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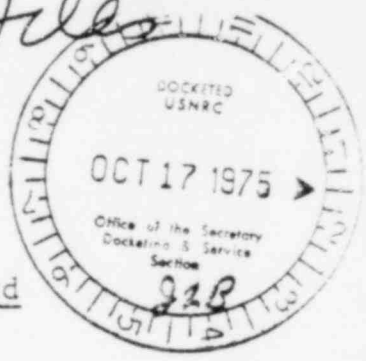
Oct. 17, 1975



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	50-500A
	)	50-501A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	Docket Nos. 50-440A
	)	50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

MEMORANDUM AND ORDER
OF BOARD ON MOTION OF THE CITY
OF CLEVELAND TO COMPEL DISCOVERY

By Motion of October 1, 1975, the City of Cleveland (City) moved the Board to enter an order directing Donald H. Hauser, an employee of the Cleveland Electric Illuminating Company (CEI), to appear in Washington, D. C. to respond to questions put to him during the course of his deposition and to reasonable additional questions. City further moved that Applicants bear all expenses attributable to the reconvening of the Hauser deposition. On October 7, 1975, Applicants filed a reply in opposition to the Motion citing Section 2.740(f)(1) of the Commission's Rules of Practice which provides in pertinent part as follows:

> If a deponent . . . fails to respond or objects to the request, or any part thereof . . . the deposing party . . . may move the presiding officer, within five (5) days after the date of the response . . . for an order compelling a response . . . . The motion shall set forth the nature of the questions . . ., the response or objection . . ., and arguments in support of the motion.

The Hauser deposition took place on July 11, 12 and 18, 1975 (City's Motion, p. 1). Thus, no later than July 18 City was aware of the basis upon which a motion to compel discovery could be formulated. The questions as to which answers now are sought were objected to on the ground that the answers invaded the area of attorney/client privilege. City contends that had the Board ordered CEI to make available certain documents withheld on grounds of privilege, the instant motion might not have been necessary. At the same time, City contends that the answers being sought do not ask for the contents of the documents. That being so, we can see no reason why the City should not have been prepared to move timely for an order requiring the answers now being sought irrespective of any decision of this Board relating to privileged documents. Moreover, we note that on July 21, 1975, the Board declined to review the Master's rulings with respect to privilege and further refused to certify the issue to the Appeal Board.* Thus, since at least late July, City was

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* The Appeal Board in turn rejected City's attempt to obtain access to the assertedly privileged documents in its ruling of September 19, 1975. Eleven days elapsed before the City filed the instant motion, and although the City has applied

(Footnote continued on following page)

in a position to apply for the relief now being sought.

City's Motion is in such obvious disregard of Rule 2.740(f) that the request for relief must be denied. In so ruling, we have carefully read the City's moving papers to determine if good cause has been demonstrated to require some further evaluation on our part.** We are persuaded that none exists because the City unquestionably was aware of the Board's posture with respect to the privilege issue as it related to CEI documents and with respect to the termination of discovery by August 1. We see no justification for the delay until October 1 for the Motion now filed.

In ordinary circumstances, we would say no more. Where the rules of procedure require a certain result, no proper purpose is served by speculating as to what the ruling might have

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* (Footnote cont. from preceding page)

for reconsideration by the Appeal Board, surely reasonable prudence would require it to have applied for related relief within five days of the intitial Appeal Board decision. We do not rely on this sequence of events in reaching our ruling, however, since we consider the plain requirements of the rules as they relate to activities before the Licensing Board to control our determination of the City's Motion.

** We are not unmindful that on occasion the Board has exercised its discretion to permit parties to file additional pleadings which filings were not accorded the parties as a matter of right. Our inability to see any reasonable good cause basis for the City's delay, however, tips the balance against the exercise of such discretion as the rules may permit in the Motion now before us.

been but for the requirements of the rules.*

Here, however, we see some advantage in adumbrating our position with respect to certain of the recurring objections taken by CEI counsel during the Hauser deposition and cited by City as erroneous. Our preliminary thoughts, of course, are subject to re-evaluation based upon brief arguments which may take place at the hearing stage. All parties should recognize that the Board's action in commenting further with respect to evidentiary rulings it may be required to make is done solely for the purpose of placing what promises to be a recurring dispute into a framework for prompt resolution. The parties should read into this an intent by the Board to utilize the powers set forth in 10 CFR §2.718(c) and (e) and 10 CFR §2.757 to control closely the duration of these proceedings consistent with the requirements of due process.

