

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))	

ORDER

February 15, 1977

On January 17, 1977, we referred to the Licensing Board the applicants' motion for a pendente lite stay of the antitrust conditions which in its initial decision^{1/} that Board directed be imposed upon their licenses. ALAB-364, 5 NRC _____. After obtaining responses from the other parties, the Licensing Board denied the motion. LBP-77-7, 5 NRC ____ (February 4, 1977).

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

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As authorized by ALAB-364, the applicants have renewed their stay motion before us and filed a memorandum commenting upon the reasons assigned by the Licensing Board for denying the requested relief. The other parties may respond to that memorandum. All such responses shall be filed in sufficient time to be in the hands of this Board no later than the close of business on Wednesday, March 2, 1977.

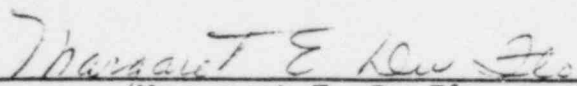
In addition, oral argument on the stay motion is hereby calendared for 9:30 a.m. on Wednesday, March 9, 1977 in the NRC Public Hearing Room, 5th floor, East-West Towers, 4350 East West Highway, Bethesda, Maryland. Ninety minutes are allotted to each side. The Secretary to this Board is to be notified, by letter mailed no later than March 2, 1977, of the names of counsel who will appear for the respective parties.

Any memoranda in response to the applicants' renewed stay motion shall address, inter alia, the question of the explicit or inherent authority of this Board to condition the grant or denial of a stay upon some undertaking, such as the posting of a bond. If they so desire, the applicants may file a supplemental memorandum by the close of business on March 2, 1977 confined to that question.

At argument, we will expect counsel to be especially well-prepared to address, with particularity, the matters of (1) whether, and if so precisely what, irreparable injury would likely be sustained by the applicants were the license conditions to take effect at this time; (2) whether, and if so precisely what, substantial harm would likely be sustained by other parties to the proceeding were the effectiveness of those conditions to be stayed pending the outcome of the appeals; and (3) specifically what are the public interest considerations which should be taken into account by this Board in deciding whether the requested relief is appropriate. In this connection, the Board will wish to be advised, inter alia, 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?

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD



Margaret E. Du Flo
Secretary to the
Appeal Board

[The supplementary remarks of Mr. Sharfman follow.]

Supplementary Remarks of Mr. Sharfman:

I would caution counsel that the next to last paragraph of this order should not be taken to mean that a party's burden of persuasion on factual questions presented by this motion will be satisfied by attorneys' representations. Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-___, 5 NRC ____, slip opinion at 3 (Feb. 7, 1977). In this connection, 10 CFR §2.730(b) provides that motions "shall be accompanied by any affidavits or other evidence relied on" and §2.730(c) provides that "a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence." And we have characterized the use of affidavits as aids in the adjudication of applications for a stay pendente lite as "crucial". Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-356, NRCI-76/11 525, 533-34 (Nov. 8, 1976). Of course, references to evidence in the record on appeal or to stipulations will suffice in lieu of affidavits. However, I think our rules of procedure recognize the basic judicial principle that disputed questions of fact may not be resolved on a non-evidentiary basis.