March 2, 1977

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

APPLICANTS' MEMORANDUM ON THE AUTHORITY OF THE APPEAL BOARD TO CONDITION THE GRANT OR DENIAL OF A STAY UPON THE POSTING OF A BOND

1. By Order of February 15, 1977, the Atomic Safety and Licensing Appeal Board ("Appeal Board") invited Applicants to file a supplemental memorandum in connection with the pending application for a pendente lite stay limited to the question of the authority of the Appeal Board to condition the grant or denial of a stay upon some undertaking, such as the posting of a bond. Applicants are unaware of any decision by a Commission licensing or appeal board dealing with this question. Similarly, we are unaware of any Commission rule that would bear on the question. As a result, Applicants have looked to

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analogous practice before the federal courts and attempted to apply principles developed there to the circumstances facing the Commission, and in particular, to the factual setting raised by Applicants' pending stay motion.

2. In our filing of February 14, 1977, we pointed out that within the context of the present administrative proceeding there is no provision for the posting of bonds or other means of security (Renewed Motion at 20). While that is obviously correct, further reflection has led us to the conclusion that the lack of explicit authority to require the posting of a bond may not end the matter.

3. Justice Cardozo made the following observation in Landis v. North American Co., 299 U.S. 248, 254-55 (1936):

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. [Emphasis added.]

From this perspective, Applicants believe that if this Appeal Board has the inherent power to issue a stay, it also probably has the power to condition that stay as it sees fit in furtherance of the public interest, including in appropriate circumstances requiring the posting of a bond. However, as described more fully below, Applicants do not believe such authority impacts significantly on the outcome of the instant motion.

4. Under the Federal Rules of Civil Procedure, the party seeking a stay can be required to post a bond or otherwise give some security. In this connection, Rule 62 deals with the procedures applicable for securing a stay pending appeal[1/] while Rule 65 deals with the procedures applicable for securing a preliminary injunction or restraining order pending a full hearing on the merits. The principles set forth in both of these rules would appear relevant to Applicants' pending stay motion. Compare Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-158, 6 A.E.C. 999 (1973) (issuance of a stay "requires a demonstration of the existence of circumstances such as those which would cause a court to grant a preliminary injunction * * *"); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-189, 7 A.E.C. 410 (1974) (same).

1/ Conceptually, Rule 62 deals with two distinct situations: those where a party may obtain a stay as a matter of right by posting a supersedeas bond (see Fed. R. Civ. P. 62(d) and 62(a)) and those where the stay is not of right but the court may issue such a stay "upon terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party" (see Fed. R. Civ. P. 62(c) and 62(a)). Applicants have never claimed a stay as a matter of right; rather our motion appears more akin to a motion seeking a stay of a mandatory injunction and thus governed by Rule 62(c) and the exception clause of Rule 62(a).

Rule 62 must be read in conjunction with Rule 8 of the Federal Rules of Appellate Procedure. Rule 8(b) comports with the language of Fed. R. Civ. P. 62(c) by explicitly authorizing a court of appeals to condition a stay "upon the filing of a bond or other appropriate security in the district courts."

5. In assessing at what amount a bond should be set, courts traditionally have not looked to the amount of eventual recovery by the winning party as the appropriate measure of security, but have focused instead on the damages likely to result from delaying the mandated action pending an appeal. See Beaver Cloth Cutting Machines v. H. Maimin Co., 37 F.R.D. 47, 50 (S.D.N.Y. 1964); Gordon Johnson Co. v. Hunt, 109 F. Supp. 571, 576 (N.D. Ohio 1952). In the context of Applicants' stay motion, these cases would seem to require Applicants to post a bond in an amount sufficient to indemnify any party's injury due to the delay in implementing the license conditions, if Applicants' appeal is eventually unsuccessful. However, the cases also hold that no bond will be required if no showing of material damage to the other parties has been proven. See, e.g., Urbain v. Knapp Brothers Mfg. Co., 217 F.2d 810, 815 (6th Cir. 1954), cert. denied, 349 U.S. 930 (1955); United States v. Onan, 190 F.2d 1, 7 (8th Cir. 1951); Tenants & Owners in Opposition to Redevelopment v. HUD, 406 F. Supp. 1024, 1041 (N.D. Cal. 1970); Western Addition Community Organization v. Weaver, 294 F. Supp. 433, 446 (N.D. Cal. 1968); Hurwitt v. City of Oakland, 247 F. Supp. 995, 1005-06 (N.D. Cal. 1965).

6. Since Applicants' motions of January 14 and February 14, 1977, adequately demonstrate that parties other than Applicants will suffer no recognizable harm if the requested stay is issued, there would appear to be no need

to require Applicants to post a bond.[2/] Even hypothesizing some injury to the non-Applicant entities, however, it plainly would be of a nature that could be cured monetarily (see n. 4, infra), and thus, even on such an hypothesis, the Appeal Board could still issue Applicants' requested stay, but require that a bond be posted to ensure the other parties that they will be made whole if injured in the interim period during the appeal.

