UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In The Matter Of

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

MOTION OF SQUIRE, SANDERS & DEMPSEY TO DISMISS DISQUALIFICATION PROCEEDINGS

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August 26, 1976

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MOTION OF SQUIRE, SANDERS & DEMPSEY
TO DISMISS DISQUALIFICATION PROCEEDINGS

Squire, Sanders and Dempsey respectfully moves the Special Board to dismiss the disqualification proceedings pending in this matter. The motion is made on the ground that the doctrine of collateral estoppel is applicable to the proceedings at bar, that the doctrine requires the Nuclear Regulatory Commission's adoption of specific findings of the United States District Court for the Northern District of Ohio, and that the adoption of specific findings of the District Court requires dismissal of the disqualification proceedings as a matter of law. A memorandum in support of the motion is annexed.

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MEMORANDUM

I. STATEMENT OF FACTS

The instant litigation before the Nuclear Regulatory Commission (NRC) is only one of a series of litigations involving antitrust claims made by the City of Cleveland (City) against the Cleveland Electric Illuminating Company (CEI). Other litigations in which similar antitrust issues were raised include proceedings held before the Federal Power Commission (FPC) in the early 1970s and a civil suit presently pending in the United States District Court for the Northern District of Ohio. The District Court litigation has been assigned to Judge Robert B. Krupansky.

Squire, Sanders and Dempsey (SS&D) has entered an appearance on behalf of CEI in both the NRC and District Court matters. The City has filed a motion to disqualify SS&D as counsel for CEI in each forum, and the legal theories and factual bases urged in each motion are identical. Each of the City's motions contains the general argument that SS&D's prior representation of the City on an ad hoc basis creates a conflict of interest with respect to its representation of CEI and precludes its present representation of CEI in matters adverse to the City. Alternatively, and more specifically, the City contends that bond issues relating to the City's Municipal Electric Light Plant (MELP) which were prepared by SS&D are "substantially related" to the antitrust proceedings; that confidential information obtained from MELP and the City passed in fact or by operation of law from SS&D lawyers representing the City to SS&D lawyers representing CEI; that SS&D partner Daniel J. O'Laughlin's former employment as Chief Counsel in the City's law department provided SS&D lawyers representing CEI with confidential information concerning the City and MELP in fact or by operation of law; and that each of these allegations constitutes an independent basis for the disqualification of SS&D in each antitrust proceeding.

A full evidentiary hearing on the matter of disqualification was commenced in the District Court before Judge Krupansky on June 14, 1976. Witnesses were called by both the City and SS&D, exhibits were presented to the Court by both parties, and arguments were made by counsel. On August 3, 1976, Judge Krupansky issued a comprehensive order on the issue of disqualification. He ruled that SS&D would not be disqualified as counsel for CEI, and he substantiated his ruling with both extensive discussions of the issues involved and specific determinations.*

The findings and determinations of Judge Krupansky bring resolution to the same controversies pending in the NRC disqualification proceedings. Analysis of the doctrine of collateral estoppel, its role in administrative law generally, and its relationship to the case at bar leads to the conclusion that Judge Krupansky's determinations are dispositive of the disqualification proceeding at hand.

II. ELEMENTS OF COLLATERAL ESTOPPEL

In Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court wrote as follows at page 443 of its opinion:

> "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."**

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* A copy of Judge Krupansky's Order is attached to SS&D's Motion to Stay Temporarily Further Discovery.

** See Harris v. Washington, 404 U.S. 55 (1971) for a reaffirmation of the Ashe definition of collateral estoppel.

Collateral estoppel is defined as follows in 1B Moore's Federal Practice ¶0.441 [2]:

> "The essence of collateral estoppel by judgment is that some question or fact in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies. Thus the principle of such an estoppel may be stated as follows: Where there is a second action between parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended."

The operation and purpose of the doctrine of collateral estoppel were described as follows by the Supreme Court in Southern Pacific Ry. v. United States, 168 U.S. 1 (1897) at page 48 of the Court's opinion:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

There can be no serious dispute about the five conditions necessary for the application of the doctrine of collateral estoppel. They are:

1.) that there was previous litigation between the parties or their privies;

2.) that the previous litigation was held in a court of competent jurisdiction;

3.) that the previous litigation resulted in a judgment;

4.) that the judgment is final;

5.) that the judgment determined particular issues in controversy.

