9/25/76

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Special Board

In The Matter Of

THE TOLEDO EDISON COMPANY and	)	Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	)	50-500A
(Davis-Besse Nuclear Power Station,	)	50-501A
Units 1, 2 and 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING	)	Docket Nos. 50-440A
COMPANY, et al.	)	50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

REPLY MEMORANDUM OF SQUIRE, SANDERS AND DEMPSEY TO
BRIEF OF THE CITY OF CLEVELAND AND ANSWER OF THE
NRC STAFF REGARDING MOTION TO DISMISS DISQUALIFICATION PROCEEDINGS

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I. THE DOCTRINE OF COLLATERAL ESTOPPEL IS APPLICABLE TO THE DISQUALIFICATION PROCEEDINGS PENDING BEFORE THE NUCLEAR REGULATORY COMMISSION

Much of the City's Brief in Opposition to SS&D's Motion to Dismiss is devoted to arguments which suggest that conditions precedent to the application of the doctrine of collateral estoppel do not exist in the proceedings at bar. The City's arguments in this regard are shallow and transparent and neither analyze the facts of the disqualification controversy at hand nor consider the fundamental principles of the law of collateral estoppel.

For example, the City urges that collateral estoppel is inapplicable to the NRC disqualification proceedings because SS&D is a "party" to neither the litigation before the NRC nor the litigation pending in the District Court for the Northern District of Ohio. While this is unquestionably true as respects the underlying antitrust litigations, it is unquestionably incorrect as respects the disqualification motions filed by the City. In each motion the City contends that its relationship with SS&D has created certain cognizable, legal rights which are possessed by the City and which preclude SS&D from representing CEI in matters in which CEI's interests are adverse to those of the City. In each motion the City requests that its rights be enforced against SS&D. In short, the City is urging that it has a right to demand the disqualification of SS&D, a right which can be raised in each of several forums.

In contesting the City's allegations in the NRC proceedings, SS&D has availed itself of these provisions of the Atomic Energy Commission's rules of practice which permit "parties" to conduct discovery (10 CFR §2.740, et seq.).

It has been required to respond to discovery requests of the City in the manner in which "parties" respond to the discovery requests of other "parties." Similarly, SS&D pursued and responded to discovery in the District Court proceedings in the manner in which "parties" are permitted and required to do pursuant to the Federal Rules of Civil Procedure. Finally, SS&D presented evidence and cross-examined the City's witnesses in the evidentiary hearing held before Judge Krupansky to determine the merits of the City's Motion to Disqualify.

In the final analysis, it is implausible for the City to urge that SS&D is not a party to disqualification proceedings investigating SS&D's professional conduct. Indeed, the City acknowledges that SS&D is a party when it serves its purposes. The parties to the disqualificacion proceedings pending before the NRC are identical to the parties to the proceedings held in the District Court.

The City also urges that collateral estoppel should not be applied in the matter at hand because its application would avoid duplicity of litigation "only in a marginal way" (City's Brief at page 3). The City suggests that irrespective or whether the disqualification proceedings are dismissed by virtue of the doctrine of collateral estoppel, litigation with respect to the underlying cause of action will continue. The City fails to recognize that similar situations will result in many circumstances in which collateral estoppel is applicable. Collateral estoppel precludes the relitigation of issues; it does not necessarily dispose of all issues in a particular lawsuit. The fact that issues in the antitrust aspect of the proceedings before the NRC remain to be determined cannot justify the refusal to collaterally estop

relitigation of issues actually determined in previous litigation between the parties.

The City describes proceedings concerning the disbarment and suspension of attorneys as "the closest applicable legal precedence" to the substantive issue in disqualification proceedings (City's Brief at page 4). The accuracy of this assertion is debatable, but its accuracy is of no importance in the matter at hand. The doctrine of collateral estoppel was not applicable in the disciplinary cases cited by the City not because the cases dealt with conduct of attorneys, but because the parties involved in the first disciplinary proceedings in each case were not the parties involved in the subsequent disciplinary proceedings. One of the fundamental conditions precedent to the applicability of collateral estoppel was not satisfied in each authority cited by the City. Had there been identity of parties in the various proceedings, previous judgments would certainly have been given collateral estoppel effect. In fact, one of the City's authorities explicitly states that this is true. Ex Parte McCue, 211 Cal. 57, 293 P.47 (1930) considered the question of whether a Montana Judgment precluded relitigation of issues in California proceedings. The Court wrote as follows at 293 P. 50:

> "The judgment of the Supreme Court of Montana in the disbarment proceeding against McCue binds all persons who were parties to said proceeding and their privies."

