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NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:



In the matter of:

THE TOLEDO EDISON COMPANY
and
THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY

(Davis-Besse Nuclear Power Station,
Units 1, 2 and 3)

THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, et al.

Plac Perry Nuclear Power Plant,
Units 1 and 2)

Date - Bethesda, Maryland

Pages

Friday, 15 October 1976

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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4 In the matter of: :

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5 THE TOLEDO EDISON COMPANY : Docket Nos. 50-346A
and : 50-500A
6 THE CLEVELAND ELECTRIC : 50-501A
ILLUMINATING COMPANY :

7 :

(Davis-Besse Nuclear Power Station, :

8 Units 1, 2 and 3) :

:

9 THE CLEVELAND ELECTRIC : Docket Nos. 50-440A
ILLUMINATING COMPANY, et al. : 50-441A
10 :

(Perry Nuclear Power Plant, :

11 Units 1 and 2) :

:

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Fifth Floor Hearing Room,
East-West Towers,
4350 East-West Highway,
Bethesda, Maryland.

Friday, 15 October 1976

Oral argument in the above entitled matter
was had, pursuant to notice, beginning at 11:00 a.m.

BEFORE:

ROBERT M. LAZO, Esq., Chairman
Atomic Safety and Licensing Special Board

DANIEL HEAD, Esq., Member

ANDREW C. GOODHOPE, Esq., Member.

APPEARANCES:

(As heretofore noted.)

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P R O C E E D I N G S

1
2 CHAIRMAN LAZO: We will be hearing oral argument
3 today to aid this Special Licensing Board's consideration of
4 the motion filed by Squire, Sanders and Dempsey to dismiss
5 the proceeding. This Special Board has been established
6 pursuant to the provisions of Section 2.713 of the Commission's
7 Rules of Practice to rule on the motion of the City of
8 Cleveland to disqualify the law firm of Squire, Sanders and
9 Dempsey from further participation as counsel for the
10 Cleveland Electric Illuminating Company in the on-going anti-
11 trust proceeding, identified as in the matter of The Toledo
12 Edison Company, et al. (Davis-Besse Nuclear Power Station,
13 Units 1, 2 and 3), and The Cleveland Electric Illuminating
14 Company, et al. (Perry Nuclear Power Station, Units 1 and 2).

15 Argument will address the motion of Squire,
16 Sanders and Dempsey to dismiss the disqualification proceed-
17 ing, as well as the answers which have been filed by the
18 other parties.

19 Now the Board's order calling for oral argument
20 did not establish a firm time schedule, but I believe it was
21 generally agreed during our conference call of October 5th
22 that 30 minutes would probably be adequate for both of the
23 real parties in interest. Accordingly the order and the time
24 for argument will be as follows:

25 The law firm, Squire, Sanders and Dempsey, 30

eb2

1 minutes; the City of Cleveland, 30 minutes; the NRC Staff,
2 15 minutes; and the Applicants, 15, minutes.

3 The Board may call for very brief rebuttal if we
4 find it necessary, and should that be the case, the order
5 will be the same as the original presentation.

6 Now as a first order of business, would the
7 attorneys arguing today please identify themselves and their
8 clients for the record?

9 MR. GALLAGHER: May it please the Board, I'm
10 Michael R. Gallagher and I represent the law firm of Squire,
11 Sanders and Dempsey in this matter before the Board.

12 CHAIRMAN LAZO: Thank you, Mr. Gallagher.

13 MR. DAVIS: My name is James B. Davis. I'm with
14 the Cleveland firm of Hahn, Loeser, and I'm acting
15 Special Counsel for the City of Cleveland today.

16 MR. GOLDBERG: My name is Jack R. Goldberg. I'm
17 counsel for the NRC Staff.

18 MR. REYNOLDS: I am William Bradford Reynolds,
19 with Shaw, Pittman, Potts and Trowbridge, and I'm appearing
20 today on behalf of the five Applicants who are involved in
21 the antitrust proceeding.

22 CHAIRMAN LAZO: Thank you, Mr. Reynolds.

23 Mr. Gallagher, following the receipt of answers
24 to your motion you filed a memorandum in response to the
25 answers filed by two of the parties with a motion that it

eb3

1 be accepted instanter.

2 At the time of our conference call I believe that
3 Mr. Davis had not yet received a copy of that memorandum and
4 we did not rule on whether or not the motion would be
5 accepted.

6 As you are aware, Section 2.730 of our Rules of
7 Practice provide that such replies will not be accepted
8 unless the Presiding Officer rules that they should be.

9 Are you still urging that the Board accept the
10 motion?

11 MR. GALLAGHER: I am, Chairman Lazo; I believe it
12 compresses in rather short order our argument succinctly
13 with respect to new matters raised in the answers, and it
14 will certainly permit me to argue today well within the time
15 frame that the Board suggests.

16 CHAIRMAN LAZO: Do any of the other parties wish
17 to file a response to the reply memorandum?

18 Mr. Davis?

19 MR. DAVIS: No, sir.

20 CHAIRMAN LAZO: Well, we will accept it.

21 Mr. Davis, if the time for argument for the City
22 should be enlarged in order for you to address the reply
23 memorandum, we would be certainly willing to do that if you
24 require additional time.

25 MR. DAVIS: I appreciate that.

eb4

1 CHAIRMAN LAZO: Very well.

2 Would you proceed, please, Mr. Gallagher?

3 ORAL ARGUMENT ON BEHALF OF SQUAIRE, SANDERS

4 AND DEMPSEY

5 by Michael R. Gallagher, Esq.

6 MR. GALLAGHER: May it please the Board, Mr. Davis,
7 Mr. Goldberg, Mr. Reynolds:

8 We are here this morning to consider the motion of
9 Squire, Sanders and Dempsey to dismiss the disqualification
10 proceedings based upon the principles of collateral estoppel
11 which preclude relitigation of issues already determined in
12 a prior action. In this particular case the prior action was
13 that of an antitrust case before Judge Robert Krupansky in
14 the United States District Court for the Northern District of
15 Ohio, Eastern Division, in Cleveland, Ohio.

16 There can be no serious dispute that the elements
17 of collateral estoppel have been met here. There was prior
18 litigation; it was between the parties. The City has argued
19 in its answer that Squire, Sanders and Dempsey is not in fact
20 a party. This is denied by all the papers which have been
21 filed in this case and by treatment of the respective bodies.

22 The Licensing Board refers to Squire, Sanders and
23 Dempsey as a party in its original opinion; it is referred
24 to as a party by the Appeal Board. Judge Krupansky in his
25 opinion, devotes two or three pages to describing the parties.

eb5 1 He describes the City and then at great length describes
2 Squire, Sanders and Dempsey.

3 It has been suggested by the City that collateral
4 estoppel does not apply to disqualification matters or to
5 disbarment matters, and cites a number of cases which so hold.
6 An examination of those cases disclosed quite clearly that
7 they went off on the ground that there was not a mutuality
8 of parties; the parties were not the same.

9 And under the circumstances, the key element of
10 collateral estoppel was not present. In fact, any question
11 on that is set to rest in the case of ex parte McCue decided
12 by the California Supreme Court and cited in our reply brief.
13 In that case it was specifically held that the ruling of
14 the Montana Supreme Court disbarring an attorney did bind all
15 of the parties to that hearing.

16 The second element is that the prior matter be
17 before a court of competent jurisdiction. We need not dally
18 on this point. Certainly the District Court for the Northern
19 District of Ohio is a court of competent jurisdiction. Indeed,
20 many of the cases discussing disqualification address the
21 fact that the District Court is preeminently the tribunal
22 to consider these questions.

23 MR. HEAD: Before you leave the first point on the
24 nature of the proceeding, is there any authority that you
25 have uncovered that would indicate that the power to

eb6 1 disqualify someone from practice, either before a court or
2 before an administrative body such as the NRC, is something
3 that is, you might say, personal to the agency or to the
4 court?

5 I would raise that question in the context of
6 suppose the judge had ruled the other way in the lawsuit in
7 Cleveland, would we then be in the position of having to
8 disqualify the law firm without giving it a hearing?

9 MR. GALLAGHER: I think you would be faced with
10 the same question and we would be down here arguing it. I'm
11 not prepared to say that collateral estoppel requires
12 complete mutuality. Indeed, I suspect there are instances
13 where it does not.

14 As respects the question of whether it may be a
15 matter personal to the agency or to the District Court, on
16 that I suppose it might differ under certain circumstances.
17 For example, here the Licensing Board said that as respects
18 Squire, Sanders and Dempsey's conduct before it, it was
19 exemplary. It's specifically stated in its initial opinion.

20 The conduct here, however, is not before the
21 specific agency and was not their conduct immediately before
22 the court, but was as respects matters between clients out-
23 side of the presence of the court.

24 MR. HEAD: Does the nature of the conduct then
25 have a bearing on whether or not collateral estoppel would

eb7

1 apply? Is that the thrust of your argument?

2 MR. GALLAGHER: No, it is not the thrust of my
3 argument. What I'm attempting to say is that I'm not pre-
4 pared to give a total answer to it. I say in this particular
5 case that collateral estoppel clearly would apply because
6 the character of the conduct was such that it required the
7 adducing of evidence by witnesses before a tribunal and the
8 litigation of that precise issue and the determination by
9 that court.

10 MR. HEAD: But you do draw a distinction between
11 conduct that actually occurred before a particular tribunal
12 as opposed to conduct that is outside of either tribunal?

13 MR. GALLAGHER: I can see where such a distinction
14 might be drawn under certain circumstances.

15 MR. HEAD: But there is no authority that has dealt
16 with the situation?

17 MR. GALLAGHER: I find no authority.

18 MR. HEAD: Thank you.

19 MR. GALLAGHER: The next element is that of a judg-
20 ment which is a final judgment and as respects it, the cases
21 are clear that finality there is the kind of finality that
22 is associated with a judgment that makes it amenable to appeal.
23 The fact that a judgment may be appealed does not lessen its
24 decisiveness or finality, or suspend its operation as a final
25 judgment for the purposes of collateral estoppel.

eb8 1 This is perfectly clear in all the federal cases
2 we have found that relate to the subject, and also the state
3 cases as well.

4 Finally, the last element is that the prior judg-
5 ment actually litigated and determined the issues in contro-
6 versy in the second judgment. And as respects it I think,
7 without belaboring the point, a careful examination of Judge
8 Krupansky's opinion and order clearly establishes that the
9 issues in both matters are the same.

10 The authorities, moreover, are clear that collateral
11 estoppel relates to administrative proceedings. We have
12 cited in our brief a number of cases which dealt with a
13 variety of administrative bodies that so held.

14 MR. HEAD: Excuse me again, Mr. Gallagher, but
15 before you leave the finality point, I'd like to inquire
16 into, first of all, is the ruling with regard to disqualifi-
17 cation made by the Judge currently on appeal?

18 MR. GALLAGHER: It is currently on appeal; that's
19 correct.

20 MR. HEAD: All right.

21 Also, we of course have heard that there is a
22 proposed sale of MELP to CEI. Is there a settlement of the
23 lawsuit before Judge Krupansky pending because of that sale?

24 MR. GALLAGHER: It is my understanding that if
25 the sale is consummated that this will include a settlement

1 of all differences among the parties.

2 MR. HEAD: Would the fact of that settlement being
3 pending -- does that affect the finality in any manner for
4 our purposes, or at least maybe not legally but from a
5 practical standpoint should we act?

6 MR. GALLAGHER: It does not affect the finality
7 from the point of view of collateral estoppel. As respects
8 it, that is final. You are bound by it.

9 It does affect your judgment as respects the
10 suggestion of the Staff that after you grant the motion of
11 dismissal that you stay it, and I frankly intend to spend
12 most of my argument today addressing myself to this question
13 of stay.

14 Now as to that particular point, it becomes
15 critical because an essential element as to whether a stay
16 is granted is whether a reversal of the lower court is likely
17 or not.

18 Now here my argument will be, when I get to it,
19 that it not only is unlikely, not only is it probable,
20 overwhelmingly probable that the case will not be reversed
21 but you have to add to that on the balance that there is a
22 strong probability that the City will abandon that appeal
23 in the event that the sale is consummated.

24 MR. HEAD: What is the timing on the possible
25 consummation of the sale?

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1 MR. GALLAGHER: Well, the Board of Directors of
2 the CEI approved the sale as broadly outlined in the agree-
3 ment on, I believe, October 8, 1976, just this past week. It
4 is then to go to the Council of the City of Cleveland and
5 the agreement provides that the Council of the City of
6 Cleveland is to give its approval on or before November 30th.

7 There is a further provision that the transaction
8 will not then ultimately be concluded until January 10th,
9 1977, so we look toward that time frame generally.

10 Now, I don't think this is engraved in stone and
11 certainly if counsel needs another week or two, why, I'm
12 certain the parties may work out some sort of an extension
13 to accommodate to that problem.

14 MR. HEAD: Of course, would, in your opinion, the
15 sale as far as our disqualification proceeding go, would
16 that in effect have basically the same effect?

