

4-16-74

POOR ORIGINAL

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of)
)
TOLEDO EDISON COMPANY, ET AL.)
CLEVELAND ELECTRIC ILLUMINATING)
COMPANY)

Docket No. - 346A
50-440A
50-441A

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents on each person designated on the official certificate filed by me with the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.221 of the Code of Federal Regulations, of the Atomic Energy Commission's Rules and Regulations.

at Washington, D. C.
16th day of April 1974.

Leopold A. Downing
Office of the Secretary of the Commission

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CLEVELAND ELECTRIC ILLUMINATING) 50-440A
COMPANY) 50-441A

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4-15-74

R. G. Files

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION



In the Matter of)	
)	
The Toledo Edison Company and)	
The Cleveland Electric Illuminating)	Docket No. 50-346A
Company)	
(Davis-Besse Nuclear Power Station))	
)	
The Cleveland Electric Illuminating)	Docket Nos. 50-440A
Company, et al.)	50-441A
)	
Duquesne Light Company, et al.)	Docket No. 50-412A
(Beaver Valley, Unit 2))	

FINAL MEMORANDUM AND ORDER
ON PETITIONS TO INTERVENE
AND REQUESTS FOR HEARING

By Memorandum and Order dated January 21, 1974, ^{1/} the Atomic Energy Commission (Commission), inter alia, designated this Atomic Safety and Licensing Board (Board) to assume jurisdiction and to rule on the petition of the City of Cleveland (Cleveland) for a hearing and for leave to intervene in the above-captioned Davis-Besse proceeding. The Commission stated that developments occurring after

1/ RAI 74-1, 15-18

the filing of Cleveland's petition to intervene required clarification of Cleveland's position. At the same time, the Commission denied the petition by American Municipal Power-Ohio, Inc. (AMP-O) for a hearing and intervention in the said Davis-Besse proceeding.

The Commission also directed this Board to rule on all petitions to intervene filed in the above-captioned Perry and Beaver Valley proceedings, and to decide whether consolidation of the proceedings would be in order.

In effect the Board had a dual responsibility, (1) to function as a "motions Board" and to rule on petitions to intervene filed in the above-captioned proceedings, and (2) to conduct any hearing(s) and to decide any issues in controversy. Accordingly, in its capacity as a "motions Board", this Board, after holding two prehearing conferences, and carefully considering all the written and oral pleadings advanced by the parties, issued a Memorandum and Order dated March 15, 1974.

Subsequently, amendments and further pleadings have

been filed, including objections and requests for reconsideration filed by the City of Cleveland^{2/} and by the American Municipal Power-Ohio, Inc.^{3/} After carefully considering all such further amendments and pleadings, the Board affirms its March 15 Memorandum and Order as modified hereinbelow:

A. A hearing is warranted in the Davis-Besse proceeding with the parties previously named. The Petition of the State of Ohio^{4/} to participate under Section 2.715(c) is granted as to the Davis-Besse proceeding.

B. A hearing, requested by the Department of Justice

^{2/} "Objections of the City of Cleveland to the Denial of Petition to Intervene and Requirement for Supplemental Statement on Nexus in Board's Memorandum and Order issued March 15, 1974, Request for Certification of Such Matters to the Commission, and Deferral of Date for Filing Supplemental Statement on Nexus Pending Commission Decision" (hereafter "Objections").

^{3/} "Request for Reconsideration of Tentative Denial of Petition to Intervene of AMP-0 and Presentation of Supplemental Data Regarding Compliance with Section 2.714 of the Commission's Rules and Regulations" (hereafter "Request").

^{4/} Petition of State of Ohio to Participate as a Matter of Right, dated April 4, 1974.

(Justice) and several petitioners, is warranted in the Perry proceeding with the parties previously named. The petition of the State of Ohio to participate under Section 2.715(c) is granted as to the Perry proceeding. In view of the response and amendment filed by AMP-0^{5/} the Board hereby rules that AMP-0 is a party to the Perry proceeding as further discussed in paragraph D. below.