Additionally, the City suggests that a condition precedent to the application of the doctrine of collateral estoppel is absent in the proceedings at bar because the NRC established a cutoff date barring evidence prior to 1965, while the District Court did not establish a cutoff date. This argument is

deficient for two independent reasons. First, the factual findings of Judge Krupansky are predicated upon events which occurred after 1965, and events surrounding the 1972 MELP bond issue in particular. Secondly, and more fundamentally, if evidence warranting disqualification does not exist in an unlimited time frame, it a fortiori cannot exist in the smaller, controlled and limited NRC time frame.

Finally, the City's assertion that collateral estoppel does not apply to the pending proceedings because different evidentiary facts which will be presented to the NRC is a transparent argument. When reduced to its essential terms, the argument is simply that evidentiary rulings of Judge Krupansky were erroneous and that proper evidentiary rulings will result in a contrary factual determination. This is an argument which should be raised in the Court of Appeals, not before the NRC.

Additionally, it is an argument which attempts to thoroughly emasculate the doctrine of collateral estoppel. If, as the City suggests, collateral estoppel does not apply whenever a litigant promises new evidentiary facts, its effects could easily be avoided in all circumstances. The inquiry in a motion predicated upon collateral estoppel is not whether a finding is accurate or inaccurate, or whether an evidentiary ruling was right or wrong, but whether a particular finding was made in a previous litigation between the parties.

All conditions precedent to the application of the doctrine of collateral estoppel exist in the proceedings at bar. The parties to both disqualification proceedings are identical, factual issues have been litigated between

the parties, and the determinations of the trier of fact have been embodied in a final judgment. Collateral estoppel is applicable to the disqualification proceedings before the NRC.

II. THE JUNE 11, 1976 DECISION OF THE NRC'S ATOMIC SAFETY AND LICENSING APPEAL BOARD DOES NOT REQUIRE OR PERMIT RELITIGATION OF ISSUES DETERMINED BY THE DISTRICT COURT

The City's Brief in Opposition to SS&D's Motion to Dismiss suggests that the law applied by Judge Krupansky is so strikingly different in a number of respects from the law discussed by the Atomic Safety and Licensing Appeal Board (Appeal Board) in its June 11, 1976 decision that further litigation before the NRC is not precluded by Judge Krupansky's Order. This contention is erroneous for a number of independent reasons, as a point-by-point response to the City's arguments demonstrates.

A. Canon 9

The City argues at page 9 of its Brief that Judge Krupansky refused to consider Canon 9 of the Code of Professional Responsibility as an independent basis for disqualification, that the Appeal Board's June 11, 1976 decision stated that Canon 9 violations could result in disqualification and, therefore, that relitigation of the disqualification issue before the NRC is permissible.

Judge Krupansky's Order in no way states that Canon 9 violation cannot be a basis for disqualification. The City is also mistaken when it states that the Order limits its discussion of the applicability of Canon 9 to SS&D partner Daniel J. O'Loughlin's former employment with the City. At

page 24 of his Order, Judge Krupansky cautions against the indiscriminate and overly broad use of Canon 9 as a basis for disqualification, but he simultaneously recognizes that there are occasions when it should be and must be used as a tool for disqualification.

The truth of the matter is that Judge Krupansky found, as one of his factual determinations, that SS&D's long standing representation of CEI, its continuing representation of CEI, and its ad hoc representation of the City in bond and non-bond matters do not create an appearance of impropriety warranting disqualification of SS&D in litigation bewteen CEI and the City. The City's argument and theory of disqualification with respect to Canon 9 were considered by the Court, and the City's proof was deemed insufficient to justify the relief requested. The issue of whether SS&D's continued representation of CEI in matters adverse to the City requires disqualification pursuant to Canon 9 cannot be relitigated before the NRC. If the City is of the opinion that Judge Krupansky's factual conclusions with respect to Canon 9 are improper, its recourse is to raise the question before the Sixth Circuit Court of Appeals.

