UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of

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

TRIAL MEMORANDUM OF SQUIRE, SANDERS AND DEMPSEY
AT EVIDENTIARY HEARING BEFORE
SPECIAL BOARD ON DISQUALIFICATION

I.

PROCEDURE

The hearing before the Special Board is a trial de novo for the purpose of hearing evidence on the six grounds stated in the Majority Memorandum as the basis for preferring charges. (Majority Memorandum, pp. 24-26)

A presumption of propriety attends the conduct of Squire, Sanders & Dempsey (SS&D herein). The Majority Memorandum made the following observation of the firm's conduct:

> "As we do so we note once again the high degree of professional skill which both CEI and the City impute to the Firm; the

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> Board's lack of criticism of any action undertaken by that Firm in the instant proceeding; and the Firm's own careful evaluation of its ethical responsibilities before it made its decision not to withdraw voluntarily."
> (Majority Memorandum, p. 23)

II.

SCOPE OF INQUIRY OF SPECIAL BOARD

The Special Board's inquiry is limited to the issue of disqualification in this proceeding alone and it must consider only the effect, if any, on the City's interest in the hearing before the Nuclear Regulatory Commission.

Thus, any inquiry beyond the narrow matter before the Nuclear Regulatory Commission is improper.

The Dissenting Memorandum states this proposition well when it says:

> "We should not suspend an attorney from practice before this Commission unless there is a nexus between the alleged misconduct and this proceeding."
> (Dissenting Memorandum, p. 7)

III.

THE CITY'S EFFORTS TO DISQUALIFY SS&D ARE UNFAIR AND INEQUITABLE. THIS BOARD SHOULD NOT PERMIT THE CITY TO USE THE CANONS OF ETHICS AS TOOLS TO PERVERT THEIR PURPOSE. THE CITY INITIATED THE DUAL REPRESENTATION WITH FULL KNOWLEDGE OF EXISTING CONTROVERSIES AND CONFLICTS. IT CONSENTED TO THE DUAL REPRESENTATION FOR PURPOSES OF ITS OWN. IT SHOULD BE ESTOPPED FROM ATTEMPTING TO TAKE UNFAIR ADVANTAGE OF A SITUATION WHICH IT CREATED. GREAT PREJUDICE WILL RESULT TO CEI AND THE OTHER APPLICANTS IF DISQUALIFICATION IS ALLOWED.

The evidence will disclose that the City used other counsel in Cleveland and in New York in bond matters preceding the bond ordinance of

1972. It will further show that notwithstanding protestations to the contrary it has engaged bond counsel to represent its interest currently.

The evidence will further disclose that the City Law Department and the Department of Utilities in 1972 had full knowledge of the controversies which existed at the time SS&D was engaged for the purpose of handling the 1972 Bond Ordinance. The Director of Law of the City of Cleveland in 1971 filed an action before the Federal Power Commission as well as filing the Petition to Intervene in 1971 in the proceedings before the NRC. During those years, the City well knew that SS&D represented CEI in its general matters and that a conflict existed. Notwithstanding this but probably because of the questionable legal status of outstanding anticipatory notes, the City of Cleveland through its Law Director and Director of Public Utilities solicited and importuned SS&D to come to its aid although SS&D had clearly indicated its reluctance to do so.

The evidence will further show that there was no communication of confidential information or any other client-oriented information within the Firm.

There will be no unfairness to the City but there will be great unfairness to CEI if disqualification is allowed.

All of the information that can conceivably bear upon the issues in the NRC proceeding is public information and has been provided by the City to all of the parties and to the public prior to this time.

The decided authorities support SS&D's position that disqualification should not be permitted in this case.

In Acorn Printing Company v. Brown, 385 S.W.2d 812 (C.A.Mo. 1964), the court would not permit a client to assert that there was lack of disclosure or consent to dual representation. Pertinent language in the opinion reads:

> "We consider what disclosure was required in these circumstances: The law does not require the doing of a useless thing. It was not necessary to tell McIntosh what he obviously already knew. We cannot consider him as an infant, a moron, a distraught wife in a divorce case, or an uneducated person. He was a business man; the record indicates he was a man of affairs. If we consider his affidavit as evidence, we can accept the fact that Patten did not tell him that a judgment could be rendered against him, but we cannot swallow the implication that he did not know that such judgment could be rendered.
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> As to consent: It was the movant here (through McIntosh) who went to and employed plaintiff's counsel to (also) represent Joplin Investors after the notice conveyed by the third-party petition. McIntosh does not contend that he did not know Patten then represented Acorn. We think it is a fair inference that he employed counsel for the plaintiff hoping thereby to secure an advantage by having plaintiff's attorney so 'trim his sails' in the conduct of his case in order to cast liability upon the other defendants Brown and Whitaker. We believe that it was a mistake for Patten to attempt to represent both Acorn and Joplin Investors under the circumstances shown here. We think it was poor judgment on his part but, proper or improper, the law and the Canons which condemn the representation of adverse interests is for the protection of the lambs, not the wolves; and the fact that the wolf has been caught in the lamb-fold is no reason why the lambs should be penalized.
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> We do not propose to allow our Canons of Ethics to be used as tools by those who seek to pervert their purpose. It is our conclusion that the movant is

> in no position to claim that there was either lack of disclosure or consent and that the judgment of the Circuit Court should be affirmed. So ordered."
> (385 S.W.2d at 819)

In Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corporation, Inc., et al., 357 F.Supp 905 (W.D.Pa. 1973). the court refused disqualification in the absence of a breach of confidence or trust. The court held that a litigant is entitled to counsel of his own choice. Headnote 8 reads:

> "It is not equitable to permit a situation to develop whereby a corporate officer who is also codefendant in a case with the corporation can either voluntarily or involuntarily terminate his relationship with the corporation and then turn around and cause the disqualification of corporate counsel."
> (357 F.Supp at 905)

In the opinion the following language appears:

> "On the other hand, we have the competing public policy that the litigant is entitled to counsel of his own choice. In this case, we are asked by plaintiff to disqualify defendant's counsel who have represented defendant throughout this litigation and for whose services defendant has paid."
> (Ibid. at 906)

* * *

> "Upon consideration of all the testimony taken at this hearing, we find that the testimony of Attorney Murray is true and that defense counsel are not in possession of any confidential information which could be used by them to the detriment of Salkeld. Since at the present time there appears to be no possibility of the use of confidential information supplied by a former client to the former client's detriment in this case, we will permit defense counsel to continue as attorneys for Super Athletics Corporation, Pinchock and Brodsky.
> (Ibid. at 907)

It is perfectly clear from the evidence that SS&D possesses no information that can be used to the City's detriment on the issues before the antitrust Board.

In Gottwals v. Rencher, et al., 98 F.2d 481 (S.Ct.Nev. 1940), the Supreme Court of Nevada made the following pertinent comments:

> "It is well settled that an attorney who is a recipient of the confidence of a client concerning a certain matter, is thereafter disqualified from acting for another party adversely interested in the same general matter." (Citations omitted)
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> "Most of the authorities presented by plaintiff are in accord with this general rule. The facts of this case, however, take it out of its operation. They show a waiver on the part of plaintiff of the privilege which, under the general rule, is secured to a client whose confidence has been given to an attorney. The privilege so secured may be waived." (Citations omitted)
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> "The waiver may be either express or implied. In Harvey v. Harvey, supra, it was deemed waived by conduct."
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> "Whether an attorney has violated his professional duty by changing sides in a particular case, which is the charge here, depends upon the facts of the particular case. Logan v. Logan, 97 Ind.App. 209, N.E. 32. Consequently, we have less hesitancy in holding a waiver in this case, because the likelihood that plaintiff sustained injury is extremely remote. He does not allege or show it, but stands on the bare legal proposition that he is entitled to a new trial because of Morse's former relations with him. There is nothing in any of the evidence adduced on the hearing to indicate that he was prejudiced." (98 P.2d at 487)

In Shelley v. The Maccabees, 184 F.Supp 797 (E.D.N.Y. 1960), the court held that it was unnecessary for a litigant to show that his former attorney was in possession of specific secrets or confidences but required a showing that the former attorney had acquired or had access to confidential information. Headnote 1 reads:

> "In order for defendant to prevail on motion to disqualify law firm, its members, employees, and associates from representing plaintiff, defendant was required to show not less than that law firm, its members, employees, and associates, as result of former representation of defendant, had acquired or had access to certain confidential information which was substantially related to matters involved in instant action, the use whereof would constitute breach of professional ethics. Canons of Professional Ethics, American Bar Association, canons, 6, 37."
> (184 F.Supp at 797)

The court pointed out

> "Nowhere in any of the affidavits submitted in support of the application for the order of disqualification is there reference to any confidential information allegedly obtained from "The Maccabees" by Manning, Hollinger and Shea, or its associates or employees, during their representation of it, let alone confidences which are substantially related to the issues involved in the instant action.
> (184 F.Supp. at 800)

The court found noteworthy in its opinion that the representation of former counsel was of a "limited and specific nature" (Ibid.).

In a case closely in point on the matter before this Special Board the need for a showing of disclosure of confidential information and of applying the doctrine of fairness is emphasized in Harry Rich Corporation v. Curtiss-Wright Corporation, 233 F.Supp. 252 (S.D.N.Y. 1964). Headnote 2 reads:

> "Where lawyer with disclosed retainer from client A enters into attorney-client relationship with client B and then learns that position of client B is adverse to that of client A, there must be reasonable showing that disclosures by client B to lawyer were confidential to disqualify lawyer from representing client A in specific matter."
> (233 F.Supp. at 252)

The court in referring to a hypothetical situation said:

> "In the first situation, then, the client has been fairly warned, and if he nevertheless elects to proceed, he must accept the consequences, absent a showing of other considerations of equity and fair dealing."
> (233 F.Supp. at 254)

A recent opinion of the ABA Committee on Ethics and Professional Responsibility addressed the question of estoppel. In Informal Opinion 1323 (April 21, 1975) the Committee stated on page 3:

> "On the other hand, giving credence to the statement by Lawyer X that when he was engaged by counsel for Company B to represent the latter in its dispute with Company C, he was advised by the lawyer for Company B that there would be no conflict in his continued representation of Company A, then it would be improper for counsel for Company B to urge disqualification of Lawyer X now that Company A and Company B have become embroiled in separate litigation."

The application of this Informal Opinion to the conduct of counsel for the City is apparent from the evidence in this hearing.