17 MR. GALLAGHER: It would moot the question.

18 MR. HEAD: It would moot the question, in your
19 opinion?

20 MR. GALLAGHER: Yes.

21 MR. HEAD: All right. Thank you.

22 MR. GOODHOPE: Had the Judge found a conflict,
23 Mr. Gallagher, and put you out of the case or put the law firm
24 out of the case, that would have been a final, appealable
25 ruling. It would not be interlocutory, would it not?

eb11

1 MR. GALLAGHER: The City would argue that, and they
2 would be in a strong arguable position. On the other hand,
3 I don't want this Board to believe that I would not argue
4 the contrary; I necessarily would as an advocate, and I would
5 point to the fact that the Federal District Court had before
6 it an unlimited time frame. It could examine the facts and
7 circumstances and the evidence back into the early part of
8 the century but that the Nuclear Regulatory Commission limited
9 itself under its remoteness rule to 1965.

10 And so my argument might go something like this,
11 that even though the District Court may have found a conflict,
12 that that conflict might arise from facts and circumstances
13 pre-1965 and not post-1965, and under the circumstances, it
14 was a different kind of picture.

15 So what I'm saying is I don't want to say at this
16 time I would not make that argument but I do indicate I have
17 problems.

18 MR. GOODHOPE: Thank you, Mr. Gallagher.

19 Now with regard to what I asked you some months
20 ago when we were all here, I asked you if the issues in the
21 antitrust suit in the Federal District Court were identical
22 with the issues before the Board in the antitrust suit in the
23 NRC.

24 You stated you didn't want to say they were iden-
25 tical. Are you going to go into this in your argument?

eb12

1 MR. GALLAGHER: I'll respond right now if I may.

2 MR. GOODHOPE: All right.

3 MR. GALLAGHER: The issues are precisely identical
4 and it's basically one issue. There are a number of subsi-
5 diary issues, but the issue as stated by the Licensing Board --
6 and I can quote from its opinion -- and the issue as stated
7 by the Appeal Board here is whether Squire, Sanders and
8 Dempsey conducted itself in accordance with the rules of the
9 United States courts. That's the ultimate issue.

10 MR. GOODHOPE: All right. But I'm talking about the
11 issue in the antitrust proceedings.

12 MR. GALLAGHER: As to whether the underlying law-
13 suits are identical in all respects?

14 MR. GOODHOPE: Yes.

15 MR. GALLAGHER: I don't think I can say they're
16 identical in all respects. I think the underlying issue is
17 one where licenses will be granted as contrasted with seeking
18 damages. But when it comes to a determination by the Nuclear
19 Regulatory Commission as to the antitrust impact and a deter-
20 mination by the District Court as to whether the antitrust
21 laws have been violated so as to warrant --

22 MR. GOODHOPE: That's what I'm getting at.

23 MR. GALLAGHER: -- to warrant the aware of damages
24 and injunctive relief, then I think they're identical.

25 MR. GOODHOPE: All right.

1 MR. GALLAGHER: But may I hasten to add that I don't
2 think necessarily the underlying issues are entirely disposi-
3 tive of this.

4 Now there was a full evidentiary hearing given.
5 Judge Krupansky made certain specific determinations. These
6 included the fact that the city waived any right to assert
7 disqualification based upon conflict. Independently he deter-
8 mined that the City was estopped from asserting it; and finally
9 he found that there was no substantial relationship between
10 the ad hoc representation of the City by Squire, Sanders and
11 Dempsey and its bond counsel representation on the one hand
12 and the antitrust controversies involved in that litigation.

13 Now the critical thing there I think is -- and
14 before we move on to other determinations he made -- each one
15 of those is individually and independently and totally dispos-
16 itive of the question before the Court, so that if any one of
17 them fall or if any of the other subsequent determinations
18 are unsupported by evidence or based on erroneous law, any
19 one of those is entirely dispositive of the question and suffic-
20 ient to support the ruling of Judge Krupansky on appeal and
21 sufficient to support any ruling of this body.

22 But, in addition to that he went on to find that
23 there was in fact, or by operation of law, no disclosure of
24 confidential information, that the relationship was not an
25 adverse relationship and finally that Mr. O'Laughlin's

mpb2 1 employment by the City and subsequent employment by Squire,
2 Sanders and Dempsey presented no basis for disqualification
3 and that there was no substantial relationship between those,
4 the MELP transactions and the antitrust controversies.

5 Now let me move on quickly to what I think is the
6 crucial matter I want to address to this Board.

7 After advising the Board that SS&D's motion to
8 dismiss these proceedings should be granted and stated unequivocally,
9 the Staff then suggested that the Order of Dismissal
10 should be stayed until after all appeals from the United States
11 District Court's order have been exhausted. It argued this
12 because of the NRC rule which allows ten days for a petition
13 for reconsideration.

14 We believe that the Staff's suggestion to this
15 Board is ill-advised. We say as an aside that preliminarily
16 that this Board is required to act as it must on our motion
17 for dismissal not out of deference, not through comity, but
18 as a matter of law. It is bound by the principles of collateral
19 estoppel, and it must make its finding.

20 If this Board follows the suggestion of the Staff
21 what it will effectively do is require the licensing board to
22 forfeit its control over its own proceedings. As we have
23 pointed out the City has already sought an extension before
24 the District Court, which was denied. It then filed a motion
25 for enlargement of time before the Court of Appeals to

mpb3 1 December first, which was granted, so that it's now an enlarge-
2 ment to docket their appeal to December first.

3 Now, just following that appellate procedure through,
4 the record then must be filed. After the record is filed there
5 is time for briefing by the City. One that is accomplished
6 there will be time for briefing by the appellee. After that,
7 it will be finally set down for oral argument. And believe me,
8 the courts do not work with the same dispatch that this Board
9 works. And after it is set down for oral argument there will
10 be that time require for the court of appeals to come to its
11 decision.

12 Now Judge Krupansky himself took very close to
13 two and a half months before his opinion issued.

14 So it is entirely conceivable that the appellate
15 procedure in the Circuit Court of Appeals will extend over a
16 period of a year and there is still always the possibility
17 that a petition for certiorari will be filed.

18 Now, the granting of a stay adds to this matter a
19 tail which extends out into the future of indefinite duration
20 outside of the control of the licensing board and in the control
21 of the City taking what extensions have been made, and in the
22 control of the Federal Court in the sense that they set up
23 their own docket and they set up their own time schedule, and
24 I submit to this Board that this is a very serious obstacle in
25 the way of the licensing board coming to a final decision in

1 this case on the underlying question and that the special board
2 should not place that obstacle in the licensing board's way.

3 We understand that the licensing board's ruling is
4 imminent and to interject uncertainty I think is to pernicious-
5 ly undermine it.

6 MR. HEAD: Excuse me, Mr. Gallagher, might not the
7 licensing board's opinion go a long way towards mootng this
8 controversy also?

9 MR. GALLAGHER: Well, yes, the licensing board has
10 requested prompt action. The appeal board has requested prompt
11 action. The Department of Justice, in its comments filed on
12 October 12, just the other day, asked the licensing board to
13 immediately inform the parties of its ruling on the antitrust
14 aspects of this case even before it filed its formal opinion,
15 apparently conscious that prompt action by the licensing board
16 is important both in the public interest and in the interests
17 of all the cities. And presumably the City would like prompt
18 action too. The antitrust department said the City should
19 have the benefit of knowing whether there will be conditions
20 imposed upon the license. And heading the questions that
21 would be inherent if there is a stay of the order I think will
22 bring about interminable delay.

23 MR. HEAD: Well, Mr. Gallagher, I guess my point
24 was if the City prevails in the basic licensing board action
25 will that not go a long way toward mootng this particular

mpb5

1 disqualification proceeding and the decision of the licensing
2 board comes out within the next -- I don't know when it will
3 come out but within a short period of time -- if when the
4 decision comes out the City prevails in the basic licensing
5 board action, isn't there some sense in this Board even if we
6 -- we wouldn't have to rule, we could take the entire motion
7 under advisement and await developments that would make either
8 further proceedings or ruling in fact unnecessary in this
9 disqualification proceeding.

10 For example, we could await the proposed sale which
11 would apparently moot this case or an imminent decision by the
12 licensing board, which may well moot it. I don't know which
13 way they'll go, of course. Why should we act?

14 MR. GALLAGHER: I'll attempt to tell you and I
15 think each point you raised pounds a further nail in the con-
16 clusion that you must act under the law which applies to this
17 kind of situation.

18 Now there are guidelines which are established by
19 the Federal Courts in the consideration of stays of judgments
20 and we have cited one case and footnoted a number of other
21 cases which state what these guidelines are and they are beyond
22 dispute. There is no question about them. The case we cite
23 is illustrative only. It's the North Central Truck Lines case.

24 But the rule is that the moving party for a stay
25 must make a strong showing, not just a showing but a strong

1 showing, and I submit there is no showing made at all here,
2 but a strong showing of four separate elements. First of all,
3 that the reversal on merits on appeal is likely.

4 Well, we submit to this Court that it is very unlike-
5 ly. First of all, the cases are clear that disqualification
6 is addressed to the sound discretion of the trial court, that
7 his discretion and judgment will not be set aside lightly,
8 will not be set aside in the absence of abusive discretion.
9 And as I mentioned before there are multiple independent grounds
10 which would support it in the event there is some merit on
11 any point. An examination of his opinion I am certain would
12 make clear to all of us that it was a scholarly one and care-
13 fully considered.

14 The chances of reversal range from improbable to
15 extremely remote, so that that initial matter simply can not
16 be satisfied. And then we add to that the mootness that you
17 address yourself to, Mr. Head, namely that the City -- that
18 if the sale goes through it will moot it. If the licensing
19 board found in favor of the City it would moot it, so you put
20 all those things together and the chance of a different result
21 obtaining is so extraordinarily remote that that simply can't
22 be met as an element to justify a stay.

23 MR. HEAD: Well, Mr. Gallagher, I think perhaps
24 we're talking about two different situations. If we take the
25 Staff's case where they say enter in what in effect would be

mpb7 1 a judgment of this Board which would be dispositive of the
2 proceeding but then stay its effectiveness I would agree
3 that the Virginia Petroleum Jobbers line of cases would
4 control whether or not we should grant a stay in that instance.

5 What I was talking about, since we have two actions
6 which are outside of our control but either one of which may
7 occur in the relatively near future now, our licensing board's
8 decision, the other is a possible settlement and action of
9 sale that would moot this particular proceeding, why shouldn't
10 we stay our hand on acting on the motion or the proceeding it-
11 self, which would not require us to use the same standard as
12 the Virginia Petroleum Jobbers but would strictly be a matter
13 of our discretion as to whether or not we should proceed with
14 this particular proceeding, either with the evidence or with
15 ruling on the motion? That would appear to be a matter of
16 discretion by the Board rather than having a more rigid standard.
17 That is in effect what we're considering stayed, a judgment.

18 MR. GALLAGHER: Well, I would think there would be
19 more discretion in staying a judgment than there would be in
20 staying your hand to act here because here all of the issues
21 which are before this Board have been litigated, they have been
22 concluded. There is nothing before this Board to decide, and
23 all it is required to do is dismiss the proceedings before it.
24 And I submit there is just nothing to justify it not doing so.
25 I don't think that's a matter of discretion. I think if there

1 is nothing before this Board, then it has all been determined
2 that this Board should grant the motion as requested.

3 MR. HEAD: It isn't sufficient reason to stay our
4 hand the fact that there is what appears to be a good likeli-
5 hood that the issue will be mooted and would not require a
6 ruling by the Board?

7 MR. GALLAGHER: The more reason that you should not
8 stay your hand, as I view it, because the City has an opportuni-
9 ty if there is -- say there is a reversal, and that's the only
10 thing that could possibly cause a problem here, a reversal.
11 If there is a reversal, Rule 60-BA of the Federal Rules of
12 Civil Procedure provide exactly for this kind of contingency.
13 Rule 60 is entitled "Relief From Judgment or Order" and it
14 provides:

15 "On motion and upon terms that are just the
16 Court may relieve a party or his legal representa-
17 tive from a final judgment order or a proceeding
18 for the following reasons:"

19 --and skipping down to Subsection 5:

20 "The judgment has been satisfied, released
21 or discharged or a prior judgment upon which it
22 is based has been reversed or otherwise vacated
23 or it is no longer equitable that that judgment
24 should have prospective application."

25 So the City is not bereft of a remedy under the

mpb9 1 circumstances and for this Board not to act continues to dangle
2 a Damocles sword that makes it difficult for everybody including
3 the Applicants, the other Applicants in this case.

4 Now I think the considerations that relate to stay-
5 ing the effectiveness of the final order may apply here and
6 the second one as you will recall is that there will be irrep-
7 arable harm to the movant unless a stay is granted. Now
8 that just isn't the case here. There is no indication of any
9 harm at all to the City either economic or procedural. As I
10 just pointed out they do have a procedural way in which to
11 act.

12 The City, in addition, can not avoid the fact that
13 substantial harm will result to other interested parties, which
14 is a requirement, and I refer to now the other Applicants.
15 They are interested in having this matter moved and this matter
16 moved promptly, and as long as this question mark is hanging
17 on in the air they are uncertain of what the circumstance is.

