UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

STAFF'S RESPONSE TO HEARING MEMORANDUM
OF CITY OF CLEVELAND ON THE
ISSUE OF DUE PROCESS

This is filed in response to the Hearing Memorandum submitted to this Atomic Safety and Licensing Appeal Board (Appeal Board) by the City of Cleveland at the oral argument held in the captioned matter held on May 10, 1976. For the reasons set forth below, the staff agrees with the position taken by the City in its Hearing Memorandum that procedural due process was accorded to SS&D in this proceeding.

Squire, Sanders and Dempsey (SS&D) in its brief [1] alleges that it has been deprived of procedural due process of law in connection with the motion to disqualify it from further participation in this proceeding. SS&D claims that it believed that an evidentiary hearing would be held and relied upon the language of 10 CFR 2.713(c) of the Commission's Rules of Practice for the right to present witnesses and adduce evidence before the Special Board. SS&D claims that the failure of the Special Board to grant the requested hearing was a denial of

1/ Brief of Squire, Sanders and Dempsey Re Special Section 2.713(c) Proceeding, dated April 30, 1976.

due process, was in violation of U.S. Code, Title 5, Chapter 5, Subchapter II (the Administrative Procedure Act), and was inconsistent with the plain meaning of 10 CFR 2.713(c).

I. Denial of Due Process

Due process requires at a minimum that the deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case. Armstrong v. Manzo, 380 U.S. 545 (1965), Mullane v. Central Hanover Tr. Co. 339 U.S. 306 (1970).

It is the staff's view, and there appears to be no dispute among the parties that SS&D received adequate notice of the charges which gave rise to its suspension from further participation in this proceeding. Thus, the first test of due process is met. Next we turn to the second element of the test which, in this proceeding, is the crucial element: Was there an opportunity to be heard which complied with due process requirements? The record discloses that SS&D presented to the Licensing Board and Special Board affidavits of those individuals it believed would be necessary to develop the facts relating to its relationship with the City of Cleveland. At the hearing before the Special Board, SS&D's attorney, subsequent to the decision of the Special Board not to take any additional evidence, made a proffer of evidence. The proffer identified four witnesses who would testify.

The affidavits of all these individuals were attached to SS&D's December 12, 1975 pleading filed with the Licensing Board.

With the exception of one of the individuals, all of the proposed witnesses were senior partners in SS&D. The one exception was Mr. Holton, who was during the period in question an employee of the City. Mr. Holton's affidavit and his proffered testimony do not dispute or alter any of the uncontroverted facts dealing with the City's general knowledge of the relationship between SS&D and CEI. Mr. Holton would testify, according to the proffer, that with regard to the 1972 bond ordinance there was "a very clear and obvious and apparent reluctance on the part of Squire, Sanders and Dempsey to handle this matter, which related to the Municipal Light Plant, on behalf of the City, because of the general counsel relationship with CEI." (Tr. 4385) According to Mr. Holton's Affidavit, "Because Squire, Sanders and Dempsey represented the Cleveland Electric Illuminating Company, Generally, which company was in competition with the City Light Plant, Squire, Sanders and Dempsey had advised us that they were reluctant to handle financing relating to the Light Plant, although they had done so occasionally." (Affidavit p. 2) Thus, there is no apparent difference between the information proffered and that which is already in the record on this issue.

The court cases relied upon by all the parties dealing with multiple representation indicate that numerous courts have based

their decisions upon affidavits and briefs in dealing with the determination of whether to allow an attorney to continue representing a party in a proceeding. In General Motors v. City of N.Y., 501 F.2d 639 (1974), the court stated at p. 641, that:2/

> The facts necessary to an understanding of our disposition of these appeals have been gleaned, in the main, from the complaint and from the affidavits filed by the parties in support of and in opposition to the respective motions at issue. They are, thankfully, rather straight forward and, in all material respects, undisputed.

The facts in this case are also in all material respects uncontroverted. (Brief of Squire, Sanders and Dempsey Re Special Section 2.713(c) Proceeding, dated April 1, 1976, page 4.) In Silver, supra., "the parties submitted voluminous affidavits, copies of pleadings in cases in which Schreiber had allegedly worked and extensive memoranda of law." The court relied on this material as well as oral argument to analyze the motion and to determine whether disqualification was warranted.