The case of Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, 518 F.2d 751 (C.A.2 1975), reaffirmed the substantially-related test in disqualification matters. While not factual on all fours, the principles stated in that case have precise application here. Headnotes 2, 4 and 5 read:

> "Ethical problems cannot be resolved in a vacuum and court cannot exclude realities of which fair decision would call for judicial notice."
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> "Inference that an attorney formerly associated with a firm himself receives confidential information transmitted by client to firm is rebuttable one."
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> "For purposes of determining whether counsel should be disqualified for conflict based on former representation, there is no basis for distinguishing between partners and associates on basis of title alone since both are members of bar and bound by same Code of Professional Responsibility; but there is reason to differentiate between attorneys who become heavily involved in facts of particular matter and those who enter briefly on periphery for limited and specific purpose relating solely to legal questions." (518 F.2d at 751)

The court takes the view that given the fact of transmission of confidential information from the client to the law firm, the inference that it was further transmitted to a particular lawyer in the office is a rebuttable one. Applying this principle to the matter at Bar, the City must prove (1) that confidential matter was communicated to Brueckel and (2) that Brueckel transmitted it to the CEI through Lansdale. The court further said

> "And a rational interpretation of the Code of Professional Responsibility does not call for disqualification on the basis of such an unrealistic perception of the practice of law in large firms."
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> "Thus, while this Circuit has recognized that an inference may arise that an attorney formerly associated with a firm himself received confidential

> information transmitted by a client to the firm, that inference is a rebuttable one. Laskey Bros. of W.Va., Inc. v. Warner Bros. Pictures, 224 F.2d 824, 827 (2d Cir. 1955), cert. denied, 350 U.S. 932, 76 S.Ct. 300, 100 L.Ed.2d 814 (1956); United States v. Standard Oil Co., 136 F.Supp 245, 364 (S.D.N.Y. 1955). And in Laskey, the court cautioned that: 'It will not do to make the presumption of confidential information rebuttable and then to make the standard of proof for rebuttal unattainably high. This is particularly true where, as here, the attorney must prove a negative, which is always a difficult burden to meet.'"
> (518 F.2d at 754)

The court acknowledged that the attorney was involved in informal discussions on procedural matters and engaged in research on specific points of law (Ibid. 756). The court nevertheless said:

> "To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions."
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> "There may have been matters within the firm which, had Schreiber worked on them, would have compelled disqualification here. But Schreiber denied having been entrusted with any such confidences. He was supported in this respect by the affidavits of Gurney and Baum. This was sufficient."
> (518 F.2d at 757)

IV.

AN ANALYSIS OF THE GROUNDS STATED BY THE MAJORITY OPINION SUPPORTING THE CHARGE DISCLOSES THEIR LACK OF SUBSTANCE

FIRST GROUND: "(1) That since at least 1965-66 there has been cross-fertilization within the Firm in which information supplied by the City to the Firm in connection with financing and Bond Counsel activities has been made available to other members of the firm who are engaged in the representation of CEI
* * * *"

SS&D denies that there has been cross-fertilization within the firm of confidential information supplied by the City in connection with finance or Bond Counsel activities.

SS&D does not deny that there is cross-fertilization within the firm in the sense of an exchange between lawyers and between departments of general matters of law and legal concepts. Thus, a lawyer in the corporate department may call upon a lawyer in the municipal law department for clarification of municipal law principles relating to a matter before him. So, too, lawyers in the litigation department may call upon lawyers in the probate department, the corporate department, or the municipal law department for law generally as it relates to matters before the litigating lawyer. This kind of cross-fertilization is the strength of a law firm. However, cross-fertilization of law and legal concepts is an entirely different matter from cross-fertilization of confidential information supplied by clients. The intercommunication of confidential information of clients does not occur within SS&D and did not occur as respects the City and CEI in any matters having any relationship with the Nuclear Regulatory Commission's proceedings.

To assure this Special Board that there was no exchange of "information supplied by the City to the Firm in connection with finance and Bond Counsel activities" we respectfully refer to the specific instances cited by the Majority Memorandum to support its erroneous conclusions.

A. 1963 Bond Issue

This was held by all members of the Board to be too remote to be meaningful. (Majority Memorandum, p. 11; Dissenting Memorandum, p. 6)

A fortiori, this view should obtain as to pre-1963 contacts and probably should obtain as to all pre-1965 matters generally, the Board having established a post-1965 boundary date for discovery in the absence of a showing of good cause. (Majority Memorandum, p. 11)

B. Exhibit E: Mr. Lansdale's Letter of October 27, 1966 And Memorandum of October 26, 1966 Relating to a Meeting Between Carl White and George Becher of the Cleveland Little Hoover Commission and John Lansdale and John Brueckel of Squire, Sanders and Dempsey

The evidence will disclose that the Little Hoover Commission was activated as a City of Cleveland project by Mayor Locher and President of Council Stanton late in 1965. It was composed of 24 persons commissioned by the Mayor and Council President to undertake in December 1965 a "crash" study of the City's finances and an "in-depth" study of all City operations, including the Municipal Light Plant.

Mayor Locher instructed all department heads to cooperate with the Cleveland Little Hoover Commission to assist him in solving the "short and long range problems of city government and of the city itself." The instruction was directed to every member of the City administration, including the Director of Law and members of the Law Department.

Outsiders dealing with the Little Hoover Commission were dealing with the City in cooperating with the Little Hoover Commission.