B. Substantial Relationship Test

The City's Brief urges that the substantial relationship test as set forth in Judge Krupansky's Order is significantly different from the substantial relationship test announced by the Appeal Board in its June 11, 1976 decision. The City asserts that Judge Krupansky's substantial relationship test consists of the following elements:

(1) that adverse attorney-client relationships existed;

(2) that the subject matter of those relationships was/ is substantially related; and

(3) that confidential information passed between attorneys actually or by operation of law.

The City juxtaposes Judge Krupansky's definition of the substantial relationship test with the test set forth in the Appeal Board's June 11, 1976 decision. The City's Brief argues that the Appeal Board's substantial relationship test contains only one element, which is that the subject matters of diverse attorney-client relationships must be substantially related.

Accepting for purposes of argument the accuracy of the City's analysis of Judge Krupansky's Order and the Appeal Board's decision, it remains patently clear that further litigation with respect to the substantial relationship test cannot be permitted. Judge Krupansky made specific findings with respect to each of the elements contained in his analysis of the substantial relationship test, including the specific finding that no substantial relationship exists between the antitrust controversies between the City and CEI and SS&D's representation of the City as bond counsel. At page 31 of his Order, Judge Krupansky specifically concludes:

> "The Court concludes that there exists no substantial relationship between the pending antitrust action and SS&D's services to the City on an ad hoc basis as special bond counsel attesting the veracity of proposed bond offerings."

This factual determination cannot be relitigated in any forum. It precludes the City from asserting in the NRC proceedings that the subject matters of SS&D's representations of the City and CEI are substantially related. It

has already been determined between the parties that no substantial relationship exists.

C. Disciplinary Rule 5-105(D)

At page 11, the City's Brief states that collateral estoppel is inapplicable in the case at bar because Judge Krupansky failed to apply Disciplinary Rule 5-105(D) of the Code of Professional Responsibility to the disqualification proceedings held in the District Court. Disciplinary Rule 5-105(D) provides that the disqualification of one member of the law firm requires the disqualification of all his partners and associates.

The language of Judge Krupansky's Order cited by the City in support of this argument has nothing whatsoever to do with Disciplinary Rule 5-105(D). In the passages cited by the City, Judge Krupansky is discussing the imputation to an attorney of all confidences obtained or presumed to be obtained by all other members of his law firm. The analysis contained in the excerpts is part of Judge Krupansky's discussion of the substantial relationsihp test and has absolutely no relationship to Disciplinary Rule 5-105(D).

Judge Krupansky's Order does not address the question of whether disqualification of one SS&D lawyer would cause disqualification of all SS&D lawyers. Judge Krupansky's determination, however, was that no SS&D lawyer could be disqualified, a finding which makes any discussion of Disciplinary Rule 5-105(D) and its ramifications irrelevant and immaterial to the matter at hand.

D. Waiver

The City's Brief in Opposition does not and cannot dispute that Judge Krupansky explicitly found that the City waived its right to assert any

alleged conflict of interest against SS&D. Neither does the City dispute that Judge Krupansky cites recent Federal case law in support of this finding. The City's discussion of Judge Krupansky's waiver ruling is nothing more than an argument that the Judge's finding was wrong and that it should be overturned. This is an argument to be made in the Court of Appeals, not in response to a motion predicated upon collateral estoppel.

E. Estoppel

It is imperative to note that the City's Brief in Opposition contains no reference to Judge Krupansky's finding that the City is estopped from asserting conflict of interest on the part of SS&D. The estoppel finding is an independently dispositive finding and the City has not even attempted to demonstrate its inaccuracy or its inapplicability to the pending proceedings.