7. There is one additional consideration that bears mentioning. The bond requirement works in both directions. That is, a court not only can require an appealing party to post a bond, it can also deny a stay to such a party on the condition that the other parties post a bond sufficient to indemnify the appealing party if its appeal is eventually successful. See Lapin v. La Maur, Inc., 11 F.R.D. 339, 341

2/ Applicants are hard pressed to see any harm which the Department of Justice or the Staff of the Nuclear Regulatory Commission will suffer if the stay is granted. The showing required by the third criterion of Virginia Petroleum Jobbers is whether other parties interested in the proceeding would suffer substantial harm, and, with the exception of Cleveland, no non-Applicant, CCCT entity saw sufficient need to intervene and become a party to these proceedings. In fact, one entity that might have represented the interests of the Ohio municipal systems, American Municipal Power-Ohio, Inc. ("AMP-O"), chose to withdraw from the proceedings barely two months before the start of hearings. This disinterest on the part of the non-participating Ohio and Pennsylvania entities, none of whom have yet indicated a desire to commit to purchase any Davis-Besse Unit 1 power, for example, which will become commercially available sometime this summer, certainly suggests that a short delay during appeal in implementation of the license conditions will work no substantial harm. Moreover, the failure of such entities to participate has made it all the more difficult for Applicants to quantify the injury they are likely to suffer if the stay is not granted, since they have no idea as to what demands these entities may now make, and thus, are not in a position to plan adequately for the development of their systems (see also n. 4, infra).

(D. Minn. 1951). This would seem to suggest that Applicants' requested stay could be denied if a bond were posted by the opposition parties to protect the Applicants.

8. However, as a practical matter, the opposition parties here are in no position to undertake a bond obligation. Pursuant to Rule 62(e) of the Federal Rules of Civil Procedure, no bond, obligation or security can be required from the United States, or an officer or agency of the government as a condition for issuance of a stay, and Applicants would presume as a condition for denial of a stay. A similar prohibition is expressly provided for by statute. See 28 U.S.C. §2408 (1970); Schell v. Cochran, 107 U.S. 625, 628 (1882); Louisville Trust Co. v. National Bank of Kentucky, 3 F. Supp. 925 (E.D. Ky. 1933); cf. Utah v. Livsey, 312 F. Supp. 1397 (D. Utah 1970). Thus, Applicants can look neither to the Staff of the Nuclear Regulatory Commission nor to the Department of Justice for security. As for the City of Cleveland, the record below makes it abundantly clear that the City is so deeply in debt that there is no realistic prospect of it posting a bond under any circumstances.[3/]

3/ As of the close of the record, the size of the City's debt to CEI was in excess of $10,000,000.00 (Hauser, Tr. 10614; A-135; A-140; see also A-212). On September 21, 1976, judgment was entered in federal district court against the City and in favor of CEI for $9,525,067.50 of that indebtedness. See City of Cleveland v. Cleveland Electric Illuminating Co., et al., Civil Action No. C75-560. CEI has recently requested the court to increase the judgment to $14,733,080.62. On February 24, 1977, the district court granted summary judgment on CEI's counterclaim for the additional $5,208,013.12, while affording to Cleveland an accounting to verify the outstanding amount of its delinquencies accrued to December 31, 1976.

Accordingly, only by staying the license conditions mandated in the Initial Decision can this Appeal Board ensure that Applicants' legitimate interests will be adequately protected during the appeal.

9. This conclusion is reinforced by the fact that Applicants' claim of injury -- which concerns essentially the prospect of a needless disruption and restructuring of existing contractual relationships with non-Applicant entities -- is not easily quantifiable in dollars-and-cents terms. This is not to say that the anticipated injury to Applicants in the absence of a stay is without serious financial consequences; rather it is to emphasize that at the present time Applicants can perceive of no meaningful way to measure the extent of their likely injury. Thus, even if the opposition parties were in a position to post a bond, Applicants do not know how this Appeal Board would begin to fix the amount of security needed to ensure that Applicants would be made whole in the event that their appeal is successful.[4/]

4/ In contrast, the substantial harm claimed by the other parties is quantifiable in dollars-and-cents terms. The only particularized injury referred to by any of the parties or by the Licensing Board is that Cleveland's electric system may fall deeper in debt to CEI (see DOJ motion of Jan. 27, 1977, at 14-15) and that Cleveland may suffer damage by being forced to deal only with CEI for purchased power (see Cleveland motion of Jan. 26, 1977, at 10). If those are legitimate concerns -- and Applicants believe the record indicates that they are not -- a clear remedy would be to require CEI to post a bond in an amount sufficient to cover the difference in price between CEI-purchased power and what the future cost of power to Cleveland would have been if the stay had not been issued. Given Cleveland's failure during the hearing to establish that sizable quantities of less expensive power were immediately available to Cleveland, we believe the amount of such a bond would be nominal at best.

10. For the foregoing reasons, the Appeal Board's inherent authority to require the posting of a bond pending the outcome of the appeal does not, in the circumstances, have any real significance to the disposition of Applicants' instant pendente lite stay request.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Robert E. Zahler

Counsel for Applicants

Dated: March 2, 1977

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Memorandum on the Authority of the Appeal Board to Condition the Grant or Denial of a Stay Upon the Posting of a Bond" 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 2nd day of March, 1977.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds

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