Twenty in-depth study projects were completed. Project #12 was described "Project #12 - Municipal Light - The White-Dechert-Pjevach Report - Financial Aspects of the Utilities - Division of Light and Power". Carl White and G. George Becher were two of the analysts charged with the responsibility

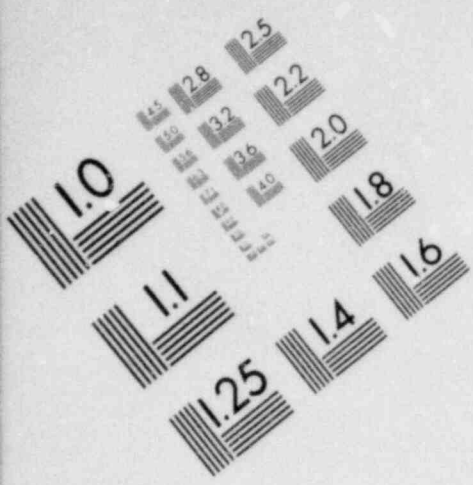
for the preparation of Project #12, The MELP Report.

An examination of the memorandum of October 26, 1966 (City's Exhibit E), which refers to the meeting of Mr. Brueckel and Mr. Lansdale with Mr. White and Mr. Becher, when taken in context refutes the charges made against SS&D in the Majority Memorandum.

The Majority Memorandum cites the conference with the Cleveland Little Hoover Commission as an instance of Mr. Lansdale directly consulting with Mr. Brueckel relating to General Fund assessments for street lights and the payment terms under the 1948 trust indenture. It finds this to be an instance "where there was specific cross-fertilization within the Firm with respect to matters jointly affecting CEI and the City in which the interests of the parties were or could have been adverse."

We find that both the Majority Memorandum and the Dissenting Memorandum misunderstood the nature of the meeting and attributed to it misconduct which, when placed in its proper context, simply did not exist. The Board may have been misled by City counsel's lack of candor in dealing with this subject.

A careful reading of City's Exhibit E discloses that Mr. Carl White headed up the Little Hoover Commission Report on the Municipal Electric Light Plant. He was appointed by the Mayor and the President of Council for this purpose. He was acting on behalf of the City. He orally identified himself to Lansdale and produced credentials to document his authority. He had been instructed to consult with Mr. Lansdale concerning the validity of any suggestion that the General Fund be relieved further by reduction in charges by the electric department to the General Fund for street lighting. Mr. White had with him a copy of opinions which Mr. Lansdale had previously furnished The Illuminating Company.



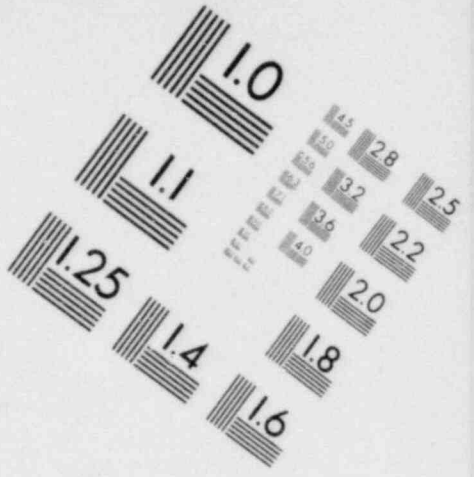
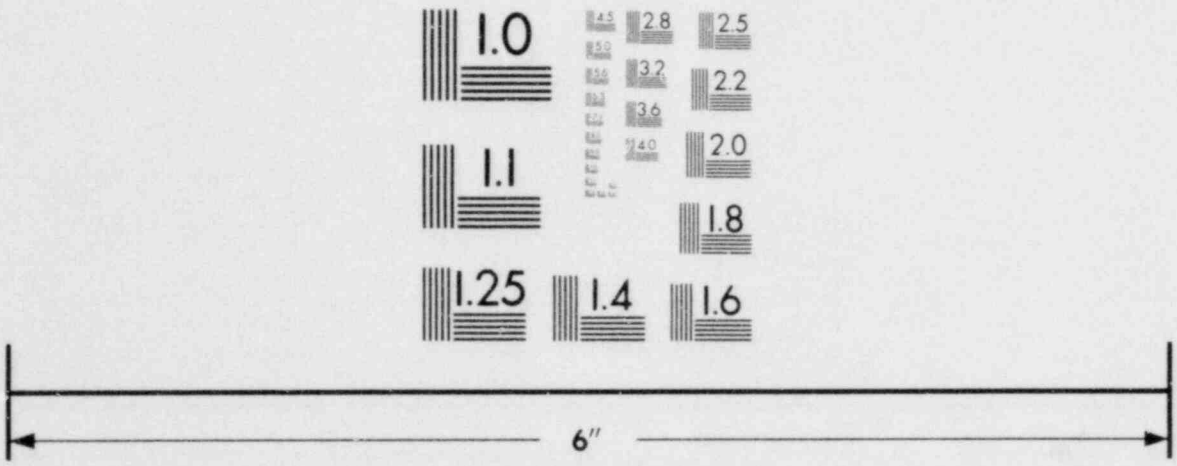


IMAGE EVALUATION
TEST TARGET (MT-3)



