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, Unit 1)	)	Dockets Nos. 50-346A 50-440A 50-441A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.,	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

APPLICANTS' MEMORANDUM IN REPLY TO THE JANUARY 2, 1975 FILINGS OF THE DEPARTMENT OF JUSTICE AND THE AEC REGULATORY STAFF AND IN FURTHER SUPPORT OF APPLICANTS' MOTION FOR A PROTECTIVE ORDER

A. Background

1. Pursuant to several requests for production of documents, Applicants herein made available for inspection and copying at their respective offices, as of December 2, 1974, a total of some 2,378,000 document pages which have been separately identified and assembled in file drawers and/or individual boxes marked to correspond to the particular requests made. The Department of Justice and the AEC Regulatory Staff objected to Applicants' document production on December 5 and 9, 1974, respectively, insisting that the volume of material made available at the home offices in response

to the government's Joint Request should be brought to Washington, D. C., at Applicants' expense, and left at the office of the AEC Staff.[1] On December 12, 1974, the City of Cleveland also asked that Applicants be made to transport to Washington, D. C. the documents produced pursuant to the City's request, and to place this material in a central depository located there.

2. Applicants filed a timely response on December 16, 1974, to the requesting parties' motions to compel document delivery in Washington, D. C. A request was then made by the AEC Staff for oral argument. This Board, by Order dated December 23, 1974, suspended the schedule for document discovery and set oral argument for January 3, 1975; it instructed the parties to submit legal memoranda on the issues raised in the requesting parties' motions by January 2, 1975, with leave to file supplementary memoranda by January 7, 1975.

3. Papers were timely filed by all parties on January 2, 1975. In their filing, Applicants moved for a protective order, pursuant to Section 2.740(c) of the Commission's Rules, which would require that the documents produced by Applicants be inspected and copied on location, rather than being brought to Washington, D. C. On January 3, 1975,

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1/ In its January 2 filing, the Department of Justice suggested alternatively that the produced material could be left at the office of Applicants' Washington counsel for intermittent review by the Government.

respective counsel for the Department of Justice, the AEC Staff, the City of Cleveland and Applicants presented oral argument to the Board on the matter of delivery. At the conclusion thereof, the Board issued a preliminary ruling which required the requesting parties to undertake a general review on site of each Applicant's document production by January 17, 1975, and to report to the Board how much of the segregated material was considered by them to be relevant for inspection and copying in this proceeding.

B. Discussion

4. It is Applicants' position -- as stated in their Memorandum of December 16, 1974, and in their Motion for a Protective Order of January 2, 1975 -- that, unless the requesting parties are able in their on-site review to narrow the document production deemed necessary for this hearing to a size comparable to that involved in prior AEC antitrust proceedings, inspection and copying of the material produced by each Applicant should take place at the respective companies' headquarters. The requesting parties have shown no good reason for compelling movement to Washington, D. C. of the mass of material involved. While they assert that travel to the five cities where the produced documents are located would be inconvenient -- in that inspection could not be accomplished with

the same accommodation to their other unrelated case commitments as would be possible if the examination were to take place in Washington, D. C. -- such a rationale provides insufficient basis for imposing on Applicants the burden and expense involved in moving the extensive documentary material hundreds of miles.

5. Any time a party in an antitrust proceeding seeks expansive documentary discovery, it must anticipate that inspection of the produced material will cause inconvenience and create schedule problems vis-a-vis other case commitments. But, having themselves initiated the discovery process, and, by their own sweeping document requests, having compelled Applicants to produce a large bulk of material -- at considerable cost and disruption to Applicants' business operations -- the requesting parties cannot now use the excuse of "inconvenience", whether geographic or personal schedule, to require Applicants to assume the burden and expense associated with copying and transporting relevant materials that rightfully should be borne by the parties who sought production.[2/]

2/ This is especially so insofar as the Government is concerned; its plaintive cry of "inconvenience" has a particularly hollow ring in this case. The Department of Justice and the AEC Staff joined together in their Document Request. They thus have two sizable staffs from which to draw for purposes of completing the instant document inspection with a minimal interference to other matters. Moreover, the Department has a large field office in Cleveland, Ohio, which presumably could provide additional manpower for this task.

