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

BRIEF OF SQUIRE, SANDERS & DEMPSEY REGARDING THE CITY'S APPEAL OF THE SPECIAL BOARD'S ORDER DISMISSING THE DISQUALIFICATION PROCEEDINGS

MALCOLM C. DOUGLAS
Acting Law Director
ROBERT D. HART
First Assistant, Director of Law

For the City of Cleveland.

MICHAEL R. GALLAGHER
Attorney for Squire, Sanders & Dempsey
630 Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310

JOSEPH RUTBERG, Esq.
Chief Antitrust Counsel
BENJAMIN H. VOGLER, Esq.
Assistant Chief Antitrust Counsel
ROY. LESSY, JR., Esq.
Counsel

For the NRC Staff.

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February 14, 1977

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I. STATEMENT OF FACTS

The proceedings before the Nuclear Regulatory Commission (NRC) are one of a series of litigations between the City of Cleveland (City) and the Cleveland Electric Illuminating Company (CEI) concerning antitrust claims asserted by the City. Similar antitrust issues were raised by the City in proceedings held before the Federal Power Commission (FPC) in the early 1970's. In addition, a civil antitrust suit was filed by the City against CEI in the United States District Court for the Northern District of Ohio in 1975.

In both the NRC proceedings and the District Court litigation, the Cleveland law firm of Squire, Sanders and Dempsey (SS&D) entered an appearance on behalf of CEI. In December of 1975, the City filed a motion to disqualify SS&D as counsel for CEI in each forum.

The legal theories and factual bases urged in each of the City's motions to disqualify were identical. Each of the motions argued that SS&D's prior representation of the City on an ad hoc basis created a conflict of interest which precludes its representing CEI in matters adverse to the City. The City's motions also urged that SS&D role as bond counsel in bond issues relating to the City's Municipal Light Plant (MELP) were "substantially related" to issues of 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 constituted an independent basis for the disqualification of SS&D as CEI's counsel in each antitrust proceeding.

With respect to the motion to disqualify filed with the NRC, the Atomic Safety and Licensing Board hearing the merits of the antitrust proceedings (Antitrust Board) found, on a preliminary basis, that the City's motion stated claims against SS&D which could substantiate an order of disqualification if found to be true. The Board preferrred charges against SS&D and a special licensing board (Special Board) was convened to hear the disqualification matter. The Special Board heard oral argument on the issue of disqualification on February 3, 1976, and issued its decision on February 24, 1976. The Special Board concluded that SS&D should not be disqualified from representing CEI.

After considering the Special Board's order, the Antitrust Board concluded that the order was advisory only and that the final decision with respect to disqualification was to be made by the Antitrust Board. In an order dated March 22, 1976, the Antitrust Board rejected the conclusions of the Special Board and ordered that SS&D be disqualified. This decision was certified to the Atomic Safety and Licensing Appeal Board (Appeal Board), which heard oral argument and issued an order dated June 11, 1976.

The Appeal Board ruled that the decision of the Special Board with respect to disqualification could not be countermanded by the Antitrust Board. The Appeal Board further found, however, that the manner in which the Special Board determined the issue of disqualification was improper and remanded the matter to the Special Board. The Appeal Board held that the question of disqualification could not be resolved in the absence of an evidentiary hearing. The Appeal Board's order also established the procedure and substantive law to be applied by the Special Board in hearing the disqualification matter.

Meanwhile, an evidentiary hearing concerning the concurrent motion to disqualify filed in the District Court was held before Judge Robert B. Krupansky on June 14, 15, and 16, 1976. At that hearing, witnesses were called by both the City and SS&D, exhibits were presented to the Court by both parties, and comprehensive 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 and specific determinations of the material issues contested.

On August 26, 1976, SS&D filed with the NRC Special Board a motion to dismiss the NRC disqualification proceedings. The basis of this motion was that the doctrine of collateral estoppel precluded relitigation of issues presented to and determined by Judge Krupansky. Extensive briefs were filed with respect to this motion and oral argument was held before the Special Board. On November 5, 1976, the Special Board granted the motion and ordered that the disqualification proceedings be dismissed. It was subsequently ordered by the Antitrust Board that the City's motion to disqualify be overruled. The instant appeal with respect to the disqualification issue concerns the propriety of these orders.

