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NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING CO.
(Davis-Besse Nuclear Power Station,
Units 1, 2 and 3)

Docket Nos.

50-346A
50-500A
50-501A

and

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, et al.
(Perry Nuclear Power Plant, Units
1 and 2)

50-440A
50-441A

Place - Bethesda, Maryland

Date - Wednesday, 31 December 1975

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Davis-Besse Nuclear Power Station,	:	50-501A
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and	:	
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	:	50-441A
(Perry Nuclear Power Plant, Units	:	
1 and 2)	:	
	:	
	:	

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Fifth Floor Hearing Room
East-West Towers
Bethesda, Maryland

Wednesday, 31 December 1975

Oral argument in the above-entitled matter was convened,
pursuant to notice, at 9:44 a.m.

BEFORE:

- DOUGLAS RIGLER, Chairman
- JOHN FRYSIK, Esq., Member
- IVAN SMITH, Member

APPEARANCES:

DAVID HJELMFELT, REUBEN GOLDBERG, Esqs., Suite 550,
1700 Pennsylvania Avenue, N. W., Washington, D. C.;

and

APPEARANCES: (continued)

ROBERT D. HART, Esq., First Assistant of the Department of Law of the City of Cleveland; and
JAMES B. DAVIS, Director of Law for the City of Cleveland, City Hall, Cleveland, Ohio 44114; on behalf of the City of Cleveland.

DONALD H. HAUSER, Esq., Corporate Solicitor, The Cleveland Electric Illuminating Company, Illuminating Building, Public Square, Cleveland, Ohio 44113; and
MICHAEL R. GALLAGHER, Esq., Gallagher, Sharp, Fulton, Norman & Mollison, Cleveland, Ohio; on behalf of the Cleveland Electric Illuminating Company.

JACK GOLDBERG, Esq., Nuclear Regulatory Commission, Office of the Executive Legal Director, Washington, D. C.; on behalf of the Nuclear Regulatory Staff.

BRADFORD REYNOLDS, Esq., Shaw, Pittman, Potts & Trowbridge, 910 Seventeenth Street, N. W., Washington, D. C.; on behalf of the Applicants.

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CHAIRMAN RIGLER: We will come to order.

Would some of the new counsel here this morning care to introduce themselves, please?

MR. HJELMFELT: Mr. Chairman, I would like to introduce on my right Mr. James B. Davis, Law Director of City of Cleveland, who will argue for the City this morning.

Mr. Davis has previously filed a written notice of appearance.

To Mr. Davis' right is Mr. Hart who previously appeared.

Behind me also with us is my partner, Mr. Reuben Goldberg.

CHAIRMAN RIGLER: We know Mr. Goldberg and Mr. Hart.

MR. GALLAGHER: Mr. Rigler, I am Michael R. Gallagher of the firm of Gallagher, Sharp, Fulton, Norman & Mollison of Cleveland, Ohio. appearing before the Panel on behalf of John Lansdale and the law firm of Squire, Sanders & Dempsey.

CHAIRMAN RIGLER: Would you care to proceed, please?

MR. DAVIS: Mr. Chairman, I might ask the indulgence of the Commission preliminarily to inquire something about the time frame in which you would like us to proceed this morning.

CHAIRMAN RIGLER: We have had ample opportunity to review your briefs. I think we are fairly conversant with

1 the factual material and the argument presented in those
2 briefs.

3 I would think that we would finish this proceeding
4 this morning. However, it is very important and I don't want
5 to foreclose you from making the complete arguments.

6 I would think perhaps an hour per side.

7 MR. DAVIS: That seems ample, your Honor.

8 I trust we are proceeding in the usual form. I
9 am the moving party. I go forward. Then we hear from
10 Mr. Gallagher and then I have a chance to respond?

11 CHAIRMAN RIGLER: That's correct.

12 MR. DAVIS: I would like to simply note a couple
13 of matters that may not be of consequence. Perhaps
14 Mr. Gallagher's statement — if his statement is to be
15 taken literally, I notice the answer to the brief was filed
16 on behalf of Mr. Lansdale. Just so there is no confusion,
17 our motion seeks to disqualify not only Mr. Lansdale but
18 his firm in Cleveland and the Washington affiliate firm as
19 well.

20 I don't know that there is perhaps going to be
21 any need to argue that at this point but we take the position
22 that the disqualification of any one lawyer who is a partner
23 in a firm acts as a disqualification of the entire firm.

24 Now, passing to the first matter, which is a
25 procedural matter, which is raised in the answer brief of

1 Squire, Sanders & Dempsey dealing with 10 CFR 2.713,
2 and the suspension of attorneys, we would take the position
3 this morning that those disciplinary matters are inappropriate
4 here.

5 What we are addressing is a very fundamental
6 question, covered in the Code of Professional Responsibility,
7 that is broader in scope and antecedes or antedates any such
8 limited disciplinary matters that are taken up under the
9 Board's own rule.

10 The Board in our judgment has full authority
11 to control its own proceedings.

12 We are not talking about a suspension of a lawyer
13 for the limited reasons set forth in those five stated grounds.
14 We are talking about the disqualification of a law firm. We
15 are talking about that under the fundamental charter of the
16 profession, the Code of Professional Responsibility and its
17 antecedent, the Canons of Professional Ethics.

18 It is our position this Commission, as any court,
19 has not only the power but the duty to see that the Canons of
20 Professional Ethics, Code of Professional Responsibility, is
21 obeyed.

22 It is also our position that what we are talking
23 about is not a mere procedural move on behalf of the City
24 of Cleveland.

25 We are talking about a duty that was incumbent

1 upon the attorneys Squire, Sanders & Dempsey and that it
2 was their duty years ago perhaps under the evidence we are
3 now starting to accumulate to take certain actions to notify
4 the City of their position or to disqualify themselves.

5 We do not want to hear it that we are latecomers
6 on this procedural matter.

7 The duty was theirs as lawyers from the very
8 outset. They were the ones in full knowledge of the position
9 they were in. They voluntarily, willingly, put themselves
10 in that position. They were the ones to know first, fore-
11 most, and exactly where they are with regard to their rights
12 and duties to these two clients. They were the ones that
13 had the duty to take steps way back in time. The precise
14 time I can't tell you, but we know now that it was perhaps
15 years ago.

16 Now, that duty continued right down to the present
17 moment.

18 It is an unusual — it is an unhappy thing for
19 a client to have to come into court and demand that the court,
20 the Commission here, disqualify and put its own attorney off
21 the case. It is a step the client takes reluctantly, and
22 the client may rather understandably come slowly to the
23 conclusion that this has to be done.

24 The client waits, and I think reasonably so, for
25 the lawyer himself to take the steps that his professional

1 duty demands that he take.

2 CHAIRMAN RIGLER: Mr. Davis, may I back you up
3 one minute to 2.713?

4 MR. DAVIS: Certainly, your Honor.

5 CHAIRMAN RIGLER: In the cases you cite in which
6 courts of the United States have required disqualification
7 of attorneys, would those actions of U.S. District Courts
8 not be taken pursuant to laws to, 2.713(c) which states
9 that the grounds of disqualification that the attorney has
10 failed to conform in the standards of conduct required in
11 the courts of the United States?

12 MR. DAVIS: I would agree that that fits, your
13 Honor. But I am simply saying I think it is unnecessary for
14 this Commission to go sideways into a suspension hearing.

15 I think we have the full Commission here. I think
16 we have — at least in our judgment — more than enough
17 material this morning to disqualify Squire, Sanders & Dempsey.

18 If the Commission chooses to invoke this procedure
19 and get into a further evidentiary hearing, we will, of course,
20 obey the commands of the Commission.

21 CHAIRMAN RIGLER: Let me explore that with you for
22 a moment.

23 So far as we have ascertained, this is the first
24 disqualification hearing which the NRC has had before it. So
25 that we are somewhat in the area of first impression.

1 It looks to us as if the rule may have been
2 directed to ensuring that where the Board is moving to
3 disqualify an attorney for contumacious conduct that the
4 rule is intended to give an objective or an independent
5 hearing to the attorney.

6 MR. DAVIS: I would agree.

7 CHAIRMAN RIGLER: However, as drafted, the rule
8 doesn't appear to make any distinction between Number 2 or
9 an occasion in which one of the parties is seeking to
10 disqualify the attorney for another party and the occasion
11 where the Board itself is troubled by the conduct of an
12 attorney.

13 MR. DAVIS: Well, I would agree with the
14 observation of the Chairman as far as it goes, and I would
15 refer the Commission to 2.718, the Power of Presiding Officer.

16 A Presiding Officer — this is the Code of Federal
17 Regulations, 2.718. A Presiding Officer has the duty to
18 conduct a fair and impartial hearing according to law, take
19 appropriate actions to avoid delay, to maintain order. He
20 has all powers necessary to meet those ends including the
21 powers to — and I skip to Subpart E — regulate the course
22 of the hearing and the conduct of the participants; F, to
23 dispose of procedural requests or similar matters, and a host
24 of other things.

25 I would take it that under this the Commission has

1 plenary powers to conduct its affairs, and I think that the
2 question of this disciplinary proceeding, this suspension
3 hearing, going sideways to a Presiding Officer really
4 doesn't advance things too far because we will have to
5 come back to the full Commission in the final analysis
6 anyway for a confirmation of that Hearing Officer's findings.

7 I would think that that really has a relevance
8 only if you choose to adopt the procedure, if you feel that
9 there is a need for further exploration, more evidence, or
10 something of that kind than is presented this morning.

11 Going on beyond that, with your permission, what
12 we have — and I will try to go a little bit beyond what is
13 being presented in our brief — I might make one other
14 preliminary observation about that brief.

15 We ground that out in five days, of which one day
16 was Thanksgiving, one was a Saturday and one was a Sunday.

17 It is obviously done in great haste. It does
18 not contain everything that might be said.

19 I am going to address myself in part this morning
20 to certain things that I think are beyond dispute, but that
21 if necessary can be backed up by further affidavits and they
22 concern principally the relationship of Squire, Sanders &
23 Dempsey to the City of Cleveland.

24 What we have here is a totally unique and extra-
25 ordinary case for disqualification that far surpasses any

1 case in the literature.

2 Let's go to the facts that differentiate this
3 case from every reported case.

4 Right this minute as we all sit here in this
5 room, Squire, Sanders & Dempsey currently represents the
6 City of Cleveland in a host of legal matters. And yet they
7 seek to represent the Cleveland Electric Illuminating
8 Company in this very proceeding at the same time.

9 In every reported case you will find the
10 situation where the lawyer used to represent one of the
11 clients in a previous action or matter and now comes before
12 a court or Board to represent the other client, but after a
13 lapse of time.

14 Not once in all the reported cases that we have
15 come across was a lawyer so brazen as to come into a court
16 and at the very moment he was collecting money from a rejected
17 client, should he seek without its consent to represent the
18 other client with an opposing interest.

19 Not once in all the reported cases that we have
20 read did a lawyer attempt to tell a court on a motion to
21 disqualify that he was then and there giving 100 percent
22 loyalty to Client B while at the same time giving 100
23 percent loyalty to Client A who he really prefers to
24 represent in the case.

25 I submit nobody ever tried to persuade a court

1 to do this before. So it is so obviously preposterous. It
2 can't be done. You can't represent two clients of opposing
3 interests simultaneously.

4 This violates something that is more fundamental
5 and broader in scope than the injunction upon a lawyer to
6 guard the confidences of his client. It violates that
7 bedrock of the legal profession; the duty of a lawyer to
8 a client is 100 percent undivided loyalty and independent
9 judgment.

10 It violates Ethical Consideration 515 of the
11 Code of Professional Responsibility, the title of which is
12 A Lawyer Should Exercise Independent Professional Judgment
13 on Behalf of the Client.

14 And I quote briefly, and in pertinent part:
15 if a lawyer is requested to undertake or continue
16 representation of multiple clients having potentially
17 differing interests, he must weigh carefully the
18 possibility that his judgment may be impaired or his loyalty
19 divided if he accepts or continues the employment. He
20 should resolve all duties against the propriety of the
21 representation. A lawyer should never represent in
22 litigation multiple clients with differing interests.

23 I will have to go back and underline that.

24 A lawyer should never represent in litigation
25 multiple clients with differing interests.

1 CHAIRMAN RIGLER: Mr. Davis, as I understand the
2 position of Squire, Sanders, they are not representing
3 multiple clients in this litigation, the proceedings here
4 at the NRC. Their preference is to represent CEI and
5 they have adhered to that preference consistently throughout
6 the proceeding since I understood their position.

7 MR. DAVIS: But they are representing two clients
8 at the same time, your Honor. Whether they are representing
9 in this narrow room, in this narrow proceeding, only one
10 client makes no difference at all.

11 The main problem is that they are currently
12 accepting fees from the City of Cleveland, have been doing
13 so for 65 continuous years, and they they come in after
14 65 continuous years of representing us and choose their
15 first-class client, CEI.

16 Now, nothing that I can see in any of the
17 reported cases, the Code of Professional Responsibility,
18 the Canons of Ethics, begins to permit that.

19 MR. SMITH: Mr. Davis, on that subject, of course,
20 in a situation like this we are concerned about a tripartite
21 arrangement, the theory being that in reference to your client
22 CEI will benefit from the fact that they are using, or that
23 they have represented the City of Cleveland.

24 You state in your brief and orally in your
25 argument that you are presently the client of Squire,

1 Sanders & Dempsey, that you hope to continue to be
2 their client.

3 Now, could not CEI make the same complaint?

e 1 4 MR. DAVIS: They could insist that Squire,
5 Sanders & Dempsey cease to represent us in this hearing,
6 if that had been the decision.