C. A hearing is not warranted in the Beaver Valley proceeding. As discussed in paragraph E. below, no additional reasons or information has been submitted that would warrant such hearing.

D. The Board noted in its March 15 Memorandum and Order a disposition to deny the petition to intervene filed by AMP-0 in the Perry proceeding, but nevertheless granted AMP-0 an additional period of 20 days to clarify and resubmit its allegation of nexus. On April 4, 1974,

^{5/} Footnote 3, supra.

AMP-O submitted its response.^{6/} Inter alia, this pleading presented additional information on nexus dealing with the impact of the Perry facility on Cleveland Electric Illuminating Company's (CEI) transmission system and thereby on AMP-O's ability to provide Cleveland with an alternative source of bulk electric power from the Power Authority of the State of New York. The Board finds such contention sufficient pleading of nexus to permit AMP-O's intervention in the Perry proceeding. Although such additional information may be adequate to admit AMP-O as a party, the Board notes difficulty in understanding the technical, economic and marketing relationships that AMP-O asserts could lead to AMP-O being unable to fulfill its commitment to Cleveland. The Board will require that these be clarified before the start of discovery.

E. As to the Beaver Valley proceeding, Cleveland has requested reconsideration of the Board's March 15

^{6/} Footnote 3, supra.

7/ Order. The Board has carefully considered all the pleadings, both written and oral, and finds no reason to reverse its earlier decision. It hereby affirms said decision for the following reasons:

1. Cleveland takes issue separately with the two aspects of the Board's decision: Cleveland's (1) failure to file timely, 8/ and (2) failure to make a proper showing of nexus. The Board addressed both factors, separately, and cumulatively, in reaching its decision.
2. The essence of the Commission's rules on timeliness is to protect the rights of all parties and to provide an orderly licensing procedure. While timeliness may be inextricably

7/ Footnote 2, supra.

8/ The Board notes an inadvertent typographical error. On page 5, line 3, of said March 15 Order "30 days" should be corrected to 60 days.

intertwined with petitioners' interests,^{9/} the Board's denial of Cleveland's petition in Beaver Valley took this factor into full account. The Board likewise considered that maintenance of the integrity of the Commission rules of procedure requires that they be strictly observed unless a party can show damage or serious disadvantage to its interests. To do otherwise would make a mockery of procedural rules and create chaos in the licensing and hearing process. In this regard Cleveland made no showing that could reasonably be interpreted as amounting to a showing of damage or disadvantage. Furthermore, a key point in assessing the weight to be given to a question of untimeliness is Cleveland's ability to protect its interests without a Beaver Valley

^{9/} See Duke Power Company, Memorandum and Order of September 6, 1973, RAI-73-9-666, pp. 670-671.

^{10/} hearing. The City of Cleveland has been admitted to the Davis-Besse and Perry proceedings which involve the same factual and legal issues that Cleveland seeks to litigate in Beaver Valley. If Cleveland shows in these two proceedings that relief is in order, Cleveland may then request the same type of remedy it seeks in Beaver Valley.

3. As to the nexus issue, Cleveland argues ^{11/} that essentially the same nexus is stated in all three petitions, i.e., in Perry, Davis-Besse, and Beaver Valley. Cleveland then proceeds to cite and compare two paragraphs each from Perry and Beaver

^{10/} Cleveland argues that if a party has a right to intervene, he can exercise this right regardless of its impact on the licensing process. On the contrary, in the present situation the issue is whether the Board in its discretion must grant Cleveland intervention in the absence of a timely petition and without a proper showing of nexus.

^{11/} Footnote 2, supra.