II. DISQUALIFICATION PROCEEDINGS ARE NOT EXEMPT OR IMMUNE FROM APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL

The City's brief represents to the Appeal Board that the doctrine of collateral estoppel is not to be applied to disqualification proceedings. In support of this assertion, three reported federal decisions are cited, all of which concern separate motions to disqualify attorneys in related antitrust proceedings. Analysis of the decisions, however, does not support the assertion that collateral estoppel is inapplicable in disqualification proceedings.

Fisher Studio v. Loews' Inc., 232 F. 2d 199 (2d Cir. 1956) (City's brief at page 3) concerned an antitrust claim filed against motion picture studios. The attorney filing suit on behalf of the plaintiffs was David H. Isaeson of the firm of Malkan & Isaeson. Isaeson had in the past represented some (but not all) of the defendants in matters substantially related to the subject matter of the antitrust suit, and the defendants moved for his disqualification on that basis. The trial court disqualified Isaeson individually and the firm of Malkan & Isaeson from representing the plaintiffs against all defendants named in the suit. The order was modified by the Court of Appeals to preclude Isaeson and the firm of Malkan & Isaeson from representing the plaintiffs against Isaeson's former clients only.

The firm of Malkan & Isacson was then dissolved, and subsequent to its dissolution attorney Arnold G. Malkan filed several suits against the defendants involved in Fisher. Each suit filed by Malkan was filed on behalf of a different group of plaintiffs and in no suit did Malkan attempt represent the plaintiffs involved in Fisher. The defendants moved to disqualify Malkan in each of the suits he filed.

In Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, 130 F. Supp. 514 (S.D. N.Y.), aff'd 224 F. 2d 824 (2d Cir. 1955) (City's brief at page 3), the trial court ruled and the appellate court affirmed that Malkan need not be disqualified in all suits filed against the defendants. He would be disqualified in all cases in which the plaintiffs retained his services through Isacson or the firm of Malkan & Isacson, but he would be permitted to participate in suits in which the plaintiffs retained his services through other channels after the dissolution of the firm of Malkan & Isacson, provided that he could demonstrate to the court that he received no confidential information substantially related to any given suit from Isacson. Applying this rule to the facts presented in Laskey Brothers, both courts held that Malkan could represent certain plaintiffs and held that he was disqualified from representing other plaintiffs.

In Harmar Drive In Theatre, Inc. v. Warner Bros. Pictures, Inc., 239 F. 2d 555 (2d Cir. 1956) (City's brief at pages 3 and 4), the rule of law established in Laskey Brothers was applied without modification to a number of other lawsuits filed by Malkan against the same defendants on behalf of still different plaintiffs. The court inquired in each case as to whether Malkan had been retained by the plaintiffs prior to or subsequent to his disassociation with Isacson. The Court of Appeals concluded that each of the plaintiffs involved in Harmar had been introduced to Malkan's services while he was a member of the Malkan & Isacson firm and ordered that he be disqualified from representing them in their suits against the defendants.

As the City states in its brief, the doctrine of collateral estoppel did not preclude multiple evidentiary hearings in the Malkan cases. Multiple hearings were held, however, not because the doctrine of collateral estoppel is inapplicable to disqualification

proceedings in general, but because application of the doctrine would have been inappropriate in the circumstances of those cases. In each case Malkan was attempting to represent a different plaintiff or group of plaintiffs, and it was necessary for the court to determine how and when each plaintiff retained Malkan's services. A factual resolution of these questions with respect to one plaintiff would not be dispositive with respect to a second plaintiff in a second suit. Multiple hearings with respect to disqualification proceedings were held in the Malkan cases, but there was no duplicity of litigation with respect to any particular issue.

The Malkan cases contain a peculiarity which is discussed at length and misinterpreted by the City. During the course of litigation in Fisher, the defendants and Isaacson stipulated that the disqualification decision would be binding upon the defendants, binding upon Isaacson, and binding upon the firm of Malkan & Isaacson in all related antitrust cases. The court in Fisher embodied this stipulation in an order, thereby facilitating the handling of disqualification motions in related cases filed within the jurisdiction of the court. At the same time, the court recognized, in the language cited at page 4 of the City's brief, that it could not order disqualification in cases filed in other jurisdictions.

The City urges that this language stands for the proposition that a disqualification order has "no effect" outside of its jurisdiction (City's brief at page 4). This statement is absolutely incorrect. In fact, the language of the court which is quoted by the City strongly suggests that the orders and decisions of the court will have extraterritorial effect and that they may serve as the basis of a motion to disqualify filed in some other jurisdiction.