If all of these conditions are satisfied, the issues determined in the previous litigation are conclusively established in all subsequent litigation between its parties or their privies. The issues determined in the previous litigation cannot be collaterally attacked by any party, and they cannot be relitigated in any forum.

III. COLLATERAL ESTOPPEL IN ADMINISTRATIVE PROCEEDINGS

Most commonly, of course, the doctrine of collateral estoppel precludes a judicial forum from relitigating an issue determined in a previous judicial forum. The doctrine, however, is equally applicable to administrative forums acting in a judicial capacity. As Professor Kenneth Culp Davis writes in § 18.11 of his Administrative Law Treatise (1958):

> "Ordinarily a court decision will be res judicata in a later administrative proceeding in the same circumstances in which it would be binding in a later judicial proceeding."

A number of reported decisions support Professor Davis' conclusion. For example, in George H. Lee Co. v. Federal Trade Commission, 113 F. 2d 583 (1940), the Eighth Circuit held that a determination of the United States District Court for the Western District of Missouri that particular goods were not falsely labelled could not be relitigated in subsequent proceedings before the Federal Trade Commission. The FTC had permitted relitigation of the question, and in vacating the Commission's order, the court wrote at page 586 of its opinion:

> "The Commission thus plainly failed to accord to the decree in the libel proceeding the effect to which it was entitled. The Commission redetermined an issue which was already settled by a court of competent jurisdiction and reached a contrary conclusion. Under the circumstances, we think that its order cannot stand."

In Bennett v. Commissioner of Internal Revenue, 113 F. 2d 837 (5th Cir. 1940), the related principle of res judicata was applied to an administrative adjudication in circumstances quite similar to those of the case at bar.* In Bennett, litigations between the IRS and a taxpayer were proceeding simultaneously in the United States District Court for the Western District of Texas and before the Board of Tax Appeals. After evidentiary hearings had been held in both forums, the District Court Judge filed findings of fact and conclusions of law and concluded that the taxpayer was entitled to a deduction. Thereafter, the Board of Tax Appeals ruled that the taxpayer was not entitled to the same deduction. The Board of Tax Appeals was aware of the District Court's judgment, but refused to accept the judgment as conclusive in the pending administrative proceedings. The Court of Appeals reversed the decision of Board of Tax Appeals and ruled that the determinations of the District Court were to be res judicata in all future proceedings before the Board. At page 840 of its opinion, the court wrote as follows:

> "[T]he rule of res judicata does not go on whether the judgment relied on was a right or a wrong decision. It rests on the finality of judgments in the interest of the end of litigation and it requires that the fact or issue adjudicated remain adjudicated."

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*Both res judicata and collateral estoppel require that prior judgments be given conclusive effect in subsequent litigations. The difference between the doctrines is explained in the following footnotes from opinions of two Circuit Courts of Appeals:

> "While res judicata bars relitigation of the same cause of action, collateral estoppel bars relitigation of the same facts or issues that were necessarily determined in the prior proceeding," Carr v. United States, 507 F. 2d 191 (5th Cir. 1975) at page 193, footnote 5.
>
> * * *
>
> "The term res judicata is sometimes used generically to cover a number of related principles. More narrowly, res judicata refers to preclusion of a cause of action, while collateral estoppel refers to preclusion of an issue," Mastracchio v. Ricci, 498 F. 2d 1257 (1st Cir. 1974) at page 1259, footnote 1.

In National Labor Relations Board v. Brown and Root, Inc., 203 F. 2d 139 (8th Cir. 1953), it was held that the National Labor Relations Board could not relitigate a fact previously determined by the Eighth Circuit Court of Appeals. The question presented in both litigations was whether certain joint venturers were one employer or two employers for purposes of the National Labor Relations Act. The court wrote at page 146 of its opinion:

> "We think that the question whether the respondents were one employer or two employers was necessarily involved in the prior proceeding, and that the Board was precluded from finding in this proceeding that they were one employer . . ."

Similarily, in Amerada Petroleum Corporation v. Federal Power Commission, 334 F. 2d 404 (8th Cir. 1964), the court held that a question concerning the jurisdiction of the Federal Power Commission could not be relitigated before the FPC after a judicial determination of the issue had been made by a competent court. The court wrote at page 412 of its opinion:

> ". . . [A] question directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action.
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> * * *
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> "In our former opinion we fully adjudicated and decided the same issue recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and that decision as between these parties bars resurrection of the issue again."