7 MR. SMITH: But you are prepared to take
8 advantage in the future of Squire, Sanders & Dempsey
9 representation to the detriment of CEI.

10 MR. DAVIS: No, your Honor. Not at all.

11 We are not asking them to represent us against
12 CEI in any litigation. We are not asking them to do any-
13 thing on our behalf against the interest of CEI.

14 The main work they are doing for us at the moment
15 is bond work dealing with the financing of the city's affairs.

16 MR. SMITH: This is what troubles me. I don't
17 understand that. It seems to me if they represented you
18 doing bond work and the suggestion by Squire, Sanders &
19 Dempsey is that the bond work is not inconsistent with their
20 litigation work, but you say not. You say the Board work is
21 inconsistent.

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MR. DAVIS: I will come to that, and I will try to address that in a good more detail.

The current bond work they are doing is, shall we agree, not directly related to the questions raised in this hearing. But that is not the principal way that I would argue for the disqualification.

All I am saying, what they are currently doing for us are not matters directly involved in this proceeding, but in the past there have been many things that they have done that have given them inside information about our affairs that can be used to our prejudice and detriment.

MR. SMITH: At the same time, they have inside information about CEI, which if they were to continue to represent you, theoretically could be used to the detriment of CEI.

MR. DAVIS: Not if they are not representing us in this case, usually. I am saying they should get out of the case altogether.

MR. SMITH: If we should follow your argument to the conclusion, Squire, Sanders and Dempsy could not represent either the City or CEI now or in the future, they you would both be in a heck of a mess.

MR. DAVIS: Well, I don't know if that totally follows, but at least for the purposes of this hearing, let me

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1 come to this, your Honor: Client can consent and waive the
2 duty here. But when clients are fundamentally contending
3 in litigation, it seems to me these problems come to their
4 sharpest focus. It can't be seriously denied that we have
5 conflicting interests between the City of Cleveland and
6 CEI in this hearing or in our case in federal court in
7 Cleveland.

8 The interests are fundamentally opposed.
9 Now, when we get into a fundamental opposition, when every
10 scrap of history in our relationship between the Cleveland
11 Municipal Light plant and CEI becomes important in an anti-
12 trust review, the fact that these lawyers have been our
13 lawyers for 65 years and know everything there is to know
14 about us, gives them an immense weapon to use against us.

15 When they were our lawyers they had our confidence
16 and our trust. The notion, the fundamental premise was
17 they were not going to use what they gleaned out of their
18 many years of representation of us in a litigation
19 proceeding against another client.

20 What I am saying, whatever difficulties may arise
21 out of this thing, and we are aware of some of the difficulties
22 that may arise, our interests here are very important.
23 They will be fundamentally prejudiced, if our own attorneys
24 are permitted to represent our antagonisms in the proceeding.
25 We can't have that.

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1 It is clear from the law and the Code of
2 Professional Responsibilities a fundamental breach of their
3 responsibilities as lawyers to attempt this, and we have
4 to come before this Commission to ask for disqualification.

5 Now, what they are really asking from this Board
6 is something quite unprecedented. That is to obtain the
7 sanction and permission for them to simultaneously represent
8 the City of Cleveland, and in certain important and highly
9 profitable areas, such as bond work, urban renewal work and
10 other things, but while this is going on in the background,
11 they are to come forward and give all of their energies for
12 CEI against the interest of their current client, the City
13 of Cleveland.

14 We say this simply cannot be done. We are
15 talking about that fundamental duty of a lawyer to give 100
16 percent of his energies and his loyalty to a client, if he
17 chooses to represent them.

18 We are talking about something here that has
19 gone on for so long that it seems nonsense to talk about the
20 City and asking them to do anything.

21 It might be worth a word to think about why this
22 has come about. Part of it, is just history. We are talking
23 about a representation that has gone back some 65 years.
24 It has been sort of a fact of life in Cleveland, Ohio, for so
25 long that it is difficult to think of it otherwise.

1 I will be happy to say that Squire, Sanders
2 and Dempsey is not only the largest or certainly one of
3 the very largest firms in Ohio, but a leader in the
4 profession, generally acknowledged as an outstanding firm
5 and generally considered to be totally ethical.

6 I don't mean to concede by that that we consider
7 all their conduct here ethical, but they have been generally
8 perceived to be that. I don't think for years and years
9 public officials or people in Cleveland generally would have
10 understood what was really going on here. We ourselves have
11 not yet begun to fully understand some of the things that
12 were happening, but it is very easy to see why one of the
13 largest firms in the state, leaders in the profession, who
14 insist piously to this day that they did nothing wrong, would
15 be taken pretty much at their word and how this situation
16 could develop. It is startling when we get into some of the
17 evidence to see how much of a conflict has existed and
18 for so long.

19 The fact is, the City is a shifting sea of
20 personalities, politicians come and go; the City law department
21 lawyers come and go. It is difficult for people in public
22 life to sometimes face the hard decisions that we are facing
23 today. It is very easy in the nature of understanding how
24 this situation could be allowed to go as long as it did, but the
25 fact is we have finally come to a fundamental collision.

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1 The City of Cleveland has a light plant that
2 is in serious trouble, despite any litigation in the past,
3 and there has been litigation in the past, a long series
4 of small personal injury cases and other cases have been
5 permitted to exist and Squire, Sanders and Dempsey perhaps
6 did take positions antagonistic to the City in the past,
7 and this was tolerated, but we have now come to a collision
8 that is so fundamental and important that we can tolerate
9 this no longer. Based upon Ethical Consideration 514
10 and Disciplinary Rule 5101 and it is unique that Squire,
11 Sanders at this very moment is representing both the
12 City of Cleveland and the Cleveland Electric Illuminating
13 Company, who are contending against each other in this
14 proceeding, they must be disqualified. I would like to
15 come to a second way in which the case is unlike any other
16 reported case.

17 That is this: there is not merely a substantial
18 relationship between the present proceeding and Squire,
19 Sanders and Dempsey's past representation of the City.
20 Rather, their past representation of the City has endured
21 so long, involved so many of their lawyers, and been so
22 all-pervasive that it is very difficult to put any limits
23 on the potential prejudices to the City's interests, if they
24 are permitted to continue.

25 Let's start with that simple fact, that they have

1 represented the City continuously for 65 years up to the
2 present moment.

3 Now, that continuum of representation far exceeds
4 anything the City itself has. We are talking about a giant
5 firm of approximately 100 lawyers with hundreds more of
6 paralegal assistants and secretaries and all the other
7 supporting personnel.

8 The sweep of their representation of the City
9 is in now way adequately suggested by the some 22 pages of
10 singel-spaced itemizations of their billings to the City,
11 which you will find in our Exhibit A. In certain critical
12 areas, namely, wherever the City deals in matters of finance
13 and particularly with utility financing, they are the final
14 word.

15 They have been for years. Now, for years they
16 have had a virtual monopoly of public financings in Northern
17 Ohio. They have an enormous public law section, perhaps the
18 largest in the United States.

19 They have not just two or three men who are experts
20 in public bond law, but squads of specialists. They have
21 enormous influence in high financial circles about what
22 may or may not sell in bonds and notes.

23 It is not hard to see why the City didn't use
24 somebody else.

25 To a large extent there is nobody else, at least

1 nobody else who can handle the difficult questions on short
2 notice.

3 All of this is illustrated in the episode in
4 1973 found in the briefs, where the City tried to go out
5 and find other counsel for its municipal light bonds. They
6 had been to New York, and there it is understandable that
7 New York counsel did not understand the Ohio law and had
8 built-in problems in the way they did a note issue.

9 My predecessor law director, Hollington, tried to go to
10 Bricker, Evatt law firm in Columbus, approximately a 15 to 20
11 man firm. There he had a question of a difficult legal
12 question and in the short time frame in which the work
13 had to be done, the lawyers down there, as you can see from
14 the correspondence, took a look and said they couldn't
15 possibly do that in that kind of time frame and gave up.

16 Where else could they go? The money was needed.
17 We went back to the embraces of Squire, Sanders and Dempsey.

18 That gives you a pretty good illustration of the
19 kind of problems the public officials face in trying to do
20 something else. It is very difficult to go outside the
21 state of Ohio.

22 I will concede Squire, Sanders and Dempsey does
23 generally excellent work and they do it for a good price.

24 It is so easy to go with them. They fully understand you.
25 They don't need to be specially briefed.

1 They know you personally. They fill in between the
2 lines, because they know us. It is difficult to get away
3 from their embrace.

4 Now, unlike the reported cases, virtually
5 all of which center on one lawyer who used to be with
6 a large law firm and specialized in something, then he
7 turns up years later in opposition to one of the clients
8 of that large law firm, here we have the large law firm
9 itself. The significance of that, is that we have
10 all that mass, combined mass of expertise and skill,
11 and information, confidentiality and everything that
12 has been gleaned by squads of Squire, Sanders and Dempsey
13 lawyers over 65 years.

14 CHAIRMAN RIGLER: Are you arguing there is
15 an obligation on their part to continue to serve as
16 your counsel?

17 MR. DAVIS: Yes, your Honor. I don't think it
18 forms any part of my argument this morning, but for purposes
19 of simply addressing that question, there is an ethical
20 duty upon a lawyer not to leave his client in a position of
21 jeopardy, when there has been a continuing representation,
22 not to drop it, at a point where the client's interest will
23 be hurt.

24 We are trying to work out some of these problems in
25 other areas right at this moment. I did give special

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1 authorization to some of their lawyers to finish a piece
2 of litigation in the Sixth Circuit, unrelated to any of
3 this, simply because they had had the entire case for a
4 matter of years, it was complex, they prepared all the materials,
5 they had all the files. In that case I felt it was incumbent
6 upon them to protect the City's interests and go forward and
7 finish the argument, which they did.

8 CHAIRMAN RIGLER: Is it your position, because they
9 have handled bond issues for the City in the past, they are
10 obligated to do so in the future.

11 MR. DAVIS: No.

12 CHAIRMAN RIGLER: Then let's come back to the '72-'73
13 bond issue in which they apparently tried to avoid handling
14 that for the City of Cleveland.

15 MR. DAVIS: Very well.

16 CHAIRMAN RIGLER: And you prevailed upon them --
17 is that an accurate way of expressing it, prevailed upon
18 them?

19 MR. DAVIS: I think prevailed upon them is maybe
20 overstressing the role of the City. I think they were very
21 happy to have our business. They got well paid. I think
22 what I would say to that whole episode, your Honor, is it
23 was one small passing phase in a 65-year continuum of
24 representation. They, in their brief, tried to focus on that
25 one episode as if that is the whole show. That is nonsense.

1 That is one tiny part of their representation of us.

2 CHAIRMAN RIGLER: But it is an indication that
3 they tried to serve the relationship or begin to serve.

4 MR. DAVIS: It is the only one in 65 years.

5 CHAIRMAN RIGLER: That is the one crucial to the NRC
6 proceeding, when we come back to what we call a nexus here,
7 the connection between your disqualification motion and
8 their representation, it seems to me that is perhaps the
9 most significant event.

10 MR. DAVIS: Well, I would respectfully disagree
11 with that, your Honor. What is -- I would not deny that
12 that was a significant episode in the relationships between
13 the light plant and the CES, but they did all the
14 municipal financing for the light plant going back in the
15 60s.

16 They have had an all-pervasive understanding
17 of our finances with the utility, otherwise, for all these
18 years.

19 That one little episode, I think, taken out of context
20 and blown up as though it is the whole crux of the relation-
21 ship, is totally misleading. What we are talking about is the
22 fact that, well, I will pursue this:

23 They are the City. It is hard to tell where they
24 leave off and the City begins in so many areas. They have a
25 knowledge of our affairs that exceeds our own. And to permit

1 them to use this knowledge, this skill, this organization
2 of our affairs that they have, against us, is a fundamental
3 breach of legal ethics.

4 CHAIRMAN RIGLER: And how are they using this
5 knowledge against you?

6 MR. DAVIS: We have given some illustrations
7 in our brief. We are in the process of finding out additional
8 areas in which this has been done. We cited in our
9 supplemental brief a little instance involving Mr. Lansdale
10 voting as an officer of CEI to deny us one of the most
11 fundamental things we want out of this whole hearing, which is
12 Wheeling.

13 We have found documents where they are taking
14 positions adverse to us.

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1 CHAIRMAN RIGLER: I think they conceded the fact
2 that Mr. Lansdale's interest and representation lies with
3 CEI. That's sort of the cornerstone of their position.

4 MR. DAVIS: But it's unholy, your Honor, because
5 he is a partner in the firm that represents the city. They
6 can't have it both ways.

7 MR. SMITH: Mr. Davis, I know Mr. Gallagher will
8 tell in detail their responsibility toward CEI. But what is
9 your view of Squire, Sanders & Dempsey's responsibility toward
10 CEI?

11 Do you recognize any?

12 MR. DAVIS: With regard to this particular motion
13 for disqualification or in general?

14 MR. SMITH: This litigation in general.

15 MR. DAVIS: Let's start with in general, your
16 Honor. All right. They represent CEI. They owe them a
17 100 percent loyalty. They owe CEI the duty to tell them
18 whenever they have another client whose interest opposes those
19 of CEI. Here we have another client who we have represented
20 for some time, you and they have opposing interests. We are
21 in a dilemma as to what do do. We owe you this duty under the
22 code of professional responsibility to make this kind of
23 disclosure, to give you a full understanding of the impact of
24 this dual representation.

25 And should we go forward, it has to be with your

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1 express consent.