The Malkan cases do not support the proposition asserted by the City. While the cases illustrate the obvious fact that collateral estoppel is not applicable in all disqualification proceedings, they certainly do not establish that the doctrine is never applicable in any disqualification proceeding. The Special Board correctly recognized that collateral estoppel is to be applied whenever conditions precedent to its invocation exist.

III. APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL BY THE SPECIAL BOARD DID NOT DENY THE CITY DUE PROCESS OF LAW

The City's brief argues that the Special Board's application of the doctrine of collateral estoppel denied the City due process of law in two respects. First, the City contends that the Special Board's ruling denied the City the opportunity to "rebutt [sic] the presumptions and inaccuricies [sic] contained in a thirty-two page document from an Ohio District Court" (City's brief at page 18). Secondly, it is urged that the Special Board's ruling denied the City the procedural rights guaranteed to the City by the Appeal Board in its June 11, 1976, order (City's brief at page 19).

The City's first argument attacks the doctrine of collateral estoppel itself. When reduced to its essential terms, the City's argument is that the application of collateral estoppel in any circumstance denies a litigant due process of law because it precludes him from rebutting the factual determinations made in previous litigation.

The argument is deficient in two respects. First, it ignores the great body of case law and the great body of secondary literature which endorses the doctrine. Among the decisions of the Supreme Court of the United States in which the doctrine has been applied are Southern Pacific Ry. v. United States, 168 U.S. 1 (1897); Ashe v. Swenson, 397 U.S. 436 (1970); and Harris v. Washington, 404 U.S. 55 (1971). Treatises as prestigious as Moore's Federal Practice and Davis' Administrative Law Treatise have discussed and explained the virtues of the doctrine.* In light of these authorities, the City cannot realistically urge that the application of the doctrine of collateral estoppel is per se violative of due process guarantees.

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*See 1B Moore's Federal Practice § 0.441 [2] and Davis, Administrative Law Treatise (1958) § 18.11.

The City also forgets that it was afforded an evidentiary hearing with respect to all of the issues determined by Judge Krupansky. The City called its own witnesses, cross-examined SS&D's witnesses, offered exhibits, argued the facts and the law to the court, filed written briefs, conducted pretrial discovery, and was afforded due process of law in every respect. The City fully and exhaustively litigated all issues determined in the District Court. Refusing to permit repetitious litigation does not abridge the City's due process protections.

The City's argument that the Special Board abridged procedural rights vested by the Appeal Board's order of June 11, 1976 is also deficient in a number of respects. First, a reading of the order discloses that the Appeal Board was construing some of the provisions of the NRC's rules of practice for the first time. The Appeal Board's order established a general procedure which is to be followed in disposing of all future disqualification motions filed with the NRC, not a special procedure unique to the present controversy between the City and SS&D.

As the procedure outlined in the order is general in nature, it would be impossible for the procedure to provide for all factual contingencies which might arise in a particular controversy. Unique factual patterns require application of general principles of substantive and procedural law, not blind and inflexible adherence to a rough procedural outline which is neither designed nor intended to deal with all contingencies. The City's assertion that the Appeal Board's June 11, 1976, order requires an evidentiary hearing come hell or high water is untenable.

This City's reliance upon the decision of Vitarelli v. Seaton, 359 U.S. 535 (1958), is inappropriate. In Vitarelli, the aggrieved employee was discharged in complete contravention of established rules of the Department of the Interior. In fact, he was discharged after a hearing in which the only evidence presented was exculpatory and established that the charges filed against him were completely unfounded.

In the case at bar, the general procedure outlined by the Appeal Board's June 11, 1976, order was not contravened or ignored by the Special Board. The Special Board

properly applied the doctrine of collateral estoppel to an unusual factual situation which simply was not contemplated by the Appeal Board at the time it issued its earlier ruling. The Special Board's ruling is not inconsistent with the Appeal Board's June 11, 1976, order. It is consistent with both the order and fundamental principals of law.