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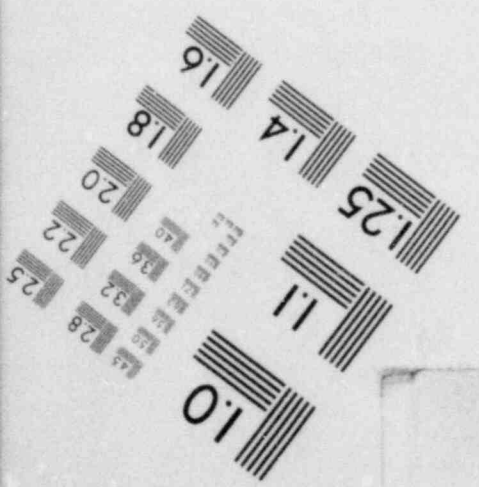

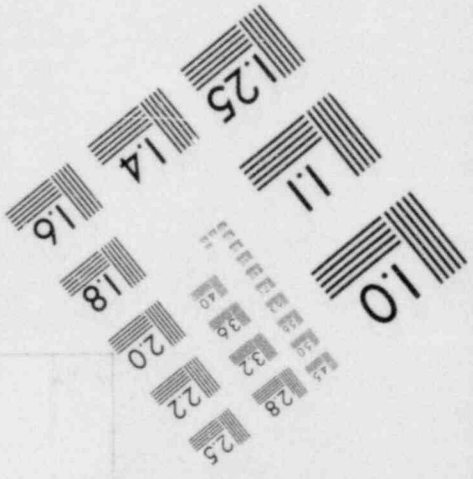

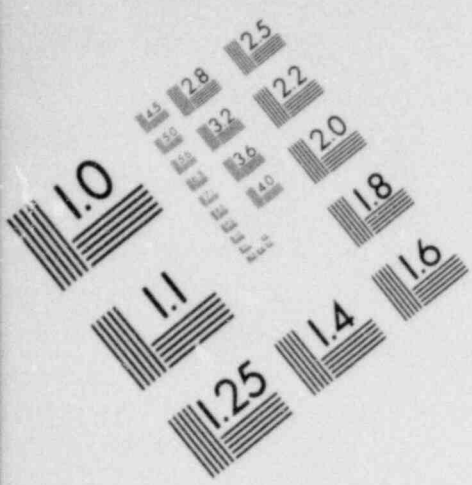

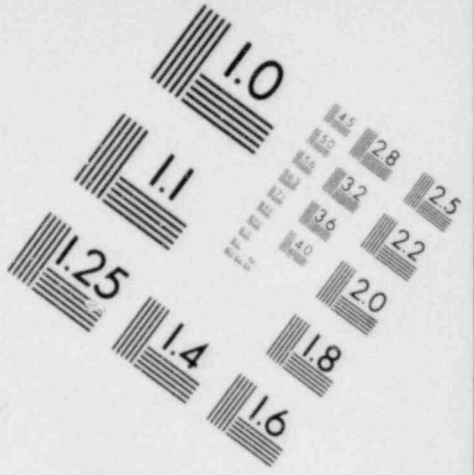

IMAGE EVALUATION
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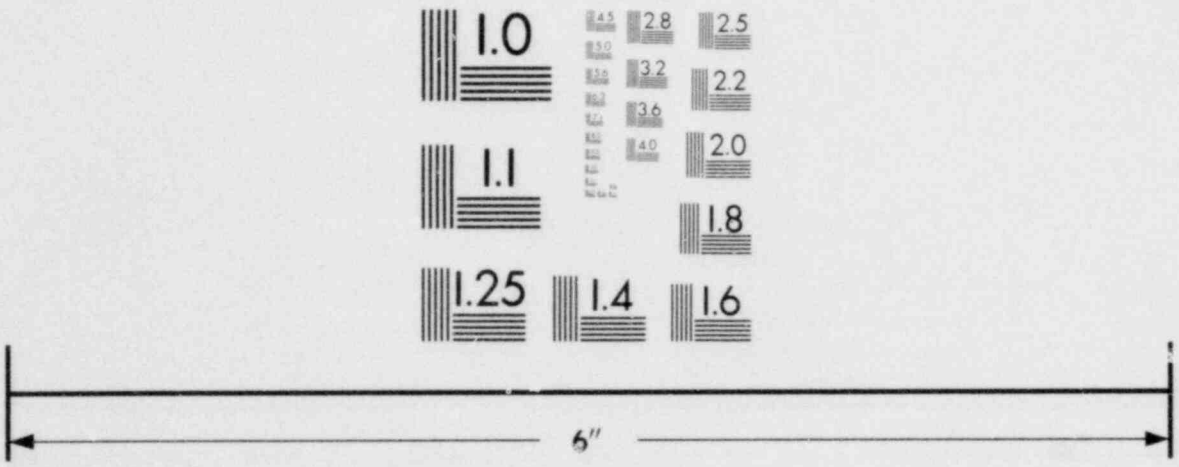

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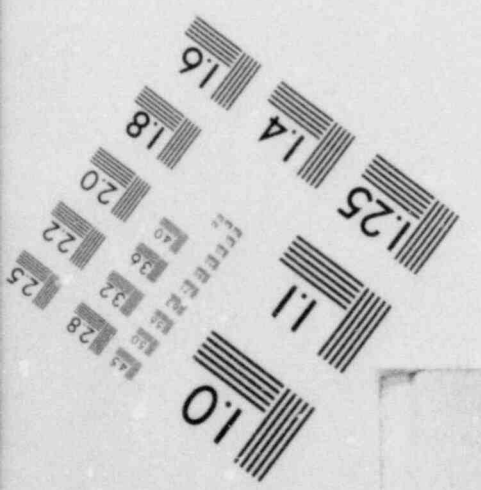

