10/31/75

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	)	Docket Nos. 50-346A 50-500A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	)	50-501A
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A 50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

APPLICATION OF THE DEPARTMENT OF JUSTICE FOR A SUBPOENA TO THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

Pursuant to Section 2.720 of the Commission's Rules of Practice (10 C.F.R. § 2.720), the Department of Justice hereby requests the issuance of the attached subpoena to the Cleveland Electric Illuminating Company ("CEI") requiring the production of certain documentary evidence on November 15, 1975.

On May 1, 1975, pursuant to the provisions of the Antitrust Civil Process Act (15 U.S.C. §§ 1311-14), the Assistant Attorney General in charge of the Antitrust Division issued Civil Investigative Demand No. 1629 to CEI in the course of a separate and independent inquiry to determine whether that

company had violated Section 2 of the Sherman Act (15 U.S.C. § 2) by attempting to monopolize or monopolizing the generation and transmission of electric power and energy and the sale of electric power and energy at wholesale and retail in Northeast Ohio. On June 27, 1975, CEI completed production of the documents called for by the Demand.

In a letter from the Department to counsel for the Applicants dated October 10, 1975, the Department indicated its intention of using documents relevant to the instant proceeding which had been produced pursuant to the above-mentioned Demand and which had thus come to the Department's knowledge. On October 21, 1975, Applicants responded that they would resist any effort on the Department's part to utilize such evidence in this proceeding. In order to permit a prompt and orderly resolution of this issue, the Department is hereby seeking a subpoena to require production of a limited number of specific documents, the existence and relevance of which are indisputable.

Applicants have resisted the Department's efforts to bring this evidence before the Licensing Board on the following grounds:

> That document production [pursuant to the Demand] was in response to a request having nothing to do with this proceeding; it went far beyond the discovery limitations imposed here by the Licensing Board, both as to the time period and subject matter involved.

As indicated above, the Demand was part of an inquiry which, to a certain extent, parallels and overlaps the subject matter of this proceeding. As we will show below, certain selected documents produced by CEI pursuant to the Demand are of relevance and probative value in this proceeding. To the extent such documents fall outside the previously established scope of discovery in this proceeding, the Department believes that such relevance and probative value constitute good cause for expanding the scope of discovery in the extremely limited fashion which would be required by this subpoena.

It should be noted that most of the "limitations" placed on the time period of the discovery in this proceeding by the Licensing Board were effected in response to Applicants' allegations that broader discovery would be unduly burdensome. However, the production of documents now sought by the Department cannot impose any burden on the Applicants. All such documents are identified with particularity. There will be no burden of searching and producing them since the Department is fully agreeable to using the identified documents which are already in its possession if Applicants will consent thereto. If Applicants insist upon strict formality, the copies already in the Department's possession can be returned to counsel for the Applicants and then immediately rendered to the Department in compliance with the Commission's subpoena.

The specific documents sought by the Department are listed and described on Schedules A, B and C which are annexed to the subpoena. All of these documents are relevant to the issues which will be before this Licensing Board at hearing. Further, all of these documents constitute evidence relevant to allegations previously made by the Department. Thus, production under the instant subpoena would not widen the scope of the issues, the matters in controversy, or the allegations previously made in this proceeding.

Schedule A - Documents listed in Schedule A deal with CEI's efforts to acquire the Painesville Municipal Electric System and hence, as to subject matter, clearly fall within the scope of document request 25 of the Joint Request of the AEC Regulatory Staff and U. S. Department of Justice for Interrogatories and for Production of Documents by Applicants, filed August 23, 1974 (hereinafter "Joint Request"), which calls for documents relating to actual, possible and contemplated acquisitions.

Some of these documents (for example, 3-105, 1-5, 1-128, 1-310, 1-416, 1-417, and 3-186) were clearly producible under document request 25, since they fall within the time frame set by the Licensing Board for document production. Other documents, which deal with the formation of various alternate plans for the acquisition of the Painesville system, reports of meetings held with Painesville officials to discuss

acquisition, and various studies to determine the effect on CEI of such an acquisition would be producible under the Joint Request but for the cut-off date on discovery. In view of the obvious relevance of these specific documents and the fact that there will be no additional burden on Applicants if production is required, we believe the discovery cut-off date should be disregarded with respect to the documents listed in all three schedules.

All of these documents constitute evidence in support of the allegations made by the Department in the second paragraph of Interrogatory Number 2, part A, of the September 5, 1975 filing.

Schedule B - Documents listed in Schedule B deal with CEI's plans, efforts and progress in acquiring the Cleveland Municipal Light Plant and also fall within the scope of document request 25 of the Joint Request. Some of these documents (for example, 3-130, 1-66, 1-69, 1-90, 1-95, 1-126, 1-127, 1-253, 1-289, 1-292, 1-342, 1-392, 1-393, 1-430, 1-452, 1-492, 1-493, and 1-494) fall within the time frame for discovery set by the Licensing Board and hence were clearly producible. Other documents predate the September 1, 1965 cut-off date but, as previously noted, the cut-off date was established to minimize the burden on Applicants; since the Department has these documents in its possession, no such burden exists.

Some of these documents provide evidence of reasons, other than those publicly stated by CEI, for opposing MELP's expansion

and for CEI's statements that the existence of MELP creates a tax subsidy for 20% of the citizens of Cleveland (MELP customers) by the other 80% (CEI customers). These reasons also appear to conflict with the statements of some deponents.

All of these documents constitute evidence in support of the allegation made by the Department in the seventh paragraph of Interrogatory Number 2, part A, in the September 5, 1975 filing.