18 But finally, and most particularly, and I do want
19 this to come to the attention of the Board, it is necessary in
20 order to secure a stay that the movant established that the
21 granting of a stay will cause no harm to the public interest.

22 Now in this connection I would like to address the
23 Board's attention to testimony in the record, and I refer to
24 pages 10,526, 10,527, which encompasses testimony of Mr.
25 Williams, an executive vice-president of the CEI in charge of

1 engineering, and he testified as follows, and it's very short
2 but I would like to read it directly:

3 "Question: What is the reason why you are in
4 a hurry to get the operating license for Davis-Besse
5 l?

6 "Answer: There is very substantial economic
7 benefit of having that unit on the line. Nuclear
8 fuel costs are less than coal fuel costs. As soon
9 as the nuclear unit is on we will back down the
10 coal fired units. That difference alone, in the
11 cheaper nuclear energy rather than the coal, will
12 save the companies and the customers about \$400,000
13 a day. It will save the company and their customers
14 between \$300- and \$400,000 a day.

15 "In addition to that we have the interest on
16 the construction dollars already invested. That
17 interest runs something like \$88,000 a day. So
18 these two factors added together give you total
19 costs of delay of the Davis-Besse Unit that runs
20 over \$400,000 a day, a large part of which will
21 accrue directly to the customers because of the
22 fuel clauses."

23 -- which is how savings or additional costs are taken into
24 account in establishing the rates to be charged.

25 If my judgment that the appeal may last as long as

mpb11 1 a year is accurate, and if we multiply 365 days times \$400,000
2 a day you come up to something in the neighborhood of \$146
3 million, which is a substantial amount of money by any standard.

4 I see that my time is up. I would like to reserve
5 a few minutes because there may be some questions raised.

6 CHAIRMAN LAZO: Mr. Gallagher, the Board has used
7 some of your time with our questioning.

8 MR. GOODHOPE: May I use some more? I'll try to be
9 brief on this.

10 The appeal board in its remand emphasized Canon
11 Nine on the theory that there should be no even appearance of
12 impropriety, and they also made the point that if information
13 were transmitted to an attorney in the law firm without any
14 qualification at all, it's assumed that it was transmitted to
15 all attorneys in the law firm. Did I make an accurate state-
16 ment?

17 MR. GALLAGHER: Yes.

18 MR. GOODHOPE: Did Judge Krupansky in his opinion
19 meet this point raised by the board?

20 MR. GALLAGHER: Yes, he addressed himself precisely
21 to both points.

22 With respect to Canon Nine, he said that Canon Nine
23 should not be used in effect as an excuse for disqualifying
24 when you can't find support under Canons Four and Five. He
25 addressed himself specifically to that Canon as respects

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1 Mr. O'Laughlin saying that his conduct was not a violation of
2 it and he addressed it I believe on page 24 with respect to
3 the other Canons and the general representation by the firm
4 of the City of Cleveland.

5 I'm sorry, the second point was --

6 MR. GOODHOPE: Well, that answers it substantially
7 as far as I'm concerned.

8 MR. GALLAGHER: But I missed your second point.

9 MR. GOODHOPE: If it is given to one lawyer it is
10 given to all.

11 MR. GALLAGHER: He very clearly went into that and,
12 as a matter of fact, this is where the term "scholarly" by
13 me I think has precise application. He dealt with treatises,
14 with texts, he analyzed decisions, he pointed out that we have
15 an evolving practice of great complexity, larger firms, larger
16 businesses and that the operation of a firm is becoming more
17 nearly akin, for example, to the operation of government. He
18 referred to the vertical transmission and horizontal, the
19 separation of departments. He very carefully addressed that
20 particular point.

21 MR. GOODHOPE: Hadn't he already verified that
22 actually there had been no information passed in the first
23 place?

24 MR. GALLAGHER: Yes.

25 MR. GOODHOPE: Why did he go into this long

mpbl3 1 discertation? I agree with you, it's quite learned and well
2 done, but why did he feel it necessary, or do you know? Can
3 you comment?

4 MR. GALLAGHER: This matter is a cause celebre. It
5 has taken an awful lot of time of various boards of the NRC
6 and it took an awful lot of time before the District Court,
7 and he felt that if this much time were to be devoted to it
8 he ought to demonstrate to everybody involved, including the
9 Court of Appeals, that he had done his homework carefully.

10 MR. GOODHOPE: All right, thank you, sir.

11 CHAIRMAN LAZO: Thank you, Mr. Gallagher.

12 Mr. Davis?

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1 ORAL ARGUMENT ON BEHALF OF THE CITY OF CLEVELAND

2 by James B. Davis, Esq.

3 MR. DAVIS: I can understand that the Board is
4 concerned about what appropriate action to take under the
5 rather unusual circumstances we now face might be. I would
6 like to make the preliminary observation that what we're
7 talking about is not essentially what Mr. Gallagher attempts
8 to have it, that is, resolution of facts between litigants
9 in a prior proceeding that now should be taken through
10 collateral estoppel to control a subsequent proceeding.

11 What we're really talking about is lawyer conduct
12 before a tribunal and more precisely, what we're talking
13 about is what should be the standard of lawyer conduct before
14 the Nuclear Regulatory Commission after it has spent the
15 better part of a year evolving careful standards in an unusual
16 case.

17 Now the City urged disqualification in this matter
18 starting before any trial on the merits of the antitrust
19 review began and here we are in October, and the question has
20 not yet been finally resolved.

21 But I suggest to you that a great deal has been
22 resolved before the Nuclear Regulatory Commission. The
23 first Licensing Board fully considered the matter on a small
24 slice of the evidence that is now available and was satisfied
25 that Squire, Sanders and Dempsey was indeed guilty of

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1 misconduct and should be suspended.

2 The contrary findings of the subsequent Special
3 Board were summarily overruled by the Appeal Board and from
4 every indication of the opinion of the Appeal Board of June
5 11th, standards were set that, by implication, pretty clearly
6 indicate that if the matter were really heard and the evi-
7 dence really presented to this Special Board, there could be
8 but one result and that would be that Squire, Sanders would
9 be disqualified.

10 There are many reasons to argue that further and
11 I will come to them, but let's set this in context.

12 The whole point of everything we have been doing
13 for this last year in this special proceeding is to determine
14 what are the standards of conduct before the Nuclear Regula-
15 tory Commission. Now what is going to be mooted and what is
16 going to happen?

17 I agree with most of what Mr. Gallagher said about
18 what is going on in Cleveland. I am not currently actively
19 involved in the negotiations; they have evolved quite a ways.
20 There is a preliminary memorandum. Mr. O'Laughlin of the
21 firm of SS&D could probably tell us a good deal more. I
22 believe he has been actively participating. It is a tentative
23 agreement.

24 I might preface that by saying that no small reason
25 for there being any agreement at all was that the same Judge

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1 who rendered this opinion at the same time that he found no
2 misconduct by SS&D rendered summary judgment in favor of
3 The Cleveland Electric Illuminating Company for in excess of
4 nine million dollars which put the City of Cleveland in a
5 very substantial financial crisis because they had not
6 budgeted or did not have funds available, and this had no
7 small part in precipitating the settlement negotiations.

8 Whatever the reasons for the negotiations they must
9 be passed upon by the City Council. It isn't clear at all
10 what is going to happen. I would agree with Mr. Gallagher
11 that the City plans to hold in abeyance its appeal to the
12 Sixth Circuit and what I am urging today of course is that
13 this panel continue to find and set for the Nuclear Regulatory
14 Commission its own standards of conduct, not wait for what is
15 to happen in Cleveland because I would agree with Mr. Gallagher
16 it is not sure that the City is going to go ahead and finally
17 determine to go ahead with that appeal.

18 My basic position of course is that the opinion
19 of Judge Krupansky was egregiously wrong. It was egregiously
20 wrong in a way that this Board already can appreciate and
21 understand on what is before the Nuclear Regulatory Commission,
22 and could not be acceptable to the Court of Appeals of the
23 Sixth Circuit.

24 It certainly cannot be acceptable as a standard of
25 conduct before the Nuclear Regulatory Commission and to

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1 accept that erroneous and outrageously unjust opinion as the
2 standard before this Commission I would think would be a
3 most unfortunate outcome after the tremendous amount of time
4 and effort that this Commission has gone into to take this
5 special case, this unusual case, as the vehicle to frame
6 for the first time, apparently, what the standards of conduct
7 before this Commission are going to be.

8 Now an additional reason why I don't believe that
9 the final outcome of the Licensing Board will really moot
10 this is as follows:

11 Let's assume on the one hand the Licensing Board
12 finds substantially in favor of the City and the Justice
13 Department. And by the way, the Justice Department, I am
14 told, is certainly going to pursue its remedies before the
15 Nuclear Regulatory Commission, whatever the City does, so
16 this case is not going to be mooted no matter what the City
17 of Cleveland does, is my understanding.

18 MR. HEAD: That of course would not apply to this
19 proceeding.

20 MR. DAVIS: Not to this special proceeding; I
21 understand that. I agree.

22 But the main case here will go on in one fashion
23 or another.

24 On the one hand, the Licensing Board and the
25 subsequent appeals might come down on the side of the City.

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1 That leaves unanswered all these questions about conduct.
2 Would the City simply drop the matter? I can't really say.
3 I've never talked to the current law director and I don't
4 know what his position might be. I'm not even sure that he
5 knows at this point.

6 But what you would have would be a void. The thing
7 would be dropped. It would be left in abeyance and all the
8 uncertainties --

9 MR. HEAD: It would be mooted, would it not?

10 MR. DAVIS: Well, mooted--

11 MR. HEAD: You were really asking that they be --

12 MR. DAVIS: They would be dropped, I suppose, not
13 mooted in the sense that it would be completely rendered
14 beside the point, because what I'm really saying is that the
15 Nuclear Regulatory Commission itself has some interest in
16 the outcome of this.

17 MR. HEAD: We would not want to issue an advisory
18 opinion, however.

19 MR. DAVIS: Well, it would not be advisory because
20 it would certainly relate back to a proceeding that would
21 have gone its full route and is going to go its full route
22 as certainly as we can predict.

23 On the other hand, suppose the Licensing Board
24 provides less or no relief, less relief than the City seeks
25 or the Justice Department seeks, or perhaps no relief. I

eb6

1 can assure you that certainly at that point the failure to
2 disqualify lawyers who should never have been in the proceed-
3 ing would be certainly a point open for raising on appeal.

4 I believe that quite apart from those considera-
5 tions, the matter having gone as far as it has, it is appro-
6 priate and in an accelerated way for this panel to complete
7 the hearing, and I submit it can be done in far less time
8 and with far less effort than you may fear may be necessary.

9 What I'm prepared to suggest is that we take the
10 record that was developed in Cleveland as supplemented by
11 the discovery that this very panel has found the City is en-
12 titled to, and with that, subject the case for final decision
13 here.

14 The reason I suggest that is two-fold, one, for the
15 savings in time, effort and the rest, and two, because that
16 is apparently the way that most courts treat the findings of
17 other courts. Most federal courts treat the findings of
18 State Bar Commissions, most federal courts treat the findings
19 of lower federal courts in similar situations where a sus-
20 pension or a disbarment of an attorney is at stake.

21 In the first part of my brief I submit what law
22 I was able to find on how these things are handled, and there
23 is no immediate or total application or acceptance by one
24 court, be it federal to federal, federal to state, higher
25 federal to lower federal, federal to agency; there is no

eb7
1 automatic or immediate acceptance by one judicial tribunal
2 of the findings of another on such a question as we are
3 dealing with here, which is the type of lawyer conduct before
4 the agency.

5 What they do do and what they say, and this comes
6 right from the Selling versus Radford case that I cite,
7 in the United States Supreme Court they pay careful attention
8 to the findings of another court. In many cases they simply
9 take the record produced in the other court and review it,
10 but they don't simply give it a hundred percent credence.

11 Now I would say that that would provide a mechanism
12 that, within a matter of perhaps less time than it will take
13 for the Licensing Board to complete its decision, would
14 provide a means for finally resolving this issue and coming
15 down with the decision that if everything had gone the way
16 perhaps it should have gone, we would have had back in early
17 spring.

18 I would say that what we're talking about here is
19 justice, too. And I think it is apparent and should be
20 apparent to anybody with even the preliminary understanding
21 and knowledge about this matter that this panel now has,
22 it should be pretty clear that Judge Krupansky rendered a
23 decision that can be most charitably described as an aberra-
24 tion.

25 In item after item and as a matter of law on item

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1 after item he took positions that were totally at odds to
2 certainly the great majority of case decisions that have come
3 down from the higher federal courts and the decisions that
4 were certainly indicated and in some cases, specifically laid
5 down by the Appeal Board of the Nuclear Regulatory Commission.

6 How can this panel accept a decision by a federal
7 judge on a body of evidence when this very panel, in a pre-
8 cisely similar way, was asked by Mr. Gallagher to accept his
9 ruling that the City was not entitled to one single bit of
10 documentary evidence? I remember your expressions when that
11 came forward. I think you were all a little bit surprised.

