT OF JUSTICE ON DOCUMENT PRODUCTION SUBMITTED AT THE REQUEST OF THE ATOMIC SAFETY AND LICENSING BOARD 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 2nd day of January 1975.

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