UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal 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

REPLY BRIEF OF SQUIRE, SANDERS AND DEMPSEY
RE SPECIAL SECTION 2.713(c) PROCEEDING

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I.

THE CITY'S FACTUAL BACKGROUND CONTAINS MATERIAL REPRESENTATIONS OF FACT THAT (1) HAVE NO SUPPORT IN THE EVIDENCE OR (2) ARE DISTORTIONS OF A SERIOUSLY MISLEADING CHARACTER.

A disqualification proceeding is essentially an inquiry into the facts. Findings based upon misrepresentations, distortions or conclusions unsupported by evidence vitiate the proceedings. It is literally impossible to deal with every unsupported or distorted representation in the City's Brief for they are pervasive. A number of recurring instances will be singled out for careful examination.

A. The City's Brief contains a number of assertions similar to the following:

> "SS&D represented the City of Cleveland for some sixty-five continuous years until December, 1975, acting as counsel to the City in connection with general litigation, municipal finance and a variety of other matters. . . . Prior to that time [December 1975], numerous SS&D lawyers worked on many phases of City legal matters dealing with the issues of these proceedings." (City's Appeal Brief p. iv; see also pp. vi, 7, 10, 13, 16)
>
> ". . . SS&D have represented the City on virtually all its financial affairs, including MELP bond financing for 65 years." (Ibid., p. 21)

It serves the City's purposes to cloud the distinction between the City and MELP. While true that SS&D has handled bond matters for the City for approximately 65 years and in recent years has handled urban renewal matters as well, and true that within the last half dozen years

it has handled occasional litigation matters, usually in a specialized area and never involving MELP, it is not true that SS&D has represented MELP for 65 years, nor is it true that it has handled litigation, finances or a variety of other matters for MELP.

During the 65 year period the City adverts to, it has been represented by its own Law Department which has a civil branch ranging from 25 to 35 lawyers. The Law Department at all pertinent times has acted both as the City's outside counsel and as its house counsel. It has routinely handled all of the City's litigation, except in very recent years in limited specialized matters. It has advised the various departments of the City, and indeed has acted in every respect as general counsel for the City. It has, acting also as general counsel and when the circumstances warranted, referred specialized matters to outside counsel engaging those firms for their expertise on an ad hoc basis.

SS&D has over the years developed a public law department with special expertise as bond counsel. A majority of the political subdivisions in Ohio use its services for bond issues. Cleveland has done so as well, except as respects MELP bond issues. Here, the evidence discloses that both before and subsequent to the 1972 bond ordinance the City used the New York law firm of Wood, King, Dawson, Love and Sabatine and its predecessor firms, save in limited instances. For example, it engaged Jones, Day, Cockley and Reavis to prepare the 1948 bond issue and trust indenture, and SS&D to handle a number of parity issues under the 1948 trust indenture, all before the 1965 remoteness cutoff date imposed by the Licensing Board.

These instances have been already carefully identified in the record.

The evidence has been carefully detailed with respect to the 1972 Bond Ordinance and two misunderstood General Obligation issues. These particular instances are examined with care as they are crucial on the matter before the Board. Suffice it to say at this moment (1) SS&D has not represented the City in the general fashion suggested by representations contained in the City's Appeal Brief; (2) SS&D lawyers have not worked on matters on behalf of MELP "dealing with the issues of these proceedings;" (3) SS&D has not worked on "MELP bond financing for sixty-five years" or indeed at all within the 1965 remoteness cutoff date with the technical exception of the 1972 Bond Ordinance.

SS&D's limited contacts with MELP are well documented in the Record of this proceeding and it subverts justice to distort them. Neither is it helpful to conjure up contacts or relationships not supported by the evidence. If the evidence warrants disqualification, so be it; but if it does not, then disqualification should not be premised on misrepresentation, distortion, speculation and hidden "icebergs."

B. Illustrative of a second area of distortion or unsupported representation is the following:

> ". . . SS&D has a comprehensive knowledge of MELP and all its financial affairs. . .SS&D acquired detailed knowledge of MELP finances in preparing MELP bond issues in 1963; street lighting issues in 1966; a Municipal Electric Light System Bond Issue in 1968, and a MELP Revenue Bond Issue in 1972. . . . MELP's marketing strategies, its financial condition, the state of repair of its equipment, its priorities in repair and renovation and other details were open to SS&D." (City's Appeal Brief, pp. vi-vii; see also p. 24)

> "In order to prepare a $6 Million Bond Issue for MELP, SS&D necessarily had access to all relevant financial information from MELP. . . ." (City's Appeal Brief, p. 35)

Similar representations of fact are interwoven throughout the City's Appeal Brief. The conclusions are unsupported by evidence and a distortion of the true facts. Distilled to its essence, the foregoing excerpts represent to the Appeal Board that SS&D had confidential knowledge of an extensive character based upon (1) the 1963 MELP Parity Issue; (2) the 1966 General Obligation bond issue; (3) 1968 General Obligation bond issue; and (4) the 1972 Revenue Bond Ordinance which the City repeatedly misidentifies as a bond issue, although by this time it assuredly knows better. Each of these bases for SS&D's "extensive confidential knowledge", when examined, proves unsubstantial.

1. The 1963 MELP Parity Issue

The Licensing Board held this Issue to be too remote to be meaningful. (Licensing Board Majority Memorandum, p. 11; Dissenting Memorandum, p. 6) It further held that it provided no basis upon which to disqualify SS&D. Should the Appeal Board reverse this holding, SS&D will be pleased to pursue the matter further. It would appear, however, that the question is foreclosed on this appeal. In view of the Licensing Board's ruling, it was not argued before the Special Board. It will not be further argued here except to say it represented the last contact with MELP until the 1972 Bond Ordinance.

2. The 1966 General Obligation Bond Issue; and
The 1968 General Obligation Bond Issue

Each of these was a multi-purpose single bond issue advertised as a unit and sold as a unit. The full faith and credit of Cleveland was pledged for their redemption. They were not revenue bonds and the revenue or financial condition of the various municipal departments involved was not material. They are paid for by taxes levied by Cleveland.

A closer examination of the 1966 General Obligation bond issue is helpful to illustrate the point. The total bond issue was for a single sum of $20,250,000 covering a package which included funds for public improvement, City Hall improvement, port development, general sewer, sewage disposal, city's portion of paving, park and recreation improvement, airport improvement, urban renewal and freeway improvement. Since the taxing authority of the City was pledged for their payment there was no need to inquire into how it would be paid, nor was there any need to know the financial status of the municipal division or department or whether it could or did produce income to retire the multi-purpose single issue bonds. Indeed, an examination of the list discloses that for the most part the departments or divisions involved are non-revenue producing.

Every witness who has addressed himself by affidavit to these General Obligation bond issues emphasized that there was no need to know the finances of the department or division of the City involved. The evidence is unrebutted that no such information was given to any lawyer

of SS&D. For the City to urge otherwise in face of (1) total absence of evidence to support its position; and (2) certain knowledge on its part of the inaccuracy of its representations, comes distressingly close to irresponsibility.

4. The 1972 Revenue Bond Ordinance

There remains now only the 1972 Revenue Bond Ordinance from which SS&D could acquire its alleged "comprehensive knowledge of MELP and its financial affairs." Although the City refers to this as a bond issue, it is aware that SS&D's participation was limited to the preparation of the bond ordinance. Constant repetition of this as a bond issue participated in by SS&D does not make it so.