12 Imagine, a federal judge says the City cannot get
13 from its own lawyers one bit of documentary evidence in a case
14 covering a span of years, going back into the Sixties, where
15 all the personnel have changed, where the City would have no
16 other possible way of finding out what SS&D knew about its
17 muni light operation without documentary discovery. And not
18 surprisingly, this panel allowed the City documentary discovery.

19 Now the failure to give the City even that minimal
20 procedural right infected everything he did. It infected
21 many of his findings.

22 MR. HEAD: Mr. Davis, though, isn't there a consider-
23 able difference between a ruling evidentiary in nature made
24 by the Judge as opposed to a decision of his that apparently
25 has been accorded at least the finality that it's subject to

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1 appeal? Aren't we talking apples and oranges when we're
2 talking about evidentiary rulings versus an actual decision
3 and judgment based on evidence that he heard and where the
4 parties are the same?

5 MR. DAVIS: Well, what I'm really saying is under
6 the law this body owes no total deference to what that Judge
7 in Cleveland did. Under the law, as best I can find it, it
8 would pay attention to what he did, it would look at the
9 record that was created, and I would beg you to look at that
10 record because that record, in my judgment, is overwhelming
11 in favor of the City.

12 There were such things in that record as the
13 complete confession by SS&D that they never once told the
14 City anything. There was no disclosure they admitted on the
15 record. There are all kinds of amazing things in that
16 record that were never alluded to in that opinion of his.

17 In my entire practice of law I have never been
18 more shocked or dismayed at a decision by any judge than I
19 was at this one. And I have to severely restrain myself
20 from characterizing what he did. I know a little too much
21 about what happened in Cleveland.

22 But in any event, you know of your own knowledge
23 that things that he did are unacceptable by the standards
24 of the Nuclear Regulatory Commission. The Nuclear Regulatory
25 Commission certainly has to grant applicants a certain right

eb9

1 of discovery, and I'm saying that that infected the very
2 foundation of his hearing. That wasn't the only mistake that
3 he made. I'm saying that right on the face of his opinion,
4 if you read it, he takes positions totally contrary to the
5 Appeal Board and totally contrary to federal law. He comes
6 up with these notions that we must show that one lawyer at
7 SS&D was in a position adverse to another lawyer. That's
8 ridiculous.

9 He talks about the need to show that information
10 from one lawyer was conveyed to another lawyer at SS&D.
11 Every federal decision that has come down on that question
12 has dismissed that kind of a need for a client to demonstrate.
13 It's impossible. Lawyers talk to each other in the halls
14 of their law firms. How can a person ever demonstrate that
15 and why should a client be put in the position of trying to
16 demonstrate that? It's presumed that lawyers communicate
17 with each-other in law firms. But not by Judge Krupansky.

18 In manner after manner he flaunts federal law
19 to come down where he wants to come down. And I'm saying that
20 the Nuclear Regulatory Commission should not be stuck with
21 that kind of law.

22 MR. HEAD: Yes, but aren't your arguments here
23 going to the merits of the Judge's decision as opposed to--
24 These may be points you may want to make on appeal up before
25 the Circuit Court, but we're really talking about whether

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1 we're bound by the ultimate decision.

2 Granted, it may be subject to any number of legal
3 attacks on appeal, but we can't use that standard in deter-
4 mining this motion, can we?

5 MR. DAVIS: I think you can, and that was my
6 reference to Sunnen which, unhappily, my secretary miscited
7 a little bit. It's certainly 330 Supreme Court, not 30.

8 Basically I cite Sunnen for the proposition that
9 you don't apply collateral estoppel unless the legal prin-
10 ciples involved in the two proceedings are the same. And
11 I'm submitting-- When I'm arguing these points I'm trying
12 not to so much argue evidence as I'm trying to submit to you
13 that you can see, right on the face of the opinion and on
14 the face of the Appeal Board decision of June 11th, major
15 differences.

16 Judge Krupansky is going off on a fancy of his
17 own, and I'm saying that where the legal principles to judge
18 attorney conduct are so widely divergent the results are
19 going to be divergent. But is that a reason that the Nuclear
20 Regulatory Commission should surrender to a set of principles
21 that its Appeal Board has already declared unacceptable? I'm
22 saying No.

23 Now I realize this is a burden. I'm asking you to
24 undertake a work that will be difficult. I realize that
25 for any judge or tribunal not to volunteer to undertake

eb11 1 things that are not necessary is a serious consideration.

2 But what I am saying is that you are not volun-
3 teers in this effort. These arguments, this whole dis-
4 qualification proceeding has been pending since the very
5 first part of this year. It has gone through an extensive
6 course through the Nuclear Regulatory Commission. I think
7 the Commission and certainly the City have a high interest
8 in a thoroughly considered and final and proper result, a
9 just result.

10 I think that to accept Judge Krupansky's outcome
11 is, it should be clear on the fact of what is already know,
12 an outrageous result, a result totally at variance with the
13 kind of standards that the Nuclear Regulatory Commission
14 should be content with.

15 It's one thing for these people to be ten feet
16 tall in Cleveland. I should think that they ought to be
17 about the same height as everybody else in Washington. And
18 the only way to do that, I submit, is to take that record,
19 and I am perfectly willing to stipulate that on the basis
20 of that record as supplemented by the discovery that we're
21 entitled to, this matter could be presented for final
22 decision without live witnesses, and in a very short space
23 of time. And this body could render the final decision that
24 is now long overdue.

25 MR. HEAD: Mr. Davis, do you have any time frame

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1 within which the City Council may meet to discuss and possi-
2 bly approve that sale of MELP to CEI?

3 MR. DAVIS: Yes, sir, I've been given the date and
4 it is November 30th. This is the date that I've heard.

5 MR. HEAD: Okay. November 30th is when the City
6 Council meets then and--

7 MR. GALLAGHER: It's the last day on which they
8 are to give their approval.

9 MR. DAVIS: That's not to say that perhaps by
10 mutual agreement that could not be extended, but the interest
11 of CEI is to get action by the City, and that's understandable.

12 MR. HEAD: And it's contemplated that January 10th,
13 '77, will be the date the sale will actually be consummated?
14 Is that right?

15 MR. DAVIS: Again I can't speak to that.

16 MR. GALLAGHER: I suppose one could call that the
17 closing date.

18 MR. HEAD: I see. And after that date, if every-
19 thing goes well, no further action will be required by either
20 party then. Is that correct?

21 MR. DAVIS: Well, I think that simplifies it.

22 MR. GALLAGHER: That may be, but the Council of
23 Cleveland is presumably very different from council in other
24 municipalities and there is just no telling what things may
25 come up which will prompt political intrigue, if you will,

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1 that will require it to be put off from month to month.

2 MR. DAVIS: Let me add on additional factor that
3 I confronted when I was Law Director of Cleveland and I
4 think this factor -- and I'm subject to correction by
5 Mr. O'Laughlin. But certainly the position of the Justice
6 Department, when I was talking about a different kind of a
7 settlement with CEI back in the spring of this year, was
8 that they were very, very concerned about any agreement
9 between the City and CEI.

10 We were talking about a continuation of the City's
11 electric light operations but giving the City its own
12 distribution area and getting rid of the overlap. At the
13 present, both systems overlap and interlace all throughout
14 the City of Cleveland. We were going to carve out an area
15 and give it in exclusivity to the City and the rest to CEI.
16 And such a territorial breakout, even under the very special
17 conditions that then existed, was something that the Depart-
18 ment of Justice had great reservations about.

19 My understanding is that they are or will literally
20 oppose the outright sale of the light plant initially and
21 where they're finally going to come down I don't think any-
22 body knows at this point.

23 So that's another ingredient that might affect the
24 outright sale by the City to CEI.

25 MR. HEAD: Is the appeal of Judge Krupansky's

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1 ruling on disqualification, is that now being held in abey-
2 ance or stayed by agreement of the parties?

3 MR. DAVIS: That's my understanding.

4 MR. HEAD: And is the basis of that agreement to
5 await the outcome of the sale?

6 MR. DAVIS: Well, I can't really speak to that
7 because other counsel are handling that, but that's basically
8 my understanding. I would not disagree with Mr. Gallagher.
9 I would think that that suit would be settled if that entire
10 sale of the system to CEI goes forward.

11 MR. HEAD: And you mentioned there was a nine
12 million dollar judgment against the City in the suit?

13 MR. DAVIS: Right. This was for past electricity
14 delivered by CEI to the City, and that is, I think, part
15 of the appeal. The settlement provides for the handling of
16 that amount due in other means, or by other means.

17 MR. HEAD: Is that judgment being stayed pending
18 settlement, too?

19 MR. DAVIS: I think it is. At least it's not
20 being acted upon.

21 MR. O'LAUGHLIN: There is no attempt at collection
22 being made.

23 MR. HEAD: But there is no formal stay before
24 the court?

25 MR. O'LAUGHLIN: No, I don't believe they've asked

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1 for a stay.

2 MR. DAVIS: I would agree with whatever
3 Mr. O'Laughlin says on that one.

4 I can go through my brief. I don't know how much
5 time I have already used up. The points that I make in my
6 brief --

7 MR. HEAD: We'll give you the two-minute warning
8 when appropriate.

9 MR. DAVIS: I would like to reserve a little time
10 for response to Mr. Goldberg and Mr. Reynolds who are taking
11 positions at least in variance with what I'm arguing to the
12 Board here. I view them as sort of adversaries this morning,
13 so perhaps I could reserve-- If there is time due me, I
14 would reserve it at this point to comment on anything they
15 might choose to say.

16 But my basic points simply are the law does not
17 require this panel to simply accept the findings of another
18 court. Collateral estoppel for attorney conduct proceedings
19 is an inappropriate concept. The more applicable standard
20 is that used by various courts, state courts, federal courts;
21 when state bar associations or other bodies have suspended
22 or disbarred lawyers, they give deference, they give atten-
23 tion, but they are free, as in *Selling* versus *Radford*, to
24 inspect what has happened for unjust results, lack of due
25 process or other things that would infect that decision, and

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1 are free to make their own decision.

2 I say to you that you are free to make your own
3 decision, that the NRC should go forward and set its own
4 standards of conduct, that this case is a unique vehicle to
5 do that, that everything so far implies that the final out-
6 come is going to be directly contrary to that of Judge
7 Krupansky, and that this body already has overruled Judge
8 Krupansky on a very fundamental point, the basic evidentiary
9 point that the City should have some discovery which under-
10 lies everything that comes after.

11 And I pointed out in my brief, and I won't go
12 through again, at least some of the ways in which the Appeal
13 Board has declared the law to be, and in consonance with
14 higher federal court, to be directly contrary to the standards
15 that Judge Krupansky applied to the City.

16 So I'm saying that it is entirely appropriate for
17 this Board to go forward and act, to take the case, to do it
18 in a summary fashion, and I will stipulate we can use the
19 record in Cleveland, which is about a 500-page or 600-page
20 record, if I'm not mistaken. It's not a terribly long
21 record. It was a two and a half day hearing.

22 But it would be a matter that could be very
23 quickly handled and it would be for the great convenience
24 of the City because many of the officials who testified were
25 officials in positions of considerable responsibility and it

eb17 1 would be a great problem to try to get them live before this
2 body. So it would be a quick, summary way, as supplemented
3 by the discovery that the City has yet to come.

4 MR. GOODHOPE: Mr. Davis, you have asked for a
5 whole lot of discovery. You've gotten some of it and a
6 whole lot of it you haven't gotten. And there have been
7 objections raised to it-- Isn't this correct -- before this
8 panel or this Board?

9 MR. DAVIS: Well, this panel has gone pretty far
10 to resolving those differences. I think the main thing now
11 is we're waiting on a stay. Mr. Gallagher has asked that
12 all the discovery proceedings be stayed pending a ruling on
13 this issue of collateral estoppel. I think that's really
14 what we're waiting for.

15 MR. GOODHOPE: I thought there were quite a few
16 objections. I didn't go into it in detail.

17 MR. DAVIS: I think those objections --

18 MR. GOODHOPE: Certainly the privilege question
19 is still very much alive.

20 MR. DAVIS: I would even say this --

21 MR. GOODHOPE: That was the basis for Judge
22 Krupansky refusing to issue the subpoenas in Cleveland, was
23 it not?

24 MR. DAVIS: I will make you a bold stipulation,
25 I feel this strongly. I would present the record without

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discovery.

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MR. GOODHOPE: Then we would come to a different

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conclusion than Judge Krupansky?

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MR. DAVIS: You would have to.

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CHAIRMAN LAZO: Thank you, Mr. Davis.

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Mr. Goldberg.

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1 ORAL ARGUMENT ON BEHALF OF THE NUCLEAR REGULATORY
2 COMMISSION

3 by Jack R. Goldberg, Esq.

4 MR. GOLDBERG: Mr. Chairman, members of the Board,
5 I would like to first summarize the Staff's position and then
6 explain in detail the reasons for our taking the position
7 that we have.