We now turn our attention to the specific objections set forth in the deposition pages attached to City's Motion. Although a series of documents and incidents are covered within these pages, a general pattern has emerged in which objections

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* This is not to say that we regard the application of Rule 2.740 as a triumph of procedure over substance in the instant case. We are in agreement with the position set forth by Applicants at the prehearing conference of September 18, 1975 that at some point discovery must terminate and that due process requires the Applicants to be aware of the boundaries of the charges being made against them. Thus, without a showing of good cause, to reopen at this late date what could become a major area of discovery would not be warranted.

were taken to questions involving (1) the identification of the person requesting a study or evaluation; (2) questions relating to the use of the study; and (3) questions relating to any action taken pursuant to or as a result of the study. Our preliminary opinion is that objections as to the identification of the person requesting a study would not be sustained, and if Mr. Hauser is called as a witness in these proceedings, he may be required to answer such questions. With respect to the use of the various studies, it is difficult to determine whether such information infringes upon the attorney/client privilege, and such rulings may necessitate consideration on an individual basis. With respect to questions relating to any action taken pursuant to or as a result of the study, we regard this as the most important of the three questions in terms of providing information relevant to the resolution of the issues in controversy. Subject to further argument from counsel, our preliminary view is that "action" taken is an objective fact and that objections to disclosing action based upon attorney/client privilege would not be sustained. There are several reasons why this is so. The "action" would not necessarily disclose any confidential communication intended to be protected since (a) several courses of action may have been proposed; (b) the "action" may not be consistent with the recommendation of the study; and (c) the "action" may have been a modified version of the study proposal. Moreover, "action" will constitute an event which by its nature

will be disclosed to those outside of any confidential communication group.

Finally, we wish to address an assertion in Applicants' Reply to City's Motion in the interest of eliminating any misunderstanding as these proceedings reach the hearing stage.* We are troubled by the assertion in paragraph two of Applicants' Reply that "this [privileged communications between CEI and its attorneys] has repeatedly been held to be entitled to protection from disclosure." No such blanket ruling has been made with respect to all communications between CEI and its attorneys. Indeed, with respect to the documents claimed by CEI to be privileged, the Special Master found some portion of these documents not to be protected by privilege or found the privilege to have been lost. With respect to claims of privilege other than those relating to the documents designated by CEI, no rulings have been made.

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* It is not necessary, of course, in ruling on a motion for the Board to address each factual or legal assertion contained in the various parties' moving and reply papers. The fact that a party has made an assertion does not make it so, nor does the assertion become binding on the Board or any other party to these proceedings. Nonetheless, in view of the prolonged controversy with respect to privilege, the Board considers it appropriate to have the record as clear and correct as possible before the evidentiary stage of the proceedings.

MOTION DENIED.

ATOMIC SAFETY AND LICENSING BOARD

John M. Frysiak, Member

Ivan W. Smith, Member

Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 17th day of October 1975.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY, ET AL.	)	Docket No.(s) 50-346A
CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	50-440A
	)	50-441A
	)	
(Davis-Besse Nuclear Power Station, Unit No. 1; Perry Nuclear Power Plant, Units 1&2)	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
17th day of Oct. 1975.

Eugene H. Pleasant
Office of the Secretary of the Commission

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NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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TOLEDO EDISON COMPANY, ET AL	)	Docket No.(s) 50-346A
(Davis-Besse Unit 1)	)	
CLEVELAND ELECTRIC ILLUMINATING	)	50-440A
COMPANY, ET AL.	)	50-441A
(Perry Units 1 and 2)	)	
TOLEDO EDISON COMPANY, ET AL.	)	50-500A
(Davis-Besse Units 2 and 3)	)	50-501A

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