Finally, in Lentin v. Commissioner of Internal Revenue, 226 F. 2d 695 (7th Cir. 1955), the court held that the Tax Court properly gave collateral estoppel effect to a judgment of the United States District Court for the Northern District of Illinois. The court rejected the argument that judicial determinations could not and did not collaterally estop relitigation in administrative forums with this terse comment at page 698 of its opinion:

> "We have found no case which so limits the applicability of the doctrine of collateral estoppel, and we can think of no reason why such doctrine should be so limited."

Indeed, there is no justification for refusing to apply the doctrine of collateral estoppel in an administrative proceeding. As the Supreme Court wrote at page 644 of CIBA Corp. v. Weinberger, 412 U.S. 640 (1973): "[T]he [Federal Food, Drug and Cosmetic] Act does not create a dual system of control — one administrative, and the other judicial." This principle of law is equally applicable to all areas of law which are subject to both judicial and administrative control. Harmonization of administrative and judicial rulings is essential in areas of dual regulation, and application of the doctrine of collateral estoppel is essential to the harmonization of administrative and judicial rulings.

IV. APPLICATION OF COLLATERAL ESTOPPEL IN CASE AT BAR

All five conditions precedent to the application of collateral estoppel (as set forth at page 4, supra) are present in the case at bar. First of all, there can be no dispute that there has been previous litigation between the parties to these disqualification proceedings. In fact, the alignment of the parties in the instant proceedings is identical to the alignment in the proceedings before Judge Krupansky. In each forum the City is urging that SS&D be disqualified from representing CEI.

Secondly, there can be no dispute that the District Court for the Northern District of Ohio was a court of competent jurisdiction with respect to the disqualification matter. The District Court certainly has jurisdiction of the subject matter of the underlying litigation and certainly can exercise in personam jurisdiction with respect to defendant CEI in the underlying litigation. The City, of course, has consented to the jurisdiction of the District Court by filing its antitrust complaint. As it is a matter ancillary to the underlying litigation, the District Court certainly had jurisdiction to conduct the disqualification proceedings.

Moreover, a District Court has a special duty to regulate the conduct of the members of its bar and is especially competent to consider disqualification motions directed toward members of the bar. This District Court's role in determining whether allegations of misconduct are substantiated was articulated as follows at page 1385 of the Court's opinion in Richardson v. Hamilton International Corporation, 469 F. 2d 1382 (3rd Cir. 1972):

> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession."

Thirdly, the District Court litigation with respect to disqualification resulted in a judgment. Judge Krupansky's order that SS&D not be disqualified was filed with the Clerk of Courts on August 3, 1976. Fourthly, Judge Krupansky's order is a final judgment from which an immediate appeal can be taken to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291, see Melamed v. ITT Contental Baking Company, 534 F. 2d 82 (6th Cir. 1976). As it is a decision of the Sixth Circuit Court of Appeals, Melamed is the controlling decision with respect to the finality and immediate appealability of the District Court's judgment. Other Courts of Appeals, however, have held that similar orders granting or denying motions to disqualify counsel are final and appealable pursuant to 28 U.S.C. § 1291. Among the decisions in accord with Melamed are Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F. 2d 800 (2nd Cir. 1974); Kroungold v. Triester, 521 F. 2d 763 (3rd Cir. 1975); Draganescu v. First National Bank of Hollywood, 502 F. 2d 550 (5th Cir. 1974); and Fullmer v. Harper, 517 F. 2d 20 (10th Cir. 1975).

It is important to note that a judgment is final and binding for purposes of collateral estoppel even though it is being appealed and even though its execution has been stayed on appeal. The inquiry in determining whether a judgment should be given

collateral estoppel effect is whether the judgment is final, not whether it may possibly be reversed some day on appeal. This rule of law is summarized in the following excerpts from 1B Moore's Federal Practice ¶ 0.416 [3]:

> "A judgment must be final in order to have res judicata or collateral estoppel effect. The test for finality for purposes of these doctrines in federal courts appears to be closely related to that for appealability under the final judgment rule of 28 USC § 1291.
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> * * *
>
> "The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo. This is true even if the appeal is taken with a stay or supersedeas; these suspend execution of the judgment, but not its conclusiveness in other proceedings."

