

R. G. Jiles

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Richard S. Salzman
Jerome E. Sharfman



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

Messrs. Wm. Bradford Reynolds and Robert E. Zahler,
Washington, D. C., for the applicants, Toledo
Edison Company, et al.

MEMORANDUM AND ORDER

January 17, 1977

(ALAB-364)

The applicants have filed a motion for a pendente lite stay of the antitrust conditions which in its initial decision^{1/} the Licensing Board has directed be imposed upon

1/ LBP-77-1, 5 NRC ____ (January 6, 1977).

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their licenses. We think the justification offered for not first seeking such relief from the Licensing Board to be insufficient. In essence, the reason assigned by the applicants is that they have no hope of persuading the Licensing Board either that there is a substantial likelihood that they will succeed on their prospective appeal from the initial decision or that the other criteria for the grant of a stay are satisfied.^{2/} A similar argument just as easily could be advanced in the vast majority of cases -- judicial as well as administrative -- in which a stay pending appeal is sought. Yet Rule 8(a) of the Federal Rules of Appellate Procedure requires that "ordinarily" such a stay be first applied for in the trial tribunal. Further, even though doubtless confident of the correctness of the result it reached, the Licensing Board nonetheless may regard the issues which its decision considered and determined to be substantial. It would be of great assistance to us to have the views of the Licensing Board on that question as well as on the other questions bearing upon the warrant for a stay, particularly since it has a close familiarity

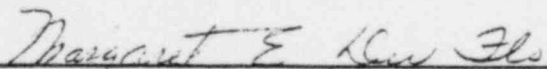
^{2/} See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, NRCI-76/7 10, 13 (July 14, 1976).

with the voluminous factual record in this case which we could obviously not acquire in a short period of time.

This being so, we might simply deny the motion out-of-hand, without prejudice to its renewal should a stay of application be filed with and denied by the Licensing Board. See Public Service Co. of New Hampshire, ALAB-338, supra fn. 2, NRCI-76/7 at 12. In the interest of the avoidance of unnecessary delay, however, we have elected instead to refer the motion to the Licensing Board, which has been served with copies of it. That Board is instructed to decide the motion as expeditiously as possible following the receipt of responses to it from the other parties (which are to be filed below and not with us). If the motion is denied, the applicants may renew it before us. We will then determine the matter on the basis of the papers considered by the Licensing Board, together with the reasons given by that Board for declining itself to grant stay relief.^{3/}

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD



Margaret E. Du Flo
Secretary to the
Appeal Board

^{3/} Any party may, however, supplement its filing before the Licensing Board for the purpose of commenting on those reasons.

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 )	)		50-440A
COMPANY )	)		50-441A
	)		50-500A
(Davis-Besse Nuclear Power )	)		50-501A
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
18th day of Jan 1977.

P. A. Dawkins
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(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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