UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

BRIEF OF THE CITY OF CLEVELAND
IN SUPPORT OF THE ENFORCEMENT OF ITS
SUBPEONA DUCES TECUM

By motion of November 20, 1975, the City of Cleveland (City), moved the Atomic Safety and Licensing Board to disqualify the law firm of Squire, Sanders & Dempsey (SS & D) and its Washington office, Cox, Langford & Brown, from appearing and/or acting as counsel for the Cleveland Electric Illuminating Company (CEI) or any other applicant in these proceedings. Following an order of the Licensing Board of January 20, 1976, suspending SS & D, but staying the effectiveness of the order and the subsequent order of the Special Licensing Board on February 25, 1976, the Atomic Safety and Licensing Appeal Board has now by its decision of June 11, 1976 (ALAB-332) reversed various findings of the Special Board and returned the matter to a newly constituted Special Board for a full evidenciary hearing, and "with a full opportunity to develop all relevant facts".[1]

Because the matter before the Licensing Board was presented on stipulated documents and affidavits, and because the Special Board in the course of its hearing reversed itself, and denied the submission of any new evidence, there has

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1/ ALAB-332 pg. 30 n. 13

never been any discovery before the NRC. There has been a limited amount of discovery in a similar proceeding to disqualify SS & D in the case of City of Cleveland v. CEI, U.S. District Court for Northern District of Ohio Eastern Division, Case C 75-560. Because of that discovery, the City here seeks only to supplement it with a single subpoena duces tecum directed to an SS & D partner. The subpoena seeks from SS & D access to the City's own files dealing with its own legal affairs, and for which the City has paid in full. In an action which must surely be unprecedented in American law, SS & D now seeks to deny its own client, the City, access to its own files. In what follows, the city adopts the headings of the SS & D memorandum for a point by point response.

A. Prior Discovery

SS & D argues that there has been discovery in the case of City of Cleveland v. CEI and that therefore no discovery should be permitted here. It should be noted at the outset that the private treble damage antitrust case in the District Court for the Northern District of Ohio, is not identical with this antitrust review before the NRC. They are entirely separate proceedings. Whatever the discovery in the District Court, the City has a clear legal right to discovery here as provided in the NRC rules of procedure and the decision of the Appeal Board. As indicated at the prehearing conference, with minimal cooperation from its own attorneys, the City still believes it should be able to complete its documentary review pursuant to the subpoena duces tecum in about a week. To deny the City any access to its own files with which to cross-examine its own lawyers about the nature of the work they previously performed for the City and its relationship to the issues in this antitrust review is to deny the City the "full opportunity to develop all relevant facts" called for in the Appeal Board decision.

B. Prior Rulings

1. Licensing Board

SS & D argues the Licensing Board reviewed in camera certain documents alleged to be connected with SS & D's representation of CEI and determined that they were privileged and that they offered no evidence in support of the City's motion for disqualification. This is totally inaccurate and misleading. None of those documents are now sought by the subpoena. Nevertheless, privilege was waived as to two of those documents and they were found to offer significant evidence. The Licensing Board said at page 16 of its Memorandum and Order of January 20, 1976 as follows:

> "With respect to the documents as to which privilege was raised, we refer to only two in connection with our decision. These two, however, are crucial documents in that in and of themselves they demonstrate an abuse of the firm's client relationship with the City and they contradict the implications if not the direct language of the Lansdale and Brueckel affidavits."

So much for SS & D's claim that the documents offered no evidence to support the City's motion for disqualification and that other documents wouldn't really disclose anything of interest. What further probative evidence may lie in the City's files at SS & D can only be determined upon examination.

2. Special Board

SS & D suggests that it has some authority for quashing the subpoena duces tecum here in that the first Special Board quashed the duces tecum feature of the subpoenas at its hearing February 3, 1976. The performance of the first special board was such that it is surprising that its rulings should be cited as any authority whatever. This particular ruling denying the City any right to utilize its subpoenas in what the Special Board had suddenly converted into an evidenciary hearing was so clearly a denial of due process that the Staff felt compelled to intervene. The thrust of this ruling of the first Special Board was

to allow SS & D to present live testimony at the last minute, but to deny the City any right to obtain materials to cross-examine live witnesses. Upon consideration of the objections of the Staff, the Special Board abruptly reversed itself and converted its hearing into oral argument only. Far from being any authority for quashing the subpoena duces tecum of the City now, this episode of the first Special Board is a clear example of an error not to be repeated, particularly in view of the mandate of the Appeal Board that this be a full evidentiary hearing, with full opportunity to develope all relevant facts.

