ıgust 10, 1976

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

MINUTES OF CONFERENCE CALL OF AUGUST 9, 1976

A conference call was initiated by Applicants' Counsel at approximately 11 a.m. on August 9, 1976. Participating in the call were Chairman Rigler, Board Members Smith and Frysiak, and Messrs. Goldberg, Charno, Hjelmfelt, Reynolds and Zahler. Mr. Zahler was appointed secretary.

Mr. Reynolds stated that he desired to respond to the request, made by the Department of Justice ("Department") at the last conference call of August 6, 1976, to move into evidence items 11 through 14 and 16 of the Bader Affidavit, previously identified as DJ Exhibit 200. Mr. Reynolds objected to receipt of that material on the following grounds:

1. The Department previously had moved the material

into evidence prior to the start of Applicants' case, and at that time the Board excluded the material. If the material was now being offered for the truth of its contents, Applicants objected since during the course of the hearing they had not deemed it necessary, in light of the previous ruling, to respond to the contents of the material, and to reopen the record at this time to receive evidence bearing on the alleged intentions of Ohio Power would provide Applicants no opportunity to respond.

2. If the Department is offering the material to show what representations were not made at the time the Buckeye business review clearance was requested, Applicants are willing to stipulate that items 11 through 14 and 16 of DJ Exhibit 200 were not furnished to the Department at that time. Mr. Reynolds stated that he had called Mr. Charno earlier and had indicated a willingness to enter into such a stipulation, but Mr. Charno was not interested.

3. If the Department is offering the material for a purpose other than to show what representations were not made in connection with the request for antitrust clearance, there is no basis under Rule 106 of the Federal Rules of Evidence to admit such material.

4. In any event, the material is of no probative value in this proceeding. It cannot be admitted for the truth of the contents. While the material is a business record of Ohio Power, it is inadmissible hearsay evidence as to these Applicants.

For two of the documents, there is not even any indication of who wrote them.

Mr. Charno responded in the following manner:

1. As to the hearsay objection, the Bader Affidavit (DJ Exhibit 200) was the subject of an exchange of correspondence between the Applicants and the Department on January 29 and February 10, 1976. In that correspondence, and in return for certain other concessions, Applicants waived any objections as to hearsay or the authenticity of the material, preserving only their right to object on grounds of relevance.

2. As to the applicability of Rule 106, the documents show an anti-competitive intent, indicating that the representations made to the Department fall short of the fair disclosure required under the business review procedures. The material is, therefore, relevant to the type of business review letter received.

The Chairman noted that the Board would be unable to make a finding on whether the Department would have issued the business review letter even if the Department had received this material. Therefore, he was not inclined to agree with Mr. Charno's last argument. Nor did the Chairman find Applicants' first line of argument persuasive since the Department was now offering this material in rebuttal to Applicants Exhibit 248 (the Turner to Dicke business review clearance letter). The Chairman

stated that he felt the material was helpful in setting the context of the Buckeye transaction and that the material provided background on Buckeye.

Mr. Reynolds asked if the material was being admitted for the truth of its contents, since some of the documents did not indicate who authored the memorandum. Mr. Charno responded that in Applicants' correspondence with the Department that objection was waived. Mr. Reynolds asked Mr. Charno to read the relevant part of the correspondence, and after hearing it, Mr. Reynolds stated that Applicants' hearsay objection had not been waived since Applicants had only agreed that the documents in question constituted business records of Ohio Power. Mr. Charno argued that Applicants were co-conspirators with Ohio Power and therefore the evidence can come in against all. Mr. Reynolds stated that he could not accept that and that there was no charge in this case alleging that Ohio Power was a co-conspirator with any of the Applicants.

The Chairman asked Mr. Reynolds if he had a copy of the July 31, 1962 letter from Patterson to Sporn with enclosure and whether he was challenging that Patterson wrote Sporn or that the enclosed memo was prepared at Cook's request. Mr. Reynolds said "no." The Chairman then asked if Mr. Reynolds had a copy of the February 16, 1962 memo from Ball and asked if Mr. Reynolds disputed that Mr. Ball was an employee of Ohio Power. Mr. Reynolds responded that he thought Mr. Ball was an employee but he just did not know how high up on the roster he

was. Mr. Reynolds said that he did not dispute that the documents are business records of Ohio Power.

At this point Mr. Charno reported that Mr. Hjelmfelt had become disconnected from the conference call and there was a brief break while the conference-call operator reconnected Mr. Hjelmfelt.

The Chairman stated that he understood that the Department was re-offering the material as rebuttal documents and on that basis the material (items 11 through 14 and 16 of DJ Exhibit 200) would be received into evidence. Mr. Reynolds then asked for an indication of what the documents were being offered in rebuttal to; if the material was rebuttal to the Buckeye business review clearance letter, for what prupose was it being introduced? The Chairman responded that the material was being offered to show Ohio Power's perception of the long-term competitive analysis relating to generation, transmission and sales by Buckeye prior to seeking business review clearance from the Department.

Mr. Reynolds commented that Ohio Power's perceptions could not be ascribed to Applicants unless a conspiracy was shown. The Chairman agreed and said the burden was on the Department to show that Applicants had knowledge of and participated in the conspiracy. Mr. Charno agreed with the Chairman's statement. Mr. Reynolds then objected to receipt of this material into evidence since Applicants had been given no

opportunity to show what their perceptions of the situation might have been, and had not had a chance to put on evidence relevant to their independent perceptions in 1962 and thereafter. The Chairman stated that the Department alleged a conspiracy relating to Buckeye in their pleadings. Mr. Reynolds argued that the conspiracy being alleged now is different from that previously contained in the Department's pleadings. He stated that the Department had never asserted a Buckeye conspiracy as of 1962 and that, therefore, there was no basis to ascribe Ohio Power's perceptions in 1962 to Applicants.