8 The Staff's position is that the elements of
9 collateral estoppel are not satisfied. There is no identity
10 of parties between the two proceedings, there is no identity
11 of issues and there has been no final adjudication of the ulti-
12 mate issue which appears before this Special Board. Even if
13 the elements of collateral estoppel were satisfied, however,
14 this Commission and this Special Board has the discretion as
15 to the extent it wishes to apply or not apply the doctrine of
16 collateral estoppel.

17 In this case the Staff's position is that even if
18 the conditions of collateral estoppel were satisfied this
19 Board should exercise its discretion to not apply the doctrine

20 However, the Staff also believes that the concept
21 of comity between this Commission and the Federal Courts
22 deserves great deference. Accordingly the Staff is of the
23 view that this Special Board should make certain findings
24 and conclusions based on the District Court's opinion. Based
25 on those findings and conclusions we would urge that this

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1 Special Board come to its own independent decision as to whether
2 or not Squire, Sanders and Dempsey should be disqualified from
3 this antitrust proceeding. Based on the findings and conclu-
4 sions that we have suggested we would recommend that the dis-
5 qualification proceeding be dismissed.

6 Finally, the Staff believes that the finality of
7 the order dismissing the disqualification issues should be
8 stayed until all appeals from the District Court's decision
9 have been exhausted.

10 I would like to now explain in detail the reasons
11 why the Staff has taken this position.

12 MR. HEAD: Before you go into that, Mr. Goldberg,
13 do you have any authority that would indicate we have discre-
14 tion to ignore collateral estoppel?

15 MR. GOLDBERG: I certainly do, Mr. Head, and I will
16 discuss that in my presentation.

17 MR. HEAD: Thank you.

18 MR. GOLDBERG: It's well established that there
19 are three prerequisites to the application of the doctrine of
20 collateral estoppel, identity of parties between two proceed-
21 ings, identity of issues and a final adjudication of those
22 issues by a court of competent jurisdiction. It's the Staff's
23 position that none of these three prerequisites are satisfied
24 in this case.

25 Furthermore, I would like to note that in order for

1 a motion to succeed which is based on collateral estoppel the
2 tribunal must be convinced that all three of those prerequisites
3 are satisfied. However, for a motion based on collateral estopp-
4 el to fail it is only necessary to show that just one of those
5 prerequisites has not been satisfied.

6 It's out opinion that none of the three have been
7 satisfied.

8 First of all -- and I think most important -- we take
9 the position that there is no identity of parties between this
10 proceeding and the proceeding that occurred before the District
11 Court. The Staff was not a party to the proceeding before the
12 District Court. The Staff is a party to the proceeding before
13 this Special Board and before this Commission to find an
14 identity of parties between this proceeding and the proceeding
15 that occurred before the District Court and then to decide
16 issues before this proceeding based solely on the basis of
17 collateral estoppel, assuming now that the other conditions
18 are satisfied, would necessarily preclude this Commission from
19 basing its decision on issues with the benefit of the Staff's
20 position on those issues.

21 Such a ruling by this Special Board, in the Staff's
22 opinion, would create a precedent which would be dangerous to
23 further proceedings before this Commission. It would do in-
24 justice to one of the very reasons behind administrative
25 agencies and that is to base its decisions in its area of its

mpb4

1 jurisdiction on the expertise of its Staff. Now this is most
2 applicable, of course, to the health, safety and environmental
3 mission of this Commission, but it illustrates that when you
4 dispose of issues based on a proceeding where the Staff was
5 not a party you are precluding yourself from considering the
6 position of your own Staff.

7 MR. HEAD: Well, Mr. Goldberg, though, the Staff has
8 no real interest in the situation between the two parties, does
9 it? You are here more as an amicus than a person who is
10 actually involved in the controversy, are you not?

11 MR. GOLDBERG: I would disagree, Mr. Head, that we
12 have no interest because our interest is very much concerned
13 with preserving the integrity of our licensing process and our
14 hearings and therefore we are certainly concerned with the
15 attorneys who practice before the Commission in our hearings.
16 We certainly want to represent the public interest as to
17 whether or not particular attorneys should be participating in
18 our proceedings and whether or not they have violated our
19 Rules of Practice.

20 MR. HEAD: Well, is that not the job for the Board
21 to sort out? Aren't we acting for the agency in that regard?
22 The Staff has not raised this. If you had raised it as a
23 particular matter on your own motion I would say that you
24 have an interest in the proceeding as such, in this disqualifica-
25 tion proceeding, and while we are interested in hearing the

mpb5 1 Staff's views, you have no, in effect, standing on the motion
2 as such, do you?

3 MR. GOLDBERG: I would agree that it is for the
4 Board to ultimately decide the issue, but I think that it
5 certainly is proper and indeed the duty of the Staff to air
6 its views on those issues. And this Board has so ruled in
7 its preconference order number 2. The Board said, and I
8 quote:

9 "In the Board's view the Staff should be
10 permitted to participate because of its duty to
11 protect the public interest in the Commission's
12 licensing proceedings."

13 And indeed our appeal board in remanding this
14 proceeding has said that all parties have a right to partici-
15 pate in the disqualification issue and the important point is
16 because the Staff is one of the parties to this proceeding
17 and because the Staff has a right to participate in this
18 proceeding there can be no identity of parties between this
19 proceeding and the proceeding in the District Court. Although
20 the primary parties are the City of Cleveland and SS&D, they
21 are not the only parties. The Staff undeniably has a right
22 to participate in this proceeding and therefore there can be
23 no identity of parties.

24 MR. GOODHOPE: Which side are you on?

25 MR. GOLDBERG: We believe the motion to dismiss

mpb6

1 this proceeding should be granted, but we disagree very strongly
2 with the reasons advanced by Mr. Gallagher. We have our own
3 reasons as to why it should be dismissed and we think those
4 reasons are very important.

5 MR. GOODHOPE: Did you plan on having discovery and
6 calling witnesses and participating in this proceeding?

7 MR. GOLDBERG: I indicated at the prehearing con-
8 ference that while we would not present our own case, that is,
9 we would not call witnesses ourselves and present documentary
10 evidence ourselves, we certainly reserved our right to object
11 to documentary evidence that was attempted to be introduced
12 into the proceeding. We certainly reserved our right to conduct
13 cross-examination of witnesses. And, once again, our interest
14 is to preserve the integrity of our licensing process.

15 MR. HEAD: Mr. Goldberg, though, isn't that just
16 a general interest as opposed to having an interest in the
17 actual controversy which is between Squire, Sanders and Dempsey
18 and the City of Cleveland? This is where the real issue lies
19 and while it may be helpful and certainly this Board is inter-
20 ested in the Staff's position, when we're talking about the
21 principles of collateral estoppel we're talking about a legal
22 interest, an actual interest that a person has to have and there
23 might have been ten parties out in the lawsuit in Cleveland
24 that might have had their say before Judge Krupansky, or there
25 might be, like the Justice Department isn't even participating

mpb7
1 in this particular hearing even though they are a part of the
2 basic proceeding.

3 What we're talking about from the collateral estoppel
4 standpoint, aren't we, is the actual interest in the controversy
5 itself? The Staff does not have an interest in the controversy
6 itself, does it; other than general interest in the conduct of
7 the proceeding?

8 MR. GOLDBERG: I think it's the phrase "other than
9 the general interest." If you want to call our interest a
10 general interest then I would agree with you that our interest
11 is a general interest of preserving and protecting our Rules
12 of Practice and voicing our opinion as to whether or not our
13 Rules of Practice have been violated.

14 However, I would add, you mentioned the Department
15 of Justice. Once again, they do have the right to participate
16 in this disqualification proceeding, and although they have
17 not exercised that right to date, I have been informed that
18 if certain of the issues were interjected into this proceeding
19 that Mr. Gallagher has indicated in the past he might want
20 to do, the Department of Justice would exercise its right to
21 participate in this disqualification proceeding.

22 MR. HEAD: Well, the point I'm trying to get at,
23 though, is when we're talking about the identity of parties,
24 two parties contesting as far as collateral estoppel goes,
25 aren't we talking about the real parties in the interest from

Acc. General Reporters, Inc.

mpb8

1 the collateral estoppel standpoint as opposed to other parties
2 that may be involved in the proceeding?

3 MR. GOLDBERG: I think that we are a real party
4 in interest with respect to disqualification. I don't see how
5 it can be said that the Staff is not a real party in interest
6 with respect to disqualification.

7 Beyond the fact that in our view there is clearly
8 no identity of parties between these proceedings, there is
9 no identity of issues when you consider the ultimate issue
10 before this Commission, before the appeal board and before this
11 Special Board. The ultimate issue is whether or not the
12 law firm of Squire, Sanders and Dempsey should be disqualified
13 from participating in the antitrust proceeding before the
14 Nuclear Regulatory Commission because of a violation of this
15 Commission's Rules of Practice. That is the ultimate issue
16 and the only tribunal who can determine that ultimate issue
17 is this Special Board and the appeal board and the Commission
18 and ultimately then can be appealed to the courts. But the
19 District Court in Cleveland did not have that issue before
20 it. The District Court in Cleveland had the following issue
21 before it: should the lawfirm of Squire, Sanders and Dempsey
22 be disqualified from participating in the antitrust litigation
23 before the District Court in Cleveland. Those are two different
24 issues and in this Commission's view of the law of the standards
25 and the ultimate conclusion as to whether or not there should

1 be disqualifications can very well differ from the ultimate
2 judgment in Cleveland.

3 With respect to that ultimate issue we suggest that
4 there is no identity of issues and therefore there was no
5 final adjudication of the ultimate issue which is before this
6 Commission.

7 CHAIRMAN LAZO: Mr. Goldberg, don't your rules
8 provide that in suspension matters that we adopt the same rules
9 as are applied in Federal District Court?

10 MR. GOLDBERG: Our rules say that the standard of
11 conduct here is the standard of conduct required in courts in
12 the United States. Putting aside the fact that various
13 federal courts differ as to what their own standards of con-
14 duct are I think because that is our standard it is appropriate
15 to look at the concept of comity and look at particular issues
16 that were litigated before the District Court in Cleveland
17 and determine whether or not we can adopt those, or whether or
18 not collateral estoppel applies to those. If there is an
19 identity of issues and if there is an identity of parties and
20 if there was a final adjudication with respect to those
21 particular facts and issues I think then you can talk about
22 whether collateral estoppel can be applied.

23 But with respect to the ultimate issue, I don't
24 think you can talk about collateral estoppel.

25 Now, the Staff's position that we should exercise

mpb10

1 our discretion and, based on the doctrine of comity, adopt
2 certain findings and conclusions, and not all of them, but certain
3 findings and conclusions of the district court is equivalent
4 in its result to saying that we believe that with respect to
5 some of the issues that were litigated before the District
6 Court in Cleveland they are the same as appear before this
7 tribunal. although there is no identity of parties because we
8 were not a party to that proceeding. We could waive our right
9 to insist on an identity of parties with respect to those issues,
10 and then you have a final adjudication of some of the identical
11 issues which appear before this tribunal. And because we can
12 waive our right to insist on identity of parties then you can
13 apply collateral estoppel to some of those facts that were --
14 those factual issues that were litigated and come to the con-
15 clusion that because of collateral estoppel applied to them
16 we now have, and go down the list of things that we have in-
17 cluded in our motion.

18 Then, based on that application of collateral
19 estoppel, ultimately conclude that this disqualification pro-
20 ceeding should be dismissed. I suggest that that's precisely
21 the way that collateral estoppel applies in all cases, it's
22 with respect to particular factual issues that have been liti-
23 gated in a prior proceeding.

24 MR. GOODHOPE: We can't hunt and pick through those
25 and pick the ones we like and discard the ones we don't like,

mpb11

1 can we? Aren't we stuck with them all once we start talking
2 about collateral estoppel?

3 MR. GOLDBERG: I think we're not stuck with all the
4 issues that were litigated in District Court because there
5 perhaps were some litigated there that are not before this
6 Commission or not necessarily crucial to this Commission's
7 decision.

8 MR. GOODHOPE: Give me an example.

9 MR. GOLDBERG: Okay.

10 The appeal board, in remanding this proceeding,
11 said we find the record sparse on certain questions and it
12 went ahead and listed about six different questions that it
13 found the record sparse and it said that we would expect on
14 remand that these issues would be addressed before the Special
15 Board.

16 Now, I believe it's possible to answer those ques-
17 tions based upon an application of the doctrine of collateral
18 estoppel to certain of the issues that were litigated before
19 the district court, but not necessarily all of them. It's
20 not necessary to look at all of them to answer the questions
21 which the appeal board wanted answered and I suggest that
22 the findings and conclusions that the Staff has suggested in
23 its answer to the motion go to answer the appeal board's
24 questions.

25 MR. GOODHOPE: I guess I see your point. I don't

mpb12

1 agree with it but I see it. I still don't think we can pick
2 and choose if we're going to start down this road of collateral
3 estoppel and say, Well, I'll pick this one out and I'll agree
4 that was decided out in that district court and I'll buy it
5 here but the next one I won't buy. I can't see -- once you
6 start down that road you've got to go all the way, and take the
7 good with the bad.