The evidence is clear: (1) that of all of the SS&D lawyers, only John B. Brueckel had engaged in the preparation of the 1972 Bond Ordinance; (2) that only the preparation of the Bond Ordinance itself was involved. The offering statement was prepared by the Wood, King, Dawson, Love and Sabatine firm in New York as were bonds and the arrangements for the issuance of them; (3) that the preparation of the bond ordinance required only a limited statement of purpose. The rest was boiler plate. The preparation of the ordinance did not require information with respect to finances or revenue nor indeed any confidential information whatsoever; (4) and that the only witnesses to the matter, John B. Brueckel and Howard J. Holton, Assistant Secretary of the Sinking Fund of the City and Brueckel's contact with the City in connection with this matter, are the only witnesses on confidentiality and both have testified unequivocally

by affidavit that the preparation of the bond ordinance required no confidential information, that Brueckel received no confidential information, that Holton gave no confidential information to Brueckel and that Holton had no confidential information to give.

It may be thus seen that when we deal with the evidence no confidential information was communicated to SS&D in any of the four transactions referred to by the City nor was there need for any such confidential information. These facts are uncontradicted. They do require the fact finder to pierce beyond the glittering generalities which make up the City's case. But the effort is worth it for it discloses a transparent attempt to besmirch the reputation and character of an outstanding law firm to secure a tactical advantage.

C. A third area where the evidence does not accord with the City's representations is illustrated by the following excerpt:

> "Until events arising out of these proceedings forced the recent break with SS&D, the City was unwilling to contemplate the added expense and serious inconvenience involved in dealing with a firm outside Cleveland."
> (City's Appeal Brief, p. vi)

The City's representation to the Appeal Board is historically inaccurate.

From the earliest records available to SS&D, the City used Peck, Schaffer and Williams of Cincinnati, Ohio and Thompson, Wood and Hoffman of New York City for MELP's October 1, 1938 $3,000,000 First Mortgage Revenue Bond Issue.

The next issue in point of time was dated October 1, 1948 and was for $7,500,000. The City used Jones, Day, Cockley and Reavis of

Cleveland, Ohio and Wood, King and Dawson of New York City, the successor to Thompson, Wood and Hoffman. Jones, Day, Cockley and Reavis drew the ordinance and the trust indenture which was the basic financing document for all subsequent issues. (The 1963 Parity Issue which the Licensing Board described to be too remote to be meaningful was under the Jones, Day, Cockley and Reavis trust indenture.)

The next revenue issue was in 1971. This was handled by the Wood, King, Dawson, Love and Sabatine firm of New York City, successor to the Wood, King and Dawson firm.

The City came to SS&D in 1972 because of its "desperate straits" but then promptly in 1973 went back to Wood, King, Dawson, Love and Sabatine for preparation of the offering statement, preparation of the bond and arrangements with respect to its issuance.

Finally, in November 1975, the City took all of its bond work to Wilke, Farr and Gallagher of New York City.

D. A fourth area where a recurring statement is at odds with the evidence, is the assertion that the City did not know of SS&D's representation of CEI in an adverse relationship with the City generally or in an antitrust context until after July 1975. For example,

> "Prior to July 1975 the City was aware only that John Lansdale of SS&D was on the Service List of this proceeding." (City's Appeal Brief, p. 14)

Mr. James B. Davis, current Law Director of the City and acting counsel for the City in this matter, has a tendency to assume his knowledge and the

City's knowledge to be coextensive; that what he does not know, either because of his brief tenure or because of his unfamiliarity with the merits of this litigation, is equally unknown to his predecessors and to other responsible officers of the City, who at pertinent times, acted as agents for the City and whose knowledge was binding on the City.

Another tendency apparent in all of the briefs and arguments made by the Law Director is found in the substitution of rhetoric for hard evidence. The hard evidence in this case consists of the affidavits filed by SS&D and the exhibits attached to the City's Motion to Disqualify. Beyond that, only admissions of counsel made against his client's interests, before the respective boards or in the briefs, are available to support the respective positions of the parties to this Motion.

What is the hard evidence respecting the above representation? There is no evidence adduced by the City as to what the City knew of John Lansdale's representation of the CEI. There is no live testimony nor is there any affidavit of an official of the City or a prior Law Director respecting what the City knew of John Lansdale's representation of CEI. Mr. Davis' remarks are not evidence in this case. If he chooses to testify, he must step down as counsel for the City as obligated by the Code of Professional Responsibility, place himself under oath and take the witness stant. His self-serving declarations are otherwise legally unacceptable. Even If Mr. Davis chose to testify, his knowledge would go back only sixteen months, hardly the 65 years he sometimes talks to or even the 11 years within the remoteness cutoff date.

Looking at the Record, what is the evidence on the City's knowledge of SS&D's representation of CEI?

(1) Mr. Davis, as a private practicing lawyer and subsequently as Law Director of the City, together with his predecessor Law Directors and the Bar of Cleveland generally, knew that SS&D had been outside general counsel for CEI representing it at all times pertinent hereto in the wide-ranging variety of matters generally associated with the responsibilities of general counsel;

(2) Mr. Davis and his predecessor Law Directors, each in his own time, knew that John I Lansdale was chief counsel for the CEI;

(3) Mr. Davis and his predecessor Law Directors knew that John Lansdale was a director of CEI; and that another SS&D partner was a director of CEI and had been president of that company during the relevant period;

(4) Each knew that in every instance where the interests of CEI and the City were adverse, SS&D represented CEI against the City and that on no occasion over the 65 year period of representation has SS&D ever represented the City of Cleveland against CEI;

(5) Documented in the City's own Exhibit U, under date of December 13, 1973, is the City's full awareness of John Lansdale's participation on behalf of CEI on the antitrust issues presently before the Nuclear Regulatory Commission. At that meeting of December 13, 1973, according to City's Exhibit U, the City's then Law Director, H. R. Whiting, was present along with Assistant Law Director, Robert Hart, who is on the City's brief before this Appeal Board and who has actively participated both on the merits and in

these disqualification proceedings.[1] Also present at that meeting were Messrs. Reuben Goldberg and David Hjemfelt, counsel for the City, and also on the briefs before the various boards including this Appeal Board. Exhibit U will also reflect that Raymond Kudukis, Director of Utilities for the City of Cleveland was to be present and the meeting was delayed half an hour awaiting his arrival. As respects the subject matter of the meeting, Exhibit U discloses that the position of the CAPCO Companies against MELP's participation was discussed and a letter presenting the CEI's counter-proposal to the City was distributed; CEI's refusal to wheel PASNY power was discussed and, in response to a question by Mr. Goldberg, CEI's position elucidated; the provision in CEI's proposal conditioning wheeling upon an agreement by the City not to sell electric energy below costs was discussed and the applicable Ohio law reviewed; discussion was had with respect to back-up arrangements and the desire to negotiate the details of these arrangements; service schedules was also included as a subject. Exhibit U reflects that CEI's proposal was not accepted by the City's representatives. Participation in other nuclear generating units was also discussed, as was the possibility of the City withdrawing its Petition to Intervene and request an antitrust review. The meeting concluded with the City stating that it would further consider CEI's proposal and get back for further discussion. The evidence thus before the Board is that the City of Cleveland, through its various officials and Law Directors over the years, knew of the nature and extent of SS&D's representation of CEI both

