

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE (SPECIAL) ATOMIC SAFETY AND LICENSING BOARD



In the Matter of

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

NRC Docket Nos. 50-346A
50-500A
50-501A

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

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

NRC STAFF'S ANSWER TO THE MOTION OF SQUIRE, SANDERS
AND DEMPSEY TO DISMISS DISQUALIFICATION PROCEEDINGS

I. INTRODUCTION

On November 20, 1975, the City of Cleveland ("City") moved the Atomic Safety and Licensing Board presiding over the above-captioned antitrust proceeding to disqualify the law firm of Squire, Sanders & Dempsey ("SS&D") from participating in this proceeding as counsel for The Cleveland Electric Illuminating Company ("CEI") or any other Applicant. That motion is based on an alleged conflict of interest arising from SS&D's prior dual representation of CEI and the City and its current representation of CEI in this proceeding. A similar motion to disqualify SS&D was filed by the City in its private antitrust suit against CEI and others in the United States District Court for the Northern District of Ohio. ^{1/} On August 3, 1976, the District Court entered an order denying the latter motion. On August 26, 1976, SS&D moved this Special Board to dismiss the disqualification proceeding

^{1/} City of Cleveland v. The Cleveland Electric Illuminating Co., Civil
Action No. C75-560.

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on the ground that the doctrine of collateral estoppel required dismissal as a matter of law. For the reasons set forth below, the Staff believes that SS&D's motion to dismiss the disqualification proceeding should be granted.

II. SQUIRE, SANDERS AND DEMPSEY'S MOTION
TO DISMISS SHOULD BE GRANTED

The ultimate issue to be resolved by this disqualification proceeding is whether this Commission should suspend the law firm of SS&D from further participation as counsel in this antitrust proceeding in order to preserve the integrity of its licensing process. The Staff submits that only this Commission, exercising its own independent judgment, can make that determination. However, the Staff also believes that the concept of comity between this Commission and the federal courts deserves great deference.^{2/} Accordingly, the Staff is of the view that based upon public policy grounds, the Special Board should adopt the findings and conclusions of the District Court's opinion, which is based on a full evidentiary hearing.

^{2/} Comity is especially appropriate in this disqualification proceeding since the City's motion to suspend SS&D from further participation as counsel in this proceeding is premised on the City's belief that SS&D "[h]as failed to conform to the standards of conduct required in the courts of the United States." 10 C.F.R. §2.713(c)(2).

Based upon our reading of the District Court opinion, the Staff believes it appropriate for this Special Board to find and conclude that:

(1) SS&D's work for the City as bond counsel in 1968 was with respect to "general obligation bonds for street lighting rather than MELP mortgage revenue bonds. As such, their relationship to MELP is so attenuated as to render them irrelevant to this proceeding." ^{3/}

(2) SS&D's work for the City as bond counsel with respect to the 1972 \$9.8 million MELP bond issue was limited to drafting the bond ordinance. ^{4/} This did not give rise to potentially differing interests between the City and CEI ^{5/} and was not adverse to SS&D's adversary representation of CEI in this proceeding. ^{6/}

(3) There is no substantial relationship between the antitrust proceeding before the NRC and SS&D's services to the City on an ad hoc basis as special bond counsel. ^{7/}

(4) When the City retained SS&D as bond counsel in 1968 and 1970, it was aware of the potential for conflict implicit in SS&D's simultaneous representation of CEI and the City and the subject was openly discussed between the Law Director and the Director of Utilities. The City's insistence that SS&D act as bond counsel was with a full understanding of the impact that such insistence could have upon the ethical issues evolving

^{3/} City of Cleveland v. The Cleveland Electric Illuminating Co., Civil Action No. C75-560, Order, August 3, 1976, at 12.

^{4/} Id. at 17.

^{5/} Id. at 29.

^{6/} Id. at 40.

^{7/} Id. at 31, 40.

from the undertaking.^{8/}

(5) The City consented to SS&D's role as bond counsel for it with a full knowledge of the potential for conflict and thus waived any rights to assert an alleged conflict of interest against SS&D.^{9/}

In the Staff's view these findings sufficiently resolve the issues upon which the City's motion is based so that any further evidentiary hearings here for the most part would be duplicative and would add little to our knowledge of the facts. Based on the above findings, the Staff recommends that the Special Board dismiss the instant disqualification proceeding.

III. THE FINALITY OF THE ORDER DISMISSING THE DISQUALIFICATION PROCEEDING SHOULD BE STAYED UNTIL ALL APPEALS FROM THE U.S. DISTRICT COURT'S ORDER DENYING DISQUALIFICATION HAVE BEEN EXHAUSTED

In order to avoid the possibility of this Special Board, the Appeal Board, and eventually the Commission, basing its resolution of the ultimate disqualification issue on a district court opinion which subsequently is reversed on appeal, the Staff suggests that the Special Board order dismissal, but stay the finality of that order until all appeals from the District Court's order are exhausted. Because the NRC Rules of Practice allow only 10 days from the date of a final order for the filing of a petition for reconsideration,^{10/} staying the finality of the dismissal order

^{8/} Id. at 16-17.

^{9/} Id. at 16-17, 21-24, 40.

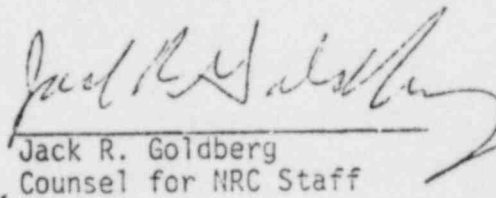
^{10/} 10 C.F.R. §2.771(a).

would allow the timely filing of a petition for reconsideration if the District Court is reversed on appeal.

IV. CONCLUSION

For the reasons discussed above, the Staff believes that SS&D's motion to dismiss should be granted, but that the finality of the order dismissing the disqualification proceeding should be stayed until all appeals from the U.S. District Court's order denying disqualification have been exhausted.

Respectfully submitted,


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Dated at Bethesda, Maryland
this 24th day of September 1976.

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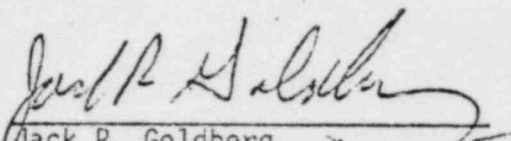
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