6. Significantly, the requesting parties have not cited any pertinent authority to support their position. The Department of Justice relies on four cases under Rule 34 of the Federal Rules of Civil Procedure for their argument that Applicants can, as a general matter, be made to assume the burden and expense of delivering their produced material to Washington, D. C. See Service Liquor Distributors, Inc. v Calvert Distillers Corp., 16 F.R.D. 507 (S.D.N.Y. 1954); 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); Hirshorn v Mine Safety Appliances Co., 8 F.R.D. 11, 23 (W.D. Pa. 1948). An additional five cases are cited by the AEC Staff. See United States v R. J. Reynolds Tobacco Co., 268 F. Supp. 769 (D.C.N.J. 1966); United States v American Optical Co., 39 F.R.D. 580 (D.C. Col. 1966); Keco Industry, Inc. v Stearns Electric Corp., 285 F. Supp. 912 (D.C. Wisc. 1968); Rockaway Pix Theatre, Inc. v Metro-Goldwyn-Mayer, Inc., 36 F.R.D. 15 (D.C.N.Y. 1964); Loeks Enterprises, Inc. v W. S. Butterfield Theatres, Inc., 13 F.R.D. 5 (E.D. Mich. 1952).[3/] Each of these cases, however, stands only for the proposition that a producing party must bear the burden and expense asso-

3/ The City of Cleveland has filed no legal memorandum in support of its request for the transfer and placement in a central depository in Washington, D. C. of the documents produced by Applicants in response to the City's request. No authority has been cited to support such a transfer; nor do we know of any basis for granting such a request.

ciated with an initial file search for the documents requested, including a segregation or separate identification of all relevant documents discovered.

7. Applicants, of course, have already assumed that burden and expense in the present proceeding. The aforesaid cases require that they do no more. Indeed, but for the decision in American Optical Co., supra, the question raised here concerning the matter of delivery of the produced material to a distant location is not discussed. Even with regard to American Optical Co., the court there required production of certain requested documents in response to a subpoena duces tecum only after first finding that such a requirement would impose no real burden on the subpoenaed party. Also noteworthy is the fact that in the Michel case, supra, the court specifically structured its production order to accommodate the request made by the producing party as to the place of inspection. And, in Hirshorn, supra, the court's order called for delivery of produced material at a place mutually agreed upon by the parties, or, alternatively, at the Federal Building in the same city where the producing party's documents were already located, not some distant location many miles away. The government's cited cases are therefore unpersuasive authority for directing here that there be a Washington delivery of Applicants' produced documents.

8. Nor is the Department of Justice on any firmer footing by virtue of its reliance on a number of cases which stand for the proposition that sanctions can be imposed upon the producing party, under Rule 37(d) of the Federal Rules of Civil Procedure, for a "willful failure" to comply with a discovery order. See Robinson v Transamerica Ins. Co., 368 F.2d 37 (10th Cir. 1966); Patterson v C.I.T. Corp., 352 F.2d 313 (10th Cir. 1965); United States v Continental Casualty Co., 303 F.2d 91 (4th Cir. 1962).[4/] These decisions have no application in the present context. In the first place, it is clear from the cited authorities that the term "willful failure" is invoked by the courts in those situations where a party has been entirely unresponsive to a discovery request -- that is, where the demand for answers to interrogatories, for deposition testimony, or for document production has been purposefully evaded or totally ignored.

9. Such is not the case here. Applicants timely answered all interrogatories[5/] and document requests.[6/] With

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4/ And see the cases cited at footnotes 12 and 13 of the Department's Memorandum of January 2, 1975.

5/ While the Department of Justice separately objected to certain interrogatory answers as being evasive and unresponsive, it was pointed out by Applicants in their December 16 filing that the principal reason for differences in their responses was the vagueness of the questions propounded. The Department then agreed to attempt to cure this defect by propounding new interrogatories, more artfully worded. Applicants have agreed to respond to these revised interrogatories within 20 days after they are received.

6/ Because of the Thanksgiving holiday, Applicants' counsel was
(Cont'd next page)

regard to the latter, hundreds of thousands of documents were produced by each Applicant as being relevant to the production requests. Counsel for the City of Cleveland stated at the January 3 oral argument that over fifteen percent of the produced material examined by him so far has been deemed sufficiently important to warrant copying (Tr. 866). There thus is no basis for a charge here of "willful failure."

