

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

THE TOLEDO EDISON COMPANY and
THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY
(Davis-Besse Nuclear Power Station,
Units 1, 2 & 3)

5/1/77
NRC Docket Nos. 50-346A
50-500A
50-501A

THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, ET AL.
(Perry Nuclear Power Plant, Units
1 & 2)

NRC Docket Nos. 50-440A
50-441A

ANSWER OF NRC STAFF TO MOTIONS TO STRIKE APPENDICES
A AND B OF APPLICANTS' REPLY BRIEF BY THE CITY OF
CLEVELAND (APPENDIX A) AND THE DEPARTMENT
OF JUSTICE (APPENDIX B)

When Applicants filed their "Reply Brief" on August 4, 1977, four appendices were attached thereto. Promptly, on August 5, 1977, intervenor, the City of Cleveland, moved to strike Applicants Appendix A. On August 10, 1977, while not answering the City's motion, the Department of Justice moved to strike Applicants' Appendix B. These two motions will be discussed separately.

Appendix A

"Applicants' Reply Brief" consumed the allotted one-hundred pages. Appendix A is a sixteen page series of charts, containing footnotes "a-x". The stated purpose of Appendix A was:

...to pull together in one place the articulated positions of all the parties to this appeal and to reflect where in the Initial Decision the same points have been addressed. 1/

1/ "Applicants Reply To Cleveland's Motion To Strike", p. 3 (August 9, 1977).

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The City contends that Appendix A represents an attempt to evade the page limitations established by this Appeal Board.^{2/} The Staff does not agree. Although Appendix A may technically be considered to violate the page limitation established by the Appeal Board, the inclusion of that appendix in Applicant's Reply Brief does not appear to warrant the action proposed by the City in its motion.

However, it must be noted, that the charts contained in Appendix A, were prepared solely by Applicants and based therefore, on their sole understanding of the arguments advanced by the other parties. On their face, the charts are incomplete. The charts do not attempt to categorize arguments made in support of the Licensing Board's Findings of Fact 1 through 25, or 216 through 222. While it is true that certain portions of the omitted findings deal with legal questions or matters of expert testimony, many of the omitted findings are based on factual findings (See for example F/F 2-4, 6, 7-8, 11-15, 220, and 222A-F).

Moreover, a brief review of Applicants' attempted charting of the Staff's arguments reveals that these charts are also incomplete. For example, Applicants list on page A-16 that the Staff discussed Licensing

^{2/} "City of Cleveland's Motion To Strike Appendix To Applicant's Reply Brief", p. 12, (August 7, 1977).

Board Finding of Fact 210 (denial of access to nuclear facilities and Applicants' Exhibit 44 "policy commitments") on page 174 of its Brief. That categorization overlooks: (i) the entire section III of Staff's Brief (pp. 21-30) dealing directly with Applicants Exhibit 44 and (ii) pages 89-95, 110-111, 118 (para. 2), 119 (para. 5), and 162-165 of Staff's Brief discussing the Licensing Board's findings of Applicants' separate denials of access to nuclear units. In conclusion, it is the Staff's position that the City of Cleveland's motion should be denied.

Appendix B

The Department of Justice has moved to strike the last sentence of footnote 9 (p. 13) ^{3/} and all of Appendix B of "Applicants' Reply Brief". Appendix B contains three letters, not offered into evidence in this proceeding, between Mr. Charno, formerly of the Department of Justice, and Mr. Ardery of Louisville, Kentucky. The letters are dated in late 1972 and early 1973 and relate to the Department's consideration of antitrust questions in connection with the CAPCO companies' application with respect to the Beaver Valley Power Station, Unit No. 2. The Department rendered a no-hearing advice letter with respect to that unit and no antitrust hearing was held. Attached to one of those letters is the "Affidavit of William M. Lewis, Jr.," which is identical to a document received into evidence in this proceeding as NRC 127. Applicants apparently contend that the three letters in Appendix B

3/ The language the Department has moved to strike is:

"In this regard, we are admittedly disappointed to find DOJ stating categorically to this Appeal Board that Mr. Lewis' affidavit of January 19, 1973 (S-127) "was not prepared for litigation" (D. Br. at 142 n.177), when it knows full well that the Lewis affidavit was in fact prepared at the explicit request of the then lead counsel for DOJ, Mr. Charno, in connection with the Department's antitrust investigation of these very Applicants under Section 105c (see correspondence attached hereto as Appendix B)."

support their proposition that to state that the affidavit was not prepared for litigation was false.