On the basis of the above, the staff believes that the requirements of due process have been complied with in that SS&D has had sufficient notice of the charges preferred and has had an appropriate opportunity, in light of the nature of the case, to be heard on the question of disqualification.

2/ See also Harry Rich Corp. v. Curtiss-Wright, 233 F. Supp. 252 (S.D. N.Y., 1964); Marketti v. Fitzsimmons, 373 F. Supp. 637, 638 (W.D. Wisc. 1974)(on the basis of uncontroverted statements in the affidavits, the court was able to rule on the motion); Shelly v. The Macabees 184 F. Supp. 797 (E.D. N.Y. 1960); and Silver Chrysler Plymouth v. Chrysler Motor Corp. 518 F.2d 751 (2d Cir. 1975).

II. Administrative Procedure Act

The question of the applicability of the Administrative Procedure Act [3/] was first raised by SS&D in its April 1, 1976 pleading before this Appeal Board. SS&D believes that the Administrative Procedure Act applies to this disqualification proceeding and that sections 556(d) and (e) of that Act require that in a disqualification proceeding it should have been allowed an opportunity to present its case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of facts. However, section 556 by its own terms does not apply to the present situation. Section 556(a) states that it applies only to hearings required by sections 553 or 554. Section 553 is concerned with rulemaking and has no applicability to this disqualification proceeding. Section 554 does not apply to this disqualification proceeding since it is limited adjudication required by statute.

In Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953), the Court was faced with basically the same issue that is presented by SS&D with respect to the application of the Administrative Procedure Act. An attorney was found to have violated certain cannons of ethics of the American Bar Association. The Court stated at p. 716 that:

> We do not consider whether the Commission's proceedings complied with the requirements of §§5, 7 and 8 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A.

3/ 5 USC §551 et. seq.

§1001 et. seq. The requirements regarding adjudication apply "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing..." (§5) and the hearing and decision requirements of §§7 and 8 apply to rule making "where rules are required by statute to be made on the record after opportunity for an agency hearing...." §4(b). No statute creates the conditions that would make these provisions applicable to the disciplinary proceedings here involved.

Accordingly, the staff does not believe that SS&D was denied any right that may have been afforded pursuant to the Administrative Procedure Act.

III. Section 2.713(c)

The staff does not believe that 10 CFR 2.713(c) [4/] requires a full evidentiary hearing in every instance. Consistent with the requirements of due process, discussed supra., a Special Board has the authority in each instance to determine on the basis of the charges preferred and the state of the factual record as developed before the Licensing Board the type of hearing that will be required for it to fulfill its responsibility. This could range from the submittal of briefs and additional affidavits to a formal evidentiary hearing. Under the circumstances present in this proceeding, we believe that the Special Board properly exercised its discretionary authority to reach a decision based on the record before it rather than convening an evidentiary hearing.

4/ 10 CFR 2.713 states in part that, "Before any person is suspended or barred from participation as an attorney in a proceeding, charges shall be preferred by the presiding officer against such person and he shall be afforded an opportunity to be heard thereon before another presiding officer.

IV. Additional Hearings

Although, in our view, the record is adequate now for a decision to be rendered by the Appeal Board on the merits of the issue presented, we recognize that the outcome could have a significant impact on SS&D as well as on the proceeding. Accordingly, we would urge the Appeal Board, if it believes there is a close question involved, to resolve that question in favor of granting SS&D a hearing deemed appropriate by the Appeal Board.

If the Appeal Board rules that a hearing is warranted under the circumstances on this issue then we would urge that it remand the matter to the Special Board with specific instructions regarding the matters to be heard and establish an expedited schedule for completing the hearing and rendering a decision. In the alternative, of course, the Appeal Board itself could elect to convene a hearing to complete the record in this matter. Whichever course of action the Appeal Board may elect to follow, it should bear in mind that time is of the essence. The antitrust hearing in the captioned matter is rapidly drawing to a close.

Respectfully submitted,

Joseph Rutberg
Chief Antitrust Counsel for
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Jack R. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of May 1976.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF'S RESPONSE TO HEARING MEMORANDUM OF CITY OF CLEVELAND ON THE ISSUE OF DUE PROCESS, dated May 18, 1976, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail, this 18th day of May 1976:

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