

UNITED STATES OF AMERICA
BEFORE THE ATOMIC ENERGY COMMISSION

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)	Docket Nos. 50-440A
Company, et al.)	50-441A
(Perry Plant, Units 1 and 2))	
)	
Duquesne Light Company, et al.)	Docket No. 50-412A
(Beaver Valley, Unit 2))	

MOTION OF THE CITY OF CLEVELAND
TO QUASH SUBPOENAS AND APPLICATION
FOR SUBPOENA IN THE EVENT MOTION
TO QUASH IS DENIED

On March 27, 1974, Applicants filed an Application for Subpoenas with this Board directed to Mr. Francis E. Gaul, Mr. Michael Zone, and Mr. Raymond Kudukis. The subpoenas were signed on March 27, 1974. The City of Cleveland (Cleveland) moves pursuant to 10 CFR §2.720(f) to quash the subpoenas.

Applicants have failed to make any showing that the matters concerning which the depositions are to be taken have any relevance to any matter in issue in these proceedings. Indeed no such showing could be made.

The statements allegedly made by Mr. Kudukis do not represent the position of Cleveland. Cleveland's position with respect to access to the remedies which it believes are necessary to alleviate the damages done to Cleveland by the anticompetitive activities of Applicants is set forth in its petitions to intervene in the Davis-Besse, Beaver Valley and Perry proceedings. The petitions in Davis-Besse and Beaver Valley were signed by Mayor Perk. The petition to intervene in Perry was signed by Judge Whiting, Law Director of Cleveland and acting Mayor in the absence of the Mayor. Each petition was accompanied by an affidavit signed by Mr. Kudukis identifying the specific aspects of the subject matter to the proceeding as to which Cleveland wished to intervene and the facts pertaining to Cleveland's interest and the basis for its contention. In none of his affidavits did Mr. Kudukis include a prayer for relief.

Even assuming, arguendo, that Mr. Kudukis made the alleged statements, nothing in those statements pertains to the issues of anticompetitive activities of Applicants. Rather the statements refer only to remedies. It is for the Board to determine what license conditions are necessary to avoid the creation or maintenance of a situation inconsistent with the antitrust laws. Those remedies will, of course, be formulated with regard to the needs of the public generally and not merely the needs or desires of one party.

Applicant's gratuitous reference to a question the Chairman directed to counsel was taken completely out of context. Moreover, Applicant attempts

to create the inference that the question was directed to counsel for Cleveland by failing to quote the Chairman's introductory sentence: "Mr. Charno, that bothers me" (R. 281). In any event, it provides no showing that the subject matter of the depositions is relevant.

Mr. Howley's affidavit appears to be based upon hearsay rather than personal knowledge of the facts. There is nothing in the affidavit which would show a basis for Mr. Howley's belief that such statements were made. The very least that should be required before permitting the untimely taking of irrelevant depositions is a showing that the hearsay upon which Mr. Howley relies has some basis in fact and that the source of the hearsay has direct personal knowledge of the facts.

The Commission's Rules of Practice and Procedure (10 CFR §2.740(b)(1)) provides that:

In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery shall begin only after the prehearing conference provided for in §2.751(a) and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference.

The Board has not issued an order identifying matters in controversy. Applicants' application for subpoenas would be premature even if it related to matters in controversy. The Commission's Rules do not provide for discovery prior to the identification of matters in controversy and Applicants have not shown cause for commencing discovery prior to the time established by the rules.

Section 2.740(a) of the Commission's Rules require that parties give reasonable notice before taking depositions. Cleveland has not yet received any notice as of March 28, 1974, a mere six days prior to the time set for the deposition. Even the Application for Subpoenas¹, which was left at Cleveland's Washington, D. C., counsel's office after regular business hours on March 27, 1974, was filed only seven days prior to the date set for depositions. ^{1/} No reason is advanced for such unseemly haste. The notice given is not reasonable. It is burdensome on counsel and the parties to be deposed to be called on such short notice for depositions with every reason to believe that further depositions of the same persons will be requested during the normal period for discovery.

Deposing persons on matters not relevant is unduly burdensome on Cleveland and other intervenors. Further, Cleveland objects to the taking of the depositions at the offices of the Cleveland Electric Illuminating Company. If the subpoenas are not quashed, and Cleveland believes they should be, the Board should order the depositions taken at the offices of the Law Director of the City of Cleveland, City Hall, Cleveland, Ohio.

Further, if the Board does not quash the subpoenas, Cleveland hereby requests the Board pursuant to 10 CFR §2.720(a), to issue a subpoena to Lee C. Howley requiring his attendance and testimony at oral depositions to

^{1/} Service has not yet been made on the associate counsel in Cleveland. Mr. Kudukis did not receive a subpoena until March 28, 1974.

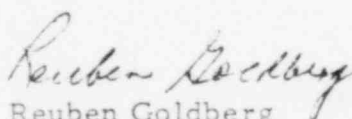
be conducted at the office of the Law Director, City of Cleveland, City Hall, Cleveland, Ohio, at 10:00 AM, April 4, 1974, for the purpose of discovery pursuant to 10 CFR §2.740.

Cleveland further requests the Board to direct that Mr. Howley bring with him for purposes of discovery all documents including originals, copies, and drafts of all writings of every kind in the possession, custody or control of the Cleveland Electric Illuminating Company including all drafts of correspondence, memoranda, reports, notes, letters, messages, minutes, inter- and intra-office communications, and recordings pertaining to the alleged statements of Mr. Kudukis, reports received of the alleged statements, contacts with Mr. Francis E. Gaul and Mr. Michael Zone or any other persons either before or after the public hearings pertaining to matters discussed at those hearings or in any manner connected with the allegations contained in Mr. Howley's affidavit or Applicants' application for subpoenas. A copy of the unsigned subpoena form is attached.

Cleveland expressly reserves the right to further depose Mr. Howley during the normal course of discovery in these proceedings.

Pursuant to 10 CFR §2.740a, Cleveland is serving upon Mr. Howley, all parties and the Board, a Notice of Deposition of Lee C. Howley in Event Motion to Quash Subpoenas is Denied.

Respectfully submitted,



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March 29, 1974

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