February 24, 1976

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

APPLICANTS' RESPONSE TO DEPARTMENT OF JUSTICE MEMORANDUM ON USE OF DEPOSITION TESTIMONY IN HEARING

1. As a general matter of law, Applicants do not doubt that it is within the authority of the Licensing Board to receive deposition transcripts into evidence.[1/] The hard

1/ This is not meant to imply that Applicants accept in their entirety the legal arguments advanced by the Department in their Memorandum. For example, the Department's reference to the "100 mile bulge" provision in Rule 32(a)(3) of the Federal Rules of Civil Procedure (Memorandum at 8) is of doubtful applicability to NRC proceedings since the Federal Rules provision tracks the 100 mile limit on the general subpoena power of a federal court (see Fed. R. Civ. P. 45(e)(1)), whereas the NRC has nationwide subpoena powers. Similarly, the reference in Rule 32 (a)(2) to officers, directors, or managing agents is with respect to their position "at the time of taking the deposition," a limitation apparently ignored by the Department. See Memorandum at 8. We note, moreover, that a large number of the depositions which the Department has designated for use in its direct case deal with testimony of individuals who were not at the time, and are not now, officers, directors or managing agents of the company-employer. As to these depositions, there is serious question whether any legal basis
(Cont'd p. 2)

question is whether the Licensing Board should exercise that discretion in the context of the present antitrust proceeding. For a number of reasons, Applicants do not believe any purpose will be served by admission of deposition testimony and that such a practice may adversely affect the decision-making process of the Licensing Board.

2. The Department of Justice ("Department") claims in its Memorandum in Support of the Admission of Depositions into Evidence that the admission of such depositions "will substantially expedite this hearing by eliminating the need for the Licensing Board to hear lengthy testimony by a substantial number of witnesses * * * ." Memorandum at 2. If Applicants believed that there was any real possibility of shortening the hearing process, the Department's suggested use of depositions might be more appealing. In reality, however, introduction of deposition testimony will unduly complicate what is already a burdensome record and most probably lengthen rather than shorten the hearing process.

3. The Department has quite correctly pointed out that it intends to avoid the introduction of irrelevant and immaterial evidence by excerpting the deposition testimony. Memorandum at 2. That is not only the Department's right but most likely its obligation. See 10 C.F.R. §2.743(c).

1/ Cont'd from p. 1
exists for their direct use in the evidentiary hearing. Plainly, statements by employees of a company who are not officers, directors or managing agents, have little, if any, significance with respect to arriving at a determination as to what might be the company's policies, practices or operating procedures.

Conversely, Applicants have a right to introduce "any other parts" of the depositions they deem relevant and material. See 10 C.F.R. §2.740a(g). Moreover, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed. R. Evid. 106 [emphasis added]; see Fed. R. Civ. P. 32(a)(4); 1 J. Weinstein & M. Berger, Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates ¶106[04], at 106-21 (1975). So as not to complicate the record, if the Licensing Board permits the introduction of deposition testimony, Applicants fully intend to avail themselves of their right to have the Department introduce other parts of the deposition testimony at the time the Department offers its portions of the depositions. While Applicants do not know the full extent or even what parts of the depositions the Department intends to offer, in all likelihood Applicants will require some time to review the entire deposition program to determine which further parts they desire to have introduced by the Department. Prior to that review process Applicnats most strenuously object to the receipt of any deposition testimony into evidence.

4. In addition, prior to the receipt of the depo-

sition testimony, the Licensing Board will be required to rule on the admissibility of the deposition testimony. That includes ruling on objections made during the course of interrogation as well as any other objection "unless the ground of the objection is one which might have been obviated or removed it presented" during interrogation. Fed. R. Civ. P. 32(d)(3)(A). While Applicants again are in no position to estimate how long such a process might take until the particular deposition segments are made available to Applicants, it is difficult to imagine that the introduction of such testimony could be carried out in any speedier fashion than the time presently being spent receiving the Department's "unsponsored exhibits" into evidence.

