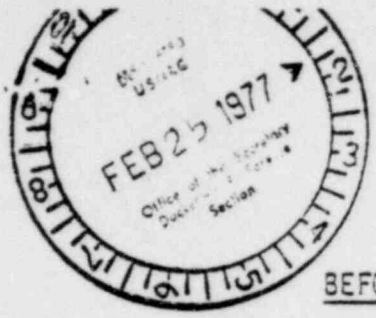


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

# STAFF'S ANSWER TO BRIEF OF CITY OF CLEVELAND RE DISQUALIFICATION PROCEEDINGS

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Office of the Executive
Legal Director

Michael B. Blume
Counsel for NRC Staff

February 24, 1977

## BACKGROUND

On November 5, 1976, the Special Board established to consider the disqualification of the law firm of Squire, Sanders & Dempsey (SS&D) from further participation in a pending antitrust matter, issued its order dismissing the proceeding.

On November 23, 1976, the Appeal Board issued an Order extending the time within which the City of Cleveland (the City) would be allowed to file its brief in support of its appeal from the decision of the Special Board to and including January 28, 1977.[1/]

On February 1, 1977, the City filed its brief in support of its appeal. SS&D filed an answering brief and the Staff now submits its position with respect to the City's appeal.

II. The Special Board's Decision to Dismiss Should Be Affirmed

The issue now before the Appeal Board is whether the Special Board in dismissing the disqualification proceeding on the basis of collateral estoppel[2/] acted in a manner consistent with the Appeal Board's decision.[3/]

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1/ The period of time was subsequently extended to February 2, 1977, by Order of the Appeal Board dated January 28, 1977.

2/ Soon after the disqualification request was filed with the Commission by the City, it filed a similar request with the United States District Court which was considering the City's complaint alleging antitrust violations. City of Cleveland v. the Cleveland Electric Illuminating Co. et al U.S. District Court, Northern District of Ohio Civil Action No. C75-560. The Court issued its order concerning disqualification on August 3, 1976.

3/ The Toledo Edison Company and the Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Units 1, 2 & 3 and Perry Nuclear Power Plant Units 1 and 2). ALAB-332, NRCI-76/6, 785-803 (June 11, 1976).

The City, the moving party with respect to disqualification, argues that the Special Board was in error in granting the dismissal on the basis of collateral estoppel; that even if collateral estoppel was applicable, the Special Board erred when it did not conduct its own inquiry; and, that there was no identity of parties with respect to the two proceedings. SS&D argues that the principle of collateral estoppel was properly applied by the Special Board; that disqualification proceedings are subject to the principles of collateral estoppel; and, that disqualification proceedings are not exempt or immune from the doctrine of collateral estoppel.

While the Staff agrees with the result reached by the Special Board, it does not adopt in toto the arguments advanced by the Special Board or either of the two other parties for the reasons discussed below.

The Staff submits that the Commission should not apply the principles of collateral estoppel to the ultimate question as to whether SS&D is or is not disqualified.

The Appeal Board has already determined that the subject matter of this disqualification proceeding is within the jurisdiction of the Commission.[4/] Accordingly, as long as an attorney at law is in good standing and admitted to practice before any court of the United States, the District of Columbia, or the highest court of any state or territory, that attorney may represent a person in an adjudicatory proceeding before the Commission.[5/] However, if for example the Commission determines that an attorney fails to conform to the standards of conduct required in the courts of the United States[6/] then it may take such action as it deems appropriate.

4/ Supra, note 3 at p. 796.
5/ 10 CFR § 2.713(a).
6/ 10 CFR § 2.713(c)(2).

We have found no support for the position that, with respect to the question of disqualification of an attorney before the Commission, it must yield its interest in regulating its bar to other agencies or to the state or federal courts on the basis of collateral estoppel. It is well established that administrative agencies have authority to regulate persons who represe others as attorneys before them.[7/]

Staff does not believe that collateral estoppel should be applied to the ultimate question of disqualification. We submit that the rationale upon which collateral estoppel is based and the interest of comity between this agency and the federal courts, dictates that a decision of a United States District Court deserves great deference. However, the application of collateral estoppel is a matter of discretion as far as an administrative agency is concerned.[8/]

The Appeal Board has already determined that res judicata and collateral estoppel are appropriate principles for the Commission to utilize in avoiding duplicate litigation.[9/] These principles are applicable to this proceeding in that: (1) the issues of fact with respect to the disqualification issue that have been raised by the City before the United States District Court and the Commission are the same; (2) there is no doubt that the District Court

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7/ Goldsmith v. U.S. Board of Trade, 270 U.S. 117 (1926); and see the opinion of the Appeal Board in The Toledo Edison Company and the Cleveland Electric Illuminating Company, note 3, supra, at 795-96.