3. District Court

In this sub-part of their brief, SS & D argue that because a federal district judge in the District Court in Cleveland quashed the City's subpoena there, the NRC Special Board should quash subpoenas here. The first major difficulty is that there are major differences between the two proceedings. The second major difficulty is that the subpoena here is quite different from the subpoena utilized in Cleveland. All reference to previously identified privileged documents has been eliminated here. The subpoena has been reworded to make it as precise as circumstances permit, given the fact that the City has never had access to its files at SS & D, does not know they are kept or labelled and has never had the benefit of the usual written interrogatories to help it specify documents in connection with this disqualification proceeding.

The only objection raised by the District Judge to the non-privileged parts of the City subpoena was that they disclosed "a general absence of reasonable particularity." There was no discussion by the court of the fact that unlike normal litigation, here a client was calling for its own files which its own lawyers had induced and could certainly retrieve at will. The court never considered restricting the City to various parts of its subpoena which were

quite specific. The Court simply denied the entire duces tecum part of the subpoena. Although firmly disagreeing with a clearly erroneous holding which denied the city access to any single document in the Cleveland hearing, the City has here reworked its subpoena and eliminated much material previously sought. This Special Board should make its own ruling based on this new subpoena, keeping in mind the difficulty the City has in being more precise without the valuable but true consuming process of written interrogatories.

III. Here the City will respond to the objections of SS & D as to each discrete category of the subpoena.

1. The City asks for all SS & D files pertaining to notes, bonds and other debt instruments for the City of Cleveland including the Division of Light and Power. SS & D complains this request is not relevant to the issues before the antitrust board. There is no claim of privilege with regard to this item. The test incidentally is not relevance but "[whether] the information sought appears reasonably calculated to lead to the discovery of admissible evidence." NRC Rules of Practice 2.740(1).

This is an antitrust review which virtually by definition involves an analysis of the financial pressures brought by the alleged monopolist against the victim. SS & D by preparing nearly all of the City's bonds and notes for some 65 years as well as serving as its financial legal advisor in other ways, had a comprehensive inside understanding of the precise financial situation of the City including MELP, at all relevant times in this NRC antitrust review. The staff in its brief of April 21, 1976 lists 14 issues where there was a substantial relationship between SS & D's bond work for the City and the issues of the antitrust review:

(1) The City's financial ability to pay for its proportionate share of the construction, operation, maintenance and all other capital in generating costs, of the five Davis-Besse and Perry units, should the City obtain access to those units.

(2) The financial ability of the City to participate as a member in the capital pool.

(3) The reasons why the 1972-73 bond ordinance was amended, and the affect of that amendment.

(4) The reasons for the difficulty in settling the 1972-73 bond issue.

(5) The inability of the City to obtain thirty MW of low cost of PASNY power due to CEI's refusal to wheel that power.

(6) CEI's attempt to cause MELP to raise its rates to private customers.

(7) The reasons for this switching of customers from MELP to CEI.

(8) The reasons why CEI for many years, refused to interconnect the City.

(9) The reasons why CEI avoided a parallel interconnection with MELP.

(10) CEI's interest in acquiring MELP.

(11) The general liability of MELP.

(12) The CAPCO method of allocating reserves.

(13) The City's financial ability to pay for interconnections or transmission facilities.

(14) The reasons for the state of disrepair of MELP's equipment at times.

The files the City is demanding are obviously calculated to lead to admissible evidence concerning such issues. It should be obvious that anyone who has had an inside look at all your finances for 65 years would have enormous knowledge and insight and thereby a tremendous advantage in defending an opposing party in an antitrust case above all cases.

These files are the City's property. Normally a simple request from a client would produce them. There should be no need for a formal demand by way of subpoena.

SS & D seeks to deny any discovery regarding the City's 1972 bond ordinance[2/] with the argument that the 1972 bond ordinance was ruled out of the antitrust proceedings. Upon examination, this ruling was based solely upon the procedural ground that the City had not listed this area in its statement of the case to be presented. Whatever the trial ruling there, it is no determination of what should or should not be permitted in the discovery stage of the entirely separate and collateral matter of disqualification.

