

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
The Toledo Edison Company and )  
The Cleveland Electric Illuminating ) Docket Nos. 50-346A  
Company ) 50-500A  
(Davis-Besse Nuclear Power Station, ) 50-501A  
Units 1, 2 and 3 )  
)  
The Cleveland Electric Illuminating ) Docket Nos. 50-440A  
Company, et al. ) 50-441A  
(Perry Nuclear Power Plant, )  
Units 1 and 2 )

2/9/76

MEMORANDUM OF THE DEPARTMENT OF JUSTICE  
IN SUPPORT OF THE ADMISSION OF DEPOSITIONS INTO EVIDENCE

The Department of Justice submits this Memorandum of points and authorities concerning the use of portions of depositions in evidence, in order to summarize the applicable legal principals for the convenience of the Licensing Board and the parties. The admission of portions of the depositions of Applicants' officers, directors and employees is proper in this proceeding, both under the Nuclear Regulatory Commission Rules of Practice (hereinafter Rules of Practice) or, by analogy, under the Federal Rules of Civil Procedure (hereinafter Federal Rules) and the Federal Rules of

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Evidence. 1/ The admission of depositions into evidence will substantially expedite this hearing by eliminating the need for the Licensing Board to hear lengthy testimony by a substantial number of witnesses when their testimony under oath and subject to cross-examination may be placed directly into the record.

Admission of deposition evidence will not introduce irrelevant or immaterial evidence into the record. As provided for under Section 2.740a(g) of the Rules of Practice (10 C.F.R. §2.740a(g)) and Rule 32 of the Federal Rules, the Department intends to offer only those portions of depositions which it considers directly relevant to its case. 2/ Moreover, under the Rules of Practice and by analogy under Rules 32(a) and 32(b) of the Federal Rules, it is clear that the Board may reject offered portions of depositions in the same manner in which it may reject any other type of oral or written evidence.

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1/ The use of deposition evidence in an NRC proceeding is not without precedent. In In The Matter of The Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit No. 3), Docket No. 50-382, Prehearing Conference Order, CCH 1974 Atom. En. L. Rep. ¶11,710.08 (January 23, 1974), the Licensing Board held:

To the extent that the Federal Rules of Civil Procedure provide for the use of formal depositions in court proceedings (cf., Rule 32 FRCP), such use will be permitted in this proceeding.

2/ Section 2.740a(g) of the Rules of Practice states that "If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts." Thus, the Rules of Practice allow for the admission of portions of a deposition while at the same time affording complete protection to the party against whom the deposition is offered.

1. The Rules of Practice Provide for the Admission of Deposition Evidence

The NRC Rules of Practice contain a broad statement concerning the admissibility of evidence. They provide that:

Only relevant, material and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable. (NRC Rules of Practice §2.743(c)).

This regulation is derived, of course, from the statutory standard for admissibility of evidence in administrative proceedings contained in the Administrative Procedure Act:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. 5 U.S.C. §556(d).

Thus, provision is made for the rejection of irrelevant, immaterial or unreliable evidence, and a ruling by this Board to admit deposition evidence would not require the admission of all offered portions of those depositions.

Section 2.740a of the Rules of Practice governs the taking and use of depositions. Depositions upon oral examination of any party or person may be taken without leave of the Commission (§2.740a(a)). The deponent shall be sworn or shall affirm before any questions are put to him and examination and cross-examination shall proceed as at hearing (§2.740a(d)).

The deponent may also be accompanied and advised by counsel (§2.740a(i)).

While the Rules of Practice do not specifically set forth the manner in which depositions may be admitted into evidence, they clearly indicate that the admission of this type of evidence was contemplated. Section 2.740a(g) states: "A deposition will not become part of the record unless received in evidence." Clearly, this provision is inconsistent with a wholesale exclusion of deposition evidence in a Commission proceeding. For guidance as to the manner in which depositions are to be admitted into evidence, it is helpful to turn to the Federal Rules.

II. Depositions of a Party, or an Officer, Director or Managing Agent of a Party Are Admissible Under The Federal Rules of Civil Procedure

Rules 26 through 37 of the Federal Rules concern depositions and discovery. The Rules differentiate only two kinds of depositions upon oral examination: those taken to perpetuate testimony before an action has been filed or pending an appeal (Rule 27) and those taken in the normal course of discovery after an action has been filed (Rule 30). Rule 27 depositions differ from Rule 30 depositions only in that leave of the Court must be secured before taking depositions under Rule 27. Both Rule 27 and Rule 30 depositions are taken in the same

manner 3/ and both may be used in Federal District Court proceedings. 4/ As in the NRC, the witness is put under oath and examination and cross-examination proceed as at trial. 5/

Rule 32(a) of the Federal Rules specifically permits the use of depositions in the Federal Courts:

Use of Depositions. At the trial or upon the hearing of a motion or any interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were

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3/ See Rule 27(a)(3) and Rule 27(b).

4/ See Rule 27(a)(4), Rule 27(b) and Rule 32.

5/ Rule 30(c). Applicants have objected to the use of depositions in this proceeding in that: "They were discovery depositions" (Eighth Prehearing Conference, Tr. at 1489) and

"I think one very real reason is, when you take discovery depositions, the witnesses are not cross-examined or required to be cross-examined. They are for purposes of discovery and discovery alone. (Eighth Prehearing Conference, Tr. at 1490-1491).

