July 6, 1976

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Special Atomic Safety and Licensing Board
on Disqualification

| | | |
|---|---|---|
| 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' MOTION TO QUASH THE CITY OF CLEVELAND'S SUBPOENA DUCES TECUM TO DANIEL J. O'LAUGHLIN, ESQ.

1. On June 23, 1976, the City of Cleveland ("City") transmitted for signature to the Chairman of this Special Board a Subpoena Duces Tecum directed to Daniel J. O'Laughlin, Esquire, a partner in the law firm of Squire, Sanders & Dempsey. At a prehearing conference on June 28, 1976, the Special Board extended the time for filing responses until July 6, 1976, since not all parties had yet received the City's filing. It is the position of the Applicants, and more particularly of The Cleveland Electric Illuminating Company ("CEI"), that the Subpoena Duces Tecum should be quashed pursuant to Section 2.720(f) of the Commission's Rules of Practice.

There are several good reasons for arriving at this conclusion.

2. We would note first that the City conveniently neglected to accompany its Subpoena Duces Tecum with an Application for Subpoena setting forth the basis for requesting issuance. This failure to comply with Section 2.720(a) of the Commission's Rules of Practice should not in this instance be tossed aside as nothing more than formalistic bickering. It is important to observe that at the time the City is trying once again to launch discovery into matters which it claims will shed light on its disqualification motion, the evidentiary hearing in the antitrust proceeding has come to an end, and the record has, but for one or two unrelated open items, been closed. The participation of Squire, Sanders & Dempsey in this hearing on behalf of CEI is now a matter of record.

3. It seems to Applicants that before the Special Board starts down a path of discovery in connection with the present collateral issue, and all the parties are asked to spend the time, money and effort that will inevitably be involved in a full-blown evidentiary hearing, the City should be required to file an Application for Subpoena advising the Board what it intends to accomplish by this exercise. In view of the fact that the City intentionally

"held off" filing its Disqualification Motion until the very commencement of the evidentiary hearing, it is in no real position to claim prejudice as a result of the participation of Squire, Sanders & Dempsey therein (Antitrust Tr. 1421-2). But, passing that for a moment, this Board is entitled to know what matters of record, if any, the City feels have caused it prejudice by virtue of the law firm's participation. Furthermore, how does the City anticipate that this particularized prejudice (if any) can be cured?

4. These are fundamental questions which should be addressed in an Application for Subpoena. If the City is unable to point to any specific prejudice on the record of the evidentiary hearing -- and furthermore can suggest no plausible remedy even assuming prejudice -- then we are all doing nothing more than playing out a charade. It is decidedly not in the public interest to proceed in such circumstances.

5. The City has sought separately in its other litigation with CEI to remove the law firm of Squire, Sanders & Dempsey from the proceeding. The City has also apparently divorced itself from the firm for all other purposes. Why, then, with the present NRC hearing at an end, is there reason to continue pressing for the disqualification of Squire, Sanders & Dempsey here? Even assuming

that the ultimate conclusion of this Special Board were to be in favor of disqualification, no purpose will be served by undertaking further evidentiary hearings to arrive at that determination unless such a ruling would impact on the record in this case. We are convinced it will not. Applicants therefore submit that the first order of business is for the City to file with this Board an Application for Subpoena in which it sets forth its answers to the above questions. In the absence of such a filing, an insufficient showing has been made in the papers filed, coupled with the City's statements at the prehearing conference, to support the signing of the City's Subpoena Duces Tecum.

6. There is in addition a separate ground for questioning the Subpoena Duces Tecum, at least insofar as it requests documents "pertaining to the issuance of notes and bonds or other debt instruments for the City of Cleveland * * *" (Subpoena, para. 1). As noted at the prehearing conference of June 28, 1976, material of this sort bears no relationship to the matters in controversy in the NRC antitrust proceeding and therefore should not be the subject of a production order by this Board (Prehearing Conf. Tr. 37, 40, 57).

7. In this connection, it is especially noteworthy that during the course of its direct case, the City

itself tried to introduce affirmatively into the antitrust proceeding an issue relating to the alleged interference by CEI (both alone and allegedly through Squire, Sanders & Dempsey) with the City's bond ordinances, notes and other debt instruments. Applicants moved to strike the testimony as being outside of the scope of the City's own allegations concerning CEI's anticompetitive behavior; the Chairman of the Antitrust Board agreed that this issue was outside the City's case and therefore ordered that the testimony of City witnesses relevant thereto be stricken (Antitrust Tr. 7499).

8. The Antitrust Board has thus removed entirely from this proceeding the City's bond ordinance issue.* Accordingly, discovery in this area cannot be for any legitimate purpose relevant to the matter of disqualification. If the law firm of Squire, Sanders & Dempsey is to be disqualified, the City must demonstrate a substantial relationship between the matters in dispute in the antitrust hearing and the matters for which it previously had employed the

---

* It is important to keep in mind that the Antitrust Board limited the permissible time period for antitrust scrutiny in this proceeding to the period from September 1, 1965 to the present. The only City bond ordinance activity involving Squire, Sanders & Dempsey within that time frame occurred in 1972, and it is specifically as to the 1972 bond ordinance that the Chairman of the Antitrust Board directed his ruling striking testimony. All other matters that might conceivably relate to the document request in paragraph 1 of the Subpoena Duces Tecum occurred prior to September 1, 1965 and are therefore well outside the scope of this hearing on that additional ground as well.

law firm. As stated by Judge Weinfeld in T. C. Theatre Corp. v Warner Bros. Pictures, 113 F.Supp. 265, 268 (S.D.N.Y. 1953), the showing by the former client must be:

> * * * that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. [Emphasis added.]