2 Now, they owe that kind of audit to CEI. They owed
3 it to us. They had a decision to make and they had it years
4 ago and they didn't face to it. We are facing up to it
5 for them here. CEI will survive without them and I think
6 we will, too. We cannot survive against them in this
7 proceeding or in Federal Court in Cleveland. And if there
8 is to be inconvenience to CEI, so be it. There will be
9 inconvenience to us, perhaps. But those things pale in
10 significance before the notion of having lawyers that have
11 represented us for 65 years come around and come at it and
12 attack us with all they have learned in that time in an
13 adversary proceeding.

14 CHAIRMAN RIGLER: What confidential information
15 did Squire, Sanders have available as a result of its represe-
16 entation for the 1973 bond issue?

17 MR. DAVIS: Well, I would answer that this way,
18 your Honor: We place no reliance whatever on confidential
19 information. At the time it was perhaps confidential, with the
20 passage of time, perhaps it is all public. I couldn't
21 precisely tell you because I wasn't there at the time. I
22 suffer from the same problem that practically every city
23 official does, in going back into time, but I would insist
24 upon, however, that to look at confidential disclosures to
25 S S & D misreads the entire body of the case literature.

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1 The cases don't go on confidentiality and we are not talking
2 about that. We are talking about the fundamental duty of
3 attorneys to give their clients 100 percent loyalty.

4 This duty of an independent judgment, as Judge
5 Weinfeld said in the D. C. theatre case and has been said all
6 the way down, we don't get into the question of what confidences
7 were. Judge Weinfeld in fact refused to get in the matter.
8 It pursues the whole nature of confidentiality to pursue that
9 line of inquiry. It's merely enough that they represented us
10 in the past, that they represented us in an area where there
11 was a substantial relationship between what they did then for us
12 and what is now the heart of the adversary proceeding.

13 We say that, and the point I am really trying to
14 make throughout this second part of my argument is, far beyond
15 confidentiality they have an all pervasive knowledge of the city
16 as far as that the city itself does not have. We are talking
17 as I say about what dozens of Squire, Sanders & Dempsey
18 lawyers have learned about the affairs of the city over all
19 these years. They alone have this continuity. The city law
20 department comes and goes. It's small in number. The
21 civil lawyers in the City of Cleveland law department number
22 somewhere between 20 and 25 and have for some years.

23 There is no Civil Service in the City of Cleveland
24 law department. All these lawyers, I, Mr. Hart, are political
25 appointments. We serve at the pleasure of the appointing

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1 authority, who is the mayor. There is a constant turnover.
2 Because of this turnover and traditional low pay, the city has
3 never managed to build any serious expertise in the more
4 difficult areas of public finance.

5 The city law department handles substantial amounts
6 of routine business of the city, the really difficult questions
7 and public finance questions go out to the new firms.

8 In this case, Squire, Sanders & Dempsey. The
9 average law director has a couple of years. I have been there
10 one year, my predecessor there is two and his predecessor 13
11 months and so on.

12 The crux of the matter is, it's only Squire, Sanders
13 & Dempsey that has the continuity and knowledge of the city's
14 finances.

15 In one case, where a lawyer did become familiar with
16 the law, and did rise to an area of expertise, Squire, Sanders
17 & Dempsey handled him away. Mr. Daniel Laughlin, who has more
18 experience in finance law than the entire law department
19 combined. When the director is faced with a difficult
20 question, you simply bypass the law department, and place a
21 call to Dowd, Morris, Knopf, or other lawyers at Squire,
22 Sanders.

23 In terms of Squire, Sanders, John Brueckel, an
24 SS & D partner, discloses the fact he has been bound counsel
25 to the city for 20 some years. The city has nobody like this.

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1 In such critical areas, particularly utility
2 finance, they are not just counsel to the city law department,
3 they are the city law department for all intents and purposes.

4 Let me make my point clear in another way. When
5 I became law director of Cleveland on January 1, just a year
6 ago, I discovered in all the prior decades of the history of
7 the Cleveland law department, no one had bothered to develop
8 a filing system at all.

9 Files more than a few years old were put in cardboard
10 boxes, taken to the basement of City Hall, no index cards, no
11 system, no retrieval. This is appalling. We are trying to
12 correct it but we are going to have to write off the past and
13 bring just our current files into some kind of a numbering
14 system.

15 I imagine trying to prepare and try a complex
16 antitrust case above all other kinds of cases with no filing
17 system. Then I imagine trying an antitrust case, against
18 a 180-man law firm, that has had total access to your informa-
19 tion and your files and your affairs, for 65 continuous years,
20 and which does have a filing system. That's the kind of
21 prejudice we are talking about. The fact now, the situation
22 has become as aggravated as it is in no small part because it
23 was enormously profitable for Squire, Sanders & Dempsey to
24 make it this way. It was their decision to expand their public
25 law sector and to offer these services.

1 There is no fault in this. It's just a fact of
2 history, but there it is. They have an enormous, skillful
3 public law section in the firm. And because of their
4 continuity, because of the fact, they do pay good salaries, they
5 have in fact sucked the financial skills of the City of
6 Cleveland into their own hands.

7 They have the files. They have the information.
8 They have the continuity of history of the utility department
9 for the City of Cleveland.

10 CHAIRMAN RIGLER: What files of the City of
11 Cleveland do they have?

12 MR. DAVIS: By number I couldn't begin to tell you.
13 I'm sure they have cabinets, rooms of files dealing with the
14 City of Cleveland's affairs.

15 CHAIRMAN RIGLER: But dealing with is different.
16 You are suggesting they actually had files that might be the
17 property of the City of Cleveland. That would not be the
18 case, would it?

19 MR. DAVIS: My point is, your Honor, in 65 years
20 of representation and with the organization, the filing
21 systems, the retrieval systems that a giant and skillful law
22 firm necessarily creates, they have the ability, they have
23 copies of everything they have asked for over the years. They
24 have the ability to go to documents, go back into history,
25 to transactions, they have correspondence, they have everything.

1 CHAIRMAN RIGLER: They have files they have
2 developed in connection with their legal work for the City of
3 Cleveland?

4 MR. DAVIS: They have been given to them by the
5 city in trust.

6 CHAIRMAN RIGLER: But they don't have actually
7 any official files of the City of Cleveland?

8 MR. DAVIS: That seems to me very minor. They
9 have copies perhaps and they know exactly where to go to get
10 them. Perhaps in some cases they have things we don't have
11 ourselves. I would think it's extremely possible that they
12 have many, many documents going back to the '60s that we just
13 don't have anymore.

14 CHAIRMAN RIGLER: Suppose it were '72 or 1973 and
15 Squire, Sanders had said we are willing to represent you on
16 this new bond issue but you must understand that we intend to
17 represent CEDI in NRC proceedings, particularly for CAPCO
18 plants and if this raises any problems you better go elsewhere
19 because we want you to know that we are going to represent
20 CEI before the NRC.

21 MR. DAVIS: Fine. But they never did. They
22 have never come across. They have never done, what they have
23 absolutely never done is to make an honest disclosure to us
24 to this day.

25 The things we are finding out about them we are

1 finding out the hard way from other lawyers in discovery
2 proceedings.

3 CHAIRMAN RIGLER: So you would distinguish between
4 the tupe of disclosure I just suggested and what actually
5 transpired in '72 or '73?

6 MR. DAVIS: Absolutely. Let them come forward
7 and show you where they made a disclosure. They can't do it.

8 MR. SMITH: Mr. Davis, haven't you known that
9 Squire, Sanders & Dempsey have been general counsel for CEI,
10 not just security or bond counsel, but general counsel for
11 all of these years?

12 MR. DAVIS: Yes, sir.

13 MR. SMITH: And you probably have known Mr.
14 Lansdale has been individually their chief counsel?

15 MR. DAVIS: Let's assume my predecessors knew
16 this. I have learned this in the course of this proceeding,
17 certainly.

18 MR. SMITH: But this has been known in Cleveland
19 I'm sure for years.

20 MR. DAVIS: Yes. Let's accept that.

21 MR. SMITH: By the bar. If they are going to
22 turn to anybody, in a transitional period, by going to
23 nuclear power, it would be to Mr. Lansdale and Squire,
24 Sanders & Dempsey.

25 MR. DAVIS: All right. Fine.

1 MR. SMITH: Didn't that forewarn you?

2 MR. DAVIS: No.

3 MR. SMITH: It didn't?

4 MR. DAVIS: It did not. They duty was on Squire,
5 Sanders & Dempsey to come forward and tell the City of
6 Cleveland what they were really doing behind our backs. It
7 was their duty to say, look, we represent CEI. This goes back
8 years in time. It was their duty to say, there is what appears
9 to us to be a real conflict of interest. It goes back far
10 beyond 1972, '71, '70, goes well back into the '60s. They
11 appreciated this years ago. We are coming up with three-year
12 plans to put us out of business that goes back even in the '60s.

13 I refer to the holy memorandum where it was the
14 corporate policy of CEI going back many years to eliminate
15 Cleveland municipal light plant. They never showed us that
16 document. That came to light here before the Commission.
17 It was that kind of disclosure they ordered us years ago.

18 If they had been honest, they would have faced
19 the fundamental conflict that was necessarily existing between
20 the CEI and the light plant going back many years. They prefer
21 to have it both ways. They preferred to have the lucrative
22 business of the CEI and they preferred to have the business of
23 the City of Cleveland which wasn't trivial in its dollar amount
24 and which was an important account for them, as public law
25 counsel for the State of Ohio, to be able to say they represented

1 the largest city in Ohio, of course, is of some significance
2 to them.

3 For them not to be able to represent their own
4 city in their own backyard conversely would be less agreeable.
5 But for whatever the reasons, they were the ones that had the
6 full understanding of the positions of both clients.

7 They had total access to both clients. They were
8 the ones that set up there and saw these conflicts before
9 anybody else. They were the lawyers that should have known
10 their duty. They were the ones that failed to act years ago.

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1 MR. SMITH: I don't see, -- perhaps I should state,
2 perhaps I should have stated I am a member of the Ohio bar.
3 I have been active in municipal and county government in Ohio
4 and I am aware of the reputation of the Squire, Sanders &
5 Dempsey. I don't see how they could have avoided over the
6 years representing the City of Cleveland doing their bond
7 work. I think it was almost inevitable. I think they prob-
8 ably do most of the bond work for most of the municipalities
9 in Ohio.

10 It's more than just a representation. It is a part
11 of selling the bonds, and without Squire, Sanders & Dempsey,
12 Moody's, Standard & Poor's would have a very -- I see your
13 problem. I mean, if you don't have them you are going to
14 have perhaps some trouble selling your bonds.

15 MR. DAVIS: Absolutely.

16 MR. SMITH: But isn't there a difference? Isn't
17 there a difference in serving as bond counsel and serving as
18 general counsel?

19 MR. DAVIS: Just to take that question, no. They
20 are lawyers and it doesn't matter what kind of law they are
21 doing.

22 MR. SMITH: But this is different. A lawyer
23 normally advises the client. Squire, Sanders & Dempsey is
24 advising the money market and Moody's and they are doing
25 more than just representing a client.

eri 4-2 1 MR. DAVIS: I agree with that, your Honor. We are
2 paying them, they owe us the duty first. These other obliga-
3 tions to the financial community and so forth are important,
4 but incidental to a lawyer/client relationship. You are well
5 aware, obviously from your background of the roal they play
6 in Ohio. Part of the problem and again this is history and I
7 don't know whether we need get in questions of blame or not
8 but it's a fact that they are a monopoly, way beyond General
9 Motors' with 57 some percent of the automobile industry. They
10 are a monopoly way beyond IBM with 75 percent of the main
11 computer business.

12 They are a total monopoly of public law business in
13 Ohio with an incredible, to pick a figure out of the air,
14 95 percent of the business programs. The exact figure is not
15 important, but the fact they so totally dominate the public
16 law sector of the law in Ohio. There should be maybe other
17 major firms in Cleveland and maybe out of there confrontation
18 there are going to be, where the city when it faced a con-
19 flict like this, for this proceeding or this kind of bond,
20 where we are obviously in conflict with another client, we can
21 go as an alternative.

22 That could have happened. There were some small
23 instances where this happened. In the case of sewer bond
24 anticipation notes we went to another giant firm in the City
25 of Cleveland, Jones-Day and they did that one little segment

1 of bond for us and they have recently done another issue for
2 us. It plays no part in this proceeding.

3 The problem is for another major firm to crank up
4 to get lawyers to do this, mean they have to break in to a
5 new field, they have to spend considerable monies to train
6 lawyers to do this kind of business, they have to have the
7 anticipation there is going to be more business coming along
8 and they will have to compete not with GM or IBM but Squire,
9 Sanders & Dempsey in that field, which that field is far
10 harder to compete with than anybody.

11 MR. SMITH: Is there any possibility of compromise?

12 MR. DAVIS: On this? Absolutely not. This has been
13 thrashed around and explored. I have talked with partners
14 at Squire, Sanders & Dempsey. We have gone up and down on
15 this thing for 6 months. As to compromise in other areas,
16 that is always possible. As to some of the fundamental
17 issues that come before the Commission, I would not want to
18 explode the possibility of compromise there, but as long as
19 this Commission is going forward, as long as we are going to
20 have evidentiary hearings, it is intolerable, impossible and
21 totally uncompromisable for us to have them on the case.

