

NRC Contract 1 - 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

3/13/70

In the Matter of)	
THE TOLEDO EDISON COMPANY and	)	NRC Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING	)	50-500A
COMPANY	)	50-501A
(Davis-Besse Nuclear Power Station,)	
Units 1, 2 & 3))	
THE CLEVELAND ELECTRIC ILLUMINATING	)	NRC Docket Nos. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant,)	
Units 1 & 2))	

STAFF'S ANSWER TO MOTION OF CITY OF CLEVELAND
FOR AN ORDER OF THE BOARD ENFORCING ITS ORDER
OF DISQUALIFICATION

On November 20, 1975, the City of Cleveland (City) moved the pre-
siding Atomic Safety and Licensing Board (Board) to disqualify the law
firm of Squire, Sanders & Dempsey (SS & D), including its Washington
office, Cox, Langford & Brown, from participating in this proceeding as
counsel for CEI or any other applicant. After oral argument on the City's
original disqualification motion, this Board, on January 20, 1976, issued
its "Memorandum and Order of the Board Suspending Counsel from Further Par-
ticipation as Attorney in these Proceedings" (Memorandum and Order), in
which it (1) preferred charges against SS & D, stated the grounds therefor,
and in accordance with 10 CFR §2.713(c) referred the charges to another
Atomic Safety and Licensing Board (Special Board); and (2) granted the
suspension as requested by the City, but stayed the effectiveness of its
order of suspension until a report was received from the Special Board.

8002270 909 M

Mr. Smith dissented from the presiding Board's Memorandum and Order and issued a "Dissenting Memorandum."

On February 3, 1976, the Special Board heard oral argument from the City and SS & D. The Special Board, on February 25, 1976, issued its "Board Ruling in Special §2.713 Proceeding" (Special Board's Ruling), in which: (1) it found no evidence of unethical conduct by SS & D in the record; (2) it held that CEI should be permitted to retain the legal counsel of its choice in this proceeding; and (3) it dismissed the charges preferred against SS & D by the Board and vacated the Board's suspension order.^{1/}

By motion dated March 1, 1976, the City moved this Board to make effective its suspension order of January 20, 1976, or, in the alternative, to certify the issue to the Atomic Safety and Licensing Appeal Board.

The Staff is not in agreement with the City's position that this Board make effective its suspension order of January 20, 1976. It is our view that the ruling of the Special Board is controlling with respect to this matter. The scheme of 10 CFR §2.713 is to provide for a review of certain rulings of a Licensing Board by another Board which presumably can bring to bear on the issues involved a more disinterested and objective viewpoint. To consider the final ruling of this Special Board as advisory and subject to the discretionary adoption or non-adoption by

^{1/} Mr. Luton issued a separate "Opinion".

the Licensing Board appears to us as defeating the very purpose of establishing such a Special Board. Unfortunately, there are no precedential rulings by the Appeal Board or the Commission regarding the finality of decisions by such a Special Board. Furthermore, the regulation and the Statements of Consideration that accompany the promulgation of the present 10 CFR §2.713 do not shed any light on the matter.^{2/} Accordingly, in our view, a rule of reason must apply and that clearly points to a finding that the Special Board's ruling on the matter referred to it must be accorded finality.

: If the Special Board's ruling is deemed final, what form of appeal is available to a disappointed party? As we see it, there are three forms of relief. One, of course, is to consider the ruling an intermediate ruling subject to the filing of exceptions to the ultimate initial decision in the proceeding. Another is for a party to request the Special Board to refer its ruling to the Appeal Board in accordance with the provisions of 10 CFR §2.730(f). A third form of relief would be for a party to request the Licensing Board to certify the question to the Appeal Board for its determination in accordance with 10 CFR §2.718(i) and Section V(f)(4) of Appendix A of 10 CFR Part 2.

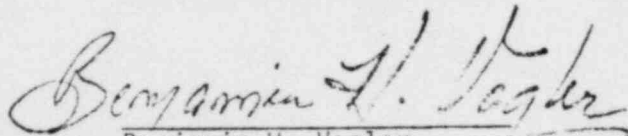
Under the circumstances present and particularly because of the varying views on the scope and nature of 10 CFR §2.713 we would have no

^{2/} 37 FR 15127


objections to the Licensing Board granting the City's alternative motion to certify the question to the Appeal Board. In our view this is the appropriate procedure to achieve an expeditious resolution of the questions regarding the scope of a Board's authority and the finality of the ruling by the Special Board. The questions to be posed to the Appeal Board would appear to clearly meet the guidance set forth in Section V (f)(4), 10 CFR Part 2, since they involve major and novel questions of policy, law or procedure which cannot be resolved except by the Appeal Board or the Commission and prompt and final decision is important for the protection of the public interest and to avoid undue delay or serious prejudice to the interests of a party.