1/ Note that after the December 12, 1973 meeting, the City called increasingly upon SS&D. In 1973 SS&D fees were $23,348, while in 1974 they were $147,000 and for the first half of 1975 they were $107,000. (City's Appeal Brief, p. V)

generally and in the Nuclear Regulatory Commission proceeding. Lansdale says so, Brueckel says so, Holton on behalf of the City says so, O'Loughlin says so, and Mr. Jack L. White, Chairman of the SS&D Administrative Committee, says so. In the correspondence attached to the City's Motion, identified as Exhibit L, Mr. White said "our Firm, throughout the period of that proceeding, has furnished counsel to The Illuminating Company with respect to the proceedings [NRC hearings], with full knowledge of the City." (City's Appeal Brief, p. 15) Mr. Davis may deny this, but he does so as a lawyer, not a witness. His denial is not affirmative evidence and it raises no fact issue for resolution by any Board considering the Motion to Disqualify. The evidence is thus totally uncontroverted on this point.

E. As a fifth area suggesting the Appeal Board examine with a critical eye all of the facutal representations appearing in the City's Brief, is the following statement:

> "In Exhibit E attached to the City's Brief of December 1, 1975 is set forth a letter and a memorandum to the file dated October 26, 1966 composed by Mr. John Lansdale of SS&D. The very existence of this document was confidential and unknown to the City until it surfaced in NCR [sic] discovery proceedings." (City's Appeal Brief, p. 33)

Exhibit E consists of a letter of John Lansdale dated October 27, 1966 and an attached memorandum of John Lansdale dated October 26, 1966. The memorandum refers to his meeting with Mr. Carl White and Mr. G. Beecher of Ernst and Ernst who headed up the Little Hoover Commission Report on the Munitipal Electric Light plant. The nature of the Little Hoover Commission

Report, the fact that is acted as an agency for the City, is spelled out in pages 12-14 of Appendix 4 attached to SS&D's Principal Appeal Brief. An examination fo the memorandum discloses in the last paragraph thereof that "the substance of the foregoing was given to Mr. Beecher of Ernst and Ernst." In addition, Mr. Lansdale's letter indicates in the last sentence thereof that a "copy" of his memorandum was turned over to the Ernst and Ernst representatives of the Little Hoover Commission. It thus is quite clear that City's own exhibit demonstrates their representation to be false. Moreover, the reports of the Little Hoover Commission made on behalf of the City are in the City's possession with all of their supporting documents.[1/] A complete set has been in the Law Director's office since their completion in December of 1966.

F. The last misleading representation to which we will refer is the City's suggestion, by quoting from unrenumbered page 87 of the December 31, 1975 transcript of the hearing before the Licensing Board, that counsel for SS&D waived a hearing before another presiding officer. (City's Appeal Brief, p. 56) SS&D's position is expressed quite clearly on pages 93-94 of the same December 31, 1975 transcript from which we quote:

> "CHAIRMAN RIGLER: Suppose we were to suggest that both sides waive reference to another presiding officer so that there could be immediate certification of the question."
>
> "MR. GALLAGHER: Our position, Mr. Rigler, on that would be we would not so waive. We think, notwithstanding comments made in this hearing to the contrary, that there is merit to the rule which required a prefering of charges and hearing before another hearing office. We think there is merit to that and would stand on it.

1/ Detailed reference to the Lansdale Memorandum is found on pages 30 and 31 of the Little Hoover Commission Report on MELP.

> I am puzzled and it might be helpful, however, to our thinking, to know whether the panel has some understanding as to what preferring of charges means, whether it carries any presumption or any weight, if it has any significance as respects the second hearing officer."
>
> "MR. RIGLER: We will take 5 minutes."
>
> "(Recess.)"

The City further misleads in this connection by citing Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y. 1975) as holding that an attorney is not entitled to an evidentiary hearing on disciplinary charges against him. In that case, there were extensive hearings before court appointed referees but the appellants argued that they were deprived of procedural due process because the Appellate Division, which was the adjudicatory body, did not itself hear the witnesses and observe the demeanor of the parties and witne-ses. The majority held that so long as the parties were afforded a full hearing, the fact that it was before a referee rather than the court itself did not constitute a deprivation of due process. (405 F.Supp. at 195) The dissent held that even though there was a meaningful hearing before the referee, this was not enough. (In Mildner the extensive hearings resulted in a record of 850 pages and in companion Levin a ten day hearing included eleven witnesses and covered 1,000 pages of transcript. (Ibid., at 202,203) There is a detailed discussion of the requirements of a "meaningful hearing" and the meaning of an "opportunity to be heard" on page 212, et seq. of the dissent. SS&D was not afforded a meaningful hearing under either the majority view or the dissenting view of the Mildner case. Mildner holds that SS&D was deprived of procedural due process in that it did not have an opportunity adequately to present its evidence before anyone.

II.

THE MANIFEST RULE IN ALL DISQUALIFICATION CASES IS THAT EACH MUST BE DECIDED ON ITS OWN FACTS. GENERALITIES AND PLATITUDES OBSCURE THE CONTROLLING CONSIDERATIONS. A CAREFUL ANALYSIS OF THE CASES CITED BY THE CITY DISCLOSES THAT THEY DO NOT SUPPORT THE LEGAL PROPOSITIONS ASCRIBED TO THEM.

The City has cited a number of cases which it contends support the proposition that receipt of confidential information is presumed in disqualification cases. An analysis of the City's cases demonstrate (1) that the evidence adduced on hearing clearly established actual receipt of confidential information; (2) that the attorney involved worked on the identical matter under circumstances which would make it irrational to conclude he did not actually receive confidential information; or (3) the statements quoted were obiter dictum unrelated to the facts before the court.

As burdensome as it may be, the Appeal Board cannot avoid a careful reading of each of the cases cited. Only in this way can it assure itself of the rules for which they stand. The following summaries may hopefully ease the Appeal Board's burden.

In Cord v. Smith, 338 F.2d 516 (C.A. 9 1964) a suit was filed by Smith against Cord on a contract originally prepared by Attorney Young who was acting in the lawsuit as Smith's counsel and charging a breach of the contract by Cord. The court granted Cord's Motion to Disqualify on the ground that the attorney could not sue a former client on a contract which he had himself prepared.

In E.F. Hutton and Co. v. Brown, 305 F.Supp. 371, 394 (S.D. Tex. 1969) the court stated the issue to be decided in that case to be:

"Whether the attorney for two formerly joint clients [corporation and corporate officer] should be disqualified from appearing in litigation between them [suit by corporation against its corporate officer for breach of fiduciary trust] over a matter which was the subject of former representation [misconduct of officer, in SEC and Bankruptcy proceedings.]"