9. Where, as here, one of those matters for which the firm had previously been used by a former client (i.e., the City) has been explicitly removed from subsequent litigation involving the same law firm on behalf of an adversary, there is no further need for discovery into that stricken matter. Such is the situation here with respect to the City's bond ordinances, notes and other debt instruments, and thus the Subpoena Duces Tecum should be denied in this respect in any event.

10. Finally, Applicants, and more particularly CEI, would urge that this Board quash the City's Subpoena Duces Tecum to the extent that compliance therewith by Daniel J. O'Laughlin, Esquire, would require the invasion of CEI's attorney-client privilege. The City's document requests are extremely broad -- and, by the City's own ad-

mission, intentionally so (Prehearing Conf. Tr. 29-31, 44, 46). For example, the City does not restrict itself simply to the law firm's files which relate to work done for the City; rather, it seeks documents from "all files" of Squire, Sanders & Dempsey insofar as they make reference to specified subject matters (Subpoena, para. 2). Similarly broadbased are the Subpoena requests set forth in paragraphs 4, 6 and 7 of the City's filing.

11. It must be self-evident that so sweeping a demand for a law firm's documents is necessarily going to embrace a large quantity of material entitled to protection from disclosure as privileged information of other clients. CEI does not doubt for a minute that Squire, Sanders & Dempsey has in its possession a number of files relating to legal services which the firm has rendered for CEI. To the extent that any of those files, or material contained therein, is called for under the City's Subpoena Duces Tecum, CEI would ask that this Special Board sustain the present Motion to Quash or, in the alternative, issue a protective order on behalf of CEI sufficient to preserve its claim of attorney-client privilege as to all such privileged materials in the files of Squire, Sanders & Dempsey.

WHEREFORE, Applicants request that their instant motion be granted in the manner and to the extent set out above.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Robert E. Zahler

Counsel for Applicants

Dated: July 6, 1976.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Special Atomic Safety and Licensing Board on Disqualification

| | | |
|---|---|---|
| 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 |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion To Quash The City Of Cleveland's Subpoena Duces Tecum To Daniel J. O'Laughlin, Esq." 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 6th day of July, 1976.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

SERVICE LIST

Vincent C. Campanella, Esq.
Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

Robert D. Hart, Esq.
First Assistant, Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

James B. Davis, Esq.
Special Counsel
Hahn, Loesser, Freedheim,
Dean & Wellman
National City - E. 6th Building
Cleveland, Ohio 44114

William J. Kerner, Esq.
Office of the General Attorney
The Cleveland Electric Illuminating Co.
P. O. Box 5000
Cleveland, Ohio 44101

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

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

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

Gerald Charnoff, Esq.
Wm. Bradford Reynolds, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M.Street, N.W.
Washington, D.C. 20036

Mr. Chase R. Stephens
Docketing & Service Section
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

John C. Engle, President
AMP-O Inc.
Municipal Building
20 High Street
Hamilton, Ohio 45012

Victor F. Greenslade, Jr., Esq.
Principal Staff Counsel
The Cleveland Electric Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

Lee A. Rau, Esq.
Joseph A. Rieser, Jr., Esq.
Reed, Smith, Shaw & McClay
Suite 404
Madison Building
Washington, D. C. 20005

Leslie Henry, Esq.
Michael M. Briley, Esq.
Roger P. Klee, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Pennsylvania Power Company
One East Washington Street
New Castle, Pennsylvania 15103

---

Robert M. Lazo, Esq.
Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Andrew C. Goodhope, Esq.
Member
Atomic Safety & Licensing Board
3320 Estelle Terrate
Wheaton, Maryland 20906

Daniel M. Head, Esq.
Member
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Donald H. Hauser, Esq.
Corporate Solicitor
The Cleveland Electric Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

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

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

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. John H. Buck
Dr. Lawrence K. Quarles
Atomic Safety and Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Howard K. Shapar, Esq.
Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Frank W. Karas, Chief
Public Proceedings Branch
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Abraham Braitman, Esq.
Office of Antitrust & Indemnity
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Jerome E. Sharfman, Esq.
Atomic Safety & Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Edward A. Matto, Esq.
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Richard S. Salzman, Chairman
Atomic Safety and Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Andrew F. Popper, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Benjamin H. Vogler, Esq.
Joseph Rutberg, Esq.
Robert J. Verdisco, Esq.
Roy P. Lessy, Jr., Esq.
Office of the General Counsel
Regulation
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Melvin C. Berger, Esq.
Joseph J. Saunders, Esq.
Steven M. Charno, Esq.
David A. Leckie, Esq.
Janet R. Urban, Esq.
Ruth Greenspan Bell, Esq.
Antitrust Division
Department of Justice
Post Office Box 7513
Washington, D. C. 20044

Christopher R. Schraff, Esq.
Assistant Attorneys General
Environmental Law Section
361 East Broad Street, 8th Floor
Columbus, Ohio 43215

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

Joseph Rieser, Esq.
Reed, Smith, Shaw & McClay
Suite 440
1155 Fifteenth Street, N. W.
Washington, D. C. 20005

Terrance H. Benbow, Esq.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Wallace L. Duncan, Esq.
Jon T. Brown, Esq.
Duncan, Brown, Weinberg & Palmer
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Robert P. Mone, Esq.
George, Greek, King, McMahon & McConnaughey
Columbus Center
100 East Broad Street
Columbus, Ohio 43215

David McNeill Olds, Esq.
John McN. Cramer, Esq.
William S. Lerach, Esq.
Reed, Smith, Shaw & McClay
Post Office Box 2009
Pittsburgh, Pennsylvania 15230