22 CHAIRMAN RIGLER: What are the controversies which
23 were pending in 1972 or 1973 between the City and

24 MR. DAVIS: It's just this simply, your Honor. It
25 was then I believe, and is now, was for years, the intent of

1 CEI to simply exterminate the Cleveland Municipal Light Plant.
2 It's just that simple.

3 Now, far beyond that, they had been direct competi-
4 tors for customers, residential, commercial, industrial within
5 the City of Cleveland within a confined geographical area for
6 years. There are many, many facets to this relationship.
7 They have been after us to pay certain bills they claim that
8 we owe them, but what if fundamental is that we have two
9 competing light systems within a confined geographic area.
10 They have been competing for years and it has been their
11 announced corporate policy for many years and dating from
12 the '70s to put the city light plant out of business.

13 CHAIRMAN RIGLER: In 1972 or '73, when you were
14 soliciting Squire, Sanders to work on bond issues, was there
15 any discussion between representatives of the city and Squire,
16 Sanders with respect to any actual conflicts?

17 MR. DAVIS: Well, I wasn't there and I don't
18 really know but I would come back to this, your Honor.

19 If there was a conflict and I think there was, and
20 if Squire, Sanders & Dempsey made any attempt to inform the
21 City of the nature of that conflict, where is it? Where is
22 the document? Where is the letter? Where is any evidence
23 that they notified the City officials at the time of what was
24 really involved. It does not appear in their answer brief.
25 They have never come forward with it. I don't believe there

1 ever was any.

2 CHAIRMAN RIGLER: Would you address yourself to
3 the question of waiver by the City of Cleveland?

4 MR. DAVIS: Yes. Gladly. You can't waive what you
5 don't know. You can't waive a right you don't even know you
6 have. In this area, whether we call it estoppel as they seem
7 to prefer, or waiver or whatever, the whole issue commences
8 with a full, a complete and honest disclosure by the lawyer
9 to the client, which we submit has never occurred.

10 The duty is first, foremost and always on the lawyer
11 to disclose. We are talking about the code of professional
12 responsibility. It is the lawyer's duty to do these things.
13 It is the lawyer's duty where there is any doubt about pro-
14 priety of the representation to decline it. Now, nowhere did
15 they ever sit down with any City official, and fully disclose
16 the entire scope of their representation of CEI. They never
17 told us about Mr. Lansdale, who sits here this morning. This
18 is another unique feature, nowhere in the reported literature
19 do we find two partners of the firm who are active board
20 members of the company in opposition.

21 CHAIRMAN RIGLER: Were you aware of that in 1972?

22 MR. DAVIS: I don't know. I wouldn't pretend it
23 was something that was of readily available knowledge but in
24 1972 we weren't litigating against each other. What has
25 brought this whole business to a sharp focus is the

1 aggravated case of direct confrontation in litigation.

2 CHAIRMAN RIGLER: Go back to my earlier question
3 about pending controversy. You now say there was no litigation
4 between the City and CEI in 1972. Were they opposing
5 each other in any administrative proceedings as of that date?

6 MR. DAVIS: They have submitted a list of matters of
7 litigation going back over some years where the City and CEI
8 litigated against each other. As to those prior matters, I
9 simply say that you deem them to be waived, but they were not
10 these proceedings. They were not our federal court case
11 in Cleveland. They were, however important, incidental to
12 what we are dealing with here. And the City had the full
13 right, if you please, to waive any past misconduct but we
14 also have the right not to waive it now.

15 A past waiver of other matters certainly doesn't
16 mean a blanket waiver for all future misconduct. Any of
17 these situations if you want to deem them waived, did not
18 begin to approach the situation where to waive what we are
19 talking about here, that we needed full disclosure. We have
20 never had it. We are talking about, I believe, some 780
21 privileged documents that have been identified already in
22 this proceeding. We don't know what is in those documents.
23 We have a list right here in the exhibits before this Commis-
24 sion at the moment of some 50 documents, created by Squire,
25 Sanders & Dempsey lawyers, not one, not two but many

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1 different lawyers over a period of years, directed to CEI
2 involving the electric light plant matters between the City
3 and CEI. They have never told us what they are.

4 How can we even begin to guess what is in those
5 things. We can begin to guess a little bit by what we have
6 now come across in some of the exhibits that we have attached
7 to our briefs. We can see directly prejudicial conduct.

8 CHAIRMAN RIGLER: Is it your position that information
9 disclosed in connection with the '72 or '73 bond issue may
10 be used against the City in these proceedings?

11 MR. DAVIS: Absolutely. We anticipate it will be
12 if they are permitted to continue.

13 MR. SMITH: How can that be? What type of infor-
14 mation is this?

15 MR. DAVIS: They have, as finance counsel, the need
16 to know everything there is to know about the finances of
17 the public utility operation of the City.

18 MR. SMITH: And if there is relevant, material
19 information that they learn and they also have the requirement
20 to disclose it.

21 MR. DAVIS: In some fashion, yes.

22 MR. SMITH: Publicly.

23 MR. DAVIS: But the fact they have learned it and
24 later made it public doesn't change anything. What they have
25 made is all that knowledge gleaned from their direct

1 representation of the City and they have knowledge obviously
2 knowledge of many things which they may or may not have felt
3 necessary to disclose to the public. As any practicing
4 lawyer knows, the pleadings of a case on file in the court
5 are not the heart of the case. What is the heart of the
6 case is the lawyers notes to himself, his memorandums of trial
7 strategy, his written notations of impressions of witnesses,
8 that mass of material that any lawyer working on a file over
9 a period of time will create, much of which is totally
10 internal to the file.

11 Now, it's that kind of material. Any lawyer that
12 has practiced law knows it's there. It is there. We are not
13 talking about materials of this kind generated by one lawyer
14 but dozens of lawyers over 65 years. They know more about the
15 City than we could.

16 And they got that knowledge directly out of the
17 City which paid them. It doesn't matter whether it's public
18 information now or heart. It's the fact that they have
19 skilled information and knowledge about the City that surpasses
20 anything the City can come forward with. To permit this to
21 come out of this longstanding representation and be turned
22 against us as a weapon is the most fundamental breach of the
23 code of responsibility. I can go on at length and I would
24 be happy to address any other questions. Perhaps it would
25 be good to have Mr. Gallagher respond?

jeri 9 1 CHAIRMAN RIGLER: I had one minor point I wanted to
2 raise. In your reply brief or supplemental brief you attach
3 a series of pages, which apparently are minutes of meetings
4 of the Justice Department.

5 MR. DAVIS: We apologize parenthetically for the
6 poor reproductions. It was a poor reproduction when we got
7 it. That was the best we could go.

8 CHAIRMAN RIGLER: Well, I go from page 7 of these
9 notes to page 9 of these notes. Previously it mentions a
10 meeting between CEI representatives and Justice Department
11 representatives and then when it comes to page 9, Mr. Goldberg
12 is in on the negotiations. I seem to be missing page 8.
13 I wonder if that is just peculiar to my copy. If so, if I
14 can have page 8.

15 MR. DAVIS: We would be happy to furnish you page
16 8. Apparently we have some copies in which it was produced
17 and some not.

18 CHAIRMAN RIGLER: All right.

19 Mr. Gallagher.
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1 MR. GALLAGHER: May it please the Panel: if
2 I may, I should like first to address myself to 10 CFR
3 2.173(C). It, on its clear reading, would require the
4 Presiding Officer to prefer charges and have the hearing
5 before another Hearing Officer.

6 The language in my question is quite patent,
7 before any person is suspended, or the disjunctive,
8 barred from participation.

9 It contemplates something a good deal less
10 than suspension in its more rigorous sense, but barred
11 from the hearing, as an attorney in a proceeding
12 charges shall be preferred by the Presiding Officer
13 against such person and he shall be afforded an opportunity
14 to be heard thereon before another Presiding Officer.

15 I do not presume to understand the reason
16 for that rule.

17 It does suggest to me, however, that in the
18 course of a hearing such as this certain matters may come
19 to the attention of the panel which it is felt in wisdom
20 might be prejudicial to the panel and which the panel
21 could not set aside in considering the merits of the
22 application.

23 Be that as it may, I do not think we need look
24 behind the clear language. I think it is binding on this
25 Panel.

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1 CHAIRMAN RIGLER: Suppose -- well, we will
2 take it either way.

3 Suppose that we do elect to prefer charges
4 and suppose that another Presiding Officer upholds the
5 bringing of charges, do you have any opinion as to
6 who certifies the question if the Board is so inclined?

7 MR. GALLAGHER: Would you state that again,
8 please? Do you have an opinion --

9 CHAIRMAN RIGLER: As to how the opinion might
10 be certified?

11 MR. GALLAGHER: I do not.

12 CHAIRMAN RIGLER: I might suggest to you that
13 it would be our preliminary view that it would be this
14 Board which then considered the question of certification
15 of any decision by another Presiding Officer appointed
16 pursuant to 2.713.

17 If anyone wants to address that further, I
18 would be interested in hearing it.

19 MR. GALLAGHER: I have no further observations
20 to make on that point.

21 CHAIRMAN RIGLER: I take it that no matter what
22 our decision, each side is going to press for certification.
23 That is the losing side would --

24 MR. GALLAGHER: This would be true in our case,
25 yes.

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1 CHAIRMAN RIGLER: I see Mr. Hart nodding
2 affirmatively for the City.

3 MR. HART: Yes.

4 MR. GALLAGHER: I will make some preliminary
5 points and I will move rapidly because the briefs obviously
6 have been studied.

7 The point is each case involving a question to
8 disqualify counsel turns on unique fact. This case is
9 no different and I take it from comments made by Mr. Davis
10 that he agrees with this.

11 It does not help us to deal in platitudes or
12 spoken generalization, but we must deal in precise facts
13 of this case.

14 I take it, too, from his comments, there is
15 no serious question but that the determinative issue in
16 determining whether there is a conflict of interest is
17 whether there is a substantial relationship between the
18 matter handled by counsel for one client, with the matter
19 handled by that counsel for another client.

20 We have cited just generally two LAR
21 annotations. We saw little point in going into the facts
22 of those cases because they support generally this
23 proposition. Some of the cases finding that there was
24 such a substantial relationship and disqualifying counsel,
25 others finding there was no such substantial relationship

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1 and refusing to disqualify counsel.

2 The interesting thing, I think, which is helpful
3 to this panel is Judge Kaufman's comments in his opinion
4 in the Standard Oil Case. In that case, upon affidavits
5 by the firm, that was sought to be disqualified, that they
6 did not have any confidential information in their
7 possession, nor had access to it.

8 Affidavits which established there was in fact
9 no substantial relationship.

10 Judge Kaufman held that the burdon was on the
11 movant, by affidavits or otherwise, to show that there was
12 a substantial relationship and/or, that there was actual
13 confidential material received or that the lawyer was in
14 such a position that it must be presumed that he had access
15 to it.

16 A summary of the rule is found in 44 Florida law
17 Review, page 130. I think it is clear.

18 I think a review of the many cases that have
19 dealt with this question are synthesized there, and in absence
20 of the discussion of Mr. Davis, I think we can assume that
21 to be the law on this matter.

22 Therefore, our inquiry on this matter is
23 preliminarily whether there is a substantial relationship
24 between the matter handled by Squire, Sanders & Dempsey before
25 this Panel, with its antitrust implications, and the matter

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1 or matters handled by Squire, Sanders & Dempsey for the City,
2 and more particularly for the municipal light plant.

3 We find in the brief very little or no reference,
4 except in passing, to other matters handled by Squire,
5 Sanders & Dempsey.

6 The focus is upon the three bond issues, which
7 it handled, one in 1960, one in 1963, one in 1967, and then
8 the matter of principal controversy, the bond issue of
9 1972-1973.

10 It would seem quite clearly that the bond issues
11 handled with respect to the municipal light plant, if there
12 is a substantial relationship, would be the ones that would
13 have this particular nexus.

14 Accordingly, it behooves us to examine those.

15 The principal thrust of the City's brief dealt
16 with the 1972-'73 bond issue. As respects it, we secured
17 an expensive affidavit from John Brueckel who handled that
18 matter on behalf of Squire, Sanders & Dempsey.

19 We secured and attached to our brief an
20 affidavit of Daniel O'Loughlin, also with Squire, Sanders &
21 Dempsey, and was privy to the relationships that related
22 to it.

23 We also secured an affidavit from John Lansdale
24 to obtain his knowledge with respect to the issues and the
25 relevance.

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1 Now, John Brueckel, in his affidavit, on
2 page 11, states quite clearly the function of bond counsel
3 is a somewhat unique function. It is highly technical in
4 nature. It is to assure that the constitutional and
5 statutory requirements are met, so as to assure that the
6 bond issue is a valid one and assure those who are in the
7 bond market that they are purchasing something of value.

8 CHAIRMAN RIGLER: On page 11 of that affidavit
9 I note the very first sentence on that page, he says I and
10 my firm.

11 MR. GALLAGHER: Yes. Acted solely as bond counsel
12 for the City of Cleveland.

13 CHAIRMAN RIGLER: This certainly suggests there
14 is some interplay, that Mr. Brueckel does not sit isolated
15 in an office and keep facts that come to his attention with
16 respect to the bond issue solely in his possession, but indeed
17 other members and associates of the firm were involved in a
18 collective activity.

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1 MR. GALLAGHER: I think that is probably true.
2 That he is isolated as a matter of fact, but we do not
3 in the ordinary case, one would not stand on that, because
4 I think it is presumed knowledge of one attorney in a law
5 firm, may well be knowledge of another. There are unique
6 facts in this case which, I think, do distinguish it and
7 suggest that it is somewhat different, so that we cannot
8 simply accept that as a proposition of law.