In Marketti v. Fitzsimmons, 373 F.Supp. 637 (W.D. Wis. 1974) the disqualified law firm advised a local union on the conduct of three strikes in 1972-73, represented the local in a number of lawsuits arising out of the strikes and also represented the local in a number of labor board proceedings concerning the strikes. It also advised the local concerning the payment of out-of-work benefits arising from the strikes and represented individual members of the local concerning the same strikes. The court found that the local members "gave confidential information to the firm in the course of individual representation." The law firm subsequently sought to represent the international union in an action for the imposition of a trusteeship on the local alleging as its basis the mishandling of out-of-work benefits and the conduct of the three strikes in 1972-73. The court held that the law firm ". . . represented the local in matters which are at issue in the present lawsuit" (p. 639), found "central to the present suit . . . the question of mishandling of strike benefits" and concluded that there was a "substantial relation between the subject matter of the former representation and the issues in this lawsuit. . . ." (p. 641)

In Consolidated Theatres v. Warner Bros. Cir. Man. Corp., 215 F.2d 920 (C.A. 2 1954) the disqualified attorney brought an antitrust suit against "Fox and the group" whom he had previously represented as a member of a "team" of his prior law firm in three antitrust suits extending over a period of eight years. His primary duties in the prior lawsuits included arranging files for presentation in court, attending trial, making notes of the trial and of general proceedings. The lawyer admitted that he had complete access to all of the records of Fox and the group. The special master found ". . . one of the main purposes of his endeavors was to get findings which would make it difficult for private litigation to be instituted against Fox and the group . . . [and] found that some files entrusted . . . included policy statements on the selling, releasing and withholding of pictures." (p. 922) Elsewhere in the opinion, the lawyer's work was described as "analyzing, digesting and organizing files containing documentary evidence, being present at interviews of employees, preparing witnesses to give testimony at trial and attending trial." (p. 923)

Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc., 130 F.Supp. 514 (S.D.N.Y. 1955) affirmed 224 F.2d 824 (C.A. 2 1955) involved efforts to disqualify two attorneys. One was disqualified upon showing that he had in fact obtained confidential information and that he had solicited suits against his former client as well. The court refused to disqualify the second attorney because there had been no proof that he had acquired confidential information, the court stating:

> "There has been no evidence presented that Mr. Malkan acquired such confidential information, and the burden would be upon the defendants to assert or offer proof that he had acquired such confidential information." (130 F.Supp. at 1520)

The Second Circuit Court of Appeals affirmed the lower court refusing to disqualify Malkan "in the absence of any proof that he had acquired confidential information."

T.C. Theatre Corporation v. Warner Bros. Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y. 1953) again involved two attorneys whose disqualifications were sought. The court ordered the disqualification of the attorney who represented the adverse party on an appeal where he sought to participate in a suit against the same party seeking triple damages in which the cause of action was pleaded in haec verba from the opinion and decree in the government suit and relied upon the same conspiracy which the government had established. On the other hand, the court refused to disqualify a second attorney, although it was argued by the movant that it must be presumed that the second attorney had received confidential information because of his prior relationship. The court held that it was unwilling to draw such an inference on the record, stating:

> "The Court is not required to indulge in any presumption that Cooke has divulged confidences reposed in him by his former clients simply because he is now engaged in a law suit with them. The presumption would be to the contrary."
>
> * * *
>
> "It is not clear why it should presume the attorneys have acted unethically." (113 F.Supp. at 272)

In Chugach Electric Ass'n. v. U.S.D.C. of D. of Alaska, 370 F.2d 441 (C.A. 9 1967) the disqualified lawyer, acting as attorney for trustee in bankruptcy of Mrak Coal Company, brought sui against Chugach alleging its violations of Federal antitrust laws caused Mrak's bankruptcy. Earlier, the lawyer had served as Chugach's general counsel and consultant. Three months after his resignation, the alleged antitrust activities began. The court felt it could not disregard the likelihood that the lawyer was beneficiary ". . . of knowledge of private matters gained in confidence. . . ."

In Hilo Metals Co. Ltd. v. Learner Company, 258 F.Supp. 23 (D. Hawaii 1966), the court found that the disqualified attorney had seen relevant confidential material and had actually investigated the subject matter of the litigation while he had been previously employed by the Antitrust Division of the Department of Justice. It was conceded that the issues on which he received confidential material and which he investigated were the same as those in the present action. He admited that he "participated in the subject matter of this action while holding public office as an attorney for the Antitrust Division. . . ." The language of this case cited by the City on page 54 of its Brief is inaccurate in its verbatum account and misleading in that it omits the introductory part of the quotation which relates to Canon 36's interdiction against the acceptance of employment "in connection with any matter which he has investigated or passed upon while in such [public] office or employ." The attorney in the Hilo case admitted not only that he had received confidential

materials, but that he had investigated the very issues and had passed upon them while in public employ.

In Cannon v. U.S. Acoustics Corp., 398 F.Supp. 209 (N.D. Ill. E.D. 1975) the disqualification of three sets of lawyers was considered in a derivative action brought against four officer-directors and two corporations to recover for alleged misappropriation of corporate funds and violations of Federal and State securities laws. The court held that one set of lawyers could not represent the corporation and its officers in the same action because the suit was a derivitive one and the interests of the corporation and the individual defendants were adverse on the fact of the Complaint.

As respects the second attorney, Giambalvo, the court refused disqualification. Giambalvo testified that he had never received confidential data or information regarding the business affairs of Acoustics, his former client. The court held that the movant had the burden of establishing that during the former representation, Giambalvo rendered professional services on matters substantially related to the matters embraced in the pending suit. The court concluded that it could not reasonably be said that in the course of his former representation Giambalvo might have acquired information related to the present litigation. (398 F.Supp. at 226)

With respect to the third attorney, Cannon, voluminous documentary evidence was submitted which "compels the conclusion that Cannon must have acquired information in the past representation of the corporation and their officers that he now seeks to use to his advantage and to their

detriment." The evidence established that Cannon acted as sole legal counsel for the two corporations during the periods when the wrongs against the corporations allegedly occurred. It disclosed that he gave advice on the affairs of the corporation to the defendants whom he was now suing on these matters. All the contracts and agreements relating to the internal and external affairs of the two corporations were prepared by Cannon. Cannon's Complaint in the pending litigation requested that many of these agreements he prepared be rescinded. Cannon had possession of the stock books and corporate seal of Acoustics. Cannon's Complaint alleged that Stedman received exhorbitant sums from licenses at least one sum of which was received under a contract negotiated and prepared by Cannon. Cannon initiated discussion of the possibility and advisability of the sale of the corporations. Against this evidence, Cannon argued that his past representation was limited solely to patent and trade secret matters. The court responded by saying that these matters were the sole business of the corporation, that during the period in question Cannon was the sole legal counsel for the corporation and finally, that Cannon did not dispute that he drafted the documents, including licensing agreements, gave legal opinions, and reviewed all material that was mailed to share holders, including financial statements and proxy materials of the corporation. (398 F.Supp. at 227, 228)

In Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (C.A. 2 1973) an action to declare patents invalid was filed. The attorney bringing the declaratory judgment action had previously been involved in litigation on behalf of the defendant involving the identical issue. The court

held he should be disqualified. The court stated in its opinion:

> "In light of all we have said, we conclude that the issue of Burlington's control over Patentex was a disputed matter in the Supp-hose case and is a core subject of the controversy in the present actions. Since Rabin defended Burlington against such a claim in the Supp-hose case he must be barred from asserting a 'substantially related' claim against Burlington on behalf of the present plaintiffs." (478 F.2d at 574)

It may be seen from the foregoing summary that the cases fall into the cagegories previously described. They support the view that each disqualification case must be considered on its own facts and that over-simplifications such as the transference of confidential information being presumed are unwarranted.