5. Finally, it should be noted that even after the time is spent reviewing the depositions and then moving them into evidence, there is not likely to be any appreciable savings in hearing time. Applicants would expect that after admission of the deposition testimony it will be necessary for Applicants to call many of the deponents to give live testimony. This will significantly expand the projected size of Applicants' affirmative cases and in all likelihood prompt the Department, the NRC Staff, and the City of Cleveland to undertake cross-examination not otherwise anticipated. Furthermore, such a procedure will introduce a heretofore extraneous issue into

the proceeding. It will be necessary to interrogate not only as to the merits of any given issue, but also as to the witness-deponent's understanding of the deposition questioning, the context in which a given answer was given, and what that answer was meant to signify. While such areas are presently immaterial, introduction of deposition testimony will make them germane without any benefit to the Licensing Board's understanding of the issues in controversy. Such a procedure will also unnecessarily complicate the record since the live testimony dealing with the deposition testimony of the same witness on the same subjects may be hundreds if not thousands of pages apart, requiring careful indexing to get a full and complete record.

6. In comparison to these problems, the alternative procedure of having the Department call whomever they please and elicit the desired testimony orally makes good sense. The testimony will all be in one place, the only relevant areas for examination will be the issues in controversy (which is as it should be), the Licensing Board and the parties will not have to spend precious time wrangling over the admissibility of given portions of testimony, and it will be unnecessary for Applicants to take time to review all the depositions and supplement the Department's offerings so as to present a full and accurate record. This is not to

say that the Department can make no use of the depositions. They are always available for whatever purposes the Department desires during the course of a live interrogation. This would include, for example, refreshing the witness' recollection or impeachment.

7. Perhaps the most important consideration, however, is the impact that admitting large chunks of deposition testimony will have on the integrity of a hearing process that has been going on for two and a half months and is likely to continue for at least another couple of months. There can be no doubt that introduction of the deposition testimony will radically alter the nature of the hearing. There will now be large amounts of "testimony" in the record that was not given before the Licensing Board. It will be impossible for the Board to scrutinize such testimony as is possible when live interrogation is carried out. Aside from the demeanor and credibility of the witness, the Board will be without the benefit of other indicia that give content and meaning to the written record. See Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946) and cases cited at nn. 11a-15a. Since it appears that the present record will be top-heavy with documentary evidence in any event, further increasing that mass at the expense of testimonial evidence is unwise.

8. Judge Learned Hand's admonition in Napier v. Bossard,

102 F.2d 467, 469 (2d Cir. 1939), is well worth repeating in these circumstances.

> The deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand.

Cited approvingly in: Lamb v. Globe Seaways, Inc., 516 F.2d 1352, 1355 (2d Cir. 1975) (dissenting opinion); Salsman v. Witt, 466 F.2d 76, 79 (10th Cir. 1972); Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946). See also 8 C. Wright & A. Miller, Federal Practice and Procedure §2142, at 449 (1970) ("the federal rules have not changed the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person"). The Federal Rules of Civil Procedure while authorizing the use of deposition testimony explicitly point out "the importance of presenting the testimony of witnesses orally in open court." Fed. R. Civ. P. 32(a)(3)(E). And such considerations are all the more important when questions of intent and motive are at issue, as in the present proceeding. See Newburger, Loeb & Co. v. Gross, 365 F. Supp. 1364, 1370 (S.D.N.Y. 1973).

9. On balance Applicants do not believe it would be wise for the Licensing Board to allow the wholesale admission of deposition testimony as contemplated by the Department. This

conclusion is reached only after a careful analysis of the likely impact such a suggestion would have on the hearing schedule and the character of the hearing. This would not foreclose the possibility of Applicants and the Department reaching an agreement as to the use of non-controverted parts of deposition testimony or in an exceptional case the use of small parts of a single deposition.

Respectfully submitted,

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Dated: February 24, 1976.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Response To Department of Justice Memorandum On Use Of Deposition Testimony In Hearing" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to those persons in the Washington, D. C. area and by mailing a copy, postage prepaid, to all others, all on this 24th day of February, 1976.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

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