UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Richard S. Salzman
Jerome E. Sharfman

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

Messrs. Malcolm C. Douglas, Acting Director of Law, and Robert D. Hart, 1st Assistant Director of Law, Cleveland, Ohio, for the City of Cleveland.

Mr. Michael R. Gallagher, Cleveland, Ohio, for Squire, Sanders & Dempsey.

Messrs. Joseph Rutberg and Michael B. Blume for the Nuclear Regulatory Commission staff.

DECISION

March 1, 1977

(ALAB-378)

Opinion of the Board by Mr. Rosenthal, in which Messrs. Salzman and Sharfman join:

Coming before us for a second time is the attempt of the City of Cleveland, founded upon 10 CFR 2.713(c), to

disqualify the law firm of Squire, Sanders and Dempsey from representing the Cleveland Electric Illuminating Company in this antitrust proceeding. On the previous occasion, we were confronted with an order by the Licensing Board conducting the antitrust proceeding (the "Antitrust Board") which had directed the disqualification of the law firm. This order had been entered notwithstanding the contrary conclusion on the disqualification question reached by a differently constituted special Licensing Board (the "Special Board"), convened under Section 2.713(c) for the express purpose of considering whether the charges preferred by the City against the law firm were meritorious and warranted the firm's suspension from the proceeding. Following our review of the matter, we held that, in cases such as this, Section 2.713(c) requires the special board to decide the disqualification matter in its entirety, "the initial board's function thereafter [being] limited to the carrying out of the ministerial duty of promptly entering an order giving effect to the special board's decision." ALAB-332, NRCI-76/6 785, 794 (June 11, 1976). We went on to conclude, however, that the determination of the Special Board in this instance was infected with errors of law and, further, that the law firm was entitled to an evidentiary hearing before

that Board. Id. at 794-802. Accordingly, we remanded the case to the Special Board for further proceedings consistent with the views expressed by us.

What is now at issue is an order by the Special Board on the remand, granting by a divided vote the motion of the law firm to dismiss the disqualification proceeding on the ground of collateral estoppel. LBP-76-40, NRCI-76/11 561 (November 5, 1976).[1/] For its basis, the motion had relied upon a district court decision, after an evidentiary hearing, rejecting Cleveland's endeavor to disqualify Squire, Sanders and Dempsey from representing the Cleveland Electric Illuminating Company in a civil antitrust proceeding in that court which had been instituted by the City against that utility and others in 1975. City of Cleveland v. The Cleveland Electric Illuminating Co., Civil Action No. C75-560 (N.D. Ohio, August 3, 1976). Agreeing with the law firm that a party in an administrative proceeding may be estopped from relitigating issues decided adversely to it in a judicial proceeding, the Special Board then determined that the decision of the district court addressed and resolved the

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1/ As required by ALAB-332, the Antitrust Board gave automatic effect to the Special Board's action in a brief unpublished order entered on November 23, 1976.

the same basic issue as was raised by the City in seeking the firm's disqualification from our antitrust proceeding.

On a full consideration of the papers submitted to us in support of and in opposition to the appeal taken by the City from both the Special Board's order and the order of the Antitrust Board giving effect thereto,[2/] we affirm. Because, however, we have been told that the district court's decision is now pending before the Court of Appeals for the Sixth Circuit on the City's appeal, we are retaining jurisdiction over the matter. Should the Sixth Circuit reverse, vacate or significantly modify the district court's ruling, within thirty days thereafter the City may file a motion with us requesting such relief as it may deem appropriate in light of that development. Cf. Occidental Life Ins. Co. v. Nichols, 216 F.2d 839 (5th Cir. 1954); Ray v. Hasley, 214 F.2d 366, 368-69 (5th Cir. 1954); Walz v. Agricultural Ins. Co. 282 Fed. 646, 649 (E.D. Mich. 1922).