Valley, and three paragraphs from the Davis-Besse pleadings and states that these comprise its nexus allegations.^{12/} However, the Board finds that these cited paragraphs do not meet the nexus standard^{13/} required by Waterford. The only nexus that the Board was able to discover was in the allegation of new advantages accruing to the Applicants to be created by the proposed licensing for Davis-Besse and Perry. While such allegations met the nexus test marginally in Davis-Besse and Perry, the Beaver Valley petition failed to meet or show

12/ Id., p. 3

13/ In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-382A, Memorandum and Order of February 23, 1973, RAI-73-2-48 and In the Matter of Louisiana Power & Light Company, Waterford Unit 3, Docket No. 50-382A, Memorandum and Order of September 23, 1973, RAI-73-0-619. (hereafter, Waterford) As held in the Waterford case, nexus is not established by simply reciting words of art in a pleading. Nexus requires a logical connection between the construction and operation of a nuclear power plant and a situation inconsistent with the antitrust laws.

^{14/}
this requirement. Specifically, the Perry petition described the relationship between the Central Area Power Coordination Group (CAPCO), and the proposed nuclear plant. Cleveland asserted on page 6 of its petition that:

"... membership in CAPCO has enhanced CEI's ability to construct and market power from large nuclear units and to take advantage of the economies of scale associated with such large units. At the same time, CEI and other CAPCO members have effectively shut out MELP from deriving such benefits either through participation in CAPCO or through non-CAPCO systems, thereby giving CEI a competitive advantage over MELP."^{15/}

As to the Davis-Besse petition, the Board took into consideration that Cleveland's original petition

^{14/} The Board resolved doubts in favor of Cleveland's petition, but expressly noted in its March 15 Order the Commission direction that "... if it becomes apparent at any point that no meaningful nexus can be shown, all or part of the proceeding should be summarily disposed of." See RAI-73-9 at 621.

^{15/} MELP is an acronym for Cleveland Municipal Electric Light Plant.

was filed July 6, 1971, before the Waterford decisions on February 23, 1973 and September 28, 1973. Thus, the most helpful explicit statement of the alleged Davis-Besse nexus is in the letter of April 19, 1973 from Counsel for Cleveland to Counsel for the AEC Staff. On pages 2 and 3 of that letter, the argument is made that inability to "... have access to the area or regional power exchange markets ...," through membership in organizations such as CAPCO, means that "[MELP] ... does not produce power at a cost which permits successful competition for potential customers and retention of existing customers." Further on page 6 of said letter, Cleveland's argument can be read to say that an unconditioned license to CEI for the Davis-Besse nuclear facility would, because of these alleged market conditions, prevent MELP from obtaining access to similar production economies.

No such specific allegation was found in Cleveland's Beaver Valley petition. Instead, there are summary

statements to the effect that an unconditioned license would lead (1) to "further concentration of economic power" and (2) an increase in the reliability of CEI's system and, therefore, an "overpowering advantage in its competition for customers with MELP."

If the Board had in fact limited its analysis of nexus to the paragraphs cited by Cleveland as comprising its allegations respecting nexus, the Board would not have found that nexus had been shown. However, the Board also examined each petition to intervene as a whole and in this manner found sufficient nexus in Davis-Besse and Perry, but not in Beaver Valley.

Thus for failure to show nexus and for failure to file timely without a showing of good cause, the petition to intervene and request for hearing of Cleveland as to the Beaver Valley facility was, and continues to be, denied.

F. Cleveland's request for certification of its "Objections"^{16/} to the Commission is also denied since this Memorandum and Order is the final action of the Board on all the petitions to intervene filed in the above-captioned proceedings.

G. Cleveland's request for deferral^{17/} of submission of a more detailed statement of the nexus as required by the Board in its March 15 Order was granted during a telephone conference call of the parties and is confirmed herein. The Board will entertain a discussion and oral argument of Cleveland's request at the next prehearing conference.

H. The Board concludes that:

1. A hearing is warranted and will be held in the Davis-Besse proceeding as previously noted. The parties are: Toledo Edison Co. and Cleveland Electric Illuminating Co.; City of Cleveland; and the

^{16/} Footnote 2, supra.