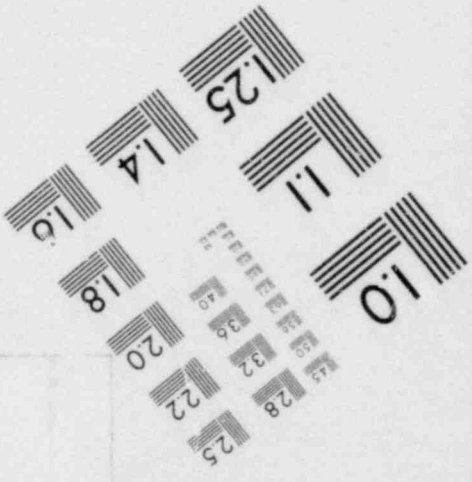

Mr. White produced also a memorandum White had prepared dated February 21, 1966 which contained his thoughts on the use of MELP funds for alleviating the critical situation of the General Fund of the City. The memorandum contained tabulations based upon studies of the cost of service for the year 1964. All of the data in those studies was produced by Mr. White for the City of Cleveland and not data produced by Mr. Brueckel, Mr. Lansdale or any member of SS&D.

Fully understood, it should be perfectly clear that Mr. Brueckel was not "participating with his Firm in acting for CEI against the competitive interest of City's electric system" nor was this a specific instance of cross-fertilization within the Firm respecting a matter where "parties were or could have been adverse." Rather, Mr. Brueckel was acting in the best interests of the City by cooperating with its Little Hoover Commission at the City's request. There was no communication of confidential information in the course of that conference.

C. Board's Exhibit A and B: Lansdale's Letter Dated June 17, 1974 and Brueckel's Memorandum Dated May 21, 1974 Re: Contracting with City and Highlighting MELP

The Majority Memorandum describes these as "crucial documents" which "demonstrate abuse of the Firm's client relationship with the City and they contradict the implications if not the direct language of the Lansdale and Brueckel Affidavits." (Majority Memorandum, p. 16)

The foregoing documents constitute the basis for the FOURTH GROUND appearing in the Majority Memorandum charging that there was an actual transmittal of material.

Even the Dissenting Memorandum was uncharitable to Mr. Brueckel ". . . Mr. Brueckel's affidavit appears to be wanting in candor . . . deceptively narrow . . . ."

These are painfully unfair accusations to Mr. Brueckel. One need only read his memorandum with care to assure himself that that accusation is unwarranted.

John Brueckel is a municipal law expert. He is a generalist in the public law department of Squire, Sanders & Dempsey. He is constantly asked questions relating to municipal law by lawyers in the corporate, probate, litigation and other departments of the firm. He and his public law department represent a majority of the cities, counties, villages, boards of education, hospital districts, regional sewer districts, state universities, community colleges, and so on, in the State of Ohio.

Mr. Brueckel's memorandum in question is an excellent illustration of the distinction between cross-fertilization within a firm with respect to law and ideas and cross-fertilization as that term may be used to suggest the transmittal of confidential information supplied by a client.

Paragraph 1 of the Brueckel memorandum (Board's Exhibit B) refers to the Cleveland Charter and identifies charter requirements. Paragraph 2 states "You may have to give attention to prior practice that has been followed in preparing contracts". But continues, "I am not familiar with the forms of these contracts." Mr. Brueckel then calls attention to the ordinances granting contracting authority to the director of the department and says: "This [the ordinances] forms the basis for the suggestions contained in the latter portion of this memorandum." Paragraph 3 states that there is

some historical evidence that the City Council wanted MELP to stand on its own two feet. This historical evidence is apparent from early newspaper articles extending back into the 1960's, from the Little Hoover Commission report and from general knowledge about the community. Indeed, it was loudly proclaimed by Council members. The memorandum concludes: "On the basis of all of the foregoing, I would suggest . . . ." The memorandum thus by its very terms is delimiting. It states precisely the basis upon which it reaches its conclusion.

The Dissenting Memorandum says that "Mr. Brueckel appears to be offering a solution in the interest of resolving a mutual problem. His purpose was probably benign." (Dissenting Memorandum, p. 14) While this is true, it is not the reason the memorandum is a proper one. The memorandum is proper because it relates to municipal law generally. It looks at the Charter of the City of Cleveland and the ordinances of the City of Cleveland. It says nothing more than any lawyer would say who practices in the City of Cleveland; and lawyer consulted on the same question with respect to Cleveland or any other city in Ohio, would approach the question identically. Nothing confidential is referred to in the memorandum nor is it inferrable that reference was made to any information obtained from the City. Certainly, there is no "nexus" or "substantial relationship" with any matter before the Nuclear Regulatory Commission.

D. Exhibit G: Lansdale's Letter dated February 18, 1965 and Gibbon's Undated Memorandum Prepared in 1962 Re: Municipal Law Questions

The Gibbon memorandum was prepared in 1962, and accordingly, is "remote" under the stated remoteness rule of the majority and dissent.

It was prepared in legal support of a proposal made by CEI to the City in a letter of CEI's President, Mr. Lindseth, to Mayor Locher dated September 17, 1962.

The question put was whether the City could legally agree to increase its rates to its customers so as to pro tanto reduce payments for its own needs and thus improve the cash position of its General Fund.