A. The essential ingredients of the doctrine of collateral estoppel are well-established and, having been

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2/ We have also scrutinized with care the 41 page decision of the district court, which was appended to the law firm's August 6, 1976 motion seeking a temporary stay of further discovery.

accurately summarized by the Special Board (NRCI-76/11 at 565), need not be rehearsed at length here. Suffice it to say that the doctrine precludes the relitigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 212-13, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974).[3/]

It is equally settled that collateral estoppel is as applicable in administrative adjudicatory proceedings as it is in the judicial arena. Id. at 214, citing, inter alia, United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966). Further, as a general matter, a judicial decision is entitled to precisely the same collateral estoppel effect in a later administrative proceeding as it would be accorded in a subsequent judicial proceeding. 2 Davis, Administrative Law Treatise, §18.11 at p. 619 (1958), citing Lentin v. Commissioner, 226 F.2d 695 (7th Cir. 1955), certiorari denied, 350 U.S. 934 (1956).

3/ In recent years, however, the courts have shown a tendency to retreat from the requirement of mutuality in certain circumstances. See, e.g., Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971).

It is quite true that "when the legislative intent is to vest primary power to make particular determinations concerning a subject matter in a particular agency, a court's decision concerning that subject matter may be without binding effect upon that agency." 2 Davis, supra, §18.12 at pp. 627-28. Cf. United States v. Radio Corporation of America, 358 U.S. 334, 347-52 (1959). We agree, however, with the majority of the Special Board (NRCI-76/11 at 566) that that principle does not come into play in this case. At bottom, the issue on the merits before the Special Board was whether, essentially by reason of its prior representation of the City in connection with municipal bond matters, the law firm should be precluded from now representing the City's adversary in an antitrust proceeding. We discern no legislative purpose that this Commission resolve such an issue independently of a court's resolution of the same issue in an antitrust proceeding before it involving the same parties.

Nor do we subscribe to the belief of the dissenting member of the Special Board that the application of collateral estoppel in this case would constitute an unwarranted intrusion into the ability of the Commission to control its internal proceedings and, as such, would be contrary to

public policy. NRCI-76/11 at 570. That line of reasoning might well have had force were the Special Board here concerned with the manner in which the law firm had conducted itself during the course of our antitrust proceeding. Assuredly, the Commission's adjudicatory boards must be free to take appropriate measures -- including debarment from a proceeding -- against any counsel whose actions threaten the orderly and proper course of the proceeding, whether or not like conduct by the same counsel has been deemed cause for disciplinary action in a related judicial proceeding. And, conceivably, there may be other types of situations in which it would be important for the Commission to reserve to itself decision in a proceeding involving allegations of unethical conduct by attorneys practicing before it. But it is difficult to fathom why the Commission's ability "to control its internal proceedings" would be imperiled to any material extent were collateral estoppel effect accorded to a judicial determination respecting whether the Code of Professional Responsibility permits a law firm to represent a particular client in specified circumstances.[4/]

4/ The foregoing discussion should not be taken to mean that this Commission is authorized to disqualify an attorney only for unprofessional conduct directly
(FOOTNOTE CONTINUED ON NEXT PAGE)

B. Having thus concluded that the doctrine of collateral estoppel is applicable in a Section 2.713(c) proceeding such as that at bar, we now turn to consider whether the Special Board was right in its determination that all of the preconditions to its application are present in this instance. We answer this question in the affirmative.

Our reading of the district court's August 3, 1976 decision in City of Cleveland v. The Cleveland Electric Illuminating Co., supra, leaves us in no doubt that the issue there considered and decided (after the evidentiary hearing in which both the City and Squire, Sanders and Dempsey participated) is precisely that which the Special Board had before it. To repeat, that common issue is whether the Code of Professional Responsibility interdicts Squire, Sanders and Dempsey's representation of the Cleveland Electric Illuminating Company in now on-going antitrust proceedings

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4/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) interfering with the course of our own proceedings. Indeed, in ALAB-332, supra, we considered and explicitly rejected an earlier holding to that effect by the Special Board (as then constituted). See NRCI-76/6 at 794-96. What we are concerned with here is not whether 10 CFR 2.713(c) reaches the violation of the Code of Professional Responsibility asserted by the City but, rather, with the entirely different question whether the determination of the district court adverse to the City is to be given collateral estoppel effect.

by reason of the firm's prior representation of another and adverse party to those proceedings (the City) in connection with different matters.