III. JUDGE KRUPANSKY'S ORDER IS PREDICATED UPON A NUMBER OF SEPARATE AND INDEPENDENT FINDINGS

The findings contained in Judge Krupansky's Order are numerous and wide ranging. It is important to remember that a number of Judge Krupansky's findings are individually sufficient to preclude disqualification of SS&D. For example, his finding of waiver on the part of the City is separate and distinct from his finding of estoppel on the part of the City. Similarly, each of these findings is separate and distinct from his finding that SS&D's bond representation of the City is not substantially related to its representation of CEI in antitrust litigation with the City.

The tenor of the City's Brief suggests that Judge Krupansky's factual findings are like a house made of playing cards which necessarily topples completely when one of its components is removed. Actually, the converse is true. Judge Krupansky's findings of waiver and estoppel are each self-contained

and independently dispositive and each is preclusive of relitigation of any issue relating to disqualification. His finding that no substantial relationship exists between the subject matters of SS&D's representations of CEI and the City, when coupled with his finding that SS&D's continued representation of CEI does not create the appearance of impropriety, precludes relitigation of any question relating to the existence of a conflict. Judge Krupansky's Order bars relitigation of disqualification issues on multiple grounds.

IV. CONCLUSION

The City's arguments that the conditions precedent to the application of collateral estoppel do not exist in the case at bar are erroneous. The parties in the disqualification proceeding at hand are identical to the parties to the disqualification proceeding held in the District Court. Issues litigated in the District Court disqualification proceedings cannot be relitigated before the NRC or in any other forum.

Analysis of the Appeal Board's decision of June 11, 1976 demonstrates that relitigation of particular issues before the NRC is neither required nor permissible. When the Appeal Board's decision is juxtaposed with Judge Krupansky's factual determinations, it is conclusively established that SS&D cannot be disqualified.

Finally, Judge Krupansky's Order that SS&D not be disqualified was predicated upon a number of independent and self-sufficient factual findings. Further proceedings regarding the disqualification of SS&D are precluded on multiple grounds.

REPLY OF SQUIRE, SANDERS AND DEMPSEY TO THE
NUCLEAR REGULATORY COMMISSION STAFF'S BRIEF
REGARDING MOTION TO DISMISS DISQUALIFICATION PROCEEDINGS

I. THE DOCTRINE OF COLLATERAL ESTOPPEL NEITHER REQUIRES NOR PERMITS THE NRC SPECIAL BOARD TO MAKE INDEPENDENT FINDINGS AND CONCLUSIONS

The Brief of the NRC Staff urges that the pending disqualification proceedings be dismissed in the interest of comity between the NRC and Federal Courts. The Staff's Brief also urges the Special Board to make or adopt specific findings and conclusions upon which dismissal can be predicated. While the Staff's conclusion regarding dismissal of the disqualification proceedings is accurate, its suggested procedure for achieving dismissal is inappropriate in light of the facts and circumstances of the matter at hand.

As the authorities previously cited by SS&D amply illustrate, SS&D is entitled to dismissal of the pending disqualification proceedings as a matter of law, not simply as a matter of comity. The NRC cannot decline to accept the District Court's findings as conclusive with respect to each issue litigated between the City and SS&D.

As relitigation of issues determined in the District Court is impermissible and as the disqualification proceedings pending before the NRC must be dismissed as a matter of law, it would be improper for the Special Board to make specific factual findings and conclusions of its own as a predicate for dismissal. Similarly, it would be improper for the Special Board to adopt or endorse the District Court's findings as being accurate. The proper procedure for effecting dismissal of the pending disqualification proceedings is simply for the NRC to acknowledge that the specific findings of Judge Krupansky cannot be relitigated between the City and SS&D and to further acknowledge that

those findings are dispositive of all bases for disqualification urged by the City. The dismissal of the pending disqualification proceedings need not and should not be accompanied by any factual findings.

