October 2, 1975

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket Nos. 50-346A 50-440A 50-441A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL. (Perry Nuclear Power Plant, Units 1 and 2)	)	

APPLICANTS' REPLY TO THE CITY OF CLEVELAND'S PETITION FOR RECONSIDERATION

1. On September 29, 1975, the City of Cleveland ("City") filed with this Appeal Board a petition for reconsideration of the Memorandum and Order issued September 19, 1975. The petition states no legitimate basis for granting the relief requested.

2. The City argues that the rulings of the Special Master cannot be considered "binding" and at the same time constitute an interlocutory determination which is unappealable under Section 2.730(f) of the Commission's rules. Such an assertion can only be based on a fundamental misconception of the basic characteristic of interlocutory rulings. They are, by definition, the intermediate decisions along the litigation path which do not finally dispose of the substantive

DAVIS-BESSE NUCLEAR POWER STATION

DOCKET NO. 50-346

1. With regard to your response to Question 3.2.2 as indicated in Amendment 3 to the FSAR, the following Quality Group A components within the reactor coolant pressure boundary are not in compliance with Section 50.55a of 10 CFR Part 50. These components are: (1) Reactor Vessel, (2) Part Length Control Rod Drive Housing, (3) Steam Generator (tube side and shell side), and (4) Pressurizer. For items 1 through 4 to be in compliance with Section 50.55a of 10 CFR Part 50 based on a construction permit date of March 24, 1971, these components should be constructed to ASME Section III, 1968 Edition, Subsection A, and the following addenda: Summer 1968 and Winter 1968.

   Our position is that conformance with Section 50.55a of 10 CFR Part 50 is mandatory unless it can be shown that compliance with these requirements would result in hardships or unusual difficulties without a compensating increase in the level of quality and safety.

2. Your Seismic Category II classification of the Spent Fuel Pool Cooling System is not in agreement with current AEC practice and is unacceptable. Our position is that those components of the Spent Fuel Pool Cooling System that perform the cooling function should be classified Seismic Category 1.

3. Your Seismic Category II classification of those portions of the Component Cooling Water System which service: (1) Reactor Coolant Pumps, (2) Letdown Cooler, and (3) Seal Return Cooler, is not in agreement with current AEC

practice and is unacceptable. Our position is that those portions of the Component Cooling Water System which service items 1, 2 and 3 should be classified Seismic Category 1.

4. Those portions of the letdown line of the Makeup and Purification System from the containment isolation valve through the prefilter, purification demineralizer and post-filter to the makeup tank that is classified Quality Group C is not in agreement with current AEC practice and is unacceptable. Our position is that these portions of the Makeup and Purification System which form the letdown loop should be classified Quality Group B and Seismic Category 1.

5. With regard to your response to Question 3.2.1 as indicated in Amendment 3 to the FSAR, the spot radiographic examination of the welded joints of the Borated Water Storage Tank is unacceptable. Nuclear Storage Tanks designed, fabricated and tested to ASME Section III, Class 2, (Quality Group B) require full radiographic examination. To be acceptable, we will require additional nondestructive testing to assure a quality level at least equivalent to that currently associated with Quality Group B.

issues in suit, but do resolve discovery and other preliminary issues that are in controversy. As such, these intermediate decisions are as "binding" on the parties with respect to the particular determinations made as any ultimate decision on the merits would be. In effect, they serve to guide the course of litigation and control the conduct of the litigants in the presentation of the case. The Special Master's determinations in the present proceeding are a classic example. They deal with a discovery issue which has traditionally been viewed as an interlocutory matter. The fact that the parties agreed "to be bound" by the Master's rulings does not remove them from the interlocutory category. They are still "binding" intermediate decisions in the hearing process with respect to which the appeal bar in Section 2.730(f) of the Commission's Rules is fully applicable.

3. With regard to the City's continued reliance on Section 034 of Chapter 0106 of the AEC Manual, its position in this regard has already been aired in briefs and on oral argument before the Appeal Board. The City still fails to appreciate that its consent to the reference procedure involved here removes this matter from the proscription in Manual Section 034 and brings it squarely within Section 2.753 of the Commission's Rules. All parties

to the stipulation stated at oral argument before this Appeal Board that this was not a reference imposed by the Chairman of the Licensing Board against the will of any party; it was an agreement entered into freely and voluntarily by all. As the Appeal Board properly concluded, to rely on Manual Section 034 in such circumstance "would exalt form over substance" (Memorandum and Order, page 4).

4. Curiously, the City seems to argue in its present petition that the parties never entered into any agreement at all regarding the procedure for resolving claims of privilege. Thus, it states, "[s]ince there was no meeting of the minds, there was no agreement" (City's Petition, page 5). This flies in the face of the City's brief filed with this Appeal Board and also contradicts the position taken by the City on oral argument. The Appeal Board has had full opportunity to consider the nature and scope of the agreement involving the Special Master and after careful deliberation has concluded that it "must be taken as precluding the parties from seeking review now or in the future, of his rulings made within the scope of the jurisdiction conferred upon him by the agreement" (Memorandum and Order, page 3). Such a reading is clearly warranted by the express stipulation "to be bound"; it accords with the understanding of Applicants, the Department of

WHEREFORE, Applicants submit that the City of Cleveland's petition for reconsideration should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Gerald Charnoff

Counsel for Applicants

Dated: October 2, 1975.

Justice and the NRC Staff, at least as of December 6, 1974[1/]; and it coincides with the Licensing Board's conclusions regarding this matter. In view of the City's argument, Judge Learned Hand's admonition in Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911), aff'd, 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50 (1913), bears repeating:

> If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

5. While the City again asserts that the Special Master ignored the law, denied the City a fair hearing and failed to do a workmanlike job, these broad assertions have never been substantiated to any degree -- nor, we submit, can they be. In any event, in light of the stipulation of the parties and the interlocutory nature of the discovery determinations being challenged, consideration of the correctness of the Special Master's rulings are not relevant to this appeal.

1/ At oral argument before this Appeal Board, both the Department of Justice and the NRC Staff stated that their original understanding of the agreement was consistent with Applicants' position. However, each expressed some "second thoughts" as to the scope of the agreement after reflecting on the matter some six months later.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Reply To The City of Cleveland's Petition For Reconsideration" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to those persons in the Washington, D. C. area and by mailing a copy, postage prepaid, to all others, all on this 2nd day of October, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

Dated: October 2, 1975.

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