In its Principal Appeal Brief, SS&D has cited cases supporting the view that whether confidences have been disclosed is a factor in the total picture to be balanced along with other factors in an effort to secure justice and fair play.

III.

THE CITY HAS ERRONEOUSLY STATED THE LAW WITH RESPECT TO WAIVER AND IGNORES THE LAW WITH RESPECT TO ESTOPPEL. THE CITY'S MOTION IS BARRED ALTERNATIVELY UNDER THE DOCTRINES OF CONSENT, EXPRESS OR IMPLIED WAIVER, OR ESTOPPEL.

The City cites Barker v. Wingo, 407 U.S. 514 (1971) for the proposition that "Waiver is an intentional voluntary relinquishing of a known right." (City's Appeal Brief, p. 14) As if to provide a whole answer, the City continues on the same page: "The City has never intentionally and voluntarily agreed to permit SS&D to represent CEI in these proceedings. CEI and SS&D will be able to offer no single writing on the part of the City in which it has waived its rights on the matter."

There is no law, nor has any case been found through our research, which suggests that a waiver must be in writing. Moreover, the waiver rule cited by the City is limited to very specific fundamental constitutional rights in criminal matters. Many constitutional rights are excepted from its application, including the right to a speedy trial. The United States Supreme Court said in Barker:

> "The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are waived."
>
> "The balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." (407 U.S. at 530)

In applying the balancing test, the court held that Barker had not been deprived of his right to a speedy trial.

Almost without exception, the requirement of an intentional and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. Schneckloth v. Bustamont, 412 U.S. 218, 237 (1972) Additionally, it is now well established that a waiver may be of all rights, both known and unknown. United States v. Blusco, 519 F.2d 473 (C.A. 4 1975) Finally, a waiver may be express or implied, an implied waiver being closely akin to an estoppel. Headnotes 6 and 9 of Kansas City Life Ins. Co. v. Davis, 95 F.2d 952 (C.A. 9 1938) read as follows:

> "6. Estoppel
> A 'waiver,' which is the voluntary relinquishment of a known right, may be either express or implied."
>
> "9. Insurance
> The doctrine of implied 'waiver,' as applied to insurance, is closely akin to 'estoppel,' and rests on course of conduct of insurer with reference to insured evidencing intention not to insist on some performance due to insurer under terms of policy."

A succinct statement of the relationship of waiver and estoppel and the continuum of conduct they cover is set forth in Matsuo Yoshida v. Liberty Mutual Insurance Co., 240 F.2d 824 (C.A. 9 1957) at pages 829-830:

> "Waiver and estoppel are legal terms which are frequently used interchangeably. Although the legal consequences of each are often the same, the requisite elements are different. Waiver refers to the voluntary or intentional relinquishment of a known right. It emphasizes the mental attitude of the actor. On the other hand, estoppel is any conduct, express or implied, which reasonably misleads another to his

> prejudice so that a repudiation of such conduct would be unjust in the eyes of the law. It is grounded not on subjective intent but rather on the objective impression created by the actor's conduct. It is in the area of implied waiver that the two doctrines are closely akin "

The acts and omissions of agents of a governmental body may work an estoppel when performed within the socpe of their authority. Headnote 10 of Smale & Robinson, Inc. v. United States, 123 F.Supp. 457 (S.D. Cal. C.D. 1954) reads as follows:

> "10. United States
> Acts or omissions of agents lawfully authorized to bind the United States or direct its course of conduct during a particular transaction will work estoppel against the government if agents acted within scope of their authority."

The doctrine of estoppel is described in Headnotes 5 and 6 of that case as follows:

> "5. Estoppel
> The doctrine of equitable estoppel is grounded upon misleading conduct, and justification for such doctrine is found in equity, common honesty and good conscience."

> "6. Estoppel
> The vital principle in equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by dissappointing the expectations upon which action was taken."

The court empahsized that both reason and policy argue that good faith reliance upon past and present conduct of the other party amply warrants invoking the doctrine of equitable estoppel. (123 F.Supp. at 467)

In United States v. Georgia-Pacific Company, 421 F.2d 92 (C.A. 9 1970), after stating that equitable estoppel prevents a party from assuming inconsistent positions to the detriment of another party, the court found that the government was estopped because of a prior position which it had taken. Moreover, it held that the equitable defense of clean hands was additionally available to preclude the government from seeking performance of an earlier agreement.

A motion to disqualify counsel is of an equitable nature. Milone v. English, 306 F.2d 814 (1962) The doctrine of equitable estoppel and the defense of clean hands are available both to SS&D and CEI in the instant case in this equitable proceeding. (421 F.2d at 103)

In United States v. Wharton, 514 F.2d 406 (C.A. 9 1975) the Court of Appeals reversed the District Court and remanded the case with instructions to apply the doctrine of estoppel. The court said that it must look to the "totality of circumstances" including prejudice that would result to the defendant if the relief sought were granted. A quotation from Brandt v. Hickel, 427 F.2d 53 (C.A. 9 1970) is particularly appropriate here.

> "To say to these appellants, 'The joke is on you. You shouldn't have trusted us.' is hardly worthy of our great government."

CEI trusted the City when it gave its consent and SS&D trusted the City when it agreed to help it out of its "desperate straits."

The doctrine of equitable estoppel is widely applied in civil litigation among non-governmental parties as well as governmental bodies.

See Upper Columbia River Towing Co. v. Maryland Casualty Company, 313 F.2d 702, 706 (C.A. 9 1963) wherein as respects two corporations the court said:

> "Estoppel has been defined as 'any conduct, express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law."

The City asked SS&D to help MELP in 1972 with respect to a bond ordinance because of its desperate straits: it wanted a bond ordinance and it could get no other counsel. The City knew from the 1971 issue that SS&D did not want to represent it in MELP matters. Then, as a consequence, it went to New York City for counsel. It knew equally well in 1972 that SS&D did not want to represent it in MELP matters. Notwithstanding this, for its own purposes, it importuned the representation. Mr. Kudukis, the Director of Utilities, and Mr. Hollington, the Law Director, knew of SS&D's general representation of CEI. They knew and acknowledged the poetential for conflict. They knew of the pending NRC proceedings and the Federal Power Commission proceedings. They knew that SS&D always took the position of CEI in adverse relationships with the City. SS&D knew that the City knew this.

The CEI, in good faith reliance upon the City's conduct and acting as a good citizen in its community, granted its consent. The City now uses this consent to euchre it out of its corporate counsel in one of the most important pieces of litigation in its corporate history.

SS&D touched every base it believed necessary, consistent with dealing in good faith with responsible people of equal good faith. It resisted the representation, if finally cleared it with its principal client and it secured a written request for its services by the Law Director,

concurred in by the Director of Utilities.

How, objectively, should one regard the conduct of the City under the circumstances? The City's law Director contends that:

> "As to any past conflicts of interests the City had the right to waive them and none of those matters was remotely as critical to it as this NRC litigation. But past waivers certainly do not imply waivers of all future conflicts of interest on the part of SS&D."
> (City's Appeal Brief, p. 11)

Past conduct, in this case past waivers, engaged in without exception over a course of some 65 years, according to the City's counsel, certainly would suggest to a reasonable person that that course of conduct might continue and might be relied on, particularly when specific affirmation is secured and granted in the context of the 1972 desperate straits of the City. This Appeal Board should not tolerate the City's telling CEI that the joke is now on it, and that its good faith effort to be of assistance to the City in 1972 was a stupid blunder.

