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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 THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	Docket Nos.	50-346A 50-500A 50-501A
(Davis-Besse Nuclear Power Station, Units 1, 2 & 3)		
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.	Docket Nos.	50-440A 50-441A
(Perry Nuclear Power Plant, Units 1 and 2)		

ORDER

February 25, 1977

On February 15, 1977, we entered an order placing applicants' motion to stay the effectiveness of the Initial Decision on our calendar for oral argument on March 9, 1977. Among other things, that order instructed the parties to be prepared to advise us "at argument"

> respecting whether any new physical interconnections will be required in order to comply with the Licensing Board's conditions. If so, specifically where, when, at what cost and by whom would these interconnections have to be furnished?

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In addition, we called for the submission of legal memoranda on March 2, 1977, addressed to our authority to condition a grant or denial of the stay upon an undertaking, such as a bond. Because the applicants' filings with us were otherwise complete, we specifically authorized them to submit to us by the March 2nd deadline a supplemental memorandum "confined to that question."

In supplementary remarks appended to the Board's order, Mr. Sharfman undertook to caution the parties that factual representations made by counsel at oral argument are ultimately no stronger than the evidence underlying them in the record of trial below or in affidavits accompanying the papers on the stay motion.

Now before us is a Department of Justice motion to have each party submit by March 2 any affidavits or record citations pertinent to the interconnection question on which it intends to rely at oral argument and, if any such affidavits are submitted, then that we "delay oral argument and reopen discovery so that other parties may obtain and analyze the data underlying the affidavits or other evidence." Without having seen the papers in question, the Department represents that unless it is able to examine

applicants' affidavits prior to oral argument it will be unable to "reply meaningfully to the assertions contained therein."

The City of Cleveland in essence supports Justice's motion, pointing out, however, that if the applicants had desired to submit affidavits in support of their stay motion, under the Commission's Rules they should have done so sometime previously, citing 10 C.F.R. §2.730.

The applicants are willing (if not eager) to submit affidavits on the interconnection question by March 2nd. They assert, however, that further discovery is not needed and suggest that, instead, it would suffice to allow the filing of reply affidavits up to March 8th, the day before oral argument.

The staff's position is, at bottom, that the hearing record is sufficient on the issue and that the parties should simply exchange record citations by March 4th, thereby obviating any need to reopen discovery, to file affidavits, or to postpone the argument.

1. The Department has evidently misread our argument order. As we have described above, the applicants have filed all the papers with us which the Rules of Practice

permit them to do. The one additional paper our argument order invited from them is to address a purely legal question, to wit: whether the Commission has authority to require the posting of security as a condition of granting a stay of licensing conditions. We find it difficult to perceive what affidavits would be relevant to the resolution of that issue.

Other than that, the only papers yet to be submitted are from those opposed to granting the stay motion, including the Department. And these papers are already due to be filed on March 2nd (see our argument order); of course they may be accompanied by affidavits. See section 2.730(c) of the Commission's Rules of Practice (10 C.F.R. §2.730(c); cf. Rule 8(a) Federal Rules of Appellate Procedure). Surely the Department does not require additional time to depose itself. We see no reason why it needs such time to interrogate either the intervenors or the staff, who are on its side in this proceeding.

Under the Commission's Rules of Practice, "the moving party [here the applicants] shall have no right to reply, except as permitted by the presiding officer * * *." 10 C.F.R. §2.730(c). The applicants have not sought such permission. Neither have we granted it. Certainly Mr. Sharfman's

remarks do not do so. These, as we noted, simply remind counsel of what they ought to know. We should have thought it elementary that one member may not exercise authority vested in a three-member board, quite apart from the fact that he did not attempt to do so.

We need only add for the applicants' benefit that the Justice Department's motion papers cannot do so either. If, at this late stage of the proceedings, the applicants believe a reply brief is in order, or that its motion papers need additional evidentiary support in the form of affidavits on the interconnection issue, then they are free to file and serve an appropriate motion under our Rules of Practice seeking permission to file such papers. 10 C.F.R. §2.730(c). We remind the applicants, however, that the Initial Decision was rendered some seven weeks ago on January 6, 1977, they have twice filed papers seeking a stay in reliance solely on the record evidence below, and that it is very late to come forward with new evidence one week before oral argument. Accordingly, as a matter of simple fairness, we shall expect any motion on their part for leave to submit affidavits on the interconnection question to be filed and served by hand no later than March 2, 1977. That motion should be accompanied with a good and sufficient explanation why those

affidavits did not accompany the two earlier sets of motion papers they previously filed. Moreover, without subscribing to Justice's thesis that the filing of those affidavits will necessitate the reopening of discovery, we are not unsympathetic to the Department's assertion that the other parties must be allowed a reasonable time to review those affidavits and, if necessary, to obtain opposing evidence. Therefore, if the applicants do seek leave to file affidavits on March 2nd, they should be on notice that their actions in this regard might well be grounds for cancelling the oral argument and, because of our commitments in other cases, for postponing it to a date no earlier than late March. We need hardly remind the applicants that the conditions ordered imposed by the Licensing Board will naturally remain in effect pending decision on the stay motion.

2. In another vein, we have detected in certain of the papers acerbic remarks which appear to be directed at opposing counsel. We remind our brethren at the bar that the parties and not the lawyers are the antagonists here. Unpleasantries between counsel are not only unprofessional but unhelpful; they serve only to focus attention on personalities and distract attention from the issues to be decided. We find the latter quite difficult enough and

have no desire to add the burdens of a referee to those of an adjudicator.

The motion of the Department of Justice is denied. If the applicants wish to supplement their motion papers with respect to the interconnection question, an appropriate request for leave to do so in accordance with our opinion should be in our hands no later than the 2nd of March.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo

Margaret E. Du Flo
Secretary to the
Appeal Board