Secondly, the City's brief suggests that the purpose of the Appeal Board's June 11, 1976, order was to grant particular procedural rights to the City. While it is indisputable that the Appeal Board's order requires all litigants always be fairly and equally treated, the order expresses a concern that challenged lawyers may not receive due process and may not receive an opportunity to refute charges filed against them in the absence of an evidentiary hearing. In its order the Appeal Board wrote:

> "Under Section 2.713(c), the charged attorney or firm is entitled to be heard " (emphasis added, page 15.)
>
> * * *
>
> "Section 2.713(c) itself provides expressly that an attorney charged with misconduct 'shall be afforded an opportunity to be heard thereon.' We hold this to mean that he is entitled to a full evidentiary hearing with all parties having the right to present evidence and conduct cross-examination.
>
> "Attempts to suspend or bar attorneys from practice in a Commission proceeding — or any administrative proceeding for that matter -- present issues of great sensitivity and importance. They reflect upon the honor and professional integrity of the attorneys whose suspension is sought. They could result in depriving a party of the right to be represented by the law firm which is his first choice," (page 29.)
>
> * * *
>
> "Of course, the fact that the charged party has the right to a hearing does not mean that there must be a hearing in all cases. For example, the charged party may waive that right," (page 30.)

There is no question but that the City is entitled to due process of law in all proceedings before the NRC. The City's assertion, however, that special, preferred procedural rights were granted to the City in the Appeal Board's June 14, 1976 order is not at all accurate. The City has received due process of law and has not been improperly deprived of any of its rights or privileges.

IV. THE DOCTRINE OF COLLATERAL ESTOPPEL WAS PROPERLY APPLIED TO THE DISQUALIFICATION PROCEEDINGS BY THE SPECIAL BOARD

At page 8 of its order of November 5, 1976, the Special Board wrote as follows:

> The applicable principles for the application of [the doctrine of collateral estoppel] are fourfold: 1. that there was previous litigation between the parties or their privies; 2. in a court of competent jurisdiction; 3. which resulted in a final judgment; 4. of the particular issues involved in the subsequent litigation.

The City's brief does not dispute the accuracy of the Special Board's definition of collateral estoppel and does not dispute that most of the conditions precedent to its application are satisfied in the case at bar. The only condition disputed by the City is that previous litigation occurred between "the parties or their privies." The City urges that the NRC, the NRC staff and the Justice Department are "parties" to the disqualification proceedings pending before the NRC, and that each of them could have directed disqualification motions toward SS&D which would not be barred by application of collateral estoppel.

The City's argument is premised upon a misconception concerning the doctrine of collateral estoppel. The faulty premise asserted by the City is that a judgment otherwise binding between two litigants is not to be given collateral estoppel effect in a subsequent litigation in which they and a third litigant are the parties. This is not a correct statement of the law. While the third litigant is not bound by the previous judgment (unless he is in privity with one of the other two litigants), the original two litigants are precluded from relitigating issues previously determined between them.

In the case at bar, the City is precluded from relitigating disqualification issues even if the NRC staff and the Justice Department are deemed "parties" to the disqualification proceedings. The findings of the District Court must be given conclusive effect in considering any motion filed by the City against SS&D. The motion to disqualify was properly dismissed irrespective of the number of parties to the disqualification proceedings.

The fact of the matter, however, is that the NRC, its staff, and the Justice Department are not parties to the disqualification proceedings. As the Special Board opined at page 10 of its order, the NRC and the Department of Justice have no interest in which counsel represents CEI, provided that CEI's counsel complies with the NRC's rules of practice in representing his client.* The real parties in interest to the disqualification proceedings are CEI, the City, and SS&D only. These are the identical parties in interest to the disqualification proceedings held before Judge Krupansky.

The City's brief urges that the City's motion to disqualify should not have been dismissed by the Special Board because both the NRC staff and the Justice Department could have moved to disqualify SS&D on the basis of the allegedly improper conduct on SS&D's part in its representations of the City and CEI. This statement is both irrelevant to any issue before the Appeal Board and an incorrect statement of the law.

The statement is irrelevant because neither the NRC staff nor the Justice Department has instituted any motion to disqualify SS&D. In fact, the NRC staff advised the Special Board that it believed SS&D's motion to dismiss the disqualification proceedings should be granted, albeit for reasons different from those urged by SS&D. The City is the only litigant which has moved for SS&D's disqualification, and the City is now collaterally estopped from the continued maintenance of the motion.

*The competency of SS&D's representation of CEI has never been questioned. Neither has SS&D's compliance with the NRC's rules of practice. In fact, the Antitrust Board wrote as follows in its Memorandum of January 19, 1976:

> "As we do so we note once again the high degree of professional skill which both CEI and the City impute to the Firm [and] the Board's lack of criticism of any action undertaken by that Firm in the instant proceeding," (page 23).