For the reasons discussed above the NRC staff objects to that portion of the City's motion that this Licensing Board make effective its Suspension Order of January 20, 1976 but has no objection to the City's alternative motion that the Licensing Board certify the questions to the Appeal Board in accordance with 10 CFR § 2.718(i). Further, we would urge the Licensing Board to adopt the questions described above for such certification.

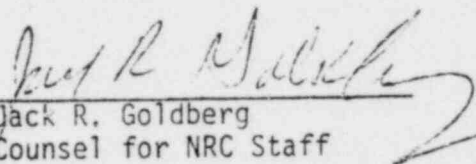
Respectfully submitted,



Benjamin H. Vogler
Assistant Chief Antitrust
Counsel for NRC Staff



Roy P. Lessy, Jr.
Counsel for NRC Staff



Jack R. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 15th day of March 1976.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
THE CLEVELAND EDISON COMPANY and	)	NRC Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING	)	50-500A
COMPANY	)	50-501A
(Davis-Besse Nuclear Power Station,)	
Units 1, 2 & 3))	
THE CLEVELAND ELECTRIC ILLUMINATING	)	NRC Docket Nos. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant,)	
Units 1 & 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF'S ANSWER TO MOTION OF CITY OF CLEVELAND FOR AN ORDER OF THE BOARD ENFORCING ITS ORDER OF DISQUALIFICATION, dated March 15, 1976, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail this 15th day of March 1976:

Douglas V. Rigler, Esq.
Chairman, Atomic Safety and
Licensing Board
Foley, Lardner, Hollabaugh
and Jacobs
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Ivan W. Smith, Esq.
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John M. Frysiak, Esq.
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph J. Saunders, Esq.
Antitrust Division
Department of Justice
Washington, D.C. 20530

Steven M. Charno, Esq.
Melvin G. Berger, Esq.
Janet R. Urban, Esq.
P. O. Box 7513
Washington, D.C. 20044

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
Goldberg, Fieldman & Hjelmfelt
1700 Pennsylvania Avenue, N.W.
Suite 550
Washington, D.C. 20006

James B. Davis
Director of Law
Robert D. Hart
1st Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

Gerald Charnoff, Esq.
Wm. Bradford Reynolds, Esq.
Robert E. Zahler, Esq.
Jay H. Bernstein, Esq.
Shaw, Pittman, Potts &
Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Frank R. Clokey, Esq.
Special Assistant
Attorney General
Room 219
Towne House Apartments
Harrisburg, Pa. 17105

Donald H. Hauser, Esq.
Victor F. Greenslade, Jr., Esq.
The Cleveland Electric
Illuminating Company
55 Public Square
Cleveland, Ohio 44101

Leslie Henry, Esq.
Michael M. Briley, Esq.
Roger P. Klee, Esq.
Fuller, Henry, Hodge & Snyder
P. O. Box 2088
Toledo, Ohio 43604

Russell J. Spetrino, Esq.
Thomas A. Kayuha, Esq.
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

Terence H. Benbow, Esq.
A. Edward Grashof, Esq.
Steven A. Berger, Esq.
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005

Thomas J. Munsch, Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pa. 15219

David Olds, Esq.
William S. Lerach, Esq.
Reed, Smith, Shaw & McClay
Union Trust Building
Box 2009
Pittsburgh, Pa. 15230

Lee A. Rau, Esq.
Joseph A. Rieser, Jr., Esq.
Reed, Smith, Shaw & McClay
Madison Building - Rm. 404
1155 15th Street, N.W.
Washington, D.C. 20005

Edward A. Matto, Esq.
Richard M. Firestone, Esq.
Karen H. Adkins, Esq.
Antitrust Section
30 E. Broad Street, 8th Floor
Columbus, Ohio 43215

James R. Edgerly, Esq.
Secretary and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, Pa. 16103

Paul M. Smart, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

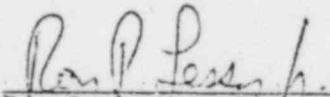
John Lansdale, Esq.
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Michael R. Gallagher, Esq.
630 Bulkley Building
Cleveland, Ohio 44115

Steven B. Peri
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005

Michael D. Oldak
Goldberg, Fieldman & Hjelmfelt
1700 Pennsylvania Avenue, N.W.
Suite 550
Washington, D.C. 20006

Alan P. Buchmann
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115


Roy P. Lessy, Jr.
Counsel for NRC Staff