9 I think here, and this argument would deal basically
10 with the waiver and estoppel position, here when you have
11 a law firm of this magnitude, I think even though there may
12 have been potentially some fact that may have come through
13 some lawyer, if in the affidavits and the representations
14 it was established, not, well, that it was not communicated
15 to others, where, in fact, a monopoly kind of situation
16 existed and where that law firm was compelled, perhaps by
17 its own feeling of obligation to the City, as well as the
18 City's existence, then the fact that the lawyer says he did not
19 have that knowledge, that it was not passed on to other
20 members of the firm, becomes important.

21 CHAIRMAN RIGLER: I don't get that. I have read
22 Mr. Lansdale's affidavit fairly closely, and he too says,
23 and my firm in connection with his various activities, so on
24 the face of the affidavit by the members of the firm, it
25 suggests there may have been some cross-play or interplay at

1 some point along the line.

2 MR. GALLAGHER: I think in other portions of
3 the affidavits, this is very clearly stated not to be true.
4 Mr. Lansdale has represented the CEI as have several other
5 members of his firm. He has never been privy, nor has
6 he ever received nor has he ever had access to any
7 information from the Municipal Light Plant.

8 Conversely, Mr. Brueckel states in another part
9 of his affidavit, that he has acted on behalf of the City
10 as bond counsel, but he has never been privy to and never
11 acted on behalf of CEI. These have been separate and discrete
12 activities by this law firm.

13 Now, I did refer to page 11 in my comment. You
14 have read it very carefully.

15 The next sentence starts, " The role of bond counsel
16 is a highly specialized role. It is to present to the client
17 the legal intricacies, to assure technical requirements
18 are met; constitutional and statutory and other legal require-
19 ments to validate the securities involved are met.

20 "It does not require participation, or advise with
21 respect to business or political judgments which may
22 motivate public bodies represented in reaching a policy con-
23 clusions nor does it involve, advising such bodies generally
24 in legal matters, with respect to the municipal system,
25 my legal services and those of my firm have been strictly

1 limited to the services of bond counsel. This limitation was
2 observed completely in the preparation and passage of
3 Ordinance Number 2104-72."

4 Mr. Lansdale, in his affidavit, points out on page
5 3, and on page 11, the following:

6 "I am familiar with the issues presented and
7 the factual and legal problems involved in the controversies
8 between the City of Cleveland and the Cleveland Electric
9 Illuminating Company, presented in the aforesaid anti-trust
10 litigation pending in the United States District Court for
11 the northern District of Ohio and before th Nuclear
12 Regulatory Commission, and the Atomic Safety and Licensing
13 Board."

14 That is a prelude to his statement on page
15 11 of his affidavit, as follows:

16 "I do know, however, that in that representation
17 our firm in no way undertook to act for the City of
18 Cleveland in conenction with the claims which it makes and the
19 issues which it presents against the Cleveland Electric
20 Illuminating Company in the matters now pending before the
21 Nuclear Regulatory Commission and the Court for the Northern
22 District of Ohio, or with respect to any matters substantially
23 related thereto or connected therewith.

24 "Further in that representation, our firm received
25 no information from the City of Cleveland confidential or

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1 otherwise, relating to such claims or issues or any of them."

2 CHAIRMAN RIGLER: Suppose one of the issues we
3 are proceeding or have been raised in this proceeding,
4 anyway, is the financial agility of the City of Cleveland
5 to participate in power pool arrangements or exchange arrange-
6 ments or to make a reliable contribution to some sort of power
7 exchange agreement.

8 MR. GALLAGHER: I think then we would have to think
9 in terms of substantial relationship, and we would have to
10 think in terms of the uniqueness of this case and of Squire,
11 Sanders and Dempsey in this particular case. It is entirely
12 possible that that may be an issue. I think it would be
13 a tangential or peripheral one. I don't think it would be
14 positive.

15 CHAIRMAN RIGLER: Suppose the question of
16 Cleveland financial ability to participate in a power
17 exchange agreement had been raised in the nature of a
18 defense, I use that term advisedly, because we have no
19 defendant, as such, in this proceeding, but this had been
20 raised in the nature of a defense by CEI through its attorneys
21 in these proceedings.

22 In other words, CEI's lawyers interject into this
23 proceeding Cleveland's reported financial inability to
24 participate as a reliable member of a power exchange agreement.

25 MR. GALLAGHER: This would have to be, I think,

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1 examined carefully. This may well be urged. I simply
2 don't know. I am not familiar with the merits of the
3 application before you. It may well be urged, because the
4 municipalities in this day and age are on somewhat questionable
5 grounds financially.

6 I do not think CEI should be barred from raising
7 it.

8 On the other hand, if the City can come forward
9 and show any evidence which would suggest that information
10 secured by Squire, Sanders and Dempsev through these
11 prior representations was being used for that purpose, then
12 it would be improper, in my judgment. I do not think from
13 what I do know of the case, that there is the remote
14 possibility of any such evidence being adduced to suggest that
15 Squire, Sanders and Dempsey did get any such information.
16 The juxtaposition of the Brueckel affidavit and the Lansdale
17 affidavit is simply to deal with the substantial relationship
18 question.

19 Mr. Lansdale assures us in his affidavit, that there
20 is no such substantial relationship, based upon his familiarity
21 both with the matter pending before this tribunal and the
22 information which he has gleaned in the defense of this
23 particular motion.

24 Now, we get, I think, to the heart of this matter,
25 when we deal with the historical perspective, in which it

1 developed.

2 For some 65 years, Squire, Sanders and Dempsey
3 has been general counsel for CEI, general counsel in
4 no covert way, but well-known to the Bar, well-known to the
5 general business community in Ohio, well-known to law directors
6 of the City of Cleveland, over those years. Acting as
7 outside general counsel, it has acted in all respects as
8 such.

9 This has meant it has dealt with anti-trust matters,
10 it has the business interest of the CEI close to its heart,
11 that there was no limitation, in fact, upon its responsibility
12 to CEI, and the legal services which it could properly
13 give to that client.

14 That this relationship was a perfectly clear
15 one ought to have been manifest to anyone when they recognize
16 that a partner of Squire, Sanders and Dempsey went over to
17 CEI and started the law department there and moved on up to the
18 presidency and became chief executive officer, and then moved
19 back to Squire, Sanders and Dempsey, when that period
20 had terminated.

21 It ought to have been perfectly clear when they
22 recognized that both Ralph Besse, the person to whom I
23 referred and Mr. Lansdale, were members of the Board of
24 Directors of that organization. It should have been a surprise
25 to no one to discover in the CEI files all sorts of memoranda

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1 from its general counsel, outside general counsel, related to
2 anti-trust matters and memoranda that relate to suggestions
3 as to how best it could handle itself, vis-a-vis any competitor
4 in the Cleveland area.

5 This should not have been something new and it
6 in fact was not anything new, as the exhibists disclose.

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1 CHAIRMAN RIGLER: I was curious about your response
2 to the privileged documents point, that the City made. They
3 say here are documents, which looks like the information
4 made available to you, you are withholding them on the ground
5 of privilege.

6 MR. GALLAGHER: The point on that, the mere fact of
7 disqualification of Mr. Lansdale of Squire, Sanders & Dempsey
8 does do away with the privilege to which the client is entitled.
9 If it's entitled to reproduction, then it continues -- it's
10 in perpetuity unless waived by the client, and it does --

11 CHAIRMAN RIGLER: Maybe I misunderstood.

12 They are saying in part, any way, are they not, that
13 these documents may reveal the nature of the relationship
14 between the City and Squire, Sanders. They may show the type
15 of information that has been made available, which in turn
16 could impact upon the issues under consideration at the NRC.

17 MR. GALLAGHER: I think our position on that,
18 Mr. Rigler, would have to be that we are prepared to acknowl-
19 edge for the purpose of this hearing that Squire, Sanders &
20 Dempsey acted in all responses as outside general counsel for
21 CEI and anything within the range of how outside counsel may
22 act for its clients can be found within those documents.

23 With that concession on our part, what additional
24 material that may be found should not have relevance to this
25 hearing. We have acted as general counsel on behalf of the

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ERI 7-2 1 CEI for some 65 years, with no limitation on that. We have
2 so acted in an overt manner. This was knowledge of everyone
3 in the Cleveland community. Now, quite the contrary is true
4 with respect to the City of Cleveland and particularly
5 Municipal Plant. This becomes important because in the
6 continuum of general representation of Squire, Sanders &
7 Dempsey, of CEI, we have what are in fact occasional or
8 sporadic acts as counsel, matters of counsel, that Squire,
9 Sander & Dempsey has been engaged to do on behalf of the City.

10 The City has had its own law department. In the
11 course of the years it will occasionally go outside to law
12 firm to handle specific matters. It has gone to Squire,
13 Sanders & Dempsey on specific matters. They say there has
14 been a continuum of representation in bond work. This in
15 fact is so over the years. But the important thing is,
16 they have been individual matters and they go to them when
17 they have wanted to and when they chose, to go elsewhere they
18 have gone elsewhere, as the evidence will suggest.

19 For example, an inaccuracy in the brief of the
20 City is the representation by Jones-Day, which has not sought
21 to disqualify in the anti-trust, in Cleveland, did not do any
22 work for the Municipal Light Plant. The fact is, in 1974, it
23 was the firm in Cleveland responsible for the indenture of
24 trust, trust indenture with respect to the first mortgage
25 bonds. So it did in fact act on this specific matter but

eri 7-3 1 the City has chosen somehow in this matter to ignore that
2 fact.

3 MR. SMITH: How does Jones-Day enter into this
4 immediate consideration?

5 MR. GALLAGHER: Jones-Day is one of the firms that
6 represent Ohio Edison in the civil anti-trust action but it is
7 one of the firms in that matter that notwithstanding the City's
8 awareness that it has worked on its behalf in the past, not
9 only on the matter I referred to but other bond matters, never-
10 theless the City has chosen to let it go ahead while at the
11 same time with respect to four other Cleveland firms threat-
12 ened them that they should not proceed with representation
13 of the Duquesne Light Co.

14 And Baker, Hostetler & Patterson in Cleveland have
15 withdrawn under this kind of threat, because it has handled
16 some airport lease negotiations. Thompson, Hine & Flory has
17 voluntarily withdrawn from the representation of that company,
18 although it's work has just been in labor negotiations.

19 The Hahn, Loeser firm has withdrawn, even though
20 it's only handled litigation on behalf of the City against
21 the Ohio Department of Transportation.

22 So the Duquesne Light Co. has had 4 Cleveland
23 firms that have voluntarily withdrawn because they had some
24 connection with the City in unrelated litigation. This in
25 our judgment is a very unhappy kind of situation, where a

eri 7-4 1 city, with the power it has, can compel law firms not to
2 represent a specific client under the threat of this kind of
3 proceeding.

4 Incidentally, I might point out as respects those
5 firms, to my knowledge, they have no prior representation, at
6 least did not act as general counsel, for the Duquesne Light
7 Co. Therefore it was a matter of saying no, we chose not to
8 represent you. It was not an instance of where they would
9 withdraw from representation, after having handled general
10 representation for over half a century.

11 Now, as respects the 1972-1973 bond issue, we have
12 spent considerable time in our brief on that, because the
13 facts spell out an estoppel in our judgment or it may be a
14 waiver or it may be construed as an actual consent. It makes
15 no difference.

16 I think the facts spell out an intolerable situation
17 which equity and good conscience would prevent the City from
18 urging disqualification in this case. The City has said that
19 back in those years, Squire, Sanders & Dempsey was the one
20 firm in Cleveland or in Ohio that had competence in this area,
21 that it had almost a total monopoly, that to not have its
22 services was a serious prejudice to the City. It urges this
23 position today, as well as through the past several decades.

24 It makes this perfectly clear in its brief.

25 Now, I put to you a situation where if the City says

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1 today you are compelled to represent us, you are obligated to
2 do this. This basically was the climate in which the City
3 approached Squire, Sanders & Dempsey back in 1972. Now, it
4 may well be that the City didn't particularly care for this.
5 It may well be that Squire, Sanders & Dempsey didn't particular-
6 ly care for it. As a matter of fact, it seems perfectly clear
7 from the affidavits that the controversies between the City,
8 the light plant and CEI, were well known to everyone. The con-
9 flict was there. They were in adverse business positions.

10 They clearly were in conflict with each other. And
11 it was on a street to street basis, as well as any other
12 basis you would wish to contemplate between two adversaries.

13 Now, the City asked the Wood, Dawson firm in 1971
14 to handle a bond issue, and the Wood, Dawson firm did handle
15 it. Anticipatory notes were issued on it. It, by its own
16 terms was to expire in June of 1972. The City came to
17 Squire, Sanders & Dempsey and indicated through its then
18 law director, Hollington, that they recognized there were
19 controversies and conflicts between the CEI and the Municipal
20 Light Plant, recognized that Squire, Sanders & Dempsey was
21 general counsel for the light plant and indicated they were
22 reluctant to have Squire, Sanders & Dempsey handled this and
23 in fact asked for suggestions, through the person of Daniel
24 O'Loughlin. The suggestion was made that they see Peck-
25 Shaffer firm in Cincinnati or the Bricker firm in Columbus

eri 7-6 1 for this service.

2 You must understand at this point they already used
3 Jones-Day in 1947, they had used Squire, Sanders & Dempsey
4 in some intervening bond issues and in 1971 they had gone to
5 New York to the Woods, Dawson firm and in 1972, after they came
6 to Squire, Sanders & Dempsey for suggestions, the firm
7 suggested a competitor in Cincinnati and in Columbus and
8 they chose to go to Columbus.

9 There is an affidavit in the brief from Mr. Chadeayne
10 from the Bricker firm who looks at this and indicates its
11 complexity and suggests perhaps there are problems created by
12 being in New York and declines representation.