^{17/} Ibid.

Regulatory Staff of the AEC. The State of Ohio is a participant under Section 2.715(c).

2. A hearing is warranted and will be held in the Perry proceeding as previously noted. The parties are: Cleveland Electric Illuminating Co., et al.; City of Cleveland; American Municipal Power-Ohio, Inc.; Department of Justice; and the Regulatory Staff of the AEC. The State of Ohio is a participant under Section 2.715(c).

3. A hearing is not warranted for Beaver Valley.

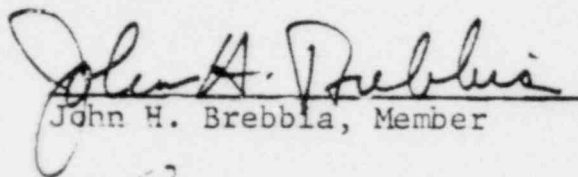
4. The revised petition of the State of Ohio dated April 4, 1973 is granted and the State may participate under Section 2.715(c) and in conformance with the agreement of the Applicant and Staff as to both the Davis-Besse and Perry proceedings.

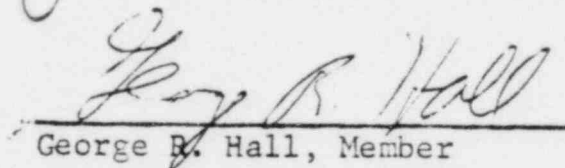
I. The Board explicitly rules that, for the purpose of any appeal, this is a final decision with respect to

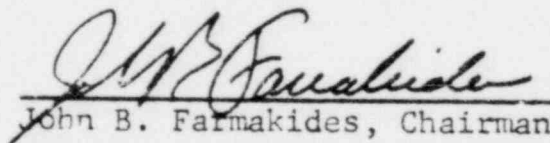
the petitions to intervene filed in the above-captioned proceedings.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING
BOARD