In "Applicants' Reply To The Department of Justice's Motion To Strike" ("Applicants August 12 Reply") dated August 12, 1977, Applicants accuse the Department of "...withholding the true facts as to the Lewis affidavit in the face of false testimony given in direct response to the Department's interrogation, and while Mr. Charno, who obviously knew better, was sitting at the counsel table."^{4/} This ad hominem attack was made by Applicants notwithstanding an express Appeal Board admonition in this appeal concerning such matters.^{5/}

Initially it should be pointed out that contrary to Applicants' assertion in their footnote 9, the Department did not "state categorically" that Mr. Lewis' affidavit "was not prepared for litigation." Rather, the Department cites Mr. Lewis' direct testimony for that proposition ("Reply Brief Of the Department of Justice...." p. 142, n.177 (June 30, 1977)).

Second, it should be noted that the Licensing Board in weighing the conflicting testimony concerning the substantive matters contained in the Lewis affidavit (5 NRC 133, 218 n. 110) noted that the Lewis affidavit was prepared "...not in contemplation of these proceedings." The "new evidence" which Applicants have attempted to incorporate into their Reply Brief supports

^{4/} Applicants August 12 Reply, p. 3.

^{5/} Unpublished Order dated February 25, 1977, pp. 6-7.

no different conclusion. The three documents in question, which the Department has moved to strike tend to indicate that the Lewis affidavit may have been prepared in connection with the Department's consideration of the Beaver Valley 2 application -- which was not "litigation" in any event. Finally, a review of the record during Mr. Lewis' direct examination reveals that, when questioned by the Licensing Board, Mr. Lewis testified that although the affidavit was prepared by him at the request of an attorney representing several municipalities in Ohio (Tr. 5617 (7-20)), Mr. Lewis had no knowledge as to whether the attorney solicited the affidavit in connection with any then pending litigation (Tr. 5619 (1-3)).^{6/}

This dispute then involves only a collateral issue. The dispute concerns not the admissibility of the affidavit, but the question of whether Mr. Lewis was correct when he testified that to his knowledge the affidavit was not prepared for any then pending litigation. As previously discussed, the documents which Applicants now ask the Appeal Board to consider do not contradict that testimony.

Moreover, no good cause has been shown for Applicants' presentation of these documents over a year after the record has closed. The record of this case indicates that the documents in question were produced by the Department and delivered to Applicants on November 27, 1974.^{7/}

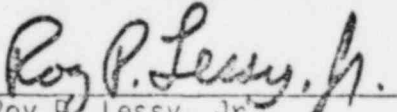
^{6/} Although not relevant to the motion to strike, while the affidavit (NRC 127) represented the past recollection recorded of the events, the witness appeared to have a present recollection of those events (Tr. 5616 (18-21)) although stating that he had briefly refreshed his recollection with the affidavit (Tr. 5627 (9-12)).

^{7/} The Staff was served with the November 27, 1974 "Response of Department of Justice To Applicants' First Request For Production of Documents And Answer To Interrogatories", but not with the documents produced. That response lists the three documents now appearing in "Appendix B" as document nos. 34, 48, and 50 in response to "Discovery Request No. 4" therein. That pleading also appears in the formal files of this case and was served on all parties.

Mr. Lewis testified on February 26, 1976 concerning this matter, and also testified on April 1, 1976, and June 14, 1976. Applicants' assert that their excuseable delay in utilizing these documents, was caused by the fact that they were "among the hundreds of thousands of documents in Applicants' possession which had been produced in this case" (Applicants' August 12 Reply, pp. 2-3). The total number of documents produced in this case is not the test. But 125 documents were produced by the Department in their principal document production on November 27, 1974. Thus, no good cause has been shown to justify Applicants' delay in presenting these materials.

Accordingly, it is the Staff's position that the Department of Justice's motion be granted.

Respectfully submitted,


Roy P. Lessy, Jr.
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 17th day of August 1977.

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CERTIFICATE OF SERVICE

I hereby certify that copies of ANSWER OF NRC STAFF TO MOTIONS TO STRIKE APPENDICES A AND B OF APPLICANTS' REPLY BRIEF BY THE CITY OF CLEVELAND (APPENDIX A) AND THE DEPARTMENT OF JUSTICE (APPENDIX B) in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or air mail, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 17th day of August 1977.

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