Mr. Gibbon is and was at the time of preparation of the subject memorandum an expert in municipal law. He concluded that he could not see "any legal objection to the company's proposal." In coming to this conclusion, he reviewed "[1] the outline of procedure for accomplishing such interconnection attached to Mr. Lindseth's letter, [2] the Charters of the City of Cleveland, [3] the indentures securing outstanding bonds issued by both The Illuminating Company and the City to construct their respective systems [4] the general law on the subject." (Gibbon Memorandum, p. 1)

Mr. Gibbon then raised a caveat as respects the joint ownership of property or joint operation of a business enterprise by the City as being legally improper (Ibid, pp. 2-3), a caveat about the bargaining away of a municipality's right to set rates (Ibid, p. 4) and made the observation that while there is no legal inhibition against a municipality furnishing its service free of charge, the trust indenture of 1948 contained language which required some payment. (Ibid, p. 5)

Mr. Lansdale's covering letter of February 18, 1965 refers to a letter of August 12, 1963 which he wrote to Lee Howley, then Vice-president of CEI's Legal Department. This is the letter to which Carl White referred in the

Cleveland Little Hoover Commission Report. The substance of the Gibbon memorandum thus had been fully disclosed shortly after August 12, 1963 as reflected in Lansdale's letter of February 18, 1965.

Accordingly, we find that there was a disclosure to the City of the contents of the memorandum, and moreover that the memorandum related to municipal law generally and not to client-related information. We find further that it bears no relationship to the financial condition of MELP as such. It involved no confidential material at all, and certainly none having any "nexus" or "substantial relationship" to the Nuclear Regulatory Commission proceeding. In any event the substance of the memorandum was disclosed to the City during the "remote" period (August 12, 1963 letter) and was, at all times pertinent hereto, in the possession of the City and its General Counsel, the Law Department.

SECOND GROUND: "(2) We hold that the Firm's representation gave rise to potential conflict in the event information relating to bond counsel advice became relevant to some later contest between the City and CEI. We hold that this potential for conflict should have been and was known to the Firm at the time it agreed to represent the City. We hold that the Firm should have recognized that absent express waiver by the City, the Firm might be precluded from representing CEI in any proceeding in which information supplied in the courts of the bond counseling could become relevant."
(Majority Memorandum, pp. 24-25)

The foregoing ground is premised upon several errors of fact and reason. First, it assumes confidential information passed from the City to SS&D at the time of the 1972-73 bond ordinance. Second, it refers to a "later contest between the City and CEI" and to the "potential for conflict."

The Majority Memorandum fails to note that there were existing contests between the City and CEI in 1972-73. The Federal Power Commission controversy, involving the same general issues as before the Nuclear Regulatory Commission, was in existence from May 13, 1971 at which time the case entitled City of Cleveland v. CEI, Docket No. E7631, was filed with the Federal Power Commission by Clarence L. James, Jr., then Law Director of the City of Cleveland. Moreover, the City had filed its Petition to Intervene in the instant proceedings before the Nuclear Regulatory Commission on July 6, 1971. It filed an amendment to the Petition to Intervene on July 27, 1971 and CEI filed a separate answer to the Petition to Intervene on October 14, 1971.

Thus, ignoring entirely the many pending lawsuits between the CEI the the City of Cleveland and ignoring entirely the rate litigation pending in Ohio, there were at the time the City of Cleveland approached SS&D two matters pending before two regulatory bodies including this very body which brought into contest the matters here in controversy. It is erroneous to talk of "later contests" and "potential for conflict." The facts at the time SS&D was employed were known to the Director of Utilities and to the Law Director of the City of Cleveland.

The Law Director of a municipality is its general counsel. In Cleveland he has in his law department many lawyers, a staff indeed larger than most law firms, save relatively few in larger cities. We must clearly differentiate between James B. Davis, the lawyer who with his staff is general counsel for a client, the City of Cleveland, and the City of Cleveland, his client. Mr. Davis as general counsel for the City is bound by the same professional standards of competence and by the same Code of Professional Responsibility as lawyers engaged in private practice.

Mr. Davis cannot come before this Board as if he has sprung fresh-born upon the world at the date of his appointment one year ago free of all knowledge of his predecessor general counsel and free of their moral and actual commitments.[1/] Herbert Whiting, Esquire, was Mr. Davis' immediate predecessor. He was preceded by Richard Hollington, Esquire, the attorney who employed SS&D to prepare the 1972-73 bond ordinance. The prior general counsel for the City, Clarence L. James, Jr., Esquire, filed the Petition to Intervene in the instant proceeding.

THIRD GROUND: "(3) We hold that notwithstanding a recognition by the City and the Firm that there were existing controversies between the City and CEI at the time the Firm undertook the 1972-73 bond representation for the City, there was no full disclosure of possible future effect in the event of a conflict; nor was there consent of the client (the City) that the Firm represent CEI and not the City in the event of such conflict as required by Disciplinary Rule 5-101(a).
(Majority Memorandum, p. 25)

The reasoning that applies to the SECOND GROUND applies also to this ground. Reference is made to "full disclosure" and to "possible future effect in the event of conflict." In 1972 general counsel for CEI was dealing with general counsel for the City. They were dealing at arm's length and as knowledgable attorneys in the City of Cleveland. There is no evidence to support an argument that the City's general counsel (Law Director Hollington) was either inept or naive at the time of SS&D's

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1/ Any more than can SS&D with respect to the knowledge and commitments of its former partners and associates.

employment for the 1972-73 bond ordinance. It must be presumed that he had the average intelligence and general knowledge of competent lawyers in the Cleveland legal community representing large clients and/or municipalities. Mr. Hollington was a partner in one of the largest and most prestigious firms in the City of Cleveland when appointed Law Director. He has since leaving the City returned as a partner in that firm, clear evidence of the esteem of his peers and of their estimate of his competence.