2. Here the City attempts as precisely as it can without having had the benefit of prior written interrogatories and in an effort to expedite this hearing to call for all SS & D files referring to its MELP operations. Once again, the City is asking for files from its own lawyers dealing with its own affairs. SS & D cries that this request is overly broad and oppressive or privileged or irrelevant, but does not explain how. Ignoring the request of this Special Board, SS & D in no way attempts to specify the volume or number of files and suggests vaguely that it would take months to comply with this request. This is simply not a credible response. Like any other large and well-established law firm, SS & D undoubtedly has index cards and a filing system that will permit it to retrieve a client's files in a matter of minutes not months. As to the claim of privilege, how can SS & D claim privilege against its own client and as to files clearly dealing with the City's own affairs? If such files were utilized without the City's consent or knowledge by its own lawyers for the benefit of CEI, such files will demonstrate disloyalty to the City and indeed a fraud upon its

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[2/] Ordinance 2104-72

rights and interests by its own lawyers which goes to the very heart of this disqualification proceeding. Is it because of this latter possibility that the City's own lawyers are so frantic to deny the City access to any document?

3-4 In Part 3 the City seeks financial documents derived from the City which SS & D has referred to in performing legal services for the City of Cleveland and in Part 4 documents originating from other sources. SS & D first claims that these items should be denied because they relate to legal services performed for the City of Cleveland and not for MELP. This is meaningless. The City of Cleveland and MELP are one and the same. MELP (Municipal Electric Light Plant) is but a name for the Divison of Light and Power which is one of the divisions of the Department of Public Utilities which is a direct part of the City of Cleveland's administration.

Once again there is not and indeed cannot be any claim of privilege here.

Obeying the mandate of the Appeal Board to go forward with a full evidenciary hearing, the City is attempting to add to its already substantial demonstration and show directly the immense amount of financial and other information gleaned by SS & D's many lawyers from various City departments over many years. Since the issue is what SS & D learned about the City, the most precise way of showing this is to go directly to the SS & D files dealing with the City. The reason for the differentiation between documents originating from the City and from other sources is the claim by SS & D that it learned nothing about the City that was not public knowledge and available from other sources. Legally this is no defense to disqualification[3/] but beyond that it is not true. SS & D knew a great deal about MELP finances that was not public. These files should demonstrate that.

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3/ A lawyer may be disqualified even though all his information regarding a client may be available to the other client. Fleischer v. A.A.P. Inc., 163 F. Supp. 551.

5. Here SS & D says that it will make available to the City a letter from SS & D to CEI to the attention of Mr. Howley dated August 12, 1963. To date the City has received no such copy.

6. In Part 6, the City seeks memoranda or opinions relating to MELP prepared by SS & D for CEI prior to the City's intervention in the NRC.

SS & D without in any way identifying the nature or type of memoranda or opinions requested by date, by author or in any other way, seeks to interpose the claim that it is "privileged information."

One starts with the proposition that in the proper disposition of litigation all pertinent information must be available to the tryer of the fact and all the parties. Claims of privilege are according to Dean Wigmore to be "strictly confined within the narrowest possible limits". The party claiming the privilege must be held to have burden of establishing the existence of the privilege and of meeting this burden by a preponderance of the evidence, not by "mere conclusory or ipso dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship [attorney-client], and any spurious claims could never be exposed."[4/]

The City has previously argued in detail the following propositions of law with regard to other documents in its briefs of April 25, 1975 and June 23, 1976 and for full citation and argument the Board is referred to those briefs.

(1) The attorney-client privilege is not applicable to all documents and communications between attorney and client.[5/] There is no presumption that a document prepared by a lawyer for a client is privileged.

(2) Attorney-client privilege is more narrowly construed for communications from the attorney to the client.[6/]

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In re Bonanno, 344 F.2d 830-833 (2nd Cir. 1965)
[illegible] v. U.S., 306 F.2d 633 (2d Cir. 1962)
United States v. Silverman, 430 F.2d 106 (2d Cir. 1970)

(3) The communications must be made in the course of obtaining legal advice from a professional legal advisor acting in his capacity as such. A communication involving business advice rather than legal advice is not privilege.7/

(4) Only the corporation's control group should be considered as a client within the meaning of the privilege.8/

(5) The communication must have been intended to be and must have remained confidential.9/

(6) Communications made in the course of a criminal, fraudulent or otherwise illegal scheme are not protected by the privilege.10/ The City in the case on the merits has made out a prima facie case that CEI was involved in a fraudulent or illegal scheme to drive MELP out of existence.

SS & D does not begin to meet its burden of establishing privilege with regard to any of the above major elements. Having been given an opportunity and having failed to meet the burden the claim of privilege must be denied.

(7) Here the City has sought internal documentation between SS & D personnel relating to the City's own affairs at the Division of Light and Power or MELP and has carefully omitted these NRC proceedings and the antitrust case in District Court of Ohio. The relevance of such material is obvious on its face. It is nonsense to suggest that the City must distinguish between privileged and non-privileged matter. The City has never seen these items and does not know what they are. It is for SS & D to meet its heavy burden of showing that specific items are privileged. It is interesting to have the City's request to its own

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7/ Colton, supra; United States v. Aluminum Co. of America, 193 F. Supp 251 (N.D N.Y. 1960).