Among the cases supporting Professor Moore's conclusions are Huron Holding Corporation v. Lincoln Mine Operating Company, 312 U.S. 183 (1941), and Nixon v. Richey, 513 F. 2d 430 (D.C. Cir. 1975), in which the respective courts wrote as follows:

> ". . . [I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality," 312 U.S. 189.
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> * * *
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> "The federal rule is that pendency of an appeal does not suspend the operation of a final judgment for purposes of collateral estoppel, except where appellate review constitutes a trial de novo [citations omitted]. The majority of the states follow the same rule [citations omitted]. The prior judgment will support a claim of collateral estoppel even where it has been stayed pending appeal," 513 F. 2d 438 at footnote 75.

Fifthly, and obviously, the District Court's order determined a number of issues controverted between the parties. As all conditions precedent to the application of collateral estoppel are satisfied, the issues determined in the District Court's order of August 3, 1976 cannot be relitigated in any proceeding before the NRC.

V. SPECIFIC FINDINGS OF THE DISTRICT COURT

The District Court's order discusses and considers the identical issues which have been raised in the proceedings before the NRC. The order contains a summary of specific conclusions as well as discursive passages which both augment and explain the specific conclusions set forth in the summary. A point by point examination of the order shows beyond any question that all of the controverted issues were decided in favor of SS&D and that each of the City's bases for disqualification was rejected by the court.

The City's argument that SS&D's "general representation" of the City gave rise to a conflict of interest requiring disqualification was summarily considered and rejected by Judge Krupansky. While the vast majority of his order deals with the ramifications of specific facets of SS&D's relationship of the city, the "general representation" argument is discussed and dismissed in the following excerpt from page 8:

> "It is conceded that apart from the services performed by its bond department, SS&D's ad hoc legal representation of the City had no substantial relationship to the case at hand although the City urges that by some undefined process of legal osmosis, unsupported by evidence, SS&D acquired an insight into the City's affairs which is in itself an impermissible conflict, a charge of the type prompting Judge Moore to comment in Silver Chrysler, supra at 754: 'The mere recital of such a proposition should be self-refuting.' "

With respect to specific aspects of SS&D's relationship with the City, Judge Krupansky first analyzed the issues of estoppel and waiver. His findings are summarized as follows at page 40 of his Order:

> "1. The city is estopped from asserting alleged conflict of interest against SS&D;
>
> "2. The City, with full knowledge of SS&D's legal representation of CEI over the years, waived any rights to assert alleged conflict of interest against SS&D."

The order also contains the following findings with respect to the issues of waiver and estoppel:

> "The Court is here constrained to interject that, from the evidence taken in its entirety, reasonable minds can arrive at but one conclusion: from the open, notorious and continuous legal representation provided by SS&D as general outside legal

> counsel to CEI, adversary to the entire world including the City for 65 years, viz., that the City was fully cognizant of the scope and depth of any potential conflict of interest that could attach to SS&D's services to the City as a bond consultant," Order, pages 15 and 16.
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> * * *
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> "The alleged conflict of interest, if any in fact exists, arises as a result of actions induced by the party seeking disqualification. SS&D's asserted defense of equitable estoppel is therefore appropriately urged," Ibid, page 20.
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> * * *
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> "From the evidence educed at the hearing, the City cannot, in good conscience, deny a full understanding of the scope and depth of SS&D's long standing general representation of CEI, if only from a review of the 49 legal actions in which SS&D represented CEI as an adversary to the City's interests (Deft.'s Exh. 29); the Hollington-O'Laughlin telephone conversations on July 24, 1972; the Holton-O'Laughlin discussions of 1972 and the open, notorious and continuous legal representation afforded CEI by SS&D for a period of 65 years," Ibid.
>
> * * *
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> "Again the Hollington-Kudukis letter of July 24, 1972, when taken in context with the Hollington-O'Laughlin telephone conversations that preceded it, leaves no room for doubt that the City did indeed waive any and all objection to SS&D's continued representation of CEI," Ibid, page 23.

The District Court's order leaves no room whatsoever for the argument that SS&D's role as bond counsel in connection with the 1972 MELP bond issue is a basis for disqualification. The order unequivocally finds that the City is estopped from asserting that a conflict of interest was created by that representation and further finds that in importuning SS&D the City waived any objection to SS&D's continued representation of CEI. These findings cannot be challenged by the City in any proceeding before the NRC, and the issues cannot be relitigated by the NRC.

