

12509

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

92 JAN 17 P4:07

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

OHIO EDISON COMPANY)

(Perry Nuclear Power Plant,
Unit 1))

THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY)

THE TOLEDO EDISON COMPANY)
(Perry Nuclear Power Plant,
Unit 1, and Davis-Besse
Nuclear Power State, Unit ?))

Docket Nos. 50-440-A
50-346-A

ASLBP No. 91-644-01-A

MOTION TO AMEND THE SCHEDULE
FOR SUMMARY DISPOSITION MOTIONS

To the Honorable, the Members of the
Atomic Safety and Licensing Board:

Pursuant to 10 C.F.R. §2.730, City of Cleveland,
Ohio (Cleveland), an Intervenor-Party, by its undersigned
counsel, files this Motion to Amend the schedule for the
submission of motions for summary disposition to include in
that schedule provision for a reply by the City of Cleveland
to Applicants' answer to the City of Cleveland's arguments
in support of its position that res judicata, collateral
estoppel, laches and law of the case bar Applicant's appli-
cations. In support of this motion Cleveland submits the
following:

1. The joint statement of issues submitted by all

DS08

parties to the Board and approved by the Board included two issues as follows:

Is the Commission without authority as a matter of law under Section 105 of the Atomic Energy Act to retain antitrust license conditions contained in an operating license if it finds that the actual cost of electricity from the licensed nuclear power plant is higher than the cost of electricity from alternative sources, all as appropriately measured and compared?

Are the Applicants' requests for suspension of the antitrust license conditions barred by res judicata, or collateral estoppel, or laches, or the law of the case?

2. By Order of the Board of November 14, 1991, the following schedule was established for submission of motions for summary disposition and responses thereto:

Applicants' Joint Motion for Summary Disposition	January 6, 1992
---	-----------------

NRC Staff and Intervenor Cross-Motions for Summary Disposition/Responses to Applicants' Joint Motion for Summary Disposition	March 9, 1992
--	---------------

Applicants Joint Reply to NRC Staff and Intervenor Cross-Motions for Summary Disposition/Responses to Applicants' Joint Motion for Summary Disposition	April 27, 1992
---	----------------

3. Under the procedural schedule, it was Cleveland's understanding that Applicants were to address both issues in their motion for summary disposition.*/

*/ At the September 19, 1991, prehearing conference the procedural schedule was discussed only in terms of the first issue. The Board's October 8, 1991, order, mimeo (continued...)

Yet, in their January 6, 1992, motion for summary disposition, p. 11, footnote 27, Applicants state that they "will address the second issue if and when intervenors choose to argue it. Applicants simply note that they do not in any way intend to waive their right to oppose the second legal issue if it is argued by another party." Applicants do not provide any basis for any contention that intervenors (and, perhaps, NRC staff) intended to waive an issue addressed by them in previous filings, stated by the Board to be appropriate for present consideration, and just recently made a part of an agreed upon joint statement consisting of only two issues.

4. Applicants apparently contend that intervenors should "go first" on the second issue, notwithstanding the fact that Cleveland's answers in opposition to the applications argued the applicability of the doctrines. Nevertheless, irrespective of the fact that Applicants have essentially defaulted on the issue under the present schedule, Cleveland is willing to "go first" on the issue but should be provided the opportunity to reply to Applicants' answer to it which Applicants would apparently intend to make on April 27 when they are scheduled to reply to Cleve-

*/(...continued)

at p. 21, n. 43, however, stated that res judicata and related issues were also appropriate for consideration at this stage of the proceeding. Thus, the parties agreed to the second issue in the joint statement.

land and others' answers to their January 6 motion for summary disposition.

5. That April 27 answer will be the first time Cleveland will see Applicants' position on the subject of the applicability of the doctrines directed at Cleveland's arguments in support of its motion for summary disposition. Without an amendment to the Schedule, Cleveland will have no assured opportunity to address Applicants' arguments on this issue which opportunity Cleveland should have.

WHEREFORE, Cleveland requests that this motion be granted and that the Order of November 14, 1991, of the Board, establishing the schedule for motions for summary disposition, be amended to provide for a reply by Cleveland to be filed on May 27, 1992 to Applicants' arguments and the arguments of any other party addressed to the arguments of Cleveland in its motion for summary disposition with respect

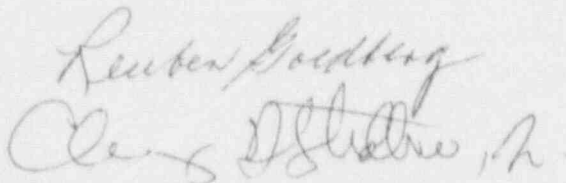
to the applicability of the doctrines of res judicata,
collateral estoppel, laches and law of the case.