The Chairman noted that it was Applicants who had introduced the Buckeye business review clearance and asked Mr. Reynolds to indicate the purpose of offering that document. Mr. Reynolds reponded that the business review letter showed that prior to entering into the Buckeye contracts the Applicants had first sought business review clearance from the Department and that thereafter they operated under those contracts knowing that they had received such clearance. The Chairman asked Mr. Reynolds which contracts he had in mind and stated that there was no basis for finding that Ohio Edison had received clearance. Mr. Reynolds directed the Chairman's attention to Mr. Turner's letter.

Mr. Reynolds then reiterated his objection to allowing the referenced parts of DJ 200 into evidence, stating that the attempt of the Department to introduce this material was openning

up a whole new issue in the proceeding. He commented that Applicants Exhibit 248 (the business review clearance) had originally been deferred so that the Department could be provided copies of the documents originally submitted at the time clearance was sought. Following that submission, the Department had altered its objection to Applicants Exhibit 248 to claim that certain representations were not made, and this provided a basis to keep it out of evidence. And, having failed with that argument, it now seeks to use Applicants Exhibit 248 as an excuse to re-introduce parts of DJ Exhibit 200 and thus bring into the hearing at the last minute entirely new issues.

The Chairman indicated that the documents do, however, focus on the long-term competitive analysis by Ohio Power relating to generation, transmission and sales by Buckeye made prior to the request for business review clearance. The Chairman then ruled that the material would be admitted to show Ohio Power's perceptions as just stated (and as similarly stated earlier in the conference call).

Mr. Reynolds then raised for discussion Applicants' motion for an extension of time, commenting that he had called each of the parties last Friday (August 6, 1976) and alerted them to Applicants' request. The Chairman asked if there were any objections; Messrs. Hjelmfelt, Charno and Goldberg objected.

Mr. Hjelmfelt stated that at the time the Board gave

the parties six weeks to file initial briefs it was understood that the six-week period was an extension over the previously contemplated month and that there would be little likelihood of further extensions. He, for one, had been hard at work and was prepared to meet the August 16, 1976 deadline. To extend the filing time caused personal hardship since he had already made vacation plans.

Mr. Charno echoed Mr. Hjelmfelt's personal concerns and stated that granting the extension would result in substantial prejudice to the Department. He explained that the prejudice arises from knowing that six weeks and only six weeks were available for preparing the Department's filing, and as a result the work had already been scoped -- for example, the Department's review of the record -- to meet the August 16 deadline. Mr. Charno stated that an extension would only help Applicants and be of no use to anyone else.

Both Messrs. Hjelmfelt and Goldberg concurred in those thoughts. Mr. Goldberg added that the extension would result in reverting back to an eight-week filing schedule and the NRC Staff was strongly opposed to such a schedule. In addition, an extension presented personal problems for the Staff, as well.

Mr. Charno suggested a one-week extension of time and elimination of reply briefs. The Chairman asked Mr. Reynolds what could be done to accommodate the personal problems and cure any prejudice that would arise from granting the extension.

Mr. Reynolds responded that he did not agree with Mr. Charno's assessment of prejudice, since Applicants had also scoped their work for a six-week deadline, but now found that impossible to meet. He was sympathetic to the personal problems indicating that he too was being forced to disrupt vacation plans made in anticipation of the six-week schedule, and hoped that something could be worked out.

A discussion among the parties as to the pros and cons of various proposals then ensued. Mr. Smith proposed the following schedule:

1. All parties except Applicants file with the Board their proposed findings of fact and conclusions of law on August 23, 1976.

2. Applicants file with the Board their proposed findings of fact and conclusions of law on August 30, 1976.

3. On the morning of September 8, 1976, all parties hand-deliver their respective filings to each other before 12 noon.

4. Applicants file with the Board their reply on September 15, 1976.

5. All parties except Applicants file their replies on September 22, 1976, and Applicants' previously-filed reply is to be made available to all parties on that date.

Mr. Charno stated that he could agree to that schedule. Mr. Goldberg stated that the Staff still had some opposition since it tended to drag the schedule out. Mr. Reynolds stated that Applicants would not voice strong exception to the schedule since

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(Davis-Besse Nuclear Power Station Units 2 and 3)	)	Docket Nos. 50-500A 50-501A

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Minutes Of Conference Call Of August 9, 1976" were served upon each of the persons listed on the attached Service List, by hand delivering copies to those persons in the Washington, D. C. area, and by mailing copies, postage prepaid, to all others, all on this 10th day of August, 1976.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Robert Zahler
Robert E. Zahler
Counsel for Applicants

it has some merit, but they would not acquiesce in the schedule either.

The Chairman commented that Applicants should be on notice that any delay caused by the schedule is attributable to Applicants. Mr. Reynolds responded by stating that he was in the unique position of having both the opposition parties and his own clients against him with respect to his request for an extension of time. The schedule proposed by Mr. Smith was adopted.

The Chairman adjourned the conference call at 12:05 p.m., noting that another conference call would be initiated to rule on the last open matter, i.e., the request by the City of Cleveland to reopen discovery.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Robert Zahler
Robert E. Zahler
Counsel for Applicants

Dated: August 10, 1976.

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