The District Court's order, however, is not limited to analysis of the issues of waiver and estoppel. With respect to the question of whether SS&D's representation of CEI in antitrust matters conflicts with SS&D's role as bond counsel for the City generally or as bond counsel for the 1972 MELP issue in particular, Judge Krupansky summarized his conclusions as follows at page 40:

"3. Brueckel's services for the City in preparation of the 1972 $9.8 million MELP related bond ordinance were not adverse to Lansdale's adversary representation of CEI in this antitrust action;

"4. SS&D's role as special bond counsel for the City on an ad hoc basis throughout the years does not constitute an adverse representation to Lansdale's representation of CEI in the instant antitrust action within the intent and meaning of the Canons."

Elsewhere, his order contains the following findings:

> "Notwithstanding the intense competition existing between CEI and MELP, the Court, in viewing the nature of the legal representation afforded each of the parties hereto by SS&D, finds that in this posture SS&D's role as the City's special bond counsel in each ad hoc instance reflected by the record herein, and more particularly for the 1972 $9.8 million MELP issue, did not give rise to potentially differing interests between the City and CEI. SS&D's representation of the City as bond counsel was not litigious. SS&D's representation of the City in bond matters was not as advocate," Order, pages 29 and 30.
>
> * * *
>
> "The Court concludes that there exists no substantial relationship between the pending antitrust action and SS&D's services to the City on an ad hoc basis as special bond counsel attesting the veracity of proposed bond offerings.
>
> "No 'patently clear' relationship exists between Brueckel's bond representation in 1972 and Lansdale's representation of CEI in this pending antitrust action. The Court is unable to discern any commonality of issues . . . [citations omitted], particularly in view of the non-litigious nature of Brueckel's bond consultations," Ibid, pages 31 and 32.
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> * * *
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> "The Court necessarily concludes that the City has failed to meet its burden of proving a substantial relationship between the instant representations," Ibid, page 32.

Just as his findings concerning estoppel and waiver cannot be relitigated before the NRC, Judge Krupansky's findings of lack of a substantial relationship between SS&D's role as bond counsel and SS&D's representation of CEI in antitrust litigation cannot be challenged by the City.

The District Court also made findings with respect to the disclosure of confidential information to SS&D lawyers and by SS&D lawyers. With respect to the issue

of disclosure of confidential information by MELP or the City to SS&D, the order reads at page 34:

> "The Court [finds] no disclosure of confidential information in the proceeding at bar."

Assuming for purposes of argument that disclosure of confidential information from MELP and the City to SS&D did occur, the Court further concluded that no confidential information concerning MELP or the City passed to SS&D lawyers representing CEI. The order contains the following findings:

> "5. Lansdale received no confidential information concerning MELP as a result of Brueckel's services as special bond counsel to the City either actually or by operation of law" Order, page 40.
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> * * *
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> "Apart from the doctrine of vertical responsibility, the City was equally unsuccessful in supporting imputed disclosure of confidential information by Brueckel to Lansdale in light of affirmative evidence rebutting such presumption," Ibid, page 37.
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> * * *
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> "The City having failed to carry its burden of proof as to the three elements of the "substantial relationship" test, it is manifest that disqualification of SS&D is not warranted under this traditional analysis," Ibid.

Finally, Judge Krupansky's order found that SS&D partner Daniel J. O'Laughlin's former employment with the City Law Department constituted no basis for SS&D's disqualification. At page 40, Judge Krupansky writes:

> "6. O'Laughlin's present employment with SS&D presents no basis for disqualification of SS&D as counsel for CEI in the pending antitrust action."

This conclusion is in accord with the following passage from page 39 of the order:

> "Manifest from the record is the City's failure to factually interconnect O'Laughlin's present employment with his previous public employment. Indeed, the record is conspicuously silent as to any specific claims or matters involving O'Laughlin's participation in MELP affairs, either substantially or remotely related to the antitrust action presently before this Court."