IV.

THE RECORD BEFORE THE APPEAL BOARD MUST BE THE RECORD THAT WAS BEFORE THE LICENSING AND SPECIAL BOARDS SAVE TO THE EXTENT THAT IT IS EXPANDED TO INCLUDE ADMISSIONS AGAINST INTEREST WHICH WERE MADE BY COUNSEL DURING ARGUMENT BEFORE OR IN RESPONSE TO QUESTIONS BY SPECIAL BOARD MEMBERS. ORDERLINESS OF APPELLATE PROCEDURE PERMITS NO COMPROMISE OF THIS RULE.

A. The Record in this disqualification proceeding first became muddied when the Licensing Board, after the termination of the hearing to prefer charges on December 31, 1975, examined some 50 privileged documents in camera. It found that they were irrelevant save for two which it appended to the Licensing Board's Majority Memorandum as Exhibits A and B and characterized them in the memorandum as crucial. The first opportunity SS&D had to discuss these documents was before the Special Board which, after explanation, concluded that they were innocuous and that the conclusion of the Licensing Board majority relating to them was unwarranted.

The Record was next muddied by the Licensing Board when it referred to its Exhibit B by saying that it "may represent only the tip of the iceberg." The obvious implication of this statement was that it believed "something lurked out there" and if it were explored it would disclose grave acts of malevolence on the part of SS&D. It should not be unnoticed that in preferring charges, the Licensing Board cited numerous grounds to support its charge. In its certification to this Appeal Board, however, it referred only to Exhibit B and then apparently conscious of the inherent weakness of its position, sought to buttress it by alluding to an outside-the-record iceberg.

How does one protect one's self from the indictment of an adjudicatory body that there exists evidence outside the Record and the further charge that the evidence is adverse? There is no way, save the traditional one of having the appellate body require the adjudicating body to confine its findings to the evidence before it.

SS&D made clear that the appendices to its Appeal Brief were "Outside the Record" and that they were added "not as affirmative evidence in this matter but to demonstrate the grave error of the Licensing Board's improper inference that an iceberg lurks beneath the surface." (SS&D's Appeal Brief, pp. 13-14)

However advantageous to it their use may be, SS&D may not use the depositions and the proferred testimony as affirmative evidence. Neither may the City do so. Any other rule would be pernicious in that it would have the Appeal Board judge the correctness of a lower board's rulings on evidence not before the lower board.

B. The City's failure to understand the elementary rule requiring evidence to support findings and ligitimate inferences is disconcerting. Perhaps the worst example of its apparent failure in this regard is the following misrepresentation of fact appearing on pages 35-36 of the City's Appeal Brief.

> "His [Brueckel] failure to defend his bond language before Cleveland Council was an outright betrayal of the City Administration which hired him and the MELP position. The deepest suspicion attaches that CEI Corporate Solicitor Donald Hauser, SS&D partner and CEI Board Member, John Lansdale and SS&D partner and City Bond Lawyer John Brueckel privately arranged these 'amendments' to the City Bonds."
> * * * "This episode bears directly upon those

> issues involving the City's ability to finance its electric system, MELP, and the City's financial ability to pay for interconnection agreements or transmission facilities."

As respects the accusation of outright betrayal and deepest suspicion of conspiracy, one can only state, quite simply,that there is no evidence to support them. Nowhere in the Records is there a scintilla of proof for these reckless charges, charges which besmirch the reputation of lawyers of high professional standing.

The further representation that this episode bears directly upon those issues in the antitrust hearing is also, quite simply, without any evidentiary support.

Not only is there no evidence on either of these points in the disqualification proceeding, but there is no evidence relating to them in the hearing on the merits of the antitrust issue. An effort was made at one time to interject the 1972 Bond Ordinance but Chairman Rigler struck it from the Record. (See Transcript pp. 7,499-7,500) Thus, even if we go outside the Record of the disqualification proceedings, we find no evidence to support these baseless charges.

C. City's counsel seeks to draw Daniel J. O'Loughlin into the controversy at the appellate board level, apparently seeking to change horses in mid-stream based upon evidence which is not part of the Record.

The preferred charge contained no ground relating to Mr. O'Loughlin. Thus SS&D does not deem further comment to be necessary on its behalf with respect to the City's effort.

V.

THE STAFF'S APPELLATE BRIEF

A. Preliminary Observations

SS&D welcomes the Staff's Brief as a cogent presentation of its views. It helps place in focus the legal issues which must be considered at the appellate level.

By our commendation of the Staff, we do not mean to suggest that we do not take serious objection to a number of the legal propositions and factual conclusions which it asserts. These disputed areas will be dealt with at length hereinafter.

B. The Staff's Authorities Dealing With Actual Injury Or Specific Exchange Of Confidential Information

The Staff's authorities have the same failing as the City's authorities; they are either irrelevant, fail to support the propositions asserted for them, or in fact support SS&D's position. Many of these authorities have been distinguished earlier in this Brief.[1/] Those cases which have not been previously analyzed will now be reviewed.

In Richardson v. Hamilton International Corporation, 333 F.Supp. 1049 (E.D. Pa. 1971) aff'd. 469 F.2d 1382 (C.A. 3 1972), Attorney Richardson brought a derivative action against his former corporate client and its officers and directors, alleging that they caused to be issued certain false and misleading proxy statements in connection

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1/ Emle Industries, Inc. v. Patentex, Inc.,478 F.2d 562 (C.A. 2 1973), supra p.21 Marketti v. Fitzsimmons, 373 F.Supp. 637 (W.D. Wis. 1974), supra p. 16 ; E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D. Tex. 1969), supra p.15 ; Estates Theatres, Inc. v. Columbia Picture Industries, Inc., 345 F.Supp. 93 S.D.N.Y. 1972), supra p. 17 ;

with the merger of two corporations and further alleging that the corporation, its officers and directors received excessive amounts of stock in the merger. Richardson performed extensive and detailed legal work for the corporation. The court describes his work as follows:

> The record shows that his services commenced in September, 1964, when the firm was retained as special counsel for Hamilton Life. At that time, the SEC was investigating whether Hamilton Life had violated the federal securities laws during an intrastate offering in Michigan. Mr. Richardson traveled to Michigan on a number of occasions to visit the Hamilton Life offices, and to conduct detailed investigations into the files of Hamilton Life, and into the personal files of its officers and directors. During these visits the plaintiff also conducted interviews with a number of the officers and director, who are now defendants in the present action. He also reviewed stock subscription agreements and prepared memoranda for registration statements filed by Hamilton Life with the SEC.
>
> During June of 1965, Mr. Richardson devoted a considerable amount of time preparing Messrs. Owens, Bruce and Safford for an SEC hearing in Washington, D.C. The preparation included the discussion of strategy with those officers and other attorneys in the Schnader firm.
>
> In October of 1965 the SEC issued 'An Order for Public Proceedings and Notice of Hearing Pursuant to Sections 15(B), 15(A) and 19(A) of the Securities and Exchange Act of 1934.' Upon receipt of the order, Mr. Richardson drafted a memorandum evaluating it and suggesting possible defenses. In November of that year, responsibility for the defense of Hamilton Life and its officials shifted to counsel in Chicago. (469 F.2d at 1384)

Marco v. Dulles, 169 F.Supp. 622 (S.D.N.Y. 1959) appeal dismissed 268 F.2d 192 (C.A. 2 1959) is erroneously cited as supporting the proposition that the receipt of confidential information need not be shown in a disqualification proceeding. In any event, if that ever were the rule in

the Second Circuit it is no longer. Silver Chrysler Plymouth v. Chrysler Motors Corp., et al., 518 F.2d 751 (C.A. 2 1975). The facts in Marco disclose that there was the receipt of confidential information. The court said:

> . . . the very transactions which were the subject matter of federal court litigation in stockholders' derivative action were the same transactions on which legal firm represented the corporation in former state action . . . . (169 F.Supp. at 623) (Emphasis supplied)

Moreover, the attorneys (Sullivan and Cromwell) were, at all times relevant, the general counsel for the corporation and had a senior partner on its board of directors. The attorneys represented all of the directors individually as well as the corporation during the period it handled the transactions.