13 Mr. Hollington then recontacts the Squire, Sanders
14 & Dempsey firm and at that point on in this timeframe there is
15 a discussion among the partners of Squire, Sanders & Dempsey
16 with respect to this representation. Mr. Rudolph, present
17 chief executive officer of CEI was contacted and the problem
18 put to him. He recognizes, as he states in his affidavit, the
19 difficulty that the City faced and he consented to this repre-
20 sentation.

21 I think that the City's insistence and persistence
22 is clear from the face that Mr. Hollington's letter referring
23 the matter, also attached the letter of Mr. Chadeayne, who
24 points out what his problems are, in that he cannot handle it,
25 thus emphasizing to Squire, Sanders & Dempsey the predicament

1 of the City and their almost total insistence that Squire,
2 Sanders & Dempsey handle this.

3 Squire, Sanders & Dempsey was aware of the problem.
4 The City was also aware of the problems, that Mr. Davis at
5 this moment, having take office a year ago may not have himself
6 personal intimate familiarity what the knowledge of the City
7 was, two years, three and four years ago, I don't think can
8 be relevant here. He does not know. We don't have from him,
9 however, an affidavit from Hollington and others. We do have
10 an affidavit from Mr. Holton who at that time was the assis-
11 tant secretary of the Sinking Fund and had been the executive
12 commissioner of the Department of Finance and had been acting
13 director of Budget and Management for the City, certainly a
14 person knowledgeable in the operation of the City, what its
15 problems were and had full information as to the City finances.
16 information as to the City finances.

17 The City, Mr. Holton says, we knew of these contro-
18 versies, we knew of these conflicts. We never the less went
19 to Squire, Sanders & Dempsey and asked them to handle this
20 matter.

21 Mr. Hollington in his letter says the same ting.

22 CHAIRMAN RIGLER: Would you refer me to the portion
23 of the Holton Affidavit you are discussing.

24 MR. GALLACHER: Holton Affidavit, pages 2 and 3,
25 Mr. Rigler. Page 2. I will read:

ri 7-8 1 "One matter of financing with which I had to
2 concern myself from time to time was the Cleveland
3 Municipal Electric Light Plant. Because Squire,
4 Sanders & Dempsey represented the Cleveland
5 Electric Illuminating Company generally, which
6 company was in competition with the City light
7 plant, Squire, Sanders & Dempsey had advised us
8 they were reluctant to handle financing related to
9 the light plant."
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1 CHAIRMAN RIGLER: That is one of the problems that
2 I am having. I have read all of the affidavits carefully and
3 they are all consistent, I think, with this point.

4 Generally it has been referred to as controversies.
5 When I asked Mr. Davis what specific controversies were
6 pending, he advised me there were none, particularly
7 controversies in litigation.

8 Now, as I look at the affidavit, the material
9 submitted by Squire, Sanders, I find that the general state-
10 ment that, well, there is competition between CEI and the
11 City, and this could lead to problems, but there is never
12 any spelling out of what those controversies were.

13 Indeed, there is no precise identification of
14 any particular controversy.

15 MR. GALLAGHER: We attempted to do so, Mr. Rigler,
16 in an Exhibit B attached to Mr. Lansdale's affidavit, in
17 that there are approximately fifty cases, actual items in
18 litigation, which are identified.

19 These run the gamut from personal injury cases
20 where the City and CEI were co-defendants, but would have
21 adverse interests, to matters where there was a directed
22 adversary relationship.

23 CHAIRMAN RIGLER: Which are the ones —

24 MR. LANSDALE: May I be permitted to make a
25 suggestion to counsel?

1 CHAIRMAN RIGLER: Mr. Lansdale, please do.

2 MR. GALLAGHER: Mr. Lansdale advises me there
3 was a matter pending before the Federal Power Commission
4 involving antitrust matters. He suggests also that the
5 newspaper article which is attached as Exhibit A to his
6 affidavit spells out the general nature of the controversies
7 that exist, with some color, I might add, between CEI and
8 Mr. Holly is quoted by the columnist as indicating quite
9 clearly he would like to buy up Munilight Plant, the City
10 ought to get rid of it, that it was not doing a job for the
11 community, and the municipal light plant people on the other
12 hand contending that they would fight the CEI, things of this
13 nature.

14 CHAIRMAN RIGLER: The newspaper article, however,
15 is dated March of '73, and it appears to me that the actual
16 representation was commenced in July or so of '72; is that
17 correct?

18 MR. GALLAGHER: I think that's right. It is dated
19 March 22, 1973. However, it does not purport to simply state
20 facts within a few days or weeks of its publication date. It
21 deals with matters that relate back many, many years, to
22 an existing and continuing situation.

23 I might point out, too, Mr. Rigler, that in
24 Exhibit B attached to Mr. Lansdale's affidavit, there appear
25 a number of direct lawsuits between the City of Cleveland

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1 and CEI.

2 On the first page, dating back as early as 1952
3 and 1953.

4 The ones in 1961, the one for example in 1961,
5 was an application of CEI to increase rates for steam and
6 hot water service in the City of Cleveland. It was a
7 controversy between the City of Cleveland and CEI, with
8 respect to service rates.

9 MR. SMITH: Who represented CEI before the FPC
10 on the interconnection controversy?

11 MR. LANSDALE: Reid & Priest.

12 MR. GALLAGHER: On page 3 of that listing there
13 are identified two cases involving the City of Cleveland
14 versus CEI, and these -- one was a petition before the
15 Public Utilities Commission seeking reduction in rates for
16 utility services.

17 A second one was a similar type of proceeding.

18 More particularly, I have in front of me a xerox
19 copy of a Supreme Court case, CEI versus PUC, cited as
20 42 Ohio State 2nd., 403, decided in 1975. And a petition
21 for intercertiari has gone to the Supreme Court and has been
22 overruled. In that Mr. Lansdale represented the Cleveland
23 Electric Illuminating Company.

24 Mr. Hart, who is with us today, was counsel in
25 that case, on behalf of the City.

1 The application there, to increase rates, was
2 filed in October of 1971 and the City of Cleveland filed
3 a petition to intervene and that was granted. That was
4 vigorously contested on up to the Supreme Court of Ohio,
5 and on to the Supreme Court of the United States, so
6 there was a clear controversy and the issues related in that
7 case related to the charge and the effects upon the city.

8 I am also advised that the antitrust litigations
9 were added to the Federal Power Commission litigation in
10 December of 1971.

11 We have, in effect, the city saying in June of
12 1972 to Squire, Sanders & Dempsey that we are in a dilemma.
13 We need you. You must give us assistance in this matter.
14 We have Squire, Sanders & Dempsey under the circumstances
15 recognizing some delicacy in the situation, saying, well,
16 one, we need your requests to us in writing; two, not only
17 do we want it from the Law Director, but from the Director
18 of Utilities, Raymond Kadukas, who is the city official
19 charged with the responsibility for the operation of the
20 municipal light plant.

21 As you will note in the letter from Mr. Holton,
22 he specifically indicates that Mr. Kadukas concurs in Squire,
23 Sanders & Dempsey handling this particular bond issue.

24 CHAIRMAN RIGLER: That seems to float.

25 I have a lot of trouble with that letter because

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1 it doesn't really get to the heart of the matter that we are
2 considering.

3 I understand that, Squire, Sanders required a
4 request letter before they would undertake the representa-
5 tion but the request letter in turn doesn't seem to constitute
6 a waiver with respect to any conflicts which may arise down
7 the road.

8 That is one of the difficulties I am having.

9 MR. GALLAGHER: It is a difficulty we would much
10 prefer -- we would much prefer that we anticipated this
11 hearing today and prepared letters in light of this hearing.

12 You simply can't do that. We thought at that time
13 ts would amply cover the situation, particularly in light
14 of the fact that Mr. Chadeayne's letter was attached to it.
15 I think that is significant.

16 In his letter in the last three paragraph he
17 points out the fact there are really complexities, that he
18 can't help it, it is his reluctant conclusion he has to
19 return it to them.

20 They then come and urge upon Squire, Sanders &
21 Dempsey, with full knowledge, I think we have to say that,
22 with full knowledge of Squire, Sanders & Dempsey's general
23 representation of CEI --

24 CHAIRMAN RIGLER: That really is one of the things
25 that is the most difficult in this entire proceeding for me.

1 In your brief on pages 12 and 13, Point Number
2 8 made by you is that the SS&D representation was with
3 the implicit, if not the explicit -- I am troubled with
4 the degree of explicit, but measure your statement in
5 Number 8, page 12 of your brief, with Ethical Canon 5-16
6 which is quoted on page 13 of the City's brief, it goes
7 over to page 14, concentrating on the underlying portions
8 there which relate to the extent of explanation that must
9 be given to the two clients with respect to possible
10 conflicts.

11 Is my question clear?

12 MR. GALLAGHER: I think it is. I think you
13 seem to find the record somewhat bare of express statements
14 by Squire, Sanders & Dempsey to the respective parties of
15 the implications of its common representation.

16 CHAIRMAN RIGLER: Right. EC5-16 is quite
17 extensive, it seems to me, in the direction that there be
18 a full explanation of all implications for the common
19 representation.

20 There is nothing in the record that has been
21 developed to date that really sets out any meeting between
22 the two, where this is all explained.

23 Moreover, it seems to me that that particular
24 canon places the responsibility on the law firm and not
25 on the client, notwithstanding how sophisticated that client

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1 may be.

2 You make the point that this is not a layman
3 off the street, this is a city that has a fairly large law
4 department of its own. You are dealing with lawyers. That
5 is a well taken point.

6 But I am not sure that that fully takes you out
7 of the parameters of this particular canon which it seems
8 to me places the burden and the entire duty on the law firm.

9 If you could address that, I think that is very
10 important to the consideration.

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1 MR. GALLAGHER: I think if the obligation is
2 on us to spell out a verbatim disclosure, we would be hard put
3 to do it, because I think in this particular case we
4 were not dealing with laymen, that we were not dealing with
5 individuals. We were dealing with Mr. Holton, who had the
6 various functions I have indicated to you over a number of
7 years, an extremely sophisticated man. We were dealing with
8 the law director.

9 On the one hand, that was the City. But they
10 should have been completely conscious of the problem is
11 clear from the fact that they had come to us on a couple of
12 occasions with respect to this problem.

13 There was a good deal of interplay here.

14 CHAIRMAN RIGLER: Maybe we would agree with what
15 you say with respect to all of the presently pending matters
16 in controversy at the time the representation was undertaken,
17 how would that effect future proceedings in which information
18 pertinent to the opinion for the bond issue might be utilized
19 by CEI.

20 MR. GALLAGHER: Then I think we must clearly understand
21 what representation, as outside general counsel is.

22 This is a continuum of representation. There are
23 occasional matters in litigation, but more particularly, one
24 devotes his time to general counseling of anticipatory
25 matters that may not occur until many years in the future.

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1 This is the nature of anti-trust counseling.
2 Counsel as to conduct today that may have ramifications
3 and impact in the future. I think the crucial thing is,
4 by the City inducing, specifically importuning Squire,
5 Sanders and Dempsey to represent it in this matter, there
6 is, and I use the term implicit as well as explicit, because
7 I wanted to be certain that we were not bound to an express
8 consent kind of thing. I don't know whether this is
9 estoppel, waiver or consent. It may be any one of them or
10 all three of them. I think we get down at the lowest level,
11 and we talk in terms of estoppel, I think, clearly there
12 is estoppel here. It would have been manifestly unfair
13 for the City to have Squire, Sanders and Dempsey represent
14 it in this matter to inadvertently preclude CEI from its
15 representation in a matter as significant as this, or in a
16 matter so significant as the matter before the District
17 Court in Cleveland.

18 I have nothing further, unless there are
19 further questions.

20 CHAIRMAN RIGLER: What I would like to do is
21 take a five minute recess before we hear any rebuttal from
22 the City.

23 During that time Mr. Goldberg of the NRC, a few
24 questions we might put to you before we hear again from
25 Mr. Davis, whether you agree this is a case of first

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1 impression in NRC proceedings; and, second, any thoughts
2 you may have with respect to the method by way this
3 issue would be certified.

4 We will not require you to answer. You may want to
5 take just five minutes to discuss it with other members of the
6 Staff. If you have any comments, we would be happy to hear
7 them.

8 MR. GOLDBERG: Very well.

9 MR. SMITH: Are you aware, Mr. Gallagher, of
10 any area of possible compromise in this case?

11 MR. GALLAGHER: I am not.

12 (Recess.)

13 MR. DAVIS: If the Commission please, I would
14 like to come back over a few of the matters raised by
15 Mr. Gallagher. We heard something about estoppel in all this.

16 I think the question of estoppel was addressed
17 in my preliminary remarks. I think the Chairman stated,
18 as well as I could hope to myself, the dilemma of the
19 position of Squire, Sanders and Dempsey with estoppel.

20 For there to be any meaningful estoppel, there
21 has to be some kind of meaningful consent. If we look
22 solely at the 1974 episode, where the City supposedly
23 prevailed upon Squire, Sanders to help out with those
24 muni light bonds, where, in all the correspondence, was there
25 any thing like this disclosure that supposedly took place.

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1 Let's consider their problems with estoppel.
2 Here I refer to our supplementary brief and the statement
3 of Mr. Lansdale. We summarize this on page one of our
4 supplementary brief. It is found in more detail in the exhibit
5 attached to that brief. Here we have Mr. Lansdale back
6 in September of 1974 saying we do not and have never, while
7 representing one client, acted adversely to such client in the
8 interests of the other.

9 Now, in our brief, of course, we point out that
10 at just about the time or prior to having made such a
11 statement, Mr. Lansdale was doing something that we
12 considered to be totally detrimental and adverse to our
13 interests, but let's look at the statement.