8 MR. GOLDBERG: If there are five issues before this
9 Special Board and there were ten issues before the district
10 court that were litigated there clearly can only be an identity
11 of issues on the five that are before this proceeding, and
12 if those five issues were litigated in the prior proceeding
13 it doesn't matter whether there were 200 or only five out
14 there. We say there's an identity of issues between five
15 issues here and five issues that were litigated before the
16 district court and with respect to those five if the other
17 elements of collateral estoppel is applied we will not re-
18 litigate those five issues.

19 MR. GOODHOPE: You didn't put that in your memorandum,
20 did you?

21 MR. GOLDBERG: No, I did not. I'm saying that
22 this is equivalent to our concept of comity and that is apply-
23 ing the doctrine of collateral estoppel to particular issues
24 that were litigated before the district court, and which is
25 before this proceeding is the same as saying the concept of

1 comity requires that this Special Board and the public interest
2 requires that this Special Board adopt certain findings and
3 conclusions of the district court. There is no difference
4 and I'm willing to state now with respect to those particular
5 issues there is an identity and we will waive our right to
6 insist on identity of parties.

7 MR. HEAD: Well, Mr. Goldberg, you indicate you
8 would waive your right. It would appear if there is not an
9 identity of parties and one of the essential elements of
10 collateral estoppel would be missing as you argued, could
11 you say since I'm that party I waive my right, would that
12 in fact be fair to the City, who is opposing the motion? Can
13 you waive that right and thereby cure a legal defect where
14 the party that is actually at interest would be harmed by it
15 because we would then presumably grant the motion?

16 MR. GOLDBERG: As between the City of Cleveland
17 and Squire, Sanders and Dempsey, as between those two, there
18 certainly is an identity of parties. The only added wrinkle
19 to it, and I think it's an important wrinkle from the Staff's
20 point of view, is that we too are a party to this proceeding
21 and we -- and I think perhaps only we can insist on an identity
22 of parties before the application of the doctrine of collateral
23 estoppel is applied and therefore we, and only we, can waive
24 the right to insist that our point of view with respect to
25 certain things that were litigated in the district court, but

mpb14

1 not the ultimate issue which was not before that district
2 court, with respect to those certain things we can waive our
3 right because of the fact that our participation would have
4 been limited, not nonexistent, but would have been limited.

5 MR. HEAD: Do you have any authority for that pro-
6 position, any cases that involve this split identity of parties?

7 MR. GOLDBERG: No, I don't. I've not been able to
8 uncover a case where there has been multiple parties with one
9 of them waiving their right to insist on it.

10 MR. HEAD: I might also ask while we're on the
11 subject of comity, are there any cases where the theory of
12 comity has been applied such as you would ask the Board to
13 apply it here?

14 MR. GOLDBERG: I think with respect to disqualifica-
15 tion, some of the cases cited by the City of Cleveland in its
16 response are in line with that in that they talk about paying
17 respect to another tribunal's decision with respect to dis-
18 qualification of attorneys appearing before it, but not being
19 bound in the collateral estoppel sense by that prior adjudica-
20 tion of the disqualification. It's something which, Mr. Head,
21 you brought up before. Is it peculiar to this Agency? I
22 think so. When we're talking about practice before this Agency
23 I think this Agency and only this Agency until it is appealed
24 can deal with that issue. And I think on that basis we have
25 to take a look at what went on in the district court, but we

1 can't blindly apply the doctrine of collateral estoppel and
2 say we won't give it our own independent attention and we'll
3 just dispose of it without the view of the Staff, and without
4 our own independent conclusion.

5 MR. HEAD: Well, is your theory, then, one really
6 of comity or would you have us take the issues that were
7 presented to the court out in Cleveland and reassess them and
8 make our own decision on them, is that what you would have us
9 do? That's not really a comity position, is it?

10 MR. GOLDBERG: Yes, that's what I would have you to
11 do. That's what I've suggested, that based on comity you
12 look at what went on in the district court and you look at
13 the findings and conclusions and based on what the district
14 court found, this Board come to its own conclusion as to
15 whether or not those findings and conclusions warrant the sus-
16 pension or disqualification of Squire, Sanders and Dempsey
17 before this tribunal. And we're saying that based upon what
18 we have read that we would recommend dismissal of this proceed-
19 ing.

20 MR. HEAD: Is that any different, then, than Mr.
21 Davis's suggestion at the end of his presentation that you
22 submit the record without discovery and let us make our own
23 judgment on it?

24 MR. GOLDBERG: It's certainly similar. Naturally
25 his goes further to give this Board its independent decision

mpbl6 1 rather than adopting findings and conclusions based on that
2 record, and then basing your ultimate conclusion of disqualifica-
3 tion or no disqualification on the findings that we suggest you
4 adopt in the district court. Mr. Davis suggests, well, go back
5 one step further and just take the entire record and look at
6 that and come to your own specific findings and conclusions
7 and to the ultimate conclusion as to whether or not there
8 should be disqualification. I think they're very similar, he
9 goes back one step further than we have.

10 MR. HEAD: Does the Staff have any objection to
11 that procedure?

12 MR. GOLDBERG: I do not object to it, I don't think
13 it's necessary but I do not object to it.

14 CHAIRMAN LAZO: Mr. Goldberg, can you conclude your
15 remarks in two or three minutes?

16 MR. GOLDBERG: Yes.

17 One of the things that the Staff is very concerned
18 about is this Special Board and eventually the appeal board
19 and the Commission basing its decision on this disqualification
20 issue on a decision in district court in Cleveland which
21 ultimately may be reversed on appeal.

22 The law is, and this is from the Supreme Court,
23 that if you do that you're stuck with that decision even
24 though it's subsequently reversed on appeal.

25 We want to avoid this Special Board and eventually

mpb17
1 the Commission basing its decision on an erroneous decision
2 and if ultimately Judge Krupansky's decision is reversed on
3 appeal and nothing is done here except adopted by collateral
4 estoppel or comity, we'll have the very unfortunate situation
5 of this Commission basing its opinion on disqualification on
6 an erroneous decision and so the Staff wants to avoid that
7 undesirable result. That's why we've suggested that the Board
8 stay the finality so that within our rules there can be a
9 petition for reconsideration if ultimately the Sixth Circuit
10 reverses the district court in Cleveland.

11 Now there's an alternative to that. An alternative
12 is to dismiss the City's motion without prejudice to it refil-
13 ling the motion if ultimately the Sixth Circuit reverses the
14 district court in Cleveland. The important thing, however,
15 is for this Special Board to guard against basing its decision
16 on an erroneous decision and not having any relief available
17 to the party who is aggrieved. Under our rules because of the
18 very short limitation of the time for filing petitions for
19 reconsideration there are two ways the Staff sees of accomplish-
20 ing the result of avoiding the undesirable result of basing
21 your opinion on an erroneous decision, and that is to stay
22 the finality so that within our rules there can be a petition
23 for reconsideration, or alternatively, dismissing without
24 prejudice to refile if ultimately the Sixth Circuit reverses
25 on appeal.

mpb18

1 MR. HEAD: Mr. Goldberg, why don't we just stay
2 the proceeding as such and await the developments that may
3 well moot the disqualification issue? Why take the step of
4 making a judgment when one may not be necessary by subsequent
5 developments?

6 MR. GOLDBERG: I think the difference is, and the
7 key is that it may not be necessary but there is no guarantee
8 of that. If this Board refrains from acting until the possible
9 sale of MELP or until we get an initial decision from the anti-
10 trust board then in the event the sale falls through or the
11 initial decision on the antitrust issues is a long way off
12 we will have accomplished nothing but delay and keeping in
13 mind the appeal board's instruction to expedite this matter I
14 think there is a danger there that ultimately there could be
15 more delay. I agree that if things went "the right way" we
16 could dispose of this without the necessity for the Board ruling
17 on this difficult issue. However, dismissing without prejudice
18 gives a finality to the disqualification proceeding, but yet
19 allows the City of Cleveland to come back in if ultimately
20 Judge Krupansky is reversed on appeal.

3.3 21 MR. GOODHOPE: Couldn't they do that without the
22 hooker on the end of it, without making it final?

23 MR. GOLDBERG: Then we come to the difference
24 between dismissing without prejudice and with prejudice.

25 MR. GOODHOPE: Or just dismissing, period.

mpbl9 1 Can't they come back to the Commission and ask to
2 have it reopened at any time in the future? The Commission
3 can do just about whatever it wants to.

4 MR. GOLDBERG: They certainly could come back. I
5 think it would make it easier on them if this Board gave some
6 indication that it too was concerned with basing its opinion
7 on an erroneous district court opinion, and I can't see any
8 reason why this Board would not want this Commission ultimately
9 to resolve this in the correct way according to the law if
10 the Sixth Circuit Court of Appeals or eventually the D.C.
11 Court of Appeals, if this disqualification issue here is
12 appealed there ultimately in accordance with what the courts
13 of appeals say the law is, and that's all we're concerned
14 about.

15 MR. HEAD: Mr. Goldberg, though, aren't there a
16 considerable number of cases in the res judicata collateral
17 estoppel area that indicate that a judgment is final even if
18 it's on appeal, and since we have that line of cases they
19 certainly don't indicate or the rule would be otherwise if they
20 said a judgment was not final and you should stay your hand on
21 a res judicata or a collateral estoppel case just because the
22 first case is on appeal, isn't that correct?

23 MR. GOLDBERG: You're certainly correct.

24 MR. HEAD: Aren't you adding an element, then, in
25 collateral estoppel that is not there?

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1 MR. GOLDBERG: No, sir, I'm doing precisely what
2 the federal courts do.

3 The federal courts according to a reference, by
4 the way, that is contained in Mr. Gallagher's original motion
5 says because the law is that the first testimony is final
6 even though it is on appeal and even though subsequently it is
7 reversed on appeal, because first result remains the law, the
8 courts have granted stays in the second forum when the first
9 judgment is on appeal.

10 Alternatively, they have dismissed without prejudice
11 the refile. This is precisely what the district courts do
12 and this is precisely what I suggest it's proper for this
13 Commission to do to avoid the result that that decision out
14 there is final even though it is on appeal and even though it
15 may ultimately be reversed on appeal. Right now we can base
16 a decision, if the elements of collateral estoppel were satis-
17 fied, on Judge Krupansky's order and if it later is reversed
18 on appeal there is no relief here and that's what I'm concerned
19 about. The courts say the only relief you have from a judgment
20 in a particular forum is a direct attack, not a collateral
21 attack.

22 Thank you very much.

23 CHAIRMAN LAZO: Thank you, Mr. Goldberg.

24 Mr. Reynolds?
25

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1 ORAL ARGUMENT ON BEHALF OF THE APPLICANTS

2 By William Bradford Reynolds, Esq.

3 MR. REYNOLDS: Mr. Chairman, members of the
4 Board:

5 I don't really have too much to add to what
6 Mr. Gallagher has said. We stated -- "we" being the
7 applicants -- have stated our position in writing. We do
8 believe the doctrine of collateral estoppel is applicable.

9 I would merely make the observation with respect
10 to the oral argument that I have heard this morning by
11 Mr. Davis and Mr. Goldberg that they sound very much as
12 though perhaps they are first drafts of arguments that
13 are ultimately to be presented in appeal contesting the
14 particular judgment of Judge Krupansky in the District
15 Court.

C-4 16 I don't think that that, as Mr. Head recognized
17 at one point, that that is the proper standard for col-
18 lateral estoppel.

19 We have an identity of parties, and I think that
20 we have an identify of issues. We have a final judgment
21 in every sense of the collateral estoppel doctrine. And
22 it seems to me that to try to sidestep an application of
23 that doctrine by attacking at this time that final judgment
24 misses the mark.

25 I would like to focus just for a few short

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1 moments on two of the questions from the Panel that seemed
2 to re-occur: One concerns Mr. Head's inquiry as to the
3 mootness problem that might be lurking, and what impact
4 that should have on action or inaction by this Special
5 Board with respect to the controversy -- or the motion
6 that is now before it.

7 The proposed or tentative settlement that is
8 now in the works in the District Court in Cleveland is
9 one that requires approval by the Board of Directors of
10 the Cleveland Electric Illuminating Company. And, as has
11 been indicated by Mr. Gallagher, that approval was given
12 on October 8th, 1976. It requires legislative action by
13 the City Council. My understanding is that a bill has
14 been submitted but not acted upon. And it's contemplated
15 the City Council will approve by November 30th.

16 In addition to that it also contemplates ap-
17 proval by Judge Krupansky in the District Court following
18 a hearing to insure that the settlement is one that is
19 consistent with the antitrust laws. --or not inconsistent
20 with the antitrust laws. And the time table for that parti-
21 cular hearing has not been set. And, indeed, if there is
22 not approval by Judge Krupansky of the settlement, then
23 obviously we're back to Stage 1 in that litigation and it
24 will heat up again, I presume, unless a new settlement is
25 restructured.