As is shown above, it is clear that there is no difference between the procedures followed when taking "discovery" depositions or when taking depositions to perpetuate testimony. Provisions are made, both under the NRC Rules of Practice and the Federal Rules for examination and cross-examination. Applicants cannot now use their professed failure to thoroughly cross-examine, although specifically afforded that right, as a reason to protest the admission of deposition evidence.

then present and testifying, 6/ may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, 7/ in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

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6/ A statement from a deposition offered into evidence is to be tested on its contents alone, "as though the witness were present and testifying." Wright, Handbook of the Law of Federal Courts at 377 (Second Edition 1963); Moore, Federal Practice Rules Pamphlet at 691 (1971).

This was also codified in Rule 802 of the Federal Rules of Evidence which provides that:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by act of Congress. (emphasis added).

The Advisory Committee's Notes to Rule 802 of the Federal Rules of Evidence uses Rule 32 of the Federal Rules of Civil Procedure as an example of "other rules" as used in Rule 802. (Federal Rules of Evidence, Advisory Committee's Notes ¶2802.)

7/ The fact that Rule 32 allows the evidentiary use of depositions against a party who had notice of the taking of the deposition (even where the party was not represented at the deposition) further undermines Applicants' argument that exclusion of this evidence is required because Applicants did not effectively cross-examine the deponents.



(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . (b) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; . . .

(4) If only a part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

\* \* \*

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) 8/ and subdivision (d)(3) 9/ of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. (Footnotes added.)

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8/ Rule 28(b) is concerned with depositions taken in foreign countries.

9/ Section (d)(3) of Rule 32 is concerned with errors and irregularities occurring during the taking of depositions. Part (A) and (B) of that section state:

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of questions or answers, in the oath of affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented are waived unless seasonable objection thereto is made at the taking of the deposition.

The depositions which the Department wishes to offer are those of officers, directors or managing agents 10/ of the Applicants who are obviously adverse parties. In addition, all of these individuals are located more than 100 miles from the place of this hearing. Such depositions would clearly be admissible in the Federal District Courts and should, under the evidentiary standards of the Rules of Practice and Administrative Procedure Act, be admitted in this proceeding. As provided in Rule 32(b), Applicants may enter objections to the relevancy or materiality of any offered portion of a deposition and these objections may be ruled on by the Licensing Board as if "the witness were then present and testifying."

### III. The Department of Justice Made No Agreement As To The Use of Depositions

During the Eighth Prehearing Conference, Applicants stated that "the other parties made a pretty strong pitch" that depositions were not going to be used in evidence (Eighth Prehearing

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10/ The question of whether a given employee is a managing agent must be decided on an instance-by-instance basis. Criteria used to determine whether an employee is a managing agent have included: whether the interests of the individual involved are identified with those of his principal; the nature of his function, responsibilities and authority respecting the subject matter of the litigation; whether any person or persons in higher authority of the deponent are in charge of the particular matter or possessed of the information as to which the examination is sought; and whether the deponent could be relied upon to give testimony, at the principal's direction, in response to the demand of a party engaged in litigation with the principal. Terry v. Modern Woodmen of America, 57 F.R.D. 141, 143 (W.D. Mo. 1972); Tomingas v. Douglas Aircraft Co., 45 F.R.D. 94 (S.D. N.Y. 1968).



Conference, Tr. at 1491-1492). The Department is unaware of any declaration or agreement as to the use of depositions or any representations that they would not be offered into evidence.

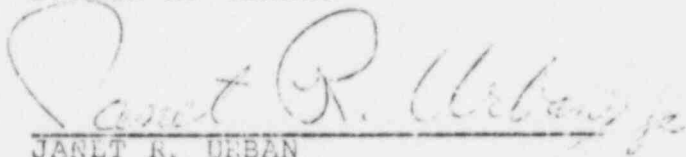
IV. Conclusion

For the reasons set forth above, the Department urges the Licensing Board to admit portions of the depositions of Applicants' officers and employees into evidence in this proceeding, subject only to objections as to materiality or relevance.

Respectfully submitted,



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February 9, 1976

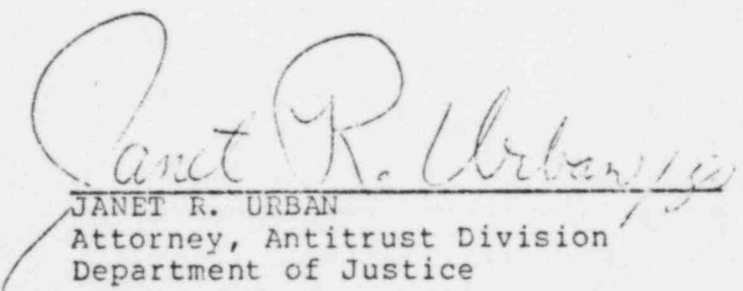
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CERTIFICATE OF SERVICE

I hereby certify that copies of MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN SUPPORT OF THE ADMISSION OF DEPOSITIONS INTO EVIDENCE have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class or air-mail, this 9th day of February, 1976.

  
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