14 Here is Squire, Sanders, Dempsey, piously
15 protesting in 1974, they had done nothing wrong, and there
16 was no reason for the City not to trust them.

17 Why shouldn't the City take them at face value,
18 the most largest firm in the State of Ohio?

19 They insist in this statement and in their brief
20 again they have done nothing wrong.

21 Now, we know they have done things wrong. It is
22 laughable. But for years they took this kind of position --

23 CHAIRMAN RIGLER: What is it they have done wrong?
24 You say we know they have done wrong.

25 MR. DAVIS: I will come to it in a moment. What I

1 am trying to say here, they are estopped, Squire, Sanders
2 and Dempsey are estopped in a way that I think is rather
3 interesting. They misled the City in to believing they had
4 done nothing wrong. This is the absolute antithesis of
5 disclosure. This is lulling the City inward to believe
6 there was no problem --

7 CHAIRMAN RIGLER: How did they mislead the City
8 into thinking they had done nothing wrong and identify
9 what it is you assert they had done wrong?

10 MR. DAVIS: The affidavit of Mr. Lansdale with this
11 very board on October 4, 1974, when Mr. Hjelmfelt raised
12 the problem that there may be adverse conduct there,
13 Mr. Lansdale comes back and insists in this affidavit,
14 Exhibit T of our supplementary brief, Squire, Sanders do not and
15 have never, while representing one client, acted adversely
16 to such client, adverse to the interests of the other.

17 That is an open invitation to the City to continue
18 to rely upon and trust its lawyers, Squire, Sanders
19 and Dempsey.

20 This followed, as we recently discovered, here is
21 Mr. Lansdale acting as a board member of CEI, voting to
22 deny us something. Subsequent to that, he is piously and in
23 public before this very board, insisting they done nothing
24 wrong. That is one episode.

25 Let's lookat some others. Mr. Gallagher said that

1 Mr. Brueckel insisted in his affidavit there will be no interchange
2 of information between the partners in Squire, Sanders and
3 Dempsey. It is nonsense to pretend that. It is not even a
4 necessary inquiry. It is presumed the information flows
5 from one partner to another, but we are way past the point
6 of presuming anything, because we have right in our exhibits,
7 in our main brief, and I refer not to Exhibit E, Exhibit E is
8 a letter from Mr. Lansdale to Mr. Hauser, who is internal
9 gneeral counsel -- internal counsel of CEI, and in this little
10 letter back in 1966, ten years ago, Mr. Lansdale is enclosing
11 a couple of copies of a memorandum reflecting recent
12 considerations that they have been giving to the matter of the
13 municipal electric light plant rates.

14 All right. We turn over the page and look at this
15 memorandum for the file, dated October 26, 1966, and here in
16 the first part of that, this is a memorandum composed by
17 Mr. Lansdale, in the last half dozen lines, we suggested to
18 the company that the competitive rates of the Cleveland
19 Electric Illuminating Company could probably be taken as a
20 measure of reasonableness.

21 Mr. Brueckel and I met with Mr. White and his
22 associates.

23 While here is Mr. Brueckel, the bond counsel of the
24 City of Cleveland and one of the partners, conferring with
25

1 Mr. Lansdale on matters relevant to this proceeding.

2 Right in there own darn documents!

3 How much clearer does it have to get than that?

4 Let's turn over another one.

5 One of these great intrigue and confidential
6 documents which were never shown to us, which are withheld
7 from us as priviledged documents.

8 Here is Document 7. This, by the way, gentlemen,
9 is Exhibit H of the City's first brief. Here as item,
10 document number 7, a document dated 5-21-74, composed by none
11 other than John Brueckel, addressed to John Lansdale in
12 1974.

13 What I am saying is, you don't have to guess whether
14 there has been cross-fertilization. You know, on the basis
15 of documents already before this board.

16 Let's take another one. Here is Mr. Ralph Gibbon
17 in our exhibits. I think this one is Exhibit -- I don't know
18 if it has a separate exhibit number. It immediately follows
19 a, I guess it is part of Exhibit G, and it is -- it is about
20 four or five pages back. It is a memorandum for Mr. Randall
21 Luke of the Legal Department of CEI. The authur is R. H. Gibbon.

22 Who is that? Mr. Ralph Gibbon is one of the very
23 senior partners of Squire, Sanders and Dempsey and heads, if
24 I am not mistaken, the public law section of that giant firm,
25 which is, if I understand him correctly, their largest single

1 section. He is a very senior and very important member of
2 that firm. Here he is, back in 1962, discussing -- let's dwell
3 on that for a moment more.

4 What is the real significance of Mr. Gibbon's position
5 atop the public sector section of Squire, Sanders, Dempsey?
6 He is the supervisor partner for all the public bond and
7 legal work of that whole firm done for the City of Cleveland
8 and all its other public clients.

9 He has access to, and all the important matters,
10 rise to Mr. Gibbon, yet here is Mr. Gibbon dealing with
11 an interconnect between the Cleveland Illuminating and
12 the light plant back on 1962. The burden of this memorandum
13 is to justify the Cleveland Electric Illuminating company's
14 position that they insist as a condition of giving the
15 City this vital interconnect that the City jack up the rates
16 to be the same as the Electric Illuminating Company.

17 Now, for the City at the time, and even at the
18 present, that was an impossible competitive request, because
19 the only way the City has survived is to charge slightly
20 less than the big private utility which had greater reliability
21 and somewhat better service..

22 Mr. Gibbon knew that very well. If it is common
23 knowledge that Mr. Lansdale was a member of the Board of
24 CEI, it was common knowledge the City Light Plant survived
25 for years, because of that slightly lower price structure,

1 yet here he is suggesting a legal way for the Cleveland
 2 Electric Illuminating Company to do away with it.

3 Gentlemen, you don't have to imagine how they have
 4 taken advantage of our role as client, all the information
 5 gleaned from us as clients over the years. You can see it.

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1 MR. SMITH: Mr. Davis, I still see an inconsis-
2 tency in your position. You are stating that this firm has
3 behaved sufficiently well for you to continue to use them
4 in the future as your bond counsel.

5 MR. DAVIS: No. I don't. They have behaved
6 abominably. I am prepared to state without any hesitation
7 they are guilty of serious misconduct. I am saying for us
8 to continue with them is an interim measure. We may be able to
9 find alternatives. I am not insisting 100 percent we are
10 going to continue with them, I am saying it would be terribly
11 difficult to change because they are a virtual monopoly on
12 bonds in Ohio. I don't like it. We don't like it.

13 I think it's a deplorable state of affairs, speaking
14 for myself and I am going to do everything I can to change
15 it as fast as I can. We are in an allout struggle before
16 this Commission and before the court in Cleveland. I
17 insist my client's rights be protected; if it means a incon-
18 venience for us or expense in going elsewhere for our bond
19 work, we will do it. I can't face these lawyers with 65
20 years of continuous knowledge of the City's affairs to come
21 at me with what I don't even have myself. It's impossible.

22 I could go on. I think that is the essence of it.
23 There never was a disclosure. There was the very contrary.
24 There were bias statements. there was no misconduct, no con-
25 flict of interest. Why wouldn't my predecessors in office

1 believe it? They wanted to believe it. It was convenient to
2 believe it. They offered services in Ohio nobody else could
3 offer. It's easy to see why this long abuse has persisted
4 for so long but there is no reason to see why it should per-
5 sist one moment further.

6 CHAIRMAN RIGLER: Mr. Goldberg?

7 MR. GOLDBERG: Yes, Mr. Chairman. I can say with
8 fair certainty that this is a case of first impression. To
9 the Staff's knowledge there has been no other full-fledged
10 hearing in which an attempt has been made either by a board
11 or party to disqualify an attorney or a law firm. There
12 certainly have been cases before the NRC where the board has
13 admonished attorneys for instances of misconduct but no
14 full-fledged hearings to disqualify an attorney or law firm.

15 As to your second question, I think that the board
16 certainly has the power under 10CFR2.178 to proceed as it is
17 doing so now. I think the proper course would be, if the
18 Board is convinced that the City's motion on this matter does
19 have merit, the Board under 2.173(c) can issue an order
20 barring participation by Squire, Sanders and Dempsey or sus-
21 pending them from participation in this proceeding.

22 If it does so, however, I think it's clear under
23 2.71(c)13(c) that Squire, Sanders & Dempsey would have a right
24 to a hearing before another presiding officer.

25 CHAIRMAN RIGLEY: Yes. The question is, suppose

1 the other presiding officer either agreed or disagreed with the
2 decision of this Board. It would be my tentative conclusion
3 that the other presiding officer would then refer his deci-
4 sion back to this Board and, this Board would then be the
5 certifying body.

6 MR. GOLDBERG: I would agree with that, Mr. Chairman,
7 in light of the language in 2.713(c). It speaks of the pre-
8 siding officer in a proceeding, ordering or barring partici-
9 pation and subject to that, however, to a hearing before
10 another presiding officer. I think it necessarily comes back
11 to the presiding officer who originally is presiding in the
12 proceeding to then certify it, or to rule on the motion for
13 certification.

14 Naturally there would be right of appeal from what-
15 ever the decision the original presiding officer made but I
16 think that would be the correct procedure under the rules.

17 CHAIRMAN RIGLER: Would you agree with that,
18 Mr. Davis?

19 MR. DAVIS: Well, I --

20 CHAIRMAN RIGLER: Assuming that we disagree with
21 your original point about whether this Board has the authority
22 to bypass reference to another presiding officer.

23 MR. DAVIS: Well, my position, your Honor, would be
24 that it does seem a wasteful duplication to refer it out to
25 a hearing board for any other reason than the taking of

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1 further evidence.

2 CHAIRMAN RIGLER: I agree. It seems to me at the
3 time this rule was drafted, the focus was more on a proceeding
4 in which conduct before the board was involved. Nonetheless,
5 it looks to me as if through accident or inadvertance we may
6 be stuck with a rule which is less than rational.

7 MR. DAVIS: I think maybe the Commission having the
8 power to make its own rules can exercise a certain amount of
9 discretion in how they are used or in waiving them. The
10 parties, I think, understood coming here today from Cleveland,
11 Mr. Gallagher in this instance all the way from Florida, that
12 this was going to be the argument on the merits. All it sug-
13 gested to me by going out, is perhaps a further reargument
14 before the hearing officer and then possibly a third rehearing
15 on the same material before the Commission again.

16 I just can't see that that advances any of the
17 interests here and it certainly is a further burden on the
18 time of the Commission and then the Commission windup making
19 the final decision anyway. I see no point to it.

20 MR. GOLDBERG: Mr. Chairman, I would like to state
21 the Staff has no position on the merits of this motion at
22 this point, but I think Mr. Davis' statement assumes that this
23 Board will find some kind of misconduct and will issue an
24 order barring participation. This Board may very well decide
25 it is not in agreement with the motion.

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1 CHAIRMAN RIGLER: In that case, certification
2 clearly would rest with the discretion of this Board.

3 MR. GOLDBERG: That is correct. I agree with what
4 has been stated about the probable intent of this rule.
5 However, it is the only rule that we have which goes to dis-
6 qualification. I see nothing in the rules which directly
7 deals with one party attempting to disqualify another.

8 MR. DAVIS: I think I addressed that earlier.
9 The Board as does any court is not confined to set rules which
10 may have been drafted for its own purposes but it has a
11 plenary power to conduct and control its own proceedings.
12 That goes well beyond the scope of these limiting rules.
13 These rules don't intend to be an all-encompassing set of
14 rules.

15 We are dealing with a situation that is based on
16 the cannons of ethics themselves and not necessarily only
17 this rule. Section 2.718, the power of the presiding officer,
18 I would refer to that.
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1 CHAIRMAN RIGLER: Can we have your statement
2 on the disqualification?

3 MR. GALLAGHER: I would agree this panel has
4 powers to act in areas not specifically covered, but here
5 we have an explicit rule and I would not think the powers
6 of this panel include casting aside a specific admonition
7 to act one way or the other.

8 CHAIRMAN RIGLER: That doesn't answer my question
9 on certification, however.

10 MR. GALLAGHER: I have nothing helpful on that
11 point.

12 CHAIRMAN RIGLER: Mr. Davis observes the parties
13 came here this morning anticipating that this would be
14 the argument. Do you agree with him on that?

15 MR. GALLAGHER: I think my brief is clearly
16 to the contrary, sir. I anticipated the court would either
17 feel there was no basis — and I hoped would find there was
18 no basis to prefer charges. If there were such a basis, we
19 would be advised of another hearing date.

20 CHAIRMAN RIGLER: If there is to be another
21 hearing, what would be your decision on submitting it on the
22 records of these proceedings this morning?

23 MR. GALLAGHER: I would have to consult with my
24 client first.

25 CHAIRMAN RIGLER: Suppose we agreed with you

1 that a hearing by another officer is required, then we come
2 to Mr. Davis' point that there is no reason to stretch this
3 thing out ad infinitum, that it will come to the Board for
4 certification no matter what we do.

5 MR. GALLAGHER: Can I consult with Mr. Lansdale
6 for a moment?

7 CHAIRMAN RIGLER: Yes.

8 MR. GALLAGHER: As I understand your question,
9 it is whether I would be prepared to agree that the submission
10 to another Hearing Officer, if this Panel does prefer
11 charges, would be on the briefs filed presently and we
12 would —

13 CHAIRMAN RIGLER: And the transcript of this
14 proceeding.

15 MR. GALLAGHER: And the transcript of this
16 proceeding.

17 CHAIRMAN RIGLER: So that no additional argument
18 need be taken.

19 MR. GALLAGHER: We are agreeable to that.

20 MR. DAVIS: I am not, your Honor. If we are going
21 to continue this further, a great deal more could be adduced.

22 We take the position there is an overwhelming
23 case for disqualification just on what we produced. Frankly,
24 we would like to know what is in those privileged documents
25 and we think the Commission should know.