10. Moreover, Applicants have indexed by reference to separate boxes or file drawers the documents they have produced to show "the particular paragraph(s) of [each] request to which each document is believed to be responsive" (Joint Request, p. 1). Counsel for the AEC Staff acknowledged during the January 3 oral argument that this procedure adequately responded to the "listing" request of the Department of Justice and the AEC Staff (Tr. 852). In addition, where applicable, Applicants have timely produced affidavits as to requested documents no longer in the Company's possession, custody and control.7/ And finally, Applicants have filed

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6/ (Cont'd)
unable to collect all the affirmations to Applicants' respective interrogatory answers before December 2, 1974. Rather than delaying matters, the responses were timely served with a cover letter stating that an identical set of responses, with notarized affirmations attached, would follow. This second set of interrogatory answers was served on each of the requesting parties, with copies to the Board, on December 16, 1974.

7/ The Ohio Edison Company has produced such an affidavit; it is at the company's office along with the other documents produced. The request was otherwise not applicable to the Applicants.

with the Board lists of documents with respect to which they intend to assert a claim of privilege.[8/]

11. Accordingly, the only aspect of the present discovery on which Applicants can in any respect be faulted pertains to their failure to deliver to Washington, D. C. some 2,378,000 pages of produced material. In the circumstances, however, such a "failure" plainly does not warrant the imposition of sanctions. In Societe Internationale Pour Participations Industrelles Et Commercales, S. A. v Rogers, 357 U.S. 197, 78 S. Ct. 1087 (1958), a case cited by the Department of Justice (albeit inaccurately), the Supreme Court of the United States stated that the test for determining if a good faith effort has been made to comply with a production order is "whether [the producing party] has attempted all which a reasonable man would have undertaken in the circumstances to comply * * * " (357 U.S. at 201, 78 S. Ct. at 1090). In light of the volume produced by each Applicant in the present proceeding, retention

8/ These lists of privileged documents were filed with the Board on December 16, 1974. There was no requirement that they be submitted earlier. Indeed, since the matter of privileged material is being submitted to a special master appointed by this Board for consideration at a later date, there plainly is no basis for faulting Applicants' December 16 filing on privileged documents as being untimely.

Applicants further point out that they have complied fully with this Board's order concerning confidential material. All documents which contain proprietary information have been segregated and identified for inspection only by counsel for the requesting parties.

of this material for inspection and copying at the company headquarters plainly satisfies that standard.

12. Even apart from this clear conclusion, however, Applicants submit that the Rule 37 cases on which the Department of Justice places heavy reliance are wholly inapposite here. They all deal with a term of art that the courts have adopted in defining the reach of that particular Federal Rule, i.e., "willful failure." But, there is no counterpart to Rule 37 in the Commission's Restructured Rules of Practice. It therefore is entirely inappropriate as a matter of law -- even assuming arguendo that there was some factual basis to sustain the argument (which is not the case here) -- to point to the "willful failure" cases in an effort to extrapolate therefrom some general principle to be applied in the present context.[9/]

9/ This is perhaps most clearly demonstrated by the Department of Justice's footnote reference at p. 14 of its January 2 Memorandum to Haney v Woodward & Lothrop, Inc., 330 F.2d 940 (4th Cir. 1964) and Underwood v Maloney, 16 F.R.D. 3 (E.D. Pa. 1954). These cases are apparently cited to support the Department's position that Applicants' should bear the transportation costs of delivering their documents to Washington, D. C., and also the reproduction costs for at least the first 12,000 pages of produced material copied by the Department. In Haney and Underwood, however, costs were assessed against the respective defendants for repeated refusals to answer interrogatories and produce documents, even in the face of specific court orders demanding compliance with discovery requests. Clearly, judicial sanctions imposed for the sort of contemptuous action involved in those cases serves as no precedent for requiring Applicants to assume any additional costs here.

13. What this means, of course, is that the requesting parties' argument rests, in the final analysis, solely on a procedural technicality. Because Applicants raised no objection at the outset of the discovery process to the request by the Department and AEC Staff for delivery to Washington, D. C. of the produced material, the claim is that they are now precluded from coming forward and resisting delivery on a showing of "good cause." Such a rigid adherence to procedural niceties comports with neither the letter nor the spirit of the Commission's Rules. It serves no legitimate purpose in the present proceeding and has little precedential significance with regard to future administrative matters.