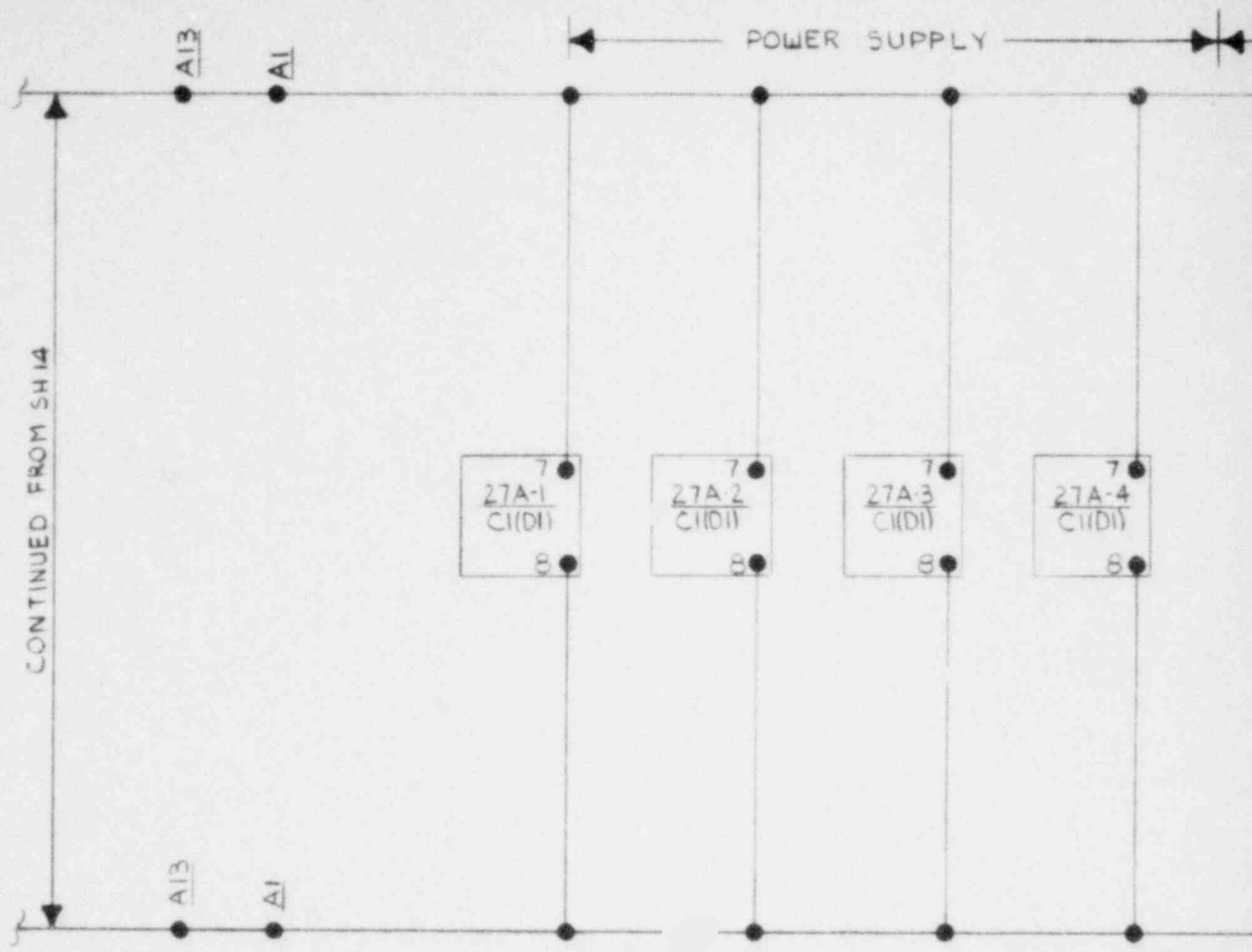

John H. Brebbia, Member


George B. Hall, Member


John B. Farmakides, Chairman

Issued at Bethesda, Maryland,
this 15th day of April, 1974.

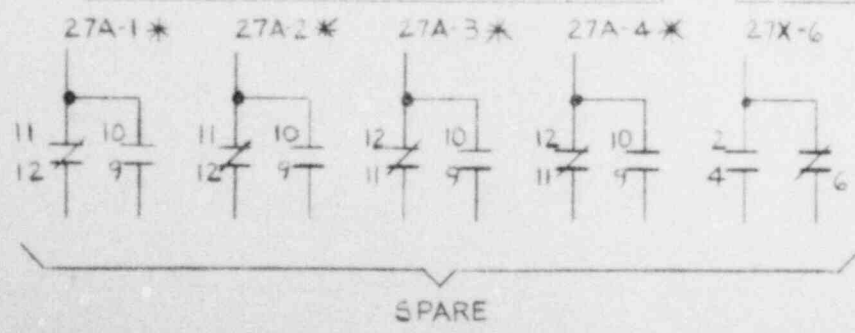
ISSUED FOR CONSTRUCTION & INC SRN 236E	DESCRIPTION	DATE	DR	CHK	SUPV	CHIEF	PROJ	OWNER	OWNER
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SCHEME NO AC103 (AD103)

27X-4 C1(D1)		
CONTACTS	FUNCTION	DWG REF
1-7	BREAKER AC10(AD10) TRIP INTLK	SH5 (11)
2-5	SPARE	
3-6	SPARE	
4-8	SPARE	
9-13	SPARE	
10-16	SPARE	

27X-5 C1(D1)		
CONTACTS	FUNCTION	DWG REF
1-7	BREAKER ABCD(AACD) TRIP INTLK	SH3 (9)
2-5	SPARE	
3-6	SPARE	
4-8	SPARE	
9-13	SPARE	
10-16	SPARE	



* SEE DWG 7749-E-22 (SH2) FOR 27A-1 THRU