8/ City of Philadelphia v. Westinghouse Electric Co., 210 F. Supp 483 (E.D. Pa. 1962).

9/ Cafritz v. Koslow, 167 F.2d 749 (D.C. Cir. 1948).

10/ Clark v. United States, 289 U.S. 1, 19 (1933). In that case Justice Cardozo stated: "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.

lawyers to produce its documentation referring to the City's own light and power operations as a "fishing expedition." Under normal circumstances, such documents, notes, memoranda, etc., would simply be handed to a client or mailed to him periodically. This was emphatically not the case between the City of Cleveland and SS & D.

(8) Here SS & D plays cute taking advantage of a mistake in the wording of the City's subpoena. As originally filed, Part 8 of the City's subpoena called for "that file together with all its contents captioned 're MELP Sales' referred to in the memorandum of John Lansale, Jr. of October 26, 1966." The subpoena should have read "re MELP Rates" which is the title of that memorandum of John Lansdale, Jr. of October 26, 1966. SS & D is doing nothing more than hiding behind this minor error. Request is hereby made to correct his error instanter and have it read "re MELP Rates". In any event there can have been no possible confusion about what was intended. The above memorandum has long been a part of the documentation in these disqualification proceedings since it was attached to the City's initial brief of December 1, 1975. If SS & D is serious about claiming privilege for this file, then let them come forward and confess that they kept such a file concerning MELP's rates on behalf of their other client CEI. Let them demonstrate as to each document or item in the file that it came solely from privileged disclosures by CEI and not from public records, communication from third parties or other sources. Let them demonstrate that each document was a result of the communication in the course of obtaining legal advice. Let them demonstrate that it was a communiation between SS & D and the control group of CEI. Let them demonstrate that it was intended to be and did remain confidential. Let them above all demonstrate that the existence of such document was not as a part of a fraudulent or otherwise illegal scheme by CEI to eliminate MELP in which SS & D was participating.

## CONCLUSION

The City has never yet been able to get a look at its own files dealing with its own affairs maintained by SS & D. The complaint of SS & D that there has already been a lot of discovery and that further discovery is burdensome is like most of the rest of the SS & D brief inaccurate and misleading as well as legally insufficient. The great bulk of discovery done was depositions of City witnesses by SS & D. The City took discovery depostions of only three SS & D lawyers and one other person. All City discovery by deposition was done without the usual careful advance preparation through written interrogatories, or the benefit of subpoena duces tecum. The City has never yet had a fair chance to undertake the normal discovery afforded to any litigant for an evidentiary hearing. What it is requesting in the present subpoena duces tecum is minimal.

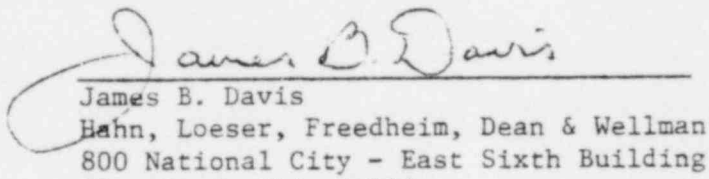
Why then, one must ask, are the City's own lawyers of sixty-five (65) years so frantically anxious to deny the City one scrap of paper? The inference is inescapable that the contents of such files would expose SS & D in the act of turning over information gleaned from its second class client, the City, to its first class client, CEI, in furtherance of CEI's long-term illegal plans to eliminate the City Light Plans as a competitor. Actual documents demonstrating this sort of SS & D conduct were attached to earlier City briefs and persuaded the Licensing Board to suspend SS & D. Consistent with its position that the City is a second-class client, SS & D now attempts to relegate the City to second-class discovery. "You may ask our lawyers questions" they say, "but do not be so bold as to obtain documents with which to test their credibility."

The very existence of a Motion and Brief seeking to deny the City any single document from SS & D, with one minor exception, is by itself a serious confession of misconduct. How can such lawyers even pretend they were loyal to the City's interests over the years?

It is not surprising that SS & D have failed to find or cite in their memorandum a single reported case to support what they seek in their motion to quash.

The time has arrived for this Board to tell SS & D that the City is not a second-class client, at least in this forum, and has the right to see its own files and those files dealing with its own business.