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1 So in terms if a time table it's a little mis-
2 leading, I think, to think in terms of that litigation
3 out there settling with any finality on November 30th.

4 There's a January 10th target date for closing,
5 but it does require the court approval. And to the extent
6 that other approvals may be necessary, for example by the
7 FPC or by the State Commission, Public Utilities Commission,
8 those are also considerations that have to be cleared
9 before this settlement is going to be finalized or imple-
10 mented.

11 MR. HEAD: Mr. Reynolds, does the January 10th
12 date contemplate that Judge Krupansky will have his hear-
13 ing on the settlement and approved it by that time, before
14 closing?

15 MR. REYNOLDS: I believe that's the hope. Al-
16 though I don't think that-- Well, the hearing by Judge
17 Krupansky has not been set. And the hope is that that
18 will be the closing date.

19 I just want to add to the picture the other
20 approvals necessary, and indicate there has not been a
21 precise time table set yet for those other approvals.

22 So in terms of staying your hand on this
23 motion on the ground that the settlement might moot and
24 therefore eliminate a need for a ruling, I think that we
25 should keep in mind that the January 10th date is probably

wb4

1 the earliest. And we are not yet in a position to say that
2 this settlement is going to be approved by the court. And
3 until there is that approval we don't know at this juncture
4 whether the settlement will stick or will not.

5 It's a bit tentative, in other words, to start
6 talking in terms of that as a critical date. The Licensing
7 Board's decision, I do not have any feel for when we will
8 get that. We have indicated to the Board that the plant
9 schedules are such that the early part of next year is
10 when we anticipate Davis-Besse Unit 1 will be ready for
11 commercial operation, fuel loading for commercial operation.

12 MR. GOODHOPE: Does it have an operating
13 license yet?

14 MR. REYNOLDS: The operating license-- It cannot
15 obtain the operating license until there is antitrust
16 clearance. And that is the clearance that we are awaiting.

17 In other words, until the Licensing Board
18 issues its decision on the antitrust matters the license
19 cannot issue. And all other clearances have been given.
20 And the commercial operation of the plant is now scheduled
21 for the early part of '77. So we would anticipate, or we
22 would hope -- and we have indicated to the Licensing
23 Board, if at all possible, given that schedule, that an
24 antitrust decision issue prior to January 1st, '77.

25 MR. GOODHOPE: Well there's no doubt the anti-

wb5 1 trust Board could go ahead and issue its decision regardless
2 of what we have done, whether we take action here or not,
3 this Board.

4 MR. REYNOLDS: I think that's correct.
5 I was looking at the question from the other side. If they
6 issue their decision then what impact would that have on
7 the action that you might take. And I was trying to first
8 indicate what dates we're talking about. Because one of
9 the alternates was perhaps to sit on the motion for some
10 period of time. And obviously that decision by this Board
11 would have to depend first on what period of time we were
12 looking at. And I was indicating that I think we are not--
13 before we even reach the question of whether those two
14 activities could moot the present motion on disqualification
15 we have to program in the fact that we're probably talking
16 about at least January '77 before the question of mootness
17 arises.

18 MR. HEAD: The Licensing Board is aware of
19 the proposed operation of the plant?

20 MR. REYNOLDS: Yes. We advised them of that.
21 And we're keeping them advised as that schedule changes.
22 It has changed a couple of times.

23 Now it's my own belief that this Board should
24 not stay its hand on the motion on the possibility that
25 any one or both of these actions might moot the controversy.

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1 I guess I really feel quite strongly about that, primarily
2 because I think that this Board has a responsibility to
3 Squire, Sanders and Dempsey -- since that law firm has been
4 charged with what I would consider in this profession as
5 probably one of the most serious charges that any law
6 firm can face--to treat the motion and to resolve the
7 issue and not to let it sit on the back burner, if you
8 will, in the hopes that perhaps it will go away.

9 I think that it's a little different posture --
10 and perhaps it's because I'm so close to the fact that we're
11 talking about disqualification of attorneys and the kind
12 of charges, it seems to me it's a little different posture
13 than the one the Board might have with respect to some
14 other type of issue. And I personally feel that for that
15 reason the Board should come to grips with the motion and
16 should resolve it.

17 And if indeed all the elements of collateral
18 estoppel are present, as I believe they are, and as I believe
19 the papers demonstrate, then it seems to me that there is
20 a responsibility for this Board to go ahead and rule on the
21 motion. That's a reason that I would give for why I would
22 urge that you take action.

23 MR. HEAD: Well, Mr. Reynolds, I understand that
24 to a certain extent. However if the basis for our dismissal
25 of the disqualification proceeding is because Judge Krupansky

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1 ruled as he did in Cleveland, that is not exactly removing
2 a cloud of making a decision on the merits by this Board
3 that there was no unethical conduct, is it?

4 MR. REYNOLDS: I believe it is. And that
5 goes to the identify of issues and a question that, earlier
6 on, Mr. Goodhope raised. And I think that's precisely
7 what that does do. Because what you have determined by
8 dismissing on collateral estoppel is that the issues are
9 identical here to the issues that were identical there.
10 And I'm now talking about the disqualification issues.

11 MR. HEAD: Yes. But aren't we in substance
12 merely accepting the Judge's resolution as opposed to
13 making our own independent decision, and therefore there
14 is no further removal of the cloud?

15 MR. REYNOLDS: Except that the whole philosophy
16 behind collateral estoppel, as I understand it, is that
17 there's no point in litigating and re-litigating and re-
18 litigating in any number of tribunals or forums the same
19 issue over and over again, especially in view of the fact
20 that you have a tryer of fact, he has heard all the evi-
21 dence, and the likelihood is that the outcome is going to
22 be identical. I mean that's the bedrock for collateral
23 estoppel.

24 It seems to me if this agency or another court
25 comes in and is confronted with the same charges and the

wb8

1 same allegations against the same party, and it says that
2 has already been fully litigated by this tribunal over
3 here and we're going to accept its judgment, that it does
4 remove the cloud; except to the extent, let's say, that
5 there is ultimately a reversal of the first tribunal, and
6 when we're in a much different situation, then collateral
7 estoppel.

8 But I really very definitely feel that it does
9 remove the cloud because of the identity of issues and of
10 the parties involved.

11 As I understood your question, Mr. Goodhope,
12 you were really asking whether the identity of the anti-
13 trust issues as opposed to the specific disqualification
14 controversy are the same. And I would like to speak to
15 that, because I do think it is a relevant question in
16 terms of Judge Krupansky's finding of a substantial relation-
17 ship.

18 MR. GOODHOPE: That's what I was getting at.
19 I thought he answered it. He said Yes.

20 MR. REYNOLDS: You mean Mr. Gallagher answered?

21 MR. GOODHOPE: Yes. He said they were identi-
22 cal.

23 MR. REYNOLDS: He said the -- I don't want
24 to put words in his mouth....

25 MR. GOODHOPE: He'll defend himself.

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1 MR. REYNOLDS: Let me give you what my under-
2 standing is.

3 Judge Krupansky that the conduct -- that there
4 was no substantial relationship between the conduct of
5 SSD and the antitrust issues before him. The antitrust
6 issues before him in one sense differ from the antitrust
7 issues before this Board in that the issue before him is
8 whether there's a violation of the antitrust laws ultimately,
9 and before this Board is whether there's an inconsistency.

10 I don't view that as the kind of difference that would
11 impact at all on the substantial relationship question.

12 The point is, I think, that the allegations
13 by the City of misconduct by CEI are identical in this pro-
14 ceeding as in that proceeding. And I say it that way
15 because there are additional allegations that were aired by
16 the City out in Cleveland that were not before the Board
17 here.

18 So, if anything, his finding of no substantial
19 relationship out there makes it crystal clear there is not
20 one here.

21 And I would also note that -- and this does not
22 alter what I just said, but it is an additional observa-
23 tion: the antitrust board in the antitrust proceeding here
24 removed from this case because of the City's pleadings an
25 issue of misconduct by CEI, or by Squire, Sanders and

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1 .Dempsey, with respect to the performance of that firm for
2 CEI in the bond activities of the City. That was removed
3 from the NRC proceeding. It was not removed from the City
4 proceeding, and Judge Krupansky said there was no substan-
5 tial relationship even with that allegation in the proceed-
6 ing.

7 My point is, basically, --

8 MR. GOODHOPE: You're talking about the earlier
9 time, the cut-off time.

10 MR. REYNOLDS: I'm saying that-- It really
11 involves after the cut-off time with respect to the '72
12 bond matter. And what I'm saying is that this antitrust
13 board in framing issues that were litigated in the antitrust
14 proceeding removed from this whole antitrust proceeding
15 that controversy and said "That is not an issue before
16 this Board."

17 So in terms of finding a substantial relation-
18 ship, if you will, between what is the alleged misconduct
19 on the one hand of Squire, Sanders and Dempsey, and the
20 controversies before the Board on antitrust matters, there
21 is no possibility that the bond activity of Squire, Sanders
22 and Dempsey would have any substantial relationship to the
23 issues of anticompetitive behavior in this particular NRC
24 proceeding.

25 MR. HEAD: Mr. Reynolds, wasn't that being by

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1 the Antitrust Licensing Board, though, a procedural one
2 as opposed to a substantive ruling that this was not an
3 antitrust issue before the Board? I recall it just vaguely.
4 But that's my recollection of it.

5 MR. REYNOLDS: It was a procedural ruling
6 which had substantive effect, because it precluded the
7 City from introducing evidence on the issue, on the basis
8 that the City had not included in its allegations that
9 pleading, or that allegation. --not included in its
10 September 5th filing, which is the one where everybody
11 came forward and said "This is what my case is going to
12 involve." It had not included that in its September 5th
13 filing.

14 It was a procedural ruling, but the substantive
15 effect of that procedural ruling was to remove that as an
16 issue in the case.

17 The only point I'm really making in terms of
18 being clear on identity of issues: even if they were in
19 the case, Judge Krupansky came to grips with it and said
20 there's no substantial relationship. There's even less of
21 a substantial relationship with respect to this particular
22 proceeding, because that was an issue, or an allegation
23 that was carved out and no evidence was introduced or
24 permitted to come in in the Antitrust proceeding on that
25 particular issue.

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1 So I just wanted to make that clear.

2 .I guess that the final thing to say -- and I'm
3 out of time, and I won't take much time with it. If there
4 is an ultimate settlement out in Cleveland of the matters
5 out there, I believe that does moot the matter here. --in
6 direct response to your question.

7 I don't believe that the decision of the
8 Licensing Board here is one that we can accurately say
9 would moot the controversy on disqualification. I come
10 down differently on that than I do on settlement.

11 MR. HEAD: That might cause the City, though,
12 to withdraw the motion, is what I had in mind. It really
13 would not moot it. Because there are appellate procedures.
14 I should address myself to the City on that, I believe.

15 MR. REYNOLDS: Okay.

16 CHAIRMAN LAZO: Thank you, Mr. Reynolds.

17 MR. HEAD: Mr. Goldberg, I do have one point.
18 This won't take very long, I hope.

19 There was one area that-- I realize we got into
20 a lot of discussion during your argument, and I don't
21 think you got to the point. But you mentioned that even
22 if the elements of collateral estoppel were present in
23 the action that the Commission -- this Board acting for
24 the Commission would have discretion to ignore the doctrine
25 if it saw fit to do so. And you indicated that you might

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1 have some authority for that proposition.

2 .Could you, without elaborating too much, give
3 me that authority whereby we would have the discretion to
4 ignore the doctrine if we found the elements to be present?

5 MR. GOLDBERG: Yes, sir.

6 On page 5 of Squire, Sanders and Dempsey's
7 Motion to Dismiss the disqualification proceeding
8 Mr. Gallagher quotes a section from the 1958 edition of
9 Davis' Administrative Law Treatise. And let me read the
10 sentence that he has quoted, because it's significant.

11 "Ordinarily a court decision will be
12 res judicata in later administrative proceedings
13 in the same circumstances in which it will be
14 binding in a later judicial proceeding."

15 Well that sentence he chose to quote was the
16 first sentence of the first paragraph of Section 1811 of
17 Davis' Administrative Law Treatise. The whole entire rest
18 of the section, some six and a half pages, discusses cases
19 which hold that an agency need not apply the doctrine of
20 collateral estoppel even when all the elements are satisfied.

21 The very next sentence in that section, which
22 appears after the sentence which Mr. Gallagher quoted, was:

23 "But this simple statement has some
24 exceptions which call for special comment."

25 And Davis goes on to talk about all the cases

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1 where administrative agencies refused to apply the doctrine
2 when all the elements were satisfied and when they were
3 upheld on appeal.

4 So I would urge you to simply look at that
5 section of Davis' Administrative Law Treatise, to look at
6 the 1970 supplement to Davis' Administrative Law Treatise
7 where he discusses more cases and says that the trend of
8 the law is for agencies not to apply the doctrine of col-
9 lateral estoppel even when all the elements are satisfied
10 when there are reasons why it should not be applied. And
11 he discusses the reasons why it should not be applied.