14. Applicants readily concede that they did not initially object to the "delivery" request. But, at the time that objections were to be filed, they had no good reason to believe that such an objection would be in order. As pointed out in Applicants' December 16 memorandum, and in the Motion for a Protective Order filed on January 2, it was anticipated on the basis of the prior experience of applicants in other antitrust proceedings that the volume of material called for by the Joint Document Request would be such that the delivery requirement could be complied with. Applicants thus considered it inappropriate to make a routine objection in this area which -- on the basis of the information then available --

it knew full well would not expedite the proceeding.

15. It was not until the final week of the time allotted for document production that the undersigned counsel learned of the mass of documentary material collected and assembled by each Applicant.[10/] At that time, reproduction and transportation to Washington, D. C. of the produced papers by the December 2 deadline would have been an impossible task, especially in light of the intervening Thanksgiving holiday. Moreover, the cost of such an undertaking was itself prohibitive. Accordingly, Applicants timely advised the requesting parties that the material called for had been separately identified and organized for inspection and copying at the respective companies' offices. In response to a telephone inquiry from the AEC Staff on December 3, 1974, as to why the documents had not been delivered, Applicants' counsel informed government counsel that the unanticipated large quantity of produced material made delivery a practical impossibility. The motions to compel delivery were then filed and timely answered, and, on January 2, 1975, Applicants sought a protective order against bringing their produced documents to Washington, D. C.

10/ While Washington counsel for the Applicants met twice with government counsel during the month of November, 1974, to discuss matters relating to a possible narrowing of the issues involved in the present proceeding, they had no indication at that time of the mass of material that Applicants' respective file searches would ultimately produce.

16. There is nothing in the Commission's Rules that suggests, in circumstances such as these, that a failure to make an initial discovery objection will preclude the producing party from later showing good cause for excusing it from an unreasonable procedural requirement -- based on facts not earlier available to it. And see Krantz v United States, 56 F.R.D. 555, 557 (W.D. Va. 1972).[11/] Indeed, in matters of more substantive import, such as intervention, the Rules specifically contemplate that such a showing may overcome untimeliness in appropriate circumstances. 10 C.F.R. 2.714(a). Moreover, as Applicants pointed out in their January 2 filing, the Commission has provided in Section 2.740(c) of its Rules that, upon motion made by a party "from whom discovery is sought, and for good cause shown," this Board "may make any order which justice requires to protect a party from * * * undue burden or expense * * * including * * * that the discovery may be had only on specified terms and conditions, including a designation of the time or place * * *."

11/ This differentiates the present situation from In the Matter of X-Ray Engineering Company (Byproduct Material License No. 4-616-3), 1 AEC Reports 553 (1960), cited in the AEC Staff's brief of January 2, 1974. There, the Commission found to be fatal a failure to file timely exceptions to an Intermediate Decision of the Hearing Examiner on the basis of the specific language in 10 C.F.R. 2.752, which then provided in relevant part: "Any objection to a ruling, finding or conclusion which is not made part of the exceptions shall be deemed to have been waived, and the Commission need not consider such objections."

17. Applicants initially sought such protection on December 16, 1974, in their timely-filed response to the government's motions to compel document delivery. They formalized their request on January 2, 1975, by filing a motion for a protective order. The requesting parties have not been prejudiced by the fact that Applicants' motion was not filed earlier. The produced documents have been available for inspection and copying since December 2, 1974, and, indeed, the City of Cleveland -- notwithstanding that it has less manpower and resources to devote to this task than the Federal Government -- has spent the last several weeks examining material in the respective companies' offices (Tr. 877, 880). Nothing has prevented the Department of Justice and the AEC Staff from doing likewise. To the extent that they have thus far chosen not to, and have thereby delayed by some six weeks the commencement of the government's document discovery, such delay works essentially only to the detriment of Applicants. The Davis-Besse unit involved in this proceeding is now scheduled for fuel loading in January 1976, and thus it is the Applicants and the customers they serve, not the requesting parties, who can ill afford to have the present hearing schedule prolonged much beyond the dates presently set by the Board.