It is, of course, of no present moment whether the court properly decided the issue; i.e., whether its findings of fact and conclusions of law were well-founded. Nor is it pivotal whether, as the City maintains, the court erred in its rulings on discovery matters. As the doctrine of collateral estoppel has been formulated, its application does not hinge upon a demonstration that the decision of the first tribunal, as well as all of its interlocutory rulings, were correct; it is enough that that tribunal had jurisdiction to render the decision.[5/] 1B Moore's Federal

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5/ It might be noted that, although the City strenuously insists that the district court committed various errors, there is no claim that those errors amounted to a denial of due process. Rather, the City's sole assertion of a deprivation of due process is advanced in the context of the dismissal of the proceeding before the Special Board on collateral estoppel grounds. The City apparently reasons that that dismissal stripped it of procedural rights (such as discovery and a full evidentiary hearing) guaranteed by our decision in ALAB-332. The City is mistaken. The portion of ALAB-332 relied upon was addressed to the procedures to be followed by the Special Board on the then-justified assumption that that Board would be called upon to decide the disqualification matter on the merits. Nothing in our earlier opinion can be reasonably construed as conferring any vested right to an evidentiary hearing in the event that, because of the occurrence of new developments, Special Board consideration of the merits of the controversy should become inappropriate as a matter of law.

Practice, Pars. 0.405[1] and [4.-1] at p. 629 and pp. 634-37 (2nd ed. 1974), and cases there cited. In any event, as previously noted, the City has appealed the district court's decision to the Sixth Circuit; should that appeal prove successful, the City will be in a position to ask that it be relieved of the estoppel created by the district court's decision.

Finally, the City's contrary view notwithstanding, it is irrelevant that the NRC staff and the Department of Justice are parties to our antitrust proceeding but not to the district court proceeding. With respect to res judicata, "* * * it is no objection that the former action included parties not joined in the present action, or vice versa, so long as the judgment was rendered on the merits, the cause of action was the same and the party against whom the doctrine is asserted was a party to the former litigation". Dreyfus v. First National Bank of Chicago, 424 F.2d 1171, 1175 (7th Cir.), certiorari denied, 400 U.S. 832 (1970); Hummel v. Equitable Assur. Soc., 151 F.2d 994, 996 (7th Cir. 1945). There is no readily apparent reason why a different principle should obtain where collateral estoppel is involved. Thus, irrespective of whether the staff and the Department of Justice might be deemed parties to the

disqualification matter because it arises out of the antitrust proceeding,[6] the district court's decision is fully binding upon the City.[7]

For the foregoing reasons, the November 5, 1976 decision of the Special Board, and the November 23, 1976 order of the Antitrust Board entered on the basis of that decision,

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6/ The staff, but not the Department, has involved itself in the disqualification matter.

7/ Although the NRC staff joins the law firm in urging affirmance of the result reached by the Special Board, it does not agree with the totality of that Board's reasoning. In essence, the staff's position is that (1) we held in Farley, ALAB-182, supra, that the application of collateral estoppel is a matter of discretion insofar as an administrative agency is concerned; (2) in the circumstances here, collateral estoppel should not be applied with respect to the "ultimate question of disqualification" but, rather, only with respect to the crucial findings of fact made by the district court; and (3) on the facts as found by that court, the legal conclusion perforce follows that the law firm should not be disqualified.

We cannot accept this analysis. In the first place, nothing said by us in Farley suggests that, absent overriding competing public policy considerations (and here none has been shown), an administrative agency is free to withhold the application of collateral estoppel as a discretionary matter. Secondly, the staff cites no authority for its seeming belief that, for collateral estoppel purposes, a distinction is to be drawn between issues of fact and issues of law. The prevailing view would appear to be otherwise: if the doctrine comes into play at all in the particular case, it reaches previously adjudicated factual and legal questions alike. See, e.g., Safir v. Gibson, 432 F.2d 137, 142-43 (2nd Cir., Friendly J.), certiorari denied, 400 U.S. 850 and 942 (1970).