Schedule C documents listed in Schedule C deal with CEI's efforts to acquire all the isolated generation within the CEI retail service area. Included therein are documents which spell out a detailed plan for such acquisitions and evaluations of isolated generating facilities in the CEI service area in preparation for proposals to acquire such facilities. Some of these documents also include evidence of CEI's knowledge that isolated generation constitutes competition to the sale of CEI power and that, in some cases, municipal electric systems were also competitors for the accounts of isolated generating industries. Lastly, some of these documents clearly show how CEI has gone about acquiring isolated generating facilities, e.g. recommended to private isolated generating entities that they install electrical equipment which would disrupt the favorable heat balance they used to generate power, so that self-generation would become less economical.

Had the definition of electric utility used by the Department in the Joint Request not been changed by the Licensing Board, these documents would have been producible thereunder in compliance with document request 25. At the time the definition was changed the Department was unaware of this program to eliminate all isolated generation in the CEI area and its importance in the overall CEI plan to acquire the Cleveland and Painesville municipal systems. Now, as has been made clear by Dr. Wein's testimony, the acquisition of industrial generation is merely another means of depriving municipal systems of potential customers, as well as potential entities with which to enter into operational coordination. Even under the restricted definition of "electric utility" established by the Licensing Board, these documents are relevant as part of the CEI's plan to acquire the Cleveland and Painesville municipal systems.

The documents listed in Schedule C constitute evidence in support of the allegations made by the Department in the second, seventh and last paragraphs of Interrogatory Number 2, part A, in the September 5, 1975 filing.

It is anticipated that the Applicants will object to the Department's utilization of documents which originally came to our attention through an investigation under the Antitrust Civil Process Act. That Act provides that no materials obtained under a Demand shall be available for examination

without consent of the party producing such material. 15 U.S.C. § 1313(c). The statute does provide, however, for the use of such materials in subsequent litigation involving antitrust violations before the federal court. 15 U.S.C. § 1313(d). It is the Department's position that, when it secures evidence in the course of a Civil Investigative Demand investigation which has relevance to a proceeding outside the federal courts, the Department is under an obligation to utilize this evidence in a manner consistent with the public interest.

While there is no authority going directly to the question of such utilization of documents obtained under a Civil Investigative Demand, cases concerning the analogous situation of the utilization of documents obtained pursuant to antitrust Grand Jury subpoenas duces tecum shed some light on the government's obligation. 1/ The standard of confidentiality concerning documents produced before an antitrust Grand Jury (Federal Rule of Criminal Procedure 6(e)) is comparable to that imposed by the Antitrust Civil Process Act. Notwithstanding such limitations, the courts have held that the government may use documents obtained pursuant to antitrust Grand Jury subpoenas duces tecum in subsequent civil or criminal actions filed under the antitrust laws and other federal statutes. In Re Grand Jury Investigation (General Motors Corporation), 32 F.R.D. 175,

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1/ Principles developed concerning the reasonableness of Grand Jury subpoenas duces tecum are applicable to Civil Investigative Demands. 15 U.S.C. § 1312(c)(1).

182 (S.D. N.Y. 1963); United States v. General Electric Co., 209 F. Supp. 197, 198-202 (E.D. Pa. 1962); see also, United States v. Procter & Gamble Co., 356 U.S. 677, 683-84 (1958).

The Court in In Re Petroleum Investigation, 152 F. Supp. 646, 647 (E.D. Va. 1957), rejected arguments that government counsel should not be allowed to utilize records obtained pursuant to a Grand Jury subpoena duces tecum in other than a criminal antitrust action, and held:

> Without reflection, the possibility of the Government's devotion of the documents to another use affronts the sense of fair play. It implies an abuse of process. But, studied, the diversion proves to be altogether correct, legally and ethically.
>
> * * *
>
> The present motion is unsound because it ignores realities. Suppose inspection of the documents in a given case should expose the commission of a criminal offense; or suppose the revelation should unearth a criminal scheme; and suppose the committed or the planned offense to be wholly foreign to the object for which the records have been requisitioned. Is the Government attorney to close his eyes to the disclosure or forswear his duty to enforce the law? To obtain the consent of the court before acting would, by delay or signal, thwart apprehension or prosecution of the accused.

The Court went on to observe that:

> The attorneys would know the papers' content; their right and their duty would enjoin them to use that knowledge in the public interest. United States v. Wallace & Tierman Co., 1949, 336 U.S. 793, 799, 69 S.Ct. 824, 93 L.Ed. 1042. To hold that the Government may avail itself of the memory of its attorneys, but it cannot retain the same information in the form of copies of the papers, would be an absurdity.

These princi, .es apply with equal force to the instant situation of documents obtained in a Civil Investigative Demand investigation which have direct relevance and probative value with respect to allegations of anticompetitive conduct in a proceeding before the Nuclear Regulatory Commission. Indeed, here the Department does not seek to directly use documents obtained pursuant to a Civil Investigative Demand. We seek merely to have documents produced pursuant to a Commission subpoena after we have demonstrated that such documents are relevant and that their production will not result in a burden on Applicants.

For the foregoing reasons, the Department requests that the attached subpoena be issued and that the Licensing Board refuse to quash or modify the subpoena should Applicants request the Board to do so.

Respectfully submitted,

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JANET R. URBAN

October 31, 1975

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
The Toledo Edison Company	)	
The Cleveland Electric Illuminating Company	)	Docket No. 50-346A
(Davis-Besse Nuclear Power Station)	)	
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A and 50-441A
(Perry Plant, Units 1 and 2)	)	
	)	
The Toledo Edison Company, et al.	)	Docket Nos. 50-500A
(Davis-Besse Nuclear Power Station, Units 2 and 3)	)	and 50-501A

CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICATION OF THE DEPARTMENT OF JUSTICE FOR A SUBPOENA TO THE CLEVELAND ELECTRIC ILLUMINATING COMPANY have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand delivery, this 31st day of October, 1975.

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