

4-22-80  
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)

NRC Docket No. 50-346A

THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, ET AL.  
(Perry Nuclear Power Plant,  
Units 1 & 2)

NRC Docket Nos. 50-440A  
50-441A

ANSWER OF NRC STAFF TO  
MOTION TO QUASH SUBPOENA  
OF WAYNE R. MILBURN

On June 17, 1975 pursuant to 10 CFR §2.720 of the Commission's Rules of Practice, the Nuclear Regulatory Commission Staff ("Staff") requested this Board to issue three subpoenas, one of which was to Mr. Wayne R. Milburn of the City of Painesville, Ohio. On June 23, 1975, this Board issued the subpoenas one of which was duly served by registered mail on Mr. Milburn.

The first paragraph of page 2 of the subpoena provided as follows:

In accordance with Section 2.720(f) of the Rules of Practice of the Nuclear Regulatory Commission, 10 CFR Part 2, you may, by motion promptly made, and in any event at or before the time specified herein for compliance and upon notice to Roy P. Lessy, Jr., Counsel for the Nuclear Regulatory Commission Staff, Washington, D.C. 20555, request that this subpoena be quashed or modified if it is unreasonable or requires evidence not relevant to any matter in issue in this proceeding.

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On July 9, 1975 Mr. Joseph Pandy, Jr. of the City of Painesville, who was also subpoenaed, appeared pursuant to that subpoena and read into the record and presented to Staff Counsel a Motion to Quash the subpoena of Mr. Milburn. Attached herewith are pages 3, 4, and 5 of the deposition of Mr. Pandy, relating to Mr. Milburn's non-attendance at his scheduled deposition based on the motion to quash.

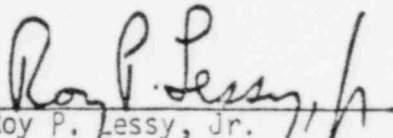
Although the original of Mr. Milburn's motion to quash was delivered to Staff Counsel at the deposition no other copies were served on any other parties. Staff Counsel then delivered the motion to the NRC Docketing and Service Section for distribution pursuant to the Commission's Rules of Practice. It should also be noted that as contrary to the requirements of both 10 CFR §2.720(f) and the terms of the subpoena, no notice was given to Staff Counsel (or any other party) that a motion to quash or modify the subpoena was to be filed. Staff also questions whether or not a motion is "promptly made" if it is served on the date of the deposition without prior notice to counsel.

Notwithstanding these procedural irregularities, the sole reason contained in the motion to quash is that Mr. Joseph Pandy would be in attendance at said deposition and would be in a position to furnish the information requested of Mr. Milburn, who as of February 1, 1975 was no longer Law Director of the City of Painesville. The record now indicates that the negotiations between the Cleveland Electric Illuminating Company ("CEI") and the City of Painesville for an interconnection agreement took place over a period of approximately 11 years. The record also indicates that Mr. Milburn was employed or served the City of Painesville

during that entire time. Mr. Pandey has been employed by the City since 1971. Because of that (and as set forth in Staff's Application for Subpoenas filed June 17, 1975) some of the relevant documents and information relating to the period of negotiation are within the sole possession or knowledge of Mr. Milburn. Therefore, it is Staff's position that Mr. Milburn's deposition may be the best evidence of certain of that information regarding the relationship between CEI and the City of Painesville.

Accordingly, it is Staff's position that the motion to quash should be denied and that Wayne Milburn be directed to appear and give testimony by deposition on oral examination and produce documents at the time and place specified in the subpoena issued to Mr. Milburn at a time convenient to all counsel but in any event no later than August 8, 1975.

Respectfully submitted,

  
Roy P. Jessy, Jr.  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 22nd day of July 1975.