

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' MOTION FOR AN EXTENSION OF  
TIME WITHIN WHICH TO FILE THEIR  
PREHEARING BRIEF

1. Pursuant to the schedule set by the Board in Prehearing Conference Order No. 4, as revised on July 21, 1975, following a request by the City of Cleveland for an extension of time within which to conduct discovery, and on October 2, 1975, following a request by the Department of Justice for more time within which to file its written expert testimony, prehearing briefs are to be filed by all parties on November 10, 1975, together with a designation of witnesses and evidentiary documents. Applicants have heretofore advised the Board that they will be unable to meet this deadline. The present motion is to request an additional two weeks, until November 24, 1975,

for filing Applicants' prehearing brief and Applicants' preliminary witness and document lists.<sup>1/</sup>

2. The additional time is needed because four of the five Applicants in this proceeding (i.e., all but CEI) had no notice of the specific allegations being made against them until September 5, 1975. Prior to that date, neither the City of Cleveland (in its three filed intervention petitions) nor the NRC Staff (which filed no pleadings) had made any charges whatsoever concerning the conduct of these four Applicants vis-a-vis municipalities or electric cooperatives located in their respective geographic service areas. The Department of Justice made only general reference in its Advice Letters to such matters; its cryptic comments gave no notice of the many allegations set forth by the Department in its September 5 filing.

3. As we have made clear to this Board in prior filings and on oral argument, Applicants have not yet had an opportunity to explore these new charges through discovery. Nor can they now afford to seek a postponement of the evidentiary hearing in order to do so in the proper manner. This is due to the fact that the delays in this antitrust proceeding have left this Licensing Board with close to four, or at the outside six, months in which to complete its anti-

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<sup>1/</sup> Applicants will need to supplement their preliminary designation of witnesses and documents after hearing the affirmative cases of the other parties.

trust review and issue its initial decision prior to the scheduled commencement of major construction of Perry Units 2 and 3 and of fuel loading for the operation of Davis-Besse Unit 1.

4. Faced with such a situation, Applicants have undertaken to meet every deadline imposed by the Board. They had hoped also to meet the November 10 filing date. However, it has now become apparent that the additional work required in order to answer the new September 5 charges in the careful manner required -- both to focus this hearing and to expedite the process to the fullest extent possible -- and to make the preliminary designation of documents and witnesses will take every bit of the additional two weeks now being requested.<sup>2/</sup> Applicants' prehearing brief is certainly important to this proceeding. There is clearly as much reason to give to Applicants the additional 14 days now requested for their filing as there was to allow the Department an additional 22 days to file Dr. Wein's written expert testimony (especially in light of the fact that Dr. Wein ultimately did little more than resubmit the same direct expert testimony he had prepared long ago for the Farley proceeding).

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<sup>2/</sup> A part of the reason for this need for additional time is that Applicants' attention to the immediate filings has been interrupted by at least 5 requests by the other parties for additional discovery material. Notwithstanding the fact that these requests have all been untimely, inappropriate and legally defective, they have required written responses, thereby causing the very sort of predictable interruptions which were deemed inappropriate by the licensing board in Commonwealth Edison Co. (Zion Station, Units 1 & 2) ALAB-196, RAI-74-4, 457, 467 n. 15 (April 25, 1975).

5. Moreover, by requesting this additional time, Applicants do not ask for a delay in the evidentiary hearing. We recognize, more acutely than the other parties seem to, the need to proceed with the hearing forthwith, and, while the November 20 date may have to slip slightly for other very legitimate reasons,<sup>3/</sup> Applicants see no reason for a delay in the November 20 hearing date because of a two-week schedule change in the filing of their prehearing brief and their lists of witnesses and documents.

6. Certainly, the other parties are in no position to claim prejudice as a result of the present motion. Each of them has informed the Board that it can file its prehearing brief and its lists of documents and witnesses on November 10, 1975. Since the Department, the NRC Staff and the City have the burden of proof in this proceeding and are the first to present their cases at the hearing, there is every reason to hold them to the November 10 date. On the other hand, Applicants' affirmative case will not commence until sometime next year, which will give the other parties several months after the requested November 24 date to digest Applicants' filings --

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<sup>3/</sup> A number of procedural matters remain to be resolved regarding, for example, (1) the designation of documents and witnesses; (2) the manner in which this Board intends to handle the introduction of evidentiary material; (3) the identification of testimony to specific claims so that the purpose for which it is being introduced, and the Applicant(s) against whom it is intended to be directed, will be known by the Board and the parties; and (4) the scope and nature of cross-examination. These and other such matters are now scheduled by the Board to be heard on November 17, 1975. Applicants do not know whether they can all be resolved before November 20, 1975.

as compared to the extremely short lead time that the Board has provided to Applicants under the present schedule.<sup>4/</sup>

7. Accordingly, Applicants hereby move for an extension of two weeks, until November 24, 1975, within which to file their prehearing brief and their preliminary lists of witnesses and documents. This motion neither requests nor anticipates any change in the November 20 hearing date. Applicants recognize all too well that energy needs and financial considerations make it extremely important that, if at all possible, antitrust review not be permitted to hold up the major construction or operation of these nuclear facilities.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By:

Wm Bradford Reynolds

Wm. Bradford Reynolds  
Gerald Charnoff

Counsel for Applicants

Dated: November 4, 1975.

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<sup>4/</sup> Applicants regard the 10-day period between the filing of the other parties' prehearing briefs, together with their witness and document lists, and the commencement of the evidentiary hearing as way too short to allow Applicants a fair opportunity to prepare for the hearing. Applicants, however, have been forced by the plant schedules to forego objecting to this infringement on Applicants' due process rights in the same way that they have had to remain silent as to other procedures followed in this proceeding which, individually and collectively, raise serious due process questions.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion For An Extension Of Time Within Which To File Their Prehearing Brief" were served upon each of the persons listed on the attached Service List, by hand delivering a copy of those persons in the Washington, D. C. area and by mailing a copy, postage prepaid, to all others, all on this 4th day of November, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: W. Bradford Reynolds  
Wm. Bradford Reynolds  
Counsel for Applicants

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