Respectfully submitted,

Danny R. Williams
Director of Law

June W. Wiener
Chief Assistant Director of Law

William T. Wigli
Assistant Director of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44115
Telephone (216) 664-2800



Reuben Goldberg
Channing D. Strother, Jr.
B. Victoria Brennan
Goldberg, Fieldman & Letham, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone (202) 463-8300

Attorneys for
City of Cleveland, Ohio

January 16, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Marshall E. Miller, Chairman
Charles Bechhoefer
G. Paul Bollwerk, III

In the Matter of)	
)	
OHIO EDISON COMPANY)	
(Perry Nuclear Power Plant,)	Docket Nos. 50-440-A
Unit 1))	50-346-A
)	
THE CLEVELAND ELECTRIC)	(Suspension of
ILLUMINATING COMPANY)	Antitrust Conditions)
)	
THE TOLEDO EDISON COMPANY)	
(Perry Nuclear Power Plant,)	ASLBP No. 91-644-01-A
Unit 1, and Davis-Besse)	
Nuclear Power State, Unit 1))	

ORDER

On January 16, 1992, the City of Cleveland, an Intervenor Party, by its counsel, filed a motion to amend the schedule for summary disposition motions and related submissions established by the Board's Order of November 14, 1991 relative to two issues set forth in a joint statement of the issues.

In its motion Cleveland points out that the Applicants for suspension of antitrust license conditions have not addressed the following of the two issues:

"Are the Applicants' requests for suspension of the antitrust license conditions barred by res judicata, or collateral estoppel, or laches, or the law of the case?"

Cleveland further points out that Applicants stated in their motion for summary disposition that they "will address the second issue if and when intervenors choose to argue it" and do not "waive their right to oppose the second legal issue if it is argued by another party." Cleveland notes that in view of Applicants' failure to address the issue in its motion unless the schedule is amended to provide for a reply to Applicants' arguments in opposition to the arguments presented by Cleveland on the second issue in its motion for summary disposition, Cleveland is not assured of the opportunity for reply that it should have.

Cleveland requests that it have until May 27, 1992, 30 days after service of Applicant's answer to Cleveland's motion for summary disposition, for the submission of a reply to Applicants' answer addressed to the second issue and to the arguments of any other party that has addressed the second issue.

Upon consideration of Cleveland's motion and the responses thereto, the schedule is amended to provide for a reply by Cleveland on May 27, 1992 to Applicants' arguments addressed in their answer to the second issue and to the arguments addressed to the second issue by any other party.

It is so ORDERED.

For the Atomic Safety and
Licensing Board

Bethesda, Maryland

_____, 1992

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

OHIO EDISON COMPANY

(Perry Nuclear Power Plant,
Unit 1)

THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY

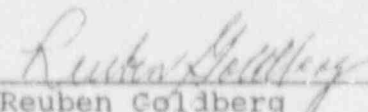
THE TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1, and Davis-Besse
Nuclear Power State, Unit 1)

Docket Nos. 50-440-A
50-346-A

ASLBP No. 91-644-01-A

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO
AMEND THE SCHEDULE FOR SUMMARY DISPOSITION MOTIONS has been
served upon the parties or their attorneys on the attached
Service List, this 16th day of January, 1992, by deposit in
Washington, D.C. in the United States Mail, first class, postage
prepaid.


Reuben Goldberg

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'92 JAN 17 P4:08

In the Matter of

OHIO EDISON COMPANY

(Perry Nuclear Power Plant,
Unit 1)

THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY

THE TOLEDO EDISON COMPANY
(Perry Nuclear Power Plant,
Unit 1, and Davis-Besse
Nuclear Power State, Unit 1)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket Nos. 50-440-A
50-346-A

ASLB# No. 91-644-01-A

SERVICE LIST

Joseph Rutberg, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory
Commission
Mail Stop OWFN 15B13
Washington, D.C. 20555

Janet Urban, Esq.
U.S. Department of Justice
Antitrust Division
Transportation, Energy and
Agriculture Section
Room 9816 JCB
555 4th Street, N.W.
Washington, D.C. 20001

David R. Straus, Esq.
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Justin T. Rogers, Jr.
President
Ohio Edison Company
76 South Main Street
Akron, OH 44308

Gerald Charnoff, Esq.
Deborah B. Charnoff, Esq.
Margaret S. Spencer, Esq.
Shaw, Pittman, Potts &
Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

James P. Murphy, Esq.
Colleen A. Conry, Esq.
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Post Office Box 407
Washington, D.C. 20044-0407

Kenneth L. Hege, P.E.
President
American Municipal Power-Ohio,
Inc.
601 Dempsey Road
P.O. Box 549
Westerville, OH 43081

Administrative Judge
G. Paul Bollwerk, III
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Mail Stop EW439
Washington, D.C. 20555

John Bentine, Esq.
Chester, Hoffman, Wilcox &
Saxbe
17 S. High Street
Columbus, OH 43215

Sherwin E. Turk, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Administrative Judge
Charles Bechhoefer
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Mail Stop EW 439
Washington, D.C. 20555

Administrative Judge
Marshall E. Miller, Chairman
Atomic Safety and Licensing
Board
1920 South Creek Blvd.
Spruce Creek Fly-In
Datona Beach, FL 32124

D. Biard MacGuineas, Esq.
Volpe, Boskey and Lyons
918 16th Street, N.W.
Suite 602
Washington, D.C. 20006

Mr. Philip N. Overholt
Office of Nuclear Plant
Performance
Office of Nuclear Energy
U.S. Department of Energy,
NE-44
Washington, D.C. 20585

Steven R. Kom, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555