1 If we are going to go to a Hearing Officer, we
2 would demand a disclosure of certainly the fifty documents
3 emanating directly from Squire, Sanders & Dempsey to CEI
4 which they have so far claimed as privileged, to get
5 really at the essence of just how they have used the
6 information coming to them as our lawyers for the benefit
7 of their other client.

8 There are a good many other things we would
9 like to have before a Hearing Officer, if we go that far.
10 If we are to do it solely on the record of what we have
11 today, what on earth is the point of going to another
12 Hearing Officer?

13 CHAIRMAN RIGLER: The requirement of the rules,
14 perhaps.

15 MR. DAVIS: It seems a rather empty requirement
16 if the whole matter comes back on the same record for this
17 Board again for the depositive word.

18 CHAIRMAN RIGLER: It seems to me it would give
19 us an opportunity for a substantial savings of time. One of
20 the problems we have had with your motion, irrespective of
21 the merits, is the eleventh hour filing of the motion
22 which your own correspondence indicates you had in mind
23 months and months.

24 MR. DAVIS: The eleventh hour action by the City,
25 your Honor, was necessitated only by the failure of counsel

1 to act years ago and continuously down through that whole
2 period. We were waiting for them to recognize their
3 responsibilities.

4 Now, coming back again to the question of this
5 rule, I suppose it could be either way, but I think frankly --

6 CHAIRMAN RIGLER: If you have made a full and
7 complete case this morning -- and I noticed at the end of
8 your argument you told us that while you could go further,
9 you felt you had made a persuasive case -- it just seems
10 to me there is an enormous benefit in compressing the time
11 period to the maximum extent possible.

12 We are not going to suspend the hearings -- we made
13 that clear -- while we are resolving this issue. So I would
14 think it would be in your interest, as well as in CEI's
15 interest, to get this issue resolved just as soon as possible.

16 MR. DAVIS: With that we certainly agree.

17 CHAIRMAN RIGLER: It seems to me we are offering
18 you a suggestion for at least compressing that time period
19 a little bit. I don't exactly see -- I suppose I could not
20 compel you to give up rights to make additional presentations
21 to another Presiding Officer, but if you have those arguments
22 why won't you make them to this Panel now?

23 MR. DAVIS: We don't have the documents.

24 My point is, if we are going to go to a Hearing
25 Officer, I would like access to the some fifty privileged

1 documents that were generated by Squire, Sanders & Dempsey
2 that have been identified in discovery proceedings before
3 this Commission, and I am confident will display in vast
4 detail how they have used their representation of the
5 City for the benefit of their other client.

6 CHAIRMAN RIGLER: Let me ask you a tough question
7 now, Mr. Gallagher. What would be your position with respect
8 to the Board's in camera examination of those fifty documents?

9 MR. LANSDALE: Our position, as far as we are
10 concerned, you can examine them until kingdom come. It is
11 the privilege of the client, however. I haven't consulted
12 my client.

13 CHAIRMAN RIGLER: Mr. Reynolds?

14 MR. REYNOLDS: Mr. Chairman, the question of the
15 privilege documents is now pending before the Court of
16 Appeals on a petition for review that was filed by the City.

17 The Cleveland Electric Illuminating Company has
18 intervened in that proceeding.

19 Certainly prior to a resolution by the Court of
20 Appeals, we would not — Cleveland Electric Illuminating
21 Company would not be amenable to any in camera examination
22 of the documents.

23 CHAIRMAN RIGLER: The issue in the Court of
24 Appeals, however, is whether they are produceable as possible
25 evidence or relevant to the issues in controversy in this

1 proceeding.

2 The purpose of the in camera examination which
3 we propose, or which we are discussing, would be for an
4 entirely different purpose, namely solely and restricted
5 to consideration of the disqualification motion and any
6 cross-fertilization between attorneys in the Squire,
7 Sanders firm with respect to information derived from
8 the City and information made available to CEI.

9 MR. REYNOLDS: I appreciate that. I would
10 caution only that in connection with the stipulation that
11 was entered into initially as to the privilege documents,
12 one of the concerns was that the Board not come in contact
13 with material that is privileged.

14 They might, by virtue of its review, invade
15 the influential area in their determination.

16 I think the Board is competent to keep it
17 separate.

18 We have a master who has already had an in
19 camera examination.

20 It may well be that in order to take care of
21 the procedural question that you are talking about, we could
22 go back to that master and he could, with those fifty
23 documents, undertake the same kind of in camera examination.

24 That would be a way to accomplish the objective
25 that the Board — that I believe the Board is aiming at,

1 but I would be reluctant, given the fact we have gone down
2 the road with the Special Master, License Board and the
3 Court of Appeals, to back up at this time for an in camera
4 examination by the Board.

5 MR. GALLAGHER: Mr. Rigler, this may help.
6 Appearing on this motion was my primary responsibility.
7 I have not had an opportunity to review these so-called
8 fifty documents and under the circumstances I could not
9 enter into any such stipulation.

10 MR. DAVIS: Just as a means to help expedite
11 the thing, I think the City of Cleveland is prepared to
12 waive reference -- that is, waive the precise issue of the
13 disqualification to another Hearing Officer. If SS&D and
14 CEI and others were so disposed.

15 I might also bring to the attention of the
16 Commission a statement which took place back some weeks
17 ago in which there was an indication on page 1420 of the
18 transcript from Chairman Rigler -- I think the Board should
19 hear this -- meaning the whole question I take it without
20 reference to a Special Master.

21 So I think we came here under the notion that
22 we were not going to be confronting the issue of the Special
23 Master, but I don't think that is the final word.

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1 MR. GALLAGHER: Mr. Rigler, Mr. Davis seems to take
2 contradictory positions. A moment ago I thought I heard him
3 say in effect he thought there should be another full-fledged
4 hearing with additional matters before another hearing officer.
5 Now he has taken a different position --

6 MR. DAVIS: I am saying we can go forward and
7 decide today on what has been presented before the Commission,
8 fine, but if we are going to take further steps and go sideways
9 to special matters, I would like to use that opportunity to
10 discover and present to the Commission the material in these
11 50 privileged documents.

12 CHAIRMAN RIGLER: Suppose we were to suggest that
13 both sides waive reference to another presiding officer so
14 that there could be immediate certification of the question.

15 MR. GALLAGHER: Our position, Mr. Rigler, on that
16 would be we would not so waive. We think, notwithstanding
17 comments made in this hearing to the contrary, that there is
18 merit to the rule which required a preferring of charges and
19 hearing before another hearing officer. We think there is
20 merit to that and would stand on it.

21 I am puzzled and it might be helpful, however, to
22 our thinking, to know whether the panel has some understanding
23 as to what preferring of charges means, whether it carries any
24 presumption or any weight, if it has any significance as
25 respects the second hearing officer.

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1 CHAIRMAN RIGLER: We will take 5 minutes.

2 (Recess.)

3 CHAIRMAN RIGLER: Did the parties do any conferring
4 while we were out? I take it there is nothing further to
5 report.

6 MR. GALLAGHER: Nothing.

7 CHAIRMAN RIGLER: All right, Mr. Gallagher's
8 pending question was, what procedure we might follow.

9 In the event we decide that there is no basis for
10 disqualification, the matter will end with this Board without
11 reference to another presiding officer, except we would be
12 prepared to certify that decision. In the event we decide
13 there is a basis for disqualification, I believe that 2.713
14 requires us to make a finding to that effect. If we make such
15 a finding we would issue an order which would state the
16 grounds for that finding. And that would constitute the basis
17 of a charge by which we might then take it to another presid-
18 ing officer.

19 We have heard both sides of the argument about the
20 necessity for a definite transfer of information obtained from
21 the City in connection with the '72-'73 bond issue to attorneys
22 for CEI, perhaps to CEI. One rule might be that in view of
23 the longstanding relationship between the City and Squire,
24 Sanders & Dempsey that so much information is necessarily
25 available that we can presume or infer that there has been a

ri 12-3 1 cross fertilization within the lawfirm of Squire, Sanders.

2 Another rule of law might be that we have to find
3 specific instances. I don't know which way we will go on that
4 particular issue right now. The Board will defer on that. It is
5 possible that we would agree with the contention of the City
6 that cross-fertilization is implicit in a longstanding relation-
7 ship. In that case, there would be no need for us to turn to the
8 privileged documents.

9 On the other hand, if we are wrong on that point,
10 the privileged documents might in fact bear on the issue of
11 whether any cross-fertilization did occur. If our decision is
12 to prefer charges before another presiding officer, we see no
13 reason why this board should not have in its possession the
14 full gamut and range of facts which will be presented to the
15 presiding officer.

16 Accordingly, it would be our intention to examine
17 en camera those privileged documents designated in part H of
18 the City's brief, for the sole purpose of finding whether
19 any cross-fertilization occurred between information received
20 in the bond department of Squire, Sanders and information sub-
21 sequently transmitted to attorneys assisting CEI in these
22 proceedings.

23 This is not an unusual procedure, despite our
24 preference to stay away from so-called privileged documents, it
25 is routine for courts to have to examine those documents and

ri 12-4 1 to make decision based on the reading of those documents and to
2 exclude either from evidence or from consideration matters not
3 relevant to the question under consideration.

4 So in this instance, we would adhere to our original
5 decision relating to privileged documents, so that our scrutiny
6 of these documents would not be for the purpose of looking at
7 relevant evidence in connection with the issues in controversy.
8 It would be solely for the purpose of the disqualification
9 motion. I believe somewhere in the Commission's files copies
10 of those documents are still available, so no further action
11 on behalf of the parties is necessary.

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1 CHAIRMAN RIGLER: Mr. Smith reminded me that even
2 if cross-fertilization might be found from the documents that
3 even its self may not be positive. I suppose the degree of
4 cross fertilization could be a factor.

5 Mr. Reynolds?

6 MR. REYNOLDS: Mr. Chairman. I will have to check
7 on this but I don't believe those privileged documents are
8 even in the possession of the Commission.

9 I believe they were returned, but it may be, with
10 the appeal pending, they still are in the special masters
11 possession. I have a recollection that they may have been
12 returned. I am not sure if that is the case.

13 CHAIRMAN RIGLER: You may be right. I believe
14 at the conclusion of those proceedings, we may have indicated
15 that none of the privileged documents were to be turned over
16 and the others were to be returned.

17 I assume there would be no problem in making
18 them available for the limited purpose I described.

19 MR. REYNOLDS: Well, I would like at this time to
20 reserve the right to object to that kind of a procedure and
21 it may well be that we would object, but that would be a
22 different matter.

23 CHAIRMAN RIGLER: We have references to the appeal
24 board decision upholding the privilege decision in which the
25 appeal board made quite clear that we had always independent

1 discretion to review those very documents.

2 MR. REYNOLDS: I appreciate that. I guess my
3 problem is, if documents are indeed found to be privileged,
4 I have some difficulty understanding how they can be used
5 to determine the substantive issue on any matter before
6 the Board, whether it is in connection with the anti-
7 trust litigation or in connection with the motion to
8 disqualify.

9 It seems to me if they are privileged material
10 and have been found to be privileged, then they are not
11 available for this board's determination on any substantive
12 issue.

13 As I understand the situation or the status
14 of the documents that are now in question, they have been
15 found to be privileged. That question is now pending before
16 the Court of Appeals.

17 All I am really stating now is, it may well be
18 that Cleveland Electric Illuminating Company would want to
19 raise the issue, if it should be necessary to raise it,
20 as to whether documents which have been deemed or have
21 been found to be privileged can be considered by this board
22 for any purpose on a substantive issue, whether it be the
23 anti-trust issue or the disqualifications.

24 CHAIRMAN RIGLER: And it was our reading of the
25 Appeal Board decision, that says in your estimation, in our

1 opinion, we can always call for those documents, in our
2 discretion.

3 MR. REYNOLDS: I don't want to argue the point,
4 but it is my recollection, and I will have to double check
5 it, that that would be for the purposes of determining
6 whether they are entitled to privileged status, but not
7 for the purpose of determining a substantive issue, once
8 privilege has been found.

9 Again, I would have to go back and review
10 that, but I do think there is a problem I have there, that
11 I want to reserve the right to address if it should be
12 necessary to do so, at the appropriate time.

13 CHAIRMAN RIGLER: I would not regard the issue of
14 possible disqualification as a substantive issue in terms
15 of the issues in controversy in our proceeding. That should
16 be clear.

17 MR. REYNOLDS: Right. I appreciate that.
18 I think my comments were addressed to what would be a different
19 issue, but a substantive matter, certainly, between Squire,
20 Sanders and the City.

21 That was what I meant my remarks to be addressed
22 to.

23 MR. DAVIS: That may have escaped me by my own
24 inadvertence. I was not clear who Mr. Reynolds was representing
25 here today. Maybe he could tell us for the record.

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1 MR. REYNOLDS: I am with Shaw, Pittman, Potts
2 and Trowbridge, and I represent all the applicants in the
3 NRC proceeding, including the Cleveland Electric Illuminating
4 Company.

5 MR. DAVIS: So today you are speaking for?

6 MR. REYNOLDS: My remarks were on behalf of the
7 Cleveland Electric Illuminating Company.

8 CHAIRMAN RIGLER: Thank you very much.

9 (Whereupon, at 12:43 p. m., the hearing was
10 adjourned.)
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