Quite obviously it would be irrational to suppose that general counsel representing corporation and individual directors on the specific transaction had no confidential information with respect to it in subsequent litigation involving the very transaction.

This should have closed the matter - but it did not.

The court noted that the attorneys had been accused of fraud in connection with the transactions and denied disqualification stating:

> The accusations relieve the defendant senior partner of Sullivan & Cromwell, and Sullivan & Cromwell themselves, from any duty not to disclose or to use such confidences, if any, as may have been reposed in them in the course of the transactions under attack.
>
> Their present position, while it may be adverse to the present interests of the former client or its successor, is not adverse to or inconsistent with the advice which they previously gave to the corporation. To defend themselves and their senior partner

> it is necessary and proper for Sullivan & Cromwell to do all they legitimately can to affirm the transactions upon which they are accused of fraud, and to supply all the ammunition which they have whether it came to them in confidence or not.
>
> Thus, Sullivan & Cromwell have been relieved from their professional obligation against non-disclosure of confidences by the accusations made against them by the plaintiff which have for all practical purposes been adopted by Ridge Realization Corporation as successor to their former client, Blue Ridge. By the same token they are free from the obligation not to represent interests adversely affecting their former client in a matter in which confidence has been reposed. (169 F.Supp. at 631)

In the case at bar the City has accused SS&D of fraud, betrayal and conspiracy in connection with the 1972 Bond Ordinance. Quite clearly the Marco case would have relieved SS&D of the obligation of non-disclosure of confidences, had any existed. (Of course, SS&D denies that there were any confidences and has proved its denial by the evidence).

In Empire Linotype School v. United States, 143 F.Supp. 627 (S.D.N.Y. 1956) the court said that the pivotal issue of the litigation was whether overpayments were made by the government under three contracts upon which the Counterclaims were based. It found that the relevant contracts were prepared by the attorney whose disqualification was sought while he was employed by the government. Under the evidence the court found that he handled the very contracts involved in the litigation. For a description of the work done by the attorney while in the government's employ, which was not disputed by the attorney, see 143 F.Supp. at 631.

In Hull v. Celanese Corporation, 513 F.2d 568 (C.A. 2 1975), the court said that the question was whether a law firm could take on, as a

client, a lawyer previously employed by the opposing party in the very litigation against the opposing party the lawyer had worked on in the opposing party's legal department.

United States v. Kasmir, 499 F.2d 444 (C.A. 5 1974) is of no assistance to either side. It holds that a lawyer should keep secrets, hardly a novel proposition.

The inapplicability of General Motors Corp. v. City of New York, 60 F.R.D. 393 (S.D.N.Y. 1973), reversed as to the disqualification issue in 501 F.2d 639 (1974), to the instant matter can best be shown by quoting Headnote 8:[1/]

> Where attorney, who had formerly worked for the Justice Department, not only participated in Justice Department antitrust case against bus manufacturer but signed complaint in that action, where he admittedly had 'substantial responsibility' in its investigatory and preparatory stages, and where attorney was thereafter retained by City of New York to bring class action against bus manufacturer alleging a nationwide monopoly with respect to buses, resulting appearance of impropriety would have to be avoided through disqualification of attorney, where the overlap of issues was plain and where involvement of attorney while in government employ was direct. (501 F.2d at 640)

Two other cases have been cited by the Staff. Their holdings will be discussed here although their relevance will appear in a subsequent portion of this Brief.

Herman v. Dulles, 205 F.2d 715 (C.A.D.C. 1953) held that it was error to place the burden on an attorney to disprove charges against him in a disqualification proceeding. This case states the clear rule that the burden of proof is on the one attempting to establish the

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1/ Disciplinary Rule [DR] 9-101(B), prohibits "A lawyer . . . [from accepting] private employment in a matter in which he had substantial responsibility while he was a public employee.'

charges to support disqualification.

In Kivitz v. Securities and Exchange Commission, 475 F.2d 956 (C.A.D.C. 1973), the court emphasized the requirement of admissible evidence to support the findings of fact. Mere hearsay and speculation are not to take the place of factual evidence, the court said. The court held that disqualification must be supported by substantial evidence and found that the evidence before it was not of sufficient quantum to support the charges. The court reversed the Commission.

Herman and Kivitz are controlling precedent from the court of appeals which will hear the appeal in the matter at bar. They clearly hold that burden of proof is on the City in the instant case to establish its charge by substantial admissible evidence.

C. The Special Board Has The Ultimate Authority To Put Into Effect Or To Vacate Order of Suspension Under Rule 2.713

We agree with the Staff's position. The Special Board, under traditional procedures and under the clear language of Rule 2.713, is the fact finding and adjudicatory body with ultimate authority on disqualification.

D. The Staff's Analysis of the Facts is Faulty. It Misconceives its Function and the Function of the Appeal Board. The Special Board's Ruling should be Affirmed.

The Staff says that:

> "there is no dispute that SS&D has represented the City in the past as bond counsel, specifically with respect to MELP financing." (Staff's Appellate Brief, p. 25)

It is indeed disputed that SS&D represented MELP as bond counsel or acted in any way with respect to MELP financing save in the circumscribed instances carefully spelled out in the Record. The Record clearly establishes that the 1966 and 1968 General Obligation bond issues were unrelated to the revenue or financial condition of MELP, and that the 1972 bond ordinance involved only its preparation and required no information relating to MELP financing.

The Staff further says that:

> "all that remains to be shown, then is that there is a substantial relationship between SS&D's past bond work for the City and the issues in the anti-trust proceeding." (Id.)

The Staff in this assertion fails to distinguish between the City and MELP. Moreover, it reflects lack of comprehension of the difference between a revenue bond and a general obligation bond. In the absence of such an understanding a faulty conclusion is unavoidable. The Staff cannot seriously mean that all bond issues which SS&D handled for the City have a substantial relationship to the issues in the anti-trust proceeding. Even the City does not say this. It must mean bond issues, if any, of MELP itself which require SS&D be the recipient of confidential information relating to MELP's finances. This brings us full circle to the general obligation issues of 1966 and 1968 as to which no financial information had to be, or was in fact, disclosed; and the 1972 bond ordinance as to which no financial information had to be, or was in fact, disclosed. The facts relating to the general obligation bond issues and the 1972 Revenue Bond Ordinance have been discussed earlier in this Brief and will not be repeated here.[1/]

1/ Supra, pp. 5-6.