Briefly restated, the conflict was not a future one but an existing one. It existed at the time of SS&D's employment in 1972. It was a conflict created by general counsel for the City when he filed proceedings before the Federal Power Commission and the Nuclear Regulatory Commission. Any effects which sprang from the conflict were effects created and caused by general counsel for the City in insisting on the employment of SS&D when they themselves had created the conflict situation.

FOURTH GROUND: "(4) We charge that there was an actual transmittal of material relating to the Firm's advice to the City in connection with the 1972-73 bond issue to attorneys within the Firm representing the interest of CEI in adversary proceedings, specifically, the Lansdale letter to Hauser of June 17, 1974 and the attached Brueckel memorandum to Lansdale of May 21, 1974.
(Majority Memorandum, p.25)

This ground has previously been discussed under FIRST GROUND section C. supra, page 14. The ground is without merit.

FIFTH GROUND: "(5) We hold that it was CEI which introduced into these proceedings the issue of the City's financial position and thus placed before us information also relevant to advice rendered by the Firm as bond counsel for the City."

The Majority Memorandum is in error in urging this ground. The Special Board is directed to the City's Petition to Intervene filed herein on July 6, 1971, approximately 4 1/2 years before the CEI Prehearing Fact Brief was filed on December 1, 1975.

See also the "STATEMENT OF THE CITY OF CLEVELAND INFORMING APPLICANTS OF THE NATURE OF THE CASE TO BE PRESENTED" filed September 5, 1975, particularly item (7) therein, pages 13 to 19.

SIXTH GROUND: "(6) We hold that Ethical Canon 5-16 is applicable to the present situation and that it requires the suspension of the Firm in accordance with the provisions of the Commission's Rule 2-713(c)(2)."

The Majority Memorandum confuses Canons, Ethical Considerations and Disciplinary Rules. The Code of Professional Responsibility consists of nine Canons with associated Disciplinary Rules and Ethical Considerations.

Ethical Considerations are characterized as aspirational. Disciplinary Rules are characterized as establishing minimal standards of conduct. There is no such thing as a "Ethical Canon" as referred to by the Majority Memorandum in SIXTH GROUND.

If a Disciplinary Rule is breached, mandatory disciplinary action is required. This is not true with respect to an Ethical Consideration. Thus, when a Majority Memorandum finds Ethical Consideration 5-16 applicable and further finds that it "requires suspension" the Majority Memorandum misconstrues

at law.2/

Ethical Consideration 5-16 relate to Canon Five which reads: "A lawyer should exercise independent, professional judgment on behalf of a client." It should be apparent that the foregoing Canon and the quoted Ethical Consideration, is irrelevant in these proceedings. No one questions that SS&D is exercising independent, professional judgment on behalf of its client CEI. CEI certainly does not so contend, nor does the City. CEI has not suggested that SS&D's involvement with the bond ordinance of 1972 prevents it from adequately protecting CEI's interest in the NRC proceeding.

As respects the City, SS&D does not represent it before the NRC. It is represented by its own general counsel and it is fully entitled to

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2/ The Code of Professional Responsibility was adopted by the American Bar Association effective January 1, 1970. The Supreme Court of Ohio adopted the Code on October 5, 1970. In addition, the Supreme Court of Ohio adopted the following preface to the Code:

> "The Canons of this Code are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.
>
> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

have its general counsel, the Law Director, exercise independent, professional judgment on its behalf.

Ethical Consideration 5-16 is irrelevant to the proceeding before this Special Board and does not support the preferred charge.

Respectfully submitted,

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Cleveland, Ohio 44115
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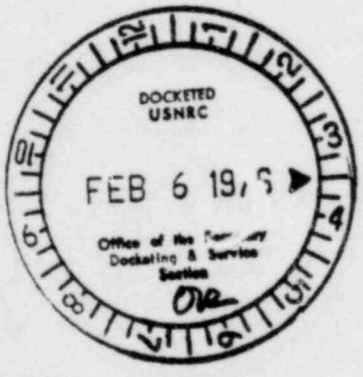
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	NRC DOCKET NOS. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING CO.,	)	50-500A
(Davis-Besse Nuclear Power Station,	)	50-501A
Units 1, 2 & 3)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING	)	NRC DOCKET NOS. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 & 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of TRIAL MEMORANDUM OF SQUIRE, SANDERS AND DEMPSEY AT EVIDENTIARY HEARING BEFORE SPECIAL BOARD ON DISQUALIFICATION, dated February 2, 1976, in the above captioned matter, have been hand delivered to James B. Davis, Esq., Director of Law, Robert D. Hart, Esq., First Assistant Director of Law, Elizabeth S. Bowers, Esq., Chairman, Edward Luton, Esq., Member, and Thomas W. Reilly, Esq., Member, this 3rd day of February 1976.



Michael R. Gallagher