8/ In the Matter of Alabama Power Company (Farley Nuclear Plant, Units 1 and 2) 7 AEC 210, 215 (1974), remanded by the Commission for other reasons 7 AEC 203 (1974).

9/ Ibid. p. 214-216.

was a tribunal empowered to consider those issues;[10] (3) the principle parties before the District Court have had a full and fair opportunity to argue their version of the facts; and (4) a final decision has been reached, which is subject to review by the Sixth Circuit Court of Appeals.[11]

Accordingly, there is neither need nor justification for a second evidentiary hearing. It cannot be disputed that the City has been afforded an opportunity for a full and fair judicial resolution of the same issues, and there is no basis to conclude that another evidentiary hearing is required.[12] The City has presented no claim that significant, supervening developments having a possible material bearing upon any of the issues previously adjudicated before the District Court have arisen; nor has it submitted some unusual factor having special public interest implications.[13]

Numerous key factual findings were made by the United States District Court which support the ultimate conclusion reached by the Special Board.

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10/ Ibid.

11/ See Lefrak v. Arabian American Oil Co., 527 F.2d 1136, 1140-1141 (2nd Cir. 1975) for principle concerning what constitutes a fair evidentiary hearing in connection with a request for attorney disqualification.

12/ See Blonder Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 328 (1971).

13/ The Staff submits however, that, with respect to disqualification, it is in the public interest for each tribunal to determine the qualifications necessary for an attorney to represent others before it. In this respect the Staff disagrees with the Special Board's conclusion that the Staff's role is limited to assuring that whoever represents CEI complies with the Commission's Rules of Practice (I.D. p. 10); neither does it agree with SS&D's argument that the Staff has no standing to urge disqualification on the basis of SS&D's past representation of the City and its present representation of CEI (SS&D Brief p. 11). See In Re Gopman 531 F.2d 262 (5th Cir. 1976).

The District Court found that:

(1) SS&D's work for the City as bond counsel in 1968 was with respect to "general obligation bonds for street lighting rather than MELP mortgage revenue bonds. As such, their relationship to MELP is so attenuated as to render them irrelevant to this proceeding."

(2) SS&D's work for the City as bond counsel with respect to the 1972 $9.8 million MELP bond issue was limited to drafting the bond ordinance. This did not give rise to potentially differing interests between the City and CEI and was not adverse to SS&D's adversary representation of CEI in this proceeding.

(3) There is no substantial relationship between the antitrust proceeding before the NRC, and SS&D's services to the City on an ad hoc basis as special bond counsel.

The Staff believes that the key finding made by the District Court, based upon an evidentiary hearing, is that there was no substantial relationship between the antitrust proceeding before that court and SS&D's services to the City of Cleveland on an ad hoc basis as special bond counsel. As the Appeal Board stated in its opinion [14] in this matter:

> ...SS&D's representation of CEI in the antitrust proceeding before the Commission is indeed something that the Commission may and should deal with if, because of prior representation of the City in a substantially related matter, such representation would violate the standards of conduct applicable in the federal courts. (emphasis added)

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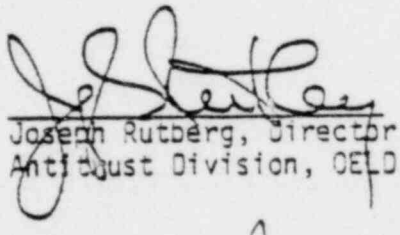
14/ Supra note 3, p. 796.

The Staff urged the Special Board to accept the factual finding made by the District Court that there was no substantial relationship between the prior bond representation by SS&D, Mr. O'Laughlin's responsibility as a City employee, and the pending antitrust case. Once the substantial relationship issue was resolved, the Special Board would then have been able to resolve the ultimate questions before the Commission and dismiss the request for disqualification. It then would have acted in a manner consistent with the Appeal Board's decision.

## CONCLUSION

For the reasons discussed above, the Staff urges that the Appeal Board affirm the decision of the Special Board and deny the exceptions raised by the City.

Respectfully submitted,



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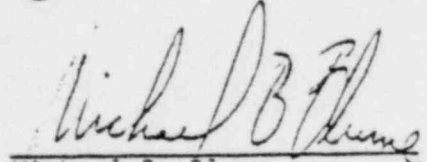

Michael B. Blume
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of February 1977

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CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF'S ANSWER TO BRIEF OF CITY OF CLEVELAND RE DISQUALIFICATION in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or air mail, or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 24th day of February 1977.

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