Also on page 25 of the Staff's Appellate Brief appears the statement that a finding of "attorney misconduct" is necessary because of

> "the exchange of some information supplied by one client of an attorney to another client of that attorney whose interests are adverse to the original client."

The operative words in the foregoing statement are "information" and "exchange". As respects "information", the Record is clear that no information was received by SS&D; emphatically no significant information, and more emphatically no confidential information. This, then, brings us to the word "exchange" and the significance which the Staff attaches to the Little Hoover Commission Memorandum, the Gibbon Memorandum and the Brueckel Memorandum. These, as best we can discern, are the vehicles of the "exchange", as the Staff views it. Assuming, arguendo, that they could have served as vehicles for this purpose, one must ask, where is the client-supplied information which they purportedly conveyed? They show simply that memoranda are exchanged between attorneys within an office. They do not demonstrate the existence of any information supplied by the City, let alone confidential or client-oriented information.

As previously pointed out, the Little Hoover Commission Memorandum related to a conference with a Little Hoover Commission member to whom the memorandum was turned over as a representative of the City, and it related to matters raised by the Little Hoover Commission itself.

The Gibbon Memorandum related to general municipal law and was prepared in 1962, long before the time of the bond matters which the Staff urges

as sources of information, and, indeed, some three years prior to the remoteness cutoff date imposed by the Licensing Board. And, finally, the Brueckel Memorandum related to general municipal law and discloses on its face that it contains no confidential or client-supplied information.

The Staff admits a "substantial relationship" must be shown between SS&D's past bond work for MELP and the issues in the anti-trust proceeding. It seeks to satisfy the requirement by referring to fourteen items on pages 26 and 27 of its Brief, concluding:

> "SS&D's prior representation of the City dealt with matters substantially related to each of the above items because SS&D's bond work for the City is directly related to the City's financial position, and the City's financial position and the reasons why the City was not in a better financial position are important aspects of these items." (Staff's Appellate Brief, p. 27)

If the Appeal Board accepts the Staff's view of "substantial relationship" as above expressed, then it must find that if SS&D handled one sewer bond issue or one street improvement issue since 1965 it must be disqualified as a matter of law. We cannot believe that the Appeal Board would accept such an absurd result nor can we believe that the Staff seriously urges it.

This raises a matter of particular concern to SS&D. The Staff has appeared to lose its neutrality in this proceeding. Certainly, SS&D has no objection to the Staff's meticulous presentation of the law and its advocacy of what it believes to be sound legal principles. However, when the Staff inserts itself into the proceeding as a third fact-finding body, weighing the evidence, accepting and discarding evidence as it chooses, speculating

and conceptualizing in areas where it has no expertise, then it permits itself to be badly used.

The burden of proof is upon the City to establish facts requiring disqualification; the burden is not on SS&D to disporve those facts. This must be borne in mind in appraising the Order of the Licensing Board and the Order of the Special Board. As respects the Licensing Board's Order, not only must the burden of proof be satisfied, but the Order must be supported by substantial admissible evidence. As respects the Special Board's Order, the burden remains on the City; there is no burden of proof on SS&D and the Special Board's ruling favorably to SS&D need not be supported by substantial evidence, for its refusal to disqualify is equally valid if it merely found that the City had not satisfied its burden to prove its case by a preponderance of the admissible evidence.

The Special Board has been established by rule as the fact-finding adjudicatory body in disqualification proceedings before the Nuclear Regulatory Commission. Its findings, unless clearly erroneous, must be upheld. Stated another way, if there is any evidence which would tend to support its findings then they should not be disturbed, particularly in this case where its ruling need not meet the requirement of burden of proof.

As a practical matter, the substantial evidence in this proceeding establishes that the City has not proved the necessary elements of its claim, establishes that SS&D has acted ethically, and establishes that the equitable defenses interposed by SS&D are well taken; and the Special Board so found.

VI.

CONCLUSION

Mr. Ivan W. Smith, member of the Licensing Board, said the following in his dissenting memorandum:

> "In measuring the equitable considerations in favor of permitting SS&D to continue in the case, it should also be noted that City, knowing SS&D was legal counsel to CEI invaded the attorney-client relationship between CEI and SS&D for its own purposes. By demanding SS&D's aid, City interferred with CEI's right to counsel. City now seeks to bootstrap its ethically questionable conduct into a litigative advantage in this proceeding.
>
> "In finding the SS&D is in violation of EC 5-16, the majority finds that SS&D's advice to the City with respect to the implications of the conflict was insufficiently explicit. I do not agree with this assessment. The conflict was obvious. It was the City who first raised the issue. There was no need to explain to City's skilled lawyers what they already knew. Nevertheless, SS&D did explain their concern about the conflict. (Holton Affidavit, supra.) To explain to the City the details of their case in this proceeding would have raised still further ethical problems, if, in so doing, SS&D violated CEI's attorney-client privilege. In addition, EC 5-16 appears to provide for the opportunity for the client to make an informed judgment as to whether it wishes to employ the lawyer. Therefore, its application to the proceeding is remote because there was never any thought that City would employ SS&D in this litigation. At that time, it had already retained its present counsel, and nothing has interferred with that relationship." (pp. 11-12)

The Special Board, in concluding that there was no proof of unethical conduct on the part of SS&D, and in holding that CEI should be permitted to retain the legal counsel of its choice, said:

> time or another, handled isolated unrelated legal matters for the City, after the City's threat of a similar 'ethics' charge, raises some question of the City's own ethics. (Dec. 31 arg., Gallagher, tr. 2531-2532; Feb. 3 arg., Bd. questions/Reilly, Davis resp., tr. 4443-4444.)" (Special Board Opinion pp. 16, 17 fn. 15)

The Special Board has been given adjudicatory authority in the instant disqualification proceeding by §2.713 and it has the ultimate authority to put into effect or vacate an order of suspension. Accordingly, the sole question for the Appeal Board in reviewing the Record should be: Could the Special Board, under the facts in the Record, have reasonably found some evidence raising a fact issue as to any element of the charge of misconduct against SS&D or as to its defenses thereto? If the Appeal Board finds that the Special Board could have so found, then the Special Board should be affirmed. Fact issues should be resolved by the Board charged with that responsibility and the Appeal Board should not disturb their findings in the absence of manifest error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the REPLY BRIEF OF SQUIRE, SANDERS AND DEMPSEY RE SPECIAL SECTION 2.713(c) PROCEEDING were served by delivering same on April 30, 1976 to James B. Davis, Esq., and Robert D. Hart, Esq., Counsel for the City of Cleveland, to Alan S. Rosenthal, Esq., Michael C. Farrar, Esq., and Richard S. Salzman, Esq., Chairman and Members respectively of the Appeal Board, and to Benjamin H. Vogler, Esq., Assistant Chief Antitrust Counsel for the NRC Staff, at the addresses appearing on the Service List attached hereto; and by delivering the original and 20 copies to the Secretary, United States Nuclear Regulatory Commission, Washington, D.C. 20555, Attention Chief, Docketing and Service Section; and by mailing one copy each to the other persons listed on the attached Service List by Regular United States Mail, First Class, Postage Prepaid, on the 29th day of April, 1976.

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