Moreover, neither the NRC staff nor the Justice Department would have standing to urge that SS&D's past representation of the City and its present representation of CEI constitutes cause for SS&D's disqualification before the NRC. While failure to represent a client pursuant to the rules of practice of the NRC or contumacious conduct might properly be raised by the Justice Department or the NRC staff or the NRC itself as a basis for disqualifying counsel, matters which are private between counsel and a client and which affect neither the quality of legal representation before the NRC nor the orderly transaction of business before the NRC cannot be cited by anyone other than the client as a basis for disqualification. To state it succinctly, if a client acquieses in its counsel's representation of an adverse litigant or determines that the representation does not present a conflict of interest, neither the NRC staff nor the Justice Department can ignore what has transpired between attorney and client and move for disqualification.

The City's reliance upon Estates Theatres, Inc. v. Columbia Pictures Industries, Inc., 345 F. Supp. 93 (S.D. N.Y. 1972) is not properly founded. In Estates Theatres plaintiff's counsel Joseph Ruskay attempted simultaneously to represent a corporation named as a co-conspirator with the defendants (but not named as a defendant) in lawsuits which were substantially related to the Estates Theatres matter. The client named as a co-conspirator did not consent to the dual representation. It was held that the defendants could bring the conflict of interest to the court's attention even though the defendants were neither present nor past clients of Ruskay.

The facts of Estates Theatres are distinguishable from those of the case at bar in several fundamental respects. First, there was a community of interest between the aggrieved client and the moving defendants in Estates Theatres. Ruskay's representation of the plaintiffs would have substantially harmed not only the client but also the defendants with which the client allegedly conspired. No community of interest exists between the City and either the NRC staff or the Justice Department in the case at bar. Neither the NRC nor the Justice Department will be prejudiced by SS&D's representation of CEI.

Secondly, Ruskay's aggrieved client was not a party to the Estates Theatres litigation and could not advise the court of Ruskay's allegedly improper conduct save through the defendants. In the matter at hand, the City is a party capable of confronting SS&D with charges of impropriety. In fact, the City had the opportunity to thoroughly litigate its bases for disqualification in the District Court. The City does not need the NRC staff or the Justice Department to protect its interests. It had the opportunity to protect them itself.

The City's arguments concerning the lack of identity of parties between the NRC proceedings and the District Court proceedings are inaccurate. Alternate theories of analysis all lead to the conclusion that collateral estoppel was properly applied to the case at bar by the Special Board, that the City is precluded from relitigating issues determined by Judge Krupansky, and that the disqualification proceedings were properly dismissed.

V. THE SPECIAL BOARD CORRECTLY CONCLUDED THAT APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL TO THE NRC DISQUALIFICATION PROCEEDINGS REQUIRED THEIR DISMISSAL AS A MATTER OF LAW

The specific factual findings of Judge Krupansky are wide ranging. All of the City's bases for disqualification were considered by Judge Krupansky and all of them were determined adversely to the City. Judge Krupansky's findings can be grouped as follows:

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;

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; and

5.) SS&D's representation of CEI in antitrust controversies with the City does not constitute the appearance of impropriety.

Contrary to the City's repeated suggestion, the issues before the Appeal Board are not whether Judge Krupansky's findings are correct, accurate, well founded, or supported by the evidence and not whether they should be disregarded in all NRC proceedings. Those questions can be raised only in the Sixth Circuit Court of Appeals. Once it is determined that the conditions precedent to the application of the doctrine of collateral estoppel are satisfied the only issue before the Appeal Board is whether the Special Board properly concluded that the findings required dismissal of the NRC disqualification proceedings as a matter of law.

The propriety of the Special Board's ruling is obvious. Three separate and distinct findings or groups of findings each require dismissal of the disqualification proceedings as a matter of law. First, Judge Krupansky found waiver on the part of the City. This finding alone is dispositive of the City's claim that it can demand SS&D's disqualification. Judge Krupansky's finding of estoppel on the part of the City is also dispositive of the disqualification proceedings. The City cannot maintain its motion in the face of this finding. Thirdly, Judge Krupansky's finding that no substantial relationship exists between SS&D's representations of CEI in antitrust matters and its ad hoc representation of the City in MELP bond, other bond, and non-bond matters together with his finding that SS&D lawyer Daniel J. O'Laughlin's past employment with the City is not substantially related to MELP transactions or to antitrust controversies between the City and CEI preclude the City from establishing any conflict of interest warranting the disqualification of SS&D.