VI. SUMMARY OF DISTRICT COURT'S FINDINGS AND THEIR EFFECT UPON NRC PROCEEDINGS

The issues determined by Judge Krupansky are wideranging. For purposes of analysis, his conclusions can be summarized into four groups of findings:

1.) The City has waived its right to assert and is estopped from asserting that SS&D's representation of CEI in matters adverse to the City creates a conflict of interest;

2.) SS&D's ad hoc bond and non-bond representation of the City is not substantially related to any issues of the antitrust controversies between the City and CEI;

3.) SS&D's representation of the City as bond counsel with respect to the 1972 MELP bond ordinance is not substantially related to any issues of the antitrust controversies between the City and CEI; and

4.) Daniel J. O'Laughlin's former employment with the City Law Department is not substantially related to MELP transactions or to the antitrust controversies between the City and CEI.

None of Judge Krupansky's determinations can be relitigated by the City in an NRC forum. The District Court's findings must be adopted in the NRC proceedings and the NRC's disposition of the City's motion to disqualify must be consistent with and predicated upon those findings.

It is important to remember that the standards for disqualification of counsel in NRC proceedings are identical to the standards applicable in the District Court proceedings. Section 2.713 (c) of the NRC's Rules of Practice provides as follows in pertinent part:

> "Suspension of attorneys. A presiding officer may, by order, suspend or bar any person from participation as an attorney in a proceeding if the presiding officer finds that such persons:
>
> (1) Is not an attorney at law in good standing admitted to practice before any court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States;
>
> (2) Has failed to conform to the standards of conduct required in the courts of the United States;
>
> (3) Is lacking in character or professional integrity;

(4) Engages in dilatory tactics or disorderly or contemptuous conduct; or

(5) Displays toward the Commission or any of its presiding officers conduct which, if displayed toward any court of the United States, would be cause for censure, suspension, or disbarment."

The City's Motion to Disqualify SS&D in the NRC proceedings has always been predicated upon an alleged violation of subpart (2) of section 2.713(c). Conduct which would require disqualification in a District Court would a fortiori be violative of section 2.713 (c)(2). Similarly, conduct which does conform to that required by courts of the United States cannot be violative of section 2.713(c) (2). The standard against which the evidence was measured in the District Court disqualification proceeding is identical to the standard applicable in the case at bar.

The fact of the matter is that the District Court's findings preclude disqualification of SS&D in the NRC proceedings. No basis for disqualification has been urged in the NRC proceedings other than those urged in and specifically rejected by the District Court. The City can advance neither SS&D's ad hoc representation of the City, nor its representation of the City as bond counsel, nor Daniel J. O'Laughlin's former employment with the City as a basis for disqualification of SS&D. As no other grounds for disqualification have been or can be advanced by the City, the disqualification proceedings before the NRC should be dismissed.

VII. CONCLUSION

The doctrine of collateral estoppel precludes relitigation before the NRC of issues determined in the disqualification proceedings held in the United States District Court for the Northern District of Ohio. The findings of the District Court are binding upon the parties in all subsequent litigations, including the NRC proceedings.

Analysis of the District Court's determinations discloses that all bases for disqualification urged by the City in the proceedings at hand have been rejected by the District Court, some of them on multiple grounds. The standard of conduct required of

counsel before the NRC is identical to the standard required by the courts of the United States, and in light of the District Court's findings there can be no disqualification of SS&D in the NRC proceedings.

SS&D respectfully submits that its motion to dismiss is proper in all respects and that it is entitled to a dismissal of the disqualification charges filed against it as a matter of law. SS&D respectfully prays that its motion to dismiss the disqualification proceedings be granted.

Respectfully submitted,

Michael R. Gallagher

MICHAEL R. GALLAGHER

SERVICE

Copies of the foregoing Motion of Squire, Sanders and Dempsey to Dismiss Disqualification Proceedings and supporting Memorandum have been mailed regular United States Mail, First Class, to Vincent C. Campanella, Director of Law, City of Cleveland, 213 City Hall, Cleveland, Ohio; Robert D. Hart, First Assistant, Director of Law, City of Cleveland, 213 City Hall, Cleveland, Ohio; James B. Davis, Esq., Special Counsel, Hahn, Loeser, Freedheim, Dean & Wellman, National City - East Sixth Building, Cleveland, Ohio 44114; in addition, the original and twenty (20) copies of the foregoing were mailed to the Secretary, Nuclear Regulatory Commission, Washington, D.C. 20555, Attn: Chief, Docketing and Service Section; and one copy to each of the persons listed on the attached Service List this 26th day of August 1976.

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