are affirmed. This Board shall, however, retain jurisdiction over the disqualification matter pending the decision of the Court of Appeals for the Sixth Circuit on the appeal taken by the City of Cleveland from the August 3, 1976 decision of the District Court for the Northern District of Ohio in City of Cleveland v. The Cleveland Electric Illuminating Co., supra. Within thirty days of its rendition, the City may bring the Sixth Circuit's decision to our attention and, in connection therewith, apply for such relief as may seem appropriate in light of that decision. In the absence of such an application within the prescribed period, this Board's jurisdiction over the disqualification proceeding shall terminate automatically without our further order.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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THE TOLEDO EDISON COMPANY, ET AL.)	Docket No.(s)	50-346A
CLEVELAND ELECTRIC ILLUMINATING)		50-440A
COMPANY)		50-441A
)		50-500A
(Davis-Besse Nuclear Power)		50-501A
Station, Unit No. 1; Perry)		
Nuclear Power Plant, Units 1&2))		

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) #1 upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
1st day of March 1977.

P A Shanaq
Office of the Secretary of the Commission

#1 - appeal Bd's Order dtd 2/25/77
2 - " Bd's Decision dtd 3/1/77
(ALAB-378)

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NUCLEAR REGULATORY COMMISSION

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(Davis-Besse Unit 1)	)	
CLEVELAND ELECTRIC ILLUMINATING	)	50-440A
COMPANY, ET AL.	)	50-441A
(Perry Units 1 and 2)	)	
TOLEDO EDISON COMPANY, ET AL.	)	50-500A
(Davis-Besse Units 2 and 3)	)	50-501A

SERVICE LIST

Douglas Rigler, Esq., Chairman
Foley, Lardner, Hollabaugh & Jacobs
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

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

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

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

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

Richard R. Salzman, Esq.
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Joseph Rutberg, Esq.
Antitrust Counsel
Counsel for NRC Staff
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Office of Antitrust & Indemnity
Office of Nuclear Reactor Regulation
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Benjamin H. Vogler, Esq.
Roy P. Lessy, Jr., Esq.
Antitrust Counsel
Counsel for NRC Staff
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Donald H. Hauser, Esq.
Victor F. Greenslade, Jr., Esq.
Cleveland Electric Illuminating Company
P. O. Box 5000
Cleveland, Ohio 44101

Joseph J. Saunders, Esq., Chief
Public Counsel and Legislative Section
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Gerald Charnoff, Esq.
Shaw, Pittman, Potts, Trowbridge
and Madden
910 -17th Street, N. W.
Washington, D. C. 20006

Lee C. Howley, Esq., Vice President
and General Counsel
Cleveland Electric Illuminating
Company
P. O. Box 5000
Cleveland, Ohio 44101

David C. Hjelmfelt, Esq.
Michael Oldak, Esq.
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Reuben Goldberg, Esq.
Arnold Fieldman, Esq.
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Steven M. Charno, Esq.
Melvin G. Berger, Esq.
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Honorable Thomas E. Kauper
Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

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

Honorable Richard M. Firestone
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Honorable William J. Brown
Attorney General
State of Ohio
Columbus, Ohio 43215

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

Honorable Deborah P. Highsmith
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Michael R. Gallagher, Esq.
Gallagher, Sharp, Fulton,
Norman and Mollison
630 Bulkley Building
Cleveland, Ohio 44115

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

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

Leslie Henry, Esq.
W. Snyder, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Mr. George B. Crosby
Director of Utilities
Piqua, Ohio 45350

William M. Lewis, Jr.
W. M. Lewis & Associates
P. O. Box 1383
Portsmouth, Ohio 45662

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

Anthony G. Aiuvalasit, Jr., Esq.
Antitrust Division
Department of Justice
P. O. Box 7513
Washington, D. C. 20044

Susan B. Cyphert, Esq.
Antitrust Division
Department of Justice
727 New Federal Building
2140 East Ninth Street
Cleveland, Ohio 44199

David M. Olds, Esq.
Reed, Smith, Shaw and McClay
P. O. Box 2009
Pittsburgh, Pennsylvania 15230

Thomas A. Kayuha, Esq.
47 North Main Street
Akron, Ohio 44308

Perry Public Library
3753 Main Street
Perry, Ohio 44081

Director
Ida Rupp Public Library
301 Madison Street
Port Clinton, Ohio 43452

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

Terence H. Benbow, Esq.
A. Edward Grashof, Esq.
Winthrop, Stimson, Putnam
and Roberts
40 Wall Street
New York, New York 10005

Janet R. Urban, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530