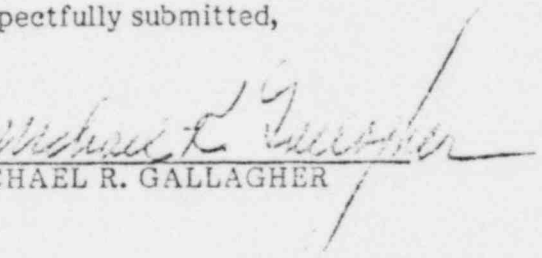
The City's suggestion that unique and unresolved issues exist in the NRC disqualification proceedings is incorrect. No matter how many ways a particular issue is phrased and no matter how many times it is repeated, it constitutes only a single issue. The issues in the NRC disqualifications are whether the subject matter of any past representation of the City by SS&D is substantially related to the subject matter of the antitrust controversies between the City and CEI and, if so, whether the City has waived or is estopped from asserting that SS&D should be disqualified. All of these issues have been resolved in SS&D's favor. Relitigation cannot be permitted.

In light of Judge Krupansky's findings, the Special Board had no choice but to dismiss the disqualification proceedings.

VI. CONCLUSION

The Special Board's order dismissing the disqualification proceedings was proper in all respects and should be affirmed. Contrary to the City's assertions, disqualification proceedings are not immune from the doctrine of collateral estoppel and application of the doctrine by the Special Board did not deny the City due process of law. All conditions precedent to the application of the doctrine of collateral estoppel exist in the case at bar, and application of the doctrine required dismissal of the City's motion to disqualify as a matter of law. SS&D respectfully submits that the City has not demonstrated error on the part of the Special Board in dismissing the disqualification proceedings and respectfully prays that the Special Board's order be affirmed.

Respectfully submitted,



MICHAEL R. GALLAGHER

SERVICE

Copies of the foregoing Brief of Squire, Sanders and Dempsey Regarding the City's Appeal of the Special Board's Order Dismissing the Disqualification Proceedings have been mailed regular United States Mail, First Class, to Malcolm C. Douglas, Acting 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 14th day of February, 1977.

Michael R. Gallagher

MICHAEL R. GALLAGHER

SERVICE LIST

Malcolm C. Douglas, Esq.
Acting Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

Robert D. Hart, Esq.
First Assistant, Director of Law
City of Cleveland
213 City Hall
Cleveland, Ohio 44114

James B. Davis, Esq.
Special Counsel
Hahn, Loeser, Freedheim, Dean & Wellman
National City - East 6th Building
Cleveland, Ohio 44114

William J. Kerner, Esq.
Office of the General Attorney
The Cleveland Electric Illuminating Co.
P. O. Box 5000
Cleveland, Ohio 44101

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

Ivan W. Smith, Esq.
Atomic Safety & Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

John M. Frysiak, Esq.
Atomic Safety & Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

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

Mr. Chase R. Stephens
Docketing & Service Section
U. S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D. C. 20555

Donald H. Hauser, Esq.
Corporate Solicitor
The Cleveland Electric Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

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

Reuben Goldberg, Esq.
David C. Hjelmfelt, Esq.
1700 Pennsylvania Avenue, N.W.
Suite 550
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 & Indemnity
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Jerome E. Sharfman, Esq.
Atomic Safety & Licensing Appeals Board
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

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

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

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

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

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

Joseph Rieser, Esq.
Reed, Smith, Shaw & McClay
Suite 440
1155 Fifteenth Street, N. W.
Washington, D. C. 20005

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

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

Robert P. Mone, Esq.
George, Greek, King, McMahon & McConnaughey
Columbus Center
100 East Broad Street
Columbus, Ohio 43215

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

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

Victor F. Greenslade, Jr., Esq.
Principal Staff Counsel
The Cleveland Electric Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

Lee A. Rau, Esq.
Joseph A. Rieser, Jr., Esq.
Reed, Smith, Shaw & McClay
Suite 404
Madison Building
Washington, D. C. 20005

Leslie Henry, Esq.
Michael M. Briley, Esq.
Roger P. Klee, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Pennsylvania Power Company
One East Washington Street
New Castle, Pennsylvania 15103

Elizabeth S. Bowers, Esq.
Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Edward Luton, Esq., Member
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas W. Reilly, Esq., Member
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555
Attn: Chief, Docketing and Service Section

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