II. THE FINALITY OF AN ORDER DISMISSING THE NRC DISQUALIFICATION PROCEEDINGS SHOULD NOT BE STAYED PENDING APPEAL OF THE DISTRICT COURT'S ORDER

The Staff's suggestion that the NRC's order of dismissal be stayed pending appeal of the District Court's decision is similarly founded upon the argument that dismissal should be predicated upon considerations of comity. As the doctrine of collateral estoppel requires dismissal of the proceedings pending before the NRC as a matter of law, no special or deferential treatment need be given to the order. The dismissal order should be made final immediately and any appeal from the dismissal order should be pursued in accordance with the rules of procedure of the NRC.

In addition, the NRC will forfeit control over its own proceedings if the finality of the dismissal order is stayed and conditioned upon the ultimate outcome of appeals taken with respect to the District Court's decision. The City has already filed a motion requesting the District Court for an extension of time in which to transmit the record on appeal and a motion requesting the Sixth Circuit Court of Appeals for an enlargement of time in which to docket the appeal.* Further extensions of time, including extensions in which to file briefs, can be requested from the Court of Appeals. There is no guarantee that the City's appeal will be argued orally within the next six months and there is no way to estimate when an appellate decision will be announced.

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*See Appendix I. City's Motion requests enlargement to December 1, 1976 of time for docketing appeal.

A petition for certiorari or other subsequent appellate activity could prolong the appellate process for an additional year or more.

Staying the finality of the dismissal order pending the culmination of the appellate process will have a significant and highly undesirable effect upon the resolution of the underlying, substantive proceedings pending before the Licensing Board of the NRC. The substantive proceedings have transpired over a period of a number of years and are nearly concluded. To inject a potentially lengthy period of uncertainty with respect to an issue as significant as disqualification will certainly cause delay and concern to the Licensing Board as it formulates its final order. In fact, the Licensing Board may feel that it is precluded from entering a final order as long as the disqualification issue remains outstanding and unresolved.

It is important to remember that the Licensing Board recognized in its January 20, 1976 Memorandum and Order that the City's Motion to Disqualify SS&D was untimely and that its untimeliness would possibly interfere with the orderly coordination of the disqualification and substantive proceedings. Accordingly, the licensing Board ordered that inconvenience caused by the City's untimely filing should be borne by the City. The Staff's suggestion to stay the finality of the dismissal entry pending appeal would be inconvenient and unfair to all involved in the NRC proceedings save to the City. To permit uncertainty, delay, and inconvenience to inure to the benefit of the City as a consequence of the untimeliness of the City's Motion to Disqualify is contrary to the express order of the Licensing Board, contrary to the interests of efficient and fair administration of justice, and contrary to plain, common sense.

The Staff's suggestion of a stay also conflicts with guidelines established by Federal courts in considering the propriety of motions for stays pending appeal. In North Central Truck Lines, Inc. v. United States, 384 F.Supp. 1188 (W.D.Mo. 1974), for example, the court held that the criteria to be considered by a court considering a motion for a stay pending appeal were:

1) whether the moving party has made a strong showing that success on the merits of the appeal is likely;

2) whether the moving party has established that irreparable harm will result unless a stay is granted;

3) whether substantial harm will come to other interested parties if a stay is granted; and

4) whether the granting of a stay will result in harm to the public interest.*

In the case at bar, all of these considerations strongly suggest that the finality of the NRC's disqualification order should not be stayed pending appeal. No demonstration that the District Court's decision is likely to be reversed has been or can be made. In fact, an NRC evaluation of the likelihood of its reversal is prohibited by the doctrine of collateral estoppel. The NRC must accept the District Court's findings as conclusive without inquiry or comment as the whether they are correct or incorrect.

Moreover, there can be no contention that irreparable harm will inure to the City if the finality of the dismissal order is not stayed. SS&D will be

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*See also Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C.Cir. 1958); Belcher v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968); Pitcher v. Laird, 415 F.2d 743 (5th Cir. 1969); and other authorities cited in North Central Truck Lines at page 1191.

permitted to participate further in the NRC proceedings on behalf of CEI irrespective of whether the order is stayed. Substantial harm, however, may come to other interested parties and to the public interest if the dismissal order is not made final. Uncertainty with respect to the disqualification issue will cause confusion and delay, will taint the entire NRC proceedings, and will unreasonably and unnecessarily interfere with their orderly disposition. The NRC should not forfeit control over its own proceedings to the detriment of litigants and to the detriment of the public interest, especially when the City's untimely filing of its Motion to Disqualify has made more orderly disposition of the disqualification issue impossible.