Respectfully submitted,



James B. Davis
Hahn, Loeser, Freedheim, Dean & Wellman
800 National City - East Sixth Building
Cleveland, Ohio 44114
(216) 621-0150

Vincent C. Campanella, Director of Law
Robert D. Hart, First Assistant Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114
(216) 694-2737

Attorneys for the City of Cleveland

July 12, 1976

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Brief of City of Cleveland has been made upon the Secretary of the United States Nuclear Regulatory Commission, Washington D.C. 20555, Attention Chief Docketing and Service Section, by mailing the original and twenty (20) copies, and on the following parties listed on the attachment hereto this 12th day of July, 1976, by depositing copies thereof in the United States mail, first class postage prepaid, or by hand delivery.

James B. Davis

James B. Davis

Attorney for City of Cleveland, Ohio

Attachment

Douglas V. Rigler, Esq., Chairman
Atomic Safety and Licensing Board
Foley, Lardner, Hollabaugh and Jacobs
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. John H. Buck
Dr. Lawrence K. Quarles
Atomic Safety and Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard K. Shapar, Esq.
Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frank W. Karas, Chief
Public Proceedings Branch
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Abraham Braitman, Esq.
Office of Antitrust and Indemnity
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Frank R. Clokey, Esq.
Special Assistant Attorney General
Towne House Apartments, Room 219
Harrisburg, Pennsylvania 17105

Edward A. Matto, Esq.
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street, 15th floor
Columbus, Ohio 43215

Christopher R. Schraff, Esq.
Assistant Attorney General
Environmental Law Section
361 East Broad Street, 8th floor
Columbus, Ohio 43215

Ivan W. Smith, Esq.
John M. Frysiak, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman, Chairman
Atomic Safety and Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael C. Farrar
Dr. W. Reed Johnson
Atomic Safety and Licensing Appeals Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jack R. Goldberg, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Benjamin H. Vogler, Esq.
Joseph Rutberg, Esq.
Robert J. Verdisco, Esq.
Roy P. Lessy, Jr., Esq.
Office of the General Counsel
Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Melvin G. Berger, Esq.
Joseph J. Saunders, Esq.
Steven M. Charno, Esq.
David A. Leckie, Esq.
Janet R. Urban, Esq.
Ruth Greenspan Bell, Esq.
Antitrust Division
Department of Justice
Post Office Box 7513
Washington, D.C. 20044

Karen H. Adkins, Esq.
Richard M. Firestone, Esq.
Assistant Attorneys General
Antitrust Section
30 East Broad Street, 15th floor
Columbus, Ohio 43215

Russell J. Spetrino, Esq.
Thomas A. Kayuha, Esq.
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

John Lansdale, Jr., Esq.
Cox, Langford & Brown
21 Dupont Circle, N. W.
Washington, D. C. 20036

Richard A. Miller, Esq.
Vice President and General Counsel
The Cleveland Electric Illuminating Co.
Post Office Box 5000
Cleveland, Ohio 44101

Gerald Charnoff, Esq.
Wm. Bradford Reynolds, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N. W.
Washington, D. C. 20036

David McNeill Olds, Esq.
William S. Lerach, Esq.
Reed, Smith, Shaw & McClay
Post Office Box 2009
Pittsburgh, Pennsylvania 15230

Terrence H. Benbow, Esq.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Jon T. Brown, Esq.
Duncan, Brown, Weinberg & Palmer
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Docketing and Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Alan P. Buchmann, Esq.
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

Leslie Henry, Esq.
Michael M. Briley, Esq.
Roger P. Klee, Esq.
Fuller, Henry, Hodge & Snyder
Post Office Box 2088
Toledo, Ohio 43604

James R. Edgerly, Esq.
Secretary and General Counsel
Pennsylvania Power Company
One East Washington Street
New Castle, Pennsylvania 16103

Donald H. Hauser, Esq.
Victor A. Greenslade, Jr., Esq.
The Cleveland Electric Illuminating Co.
Post Office Box 5000
Cleveland, Ohio 44101

Thomas J. Munsch, Jr., Esq.
General Attorney
Duquesne Light Company
435 Sixth Avenue
Pittsburgh, Pennsylvania 15219

Joseph A. Rieser, Esq.
Reed, Smith, Shaw & McClay
1150 Connecticut Avenue
Washington D,C, 20036

John C. Engle, President
AMP-O, Inc.
20 High Street
Hamilton, Ohio 45012

Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Appeal
Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Michael R. Gallagher, Esq.
630 Bulkley Building
1501 Euclid
Cleveland, Ohio 44115

Robert M. Lazo, Esq.
Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Andrew C. Goodhope, Esq.
Member
Atomic Safety & Licensing Board
3320 Estelle Terrace
Wheaton, Maryland 20906

Daniel M. Head, Esq.
Member
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555