18. The requesting parties' only response is to insist dogmatically that Applicants' motion for a protective order

was not timely filed and, therefore, should not be recognized. But such preoccupation with timeliness considerations are entirely inappropriate in this context. As Applicants showed in their earlier motion papers, traditional notions of timeliness are no longer particularly relevant under Section 2.740(c). The requirement that motions for protective orders be seasonably filed was explicitly deleted from the Commission's Rules following a similar revision in 1970 to the provision for protective orders in the Federal Rules of Civil Procedure. And it is now well recognized that such motions are an appropriate response to motions to compel discovery. 4A Moore, Federal Practice ¶34.19[2] (1974).

19. The cases cited in the AEC Staff's brief of January 2, 1975, to support a contrary position are not in point. All but one of those decisions preceded the 1970 deletion of the requirement that applications for protective orders be timely made. See Peitzman v City of Ilmo, 141 F.2d 956 (8th Cir. 1940), certiorari denied, 323 U.S. 718 (1940); Collins v Wayland, 139 F.2d 677 (9th Cir. 1944); Wong Ho v Dulles, 261 F.2d 456 (9th Cir. 1958); Stephens v Sioux City & New Orleans Barge Lines, Inc., 30 F.R.D. 397 (D.C. Mo. 1962); Gore v Maritime Overseas Corp., 256 F. Supp. 104 (D.C. Pa. 1966). Moreover, the single post-1970 case cited, Marriott Homes, Inc. v Hanson, 50 F.R.D. 396 (D.C. Mo. 1970), does not even address

the matter of timeliness. Instead, it is concerned with the willful failure of a party to respond to a notice of deposition and the sanctions under Rule 37(d), Fed. R. Civ. P., that can be imposed in such circumstances.

20. Also of little significance in this context is the reference in the AEC Staff's brief to 8 Wright and Miller, Federal Practice and Procedure §2035 (1970), pp. 262-263. There, it is stated that a protective order ordinarily should be sought before the date set for discovery. But, this statement is made with specific reference to the taking of oral depositions, where the failure of a party to appear and give testimony at the time and place specified decidedly works to the prejudice of the requesting party. Here, by contrast, Applicants did not refuse to respond to the Document Requests served upon them; they produced the documents called for in a timely and organized manner, and this material has been available for inspection and copying since December 2, 1974. As already pointed out, the requesting parties have been caused no real prejudice by Applicants failure to deliver this material to Washington, D. C. Accordingly, whatever might be considered appropriate with regard to deposition discovery, there exists no good reason to apply a flat cut-off date for the filing of motions for protective orders in the present circumstances.

C. Conclusion

For the foregoing reasons, and for the reasons stated in Applicants' earlier filings of December 16, 1974 and January 2, 1975, Applicants' motion for a protective order should be granted.12/ Contrary to the assertions of the requesting parties, such a ruling would not protract the discovery process. The Department has indicated that, without devoting full time to the task, it can review 15 file drawers of material in one week. But, if inspection takes place at Applicants' offices, so that examination can proceed without interruption, it stands to reason that many more file drawers can be reviewed within the same time frame. Moreover, the travel time associated with conducting document

12/ While both the Department of Justice and the AEC Staff rely on dicta in In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-122, RAI 73-5-322 (May 16, 1974), the language cited therein has little application here. The burden complained of, not by the applicant, but by the intervening municipalities, in Midland related to the threshhold question of production and not to the matter of delivery. The Appeal Board left the issues of burden and expense to be resolved by mutual agreement of the parties. In so doing, the Appeal Board admonished against the future use of an "all-encompassing indiscriminate claim of burden" by parties objecting to discovery requests. But Applicants have not resorted to such tactics here. As set forth in their earlier filings, and in the letter to this Board from Applicants' counsel dated December 19, 1974, the burden and expense that would be associated with the delivery of the produced material to Washington, D. C. has been carefully described and quantified.

discovery on location is significantly less than the time involved in packaging and moving to Washington, D. C., the boxes of produced material -- whether the documents are delivered in bulk on on a segmented basis. Whichever course is followed, however, the intimidating estimate by the requesting parties of an 8 or 9 month discovery period is unrealistically high. Applicants believe that 30 days is ample time to allow for completion of document discovery if inspection and copying take place where the produced material is now located.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: January 7, 1975.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Memorandum In Reply To The January 2, 1975 Filings Of The Department Of Justice And The AEC Regulatory Staff And In Further Support Of Applicants' Motion For A Protective Order" were served upon each of the persons listed on the attached Service List by U. S. Mail, postage prepaid, on this 7th day of January, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

Dated: January 7, 1975.

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