III. CONCLUSION

The procedure suggested by the NRC Staff to effect dismissal of the City's Motion to Disqualify is inappropriate in the circumstances of the case at bar. Dismissal of the pending proceedings is required as a matter of law pursuant to application of the doctrine of collateral estoppel. The NRC Special Board cannot make specific findings of its own and must acknowledge that the findings of the District Court are conclusive in and dispositive of the matter at hand.

Similarly, the finality of the order of dismissal should not be stayed pending the appeal of the District Court's decision. As SS&D is entitled to dismissal as a matter of law, the order of dismissal should not be treated deferentially in any respect. Moreover, staying the finality of the dismissal order will result in substantial harm to all interested parties with the exception of the City, while refusal to stay its finality will result in no irreparable

harm whatsoever. Finally, as the City's untimely filing of its Motion to Disqualify has prevented the orderly disposition of the disqualification issue, a stay of the dismissal order's finality is unwarranted.

SS&D respectfully submits that it is entitled to a final order dismissing the pending disqualification proceedings as a matter of law and respectfully prays that its Motion to Dismiss be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing Motion of Squire, Sanders and Dempsey For Leave to File Reply Memorandum Instanter and Reply Memorandum of Squire, Sanders and Dempsey to Brief of the City of Cleveland and Answer of the NRC Staff Regarding Motion to Dismiss Disqualification Proceedings have been mailed regular United States Mail, First Class, to Vincent C. Campanella, Director of Law, City of Cleveland, 213 City Hall, Cleveland, Ohio; Robert D. Hart, First Assistant, Director of Law, City of Cleveland, 213 City Hall, Cleveland, Ohio; James B. Davis, Esq., Special Counsel, Hahn, Loeser, Freedheim, Dean and Wellman, National City - East Sixth Building, Cleveland, Ohio 44114; in addition, the original and twenty (20) copies of the foregoing were mailed to the Secretary, Nuclear Regulatory Commission, Washington, D.C. 20555, Attn: Chief, Docketing and Service Section; and one copy to each of the persons listed on the attached Service List this 29th day of September, 1976.

Michael R. Gallagher

MICHAEL R. GALLAGHER

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF CLEVELAND,

Plaintiff-Appellant,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio,
Eastern Division (Civil Action No. C75-560)

MOTION TO ENLARGE TIME
FOR DOCKETING APPEAL

Pursuant to Rule 12(a) of the Federal Rules of Appellate Procedure, appellant requests that the time for docketing the appeal noticed August 11, 1976 be enlarged to December 1, 1976. This enlargement is consented to by appellee (the only other party in the district court with an interest in this matter, which involves a motion to disqualify appellee's counsel).

Appellant and appellee are in the process of settlement negotiations which, if consummated, would render this appeal moot. These negotiations have advanced to the point of a memorandum of understanding between the appellant City's Mayor and the President of appellee the Cleveland Electric Illuminating Company, subject to authorization by the Council of the City and by appellee's board of directors. Obtaining the necessary authorizations may take some time, especially for compliance with the procedures of the Council of the City; thus, finalization of the agreement cannot be firmly anticipated prior to November 30, 1976.

Because of this likelihood of settlement and the mooting of this appeal, it would be futile and wasteful to proceed in the interim with the docketing of the appeal and the further steps that would follow thereafter.

Appellant moved the district court on September 16, 1976 to extend the time for transmitting the record, which extension would have had the automatic effect of extending the docketing date. In an order of September 21, 1976, attached hereto as Exhibit A, the district court denied the motion as moot on the ground that the record had previously been transmitted to this Court in advance of the date specified by Rule 11(a) (September 20, 1976). The district court's order

noted, however, the consent of appellee to such an extension and indicated no disagreement with the propriety of postponing appellate proceedings.

For the foregoing reasons, we request that the time for docketing the appeal be enlarged to and including December 1, 1976.

Respectfully submitted,

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