12 He discusses the fact that agencies have the
13 right to relax or modify the doctrine in the appropriate
14 circumstances, and that the trend is for courts to apply
15 collateral estoppel to administrative decisions more readily
16 than for administrative agencies to apply collateral estop-
17 pel to court decisions.

18 So I would just urge the Board to read that
19 section in Davis and all the cases discussed and cited
20 therein.

21 MR. HEAD: Thank you.

22 CHAIRMAN LAZO: Off the record.

23 (Discussion off the record)

24 CHAIRMAN LAZO: On the record.

25 MR. GOLDBERG: I would just like to point,

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1 Mr. Head, to one of our Appeal Board decisions which dis-
2 cussed res judicata and collateral estoppel. And in that
3 Appeal Board decision the Appeal Board recognized, too,
4 that along with the cases that are cited in Davis, that
5 administrative agencies can indeed refuse to apply the doc-
6 trine of collateral estoppel or relax or modify it if there
7 are appropriate circumstances. And that is-- Let me give
8 you the cite for that.

9 That would be Alabama Power Company, Joseph M.
10 Farley Nuclear Plant Units 1 and 2, ALAB 182, appearing at
11 7 AEC 210, 1974.

12 MR. GOODHOPE: Can you comment on what some
13 of those appropriate circumstances are? Are those matters
14 which are within the expertise of the administrative agency?

15 MR. GOLDBERG: That's certainly one, Mr.
16 Goodhope, and one of the main reasons when you are dealing
17 with the area of jurisdiction of a particular administrative
18 agency, dealing with the area of the expertise of its
19 staff, it's certainly most appropriate for an administrative
20 agency to refuse to apply collateral estoppel with respect
21 to a prior court adjudication of issues which are properly
22 before the administrative agency.

23 However that's not the only reason. Some of
24 the other factors are public policy factors that weigh
25 against applying the doctrine of collateral estoppel without

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1 a full airing and consideration of the issues and the views
2 before the administrative agency. And the Staff's position
3 is that the public policy factor here is that we're dealing
4 with the integrity of our licensing process. And I will
5 not reiterate my argument. But it certainly is a public
6 policy factor which weighs heavily with this Board making
7 up its own mind on the ultimate issue, and in allowing
8 the staff to participate in the resolution of that issue.

9 MR. GOODHOPE: I'd hate to be the attorney
10 arguing a case in the Circuit Court of Appeals, trying to
11 explain that the Nuclear Regulatory Commission had some
12 expertise in conflict of interest cases that the Federal
13 District Court did not have.

14 MR. GOLDBERG: I agree, Mr. Goodhope. I'm
15 suggesting that, although that's the main reason why ad-
16 ministrative agencies need not apply collateral estoppel,
17 there are other reasons. And I think we come within the
18 other reasons.

19 The other reason is public policy grounds.
20 And I think they weigh heavily here for not blindly applying
21 collateral estoppel when there is in fact no identity of
22 parties, and when a reversal of that District Court opinion
23 would leave this Commission with a decision based on an
24 erroneous decision with no right, no means of eliminating
25 that very unfortunate result. Because only an appeal here

wb17 1 could be on a collateral estoppel basis and whether or
2 not it was proper.

3 CHAIRMAN LAZO: Mr. Gallagher, you did reserve
4 a few moments for rebuttal.

5 REBUTTAL ARGUMENT ON BEHALF OF SQUIRE,
6 SANDERS AND DEMPSEY

7 By Michael R. Gallagher, Esq.

8 MR. GALLAGHER: Very briefly. I find the things
9 that I marked as we went along were really answered so far
10 as I'm concerned by questions from the Board.

11 Let me just conclude by saying this: The
12 governing Board in its January 20th order recognized that
13 the motion filed by the City to disqualify Squire, Sanders
14 and Dempsey was untimely filed. Any inconvenience that
15 results from delay in that filing is an inconvenience
16 which should be borne by the City and not by the Applicants
17 or by the participants in this proceeding.

18 Similarly, we have the District Court judgment
19 on appeal. Now there's delay with respect to that appeal,
20 and that delay, again, is not of SS&D's making but is
21 specifically of the City's making.

22 Squire, Sanders and Dempsey is entitled under
23 circumstances where it has been charged with an indiscretion
24 to have the matter finally disposed of and finally settled.
25 The doctrine of collateral estoppel requires this finality.

wb18 1 This Board is estopped, is what it says, from
2 relitigating those issues. Those issues, therefore, have
3 been finally determined. And it's a matter of this Board
4 making that judgment.

5 Now when we deal with -- when one brings up
6 novel things at the last moment one is apt to make a mis-
7 take. In discussing comity, I think it has no application
8 here, it's some novel application that I think is unwarranted.
9 Suggesting a stay I think is improper, because we cannot
10 see down the road, as respects staying the judgment, what
11 complications may arise.

12 I think that may be similarly true, may it
13 please the Board, with respect to staying its ruling on
14 the Motion to Dismiss. We're entitled to it under collateral
15 estoppel. Under the principles that one should regard as
16 guideposts for staying matters, a stay is simply not
17 entitled here. And I submit that we ought to do what
18 traditionally we're entitled to, and not something which is
19 a little bit different and which may present problems we
20 cannot now presently foresee.

21 CHAIRMAN LAZO: Thank you.

22 Mr. Davis.

23

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1 REBUTTAL ARGUMENT ON BEHALF OF THE
2 .CITY OF CLEVELAND

3 By James B. Davis, Esq.

4 MR. DAVIS: I would try and summarize my last
5 few points as follows:

6 Mr. Gallagher presses for collateral estoppel
7 but has cited no single case to this panel where collateral
8 estoppel was used on an issue of attorney disqualification.
9 I know of no such case.

10 The cases that come close to this situation
11 as any we know of give no automatic effect. We cited
12 those in our brief and I won't take those any further.

13 In a sort of a tangential response to a ques-
14 tion by Mr. Goodhope a moment or two ago, I think that
15 the Nuclear Regulatory Commission is here in a position to
16 have perhaps more expertise than a Federal court, or at
17 least one Federal court, on the question of appropriate
18 conduct for attorneys. And not simply because of the
19 personal decisions of Judge Krupansky but for the additional
20 interesting reason, cited in our brief, that the Code
21 of Professional Responsibility of the American Bar
22 Association is the standard of the Nuclear Regulatory Com-
23 mission and is not the standard necessarily of the U.S.
24 District Court for the Northern District of Ohio, Eastern
25 Division..

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1 That court, as I set forth in my brief, has
2 no standard. And this is an anomaly that does exist in
3 the federal system. A certain number of the local district
4 courts have adopted no official standard.

5 He did indeed refer to some of the cases, and
6 he was certainly aware of what we thought was the law. But
7 he didn't seem to follow us.

8 On the question of mootness I would say that
9 I followed Mr. Goldberg and was cheering him on all the
10 way down to his conclusion where I'm somewhat puzzled even
11 yet.

12 I feel that what he is basically urging is
13 inappropriate, because I think the probabilities are that
14 there will never be any independent review of Judge
15 Krupansky's order by the Sixth Circuit. I wish that that
16 would be something within my control and something that I
17 could accelerate. But I'm not longer in a position to call
18 those shots.

19 We know there has been a stay of any further
20 proceedings in the Court of Appeals in the Sixth Circuit.
21 If the settlement in Cleveland goes forward I think we
22 can abandon any hope of seeing any independent review there
23 of what Judge Krupansky did.

24 So Mr. Goldberg's suggestion of an adoption of
25 certain of the findings of Judge Krupansky together with a

wb21 1 stay I think is impractical. I just don't think that that's
2 going to settle anything.

3 I think really, although I vehemently disagree
4 with Mr. Gallagher that collateral estoppel has any role
5 here, I think this Board really needs to act one way or
6 another. And I feel it's inappropriate, Mr. Head, for the
7 Board to duck and await the outcome of the Licensing Board
8 proceeding.

9 In disagreement with Mr. Reynolds I strongly
10 urge that no matter what Cleveland does, and I have no
11 reason to believe that the City is going to withdraw its
12 motion for disqualification here or anything of the kind.
13 Quite apart from that, what happens out in Ohio has no
14 bearing on the Nuclear Regulatory Commission. That major
15 proceeding is all but completed. We're awaiting the ruling
16 of the Licensing Board.

17 The Antitrust Division of the Department of
18 Justice has a major stake in the outcome of that whole
19 hearing. They've invested years in it. They are most con-
20 cerned about the precedents that will come out of it. It
21 is going to be one of the major rulings in the whole area
22 of antitrust review by the Nuclear Regulatory Commission.
23 It has a life of its own.

24 That this major ancillary matter is unresolved
25 I think would, in one instance, have a direct bearing on

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1 the whole validity of the decision. I think it should be
2 resolved, and, additionally, pursuant to the instructions
3 of the Appeal Board.

4 I submit that it should be pursued, resolved,
5 and resolved correctly and in consonance with justice for
6 the good of the Nuclear Regulatory Commission and for the
7 future, for the future guidance of attorneys before this
8 Board.

9 For all these reasons I think you should adopt
10 the expedited procedure that I suggest. You should make
11 your ruling. The City would feel confident that on the
12 basis of the evidence, the testimony, and not the Judge's
13 person conclusions from it, there would be but one possible
14 outcome and that would be that the original decision of
15 the Licensing Board would finally be upheld. The evidence
16 was overwhelming as to what happened.

17 And whether these be deemed to be remarks
18 appropriate for an appellate court or not, it seems to me
19 they are pertinent here because of what we're dealing with.
20 We're dealing with an extraordinary decision that doesn't
21 deal with comity beyond a look at the basic evidence that
22 was presented.

23 This Board is not bound under any law that I
24 know to simply follow it. It should look at the evidence
25 not the Judge's conclusion from the evidence, and make its

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1 own conclusion. And it can do this and do it promptly
2 within a matter of some weeks. And this is the course that
3 I urge the final outcome be.

4 MR. HEAD: Mr. Gallagher, if the Board were to
5 turn down the motion -- and I don't mean to imply any pre-
6 judgment at all by that remark. You've heard the offer by
7 Mr. Davis that he would submit the case on the record with-
8 out discovery, the record made out in Cleveland. Would
9 that be acceptable to Squire, Sanders and Dempsey?

10 MR. GALLAGHER: We certainly would agree with
11 him there would be no further discovery. I don't see how
12 we could agree to violate what the law is. And the law
13 says that this Board cannot relitigate a matter that has
14 already been settled.

15 And so I don't think there is any way that I
16 can accede to his suggestion that this matter be submitted
17 to this Board for what in effect is an appeal from Judge
18 Krupansky's ruling.

19 MR. HEAD: I take that as a "No."

20 MR. GALLAGHER: Yes.

21 MR. DAVIS: If I may, I would like to be very
22 clear that that is a desperation offer by the City. I
23 would strongly urge for a correct result a fully, a
24 thoroughly based result, we would like to have our discovery.
25 But I feel that strongly that if time considerations or

wb24 1

2 other considerations are paramount, I feel that strongly
3 about the record we made in Cleveland, that we made our case,
4 that I would do it that way.

5 CHAIRMAN LAZO: Mr. Goldberg, does the Staff
6 have rebuttal?

7 MR. GOLDBERG: We have nothing further.

8 CHAIRMAN LAZO: Thank you, sir.

9 Mr. Reynolds?

10 REBUTTAL ARGUMENT ON BEHALF OF THE APPLICANTS

11 By William Bradford Reynolds, Esq.

12 MR. REYNOLDS: If I may: I just have a couple
13 of comments.

14 My first one is that, until Mr. Davis qualified
15 it as a desperation offer I thought that we were ready to
16 walk out of here with an easy decision, because with this
17 stipulation and his concession that there is no practical
18 likelihood of an appeal ever taking place, it seems to me
19 that that disposes of the whole issue of collateral
20 estoppel about as absolutely as it can be done, and leaves
21 only the open question, if it is an open question, of
22 whether this Board in its discretion, notwithstanding all
23 the elements of collateral estoppel being present, can find
24 some basis for avoiding it.

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I guess I'm not too clear which side of the
fence the Staff is on now, whether they're urging you avoid

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1 it or don't avoid it as a matter of comity or your discre-
2 tion. But putting that aside I would simply say that
3 to the extent there is a suggestion that as a matter of
4 public policy all the elements of collateral estoppel being
5 present there would be some reason for this Board to ignore
6 those elements, I would ask the Board to look again at
7 our filing of September 24th, 1976 where we put forth in
8 very summary fashion our views on the dismissal motion.
9 And we do there address in the last two pages the question
10 of what would be in the public interest if indeed the col-
11 lateral estoppel elements are present, given the posture
12 of the NRC litigation and the question of going forward
13 with a proceeding or an evidentiary hearing on disqualifi-
14 cation of a law firm from participating in a hearing which
15 is already now fully completed after seven month of trial
16 and all the issues have been fully briefed and submitted to
17 the Board.

18 CHAIRMAN LAZO: Thank you, sir.

19 Well the Board has nothing further on the argu-
20 ment this morning. We do wish to thank you. Your views
21 have been helpful and well prepared. And we do thank you
22 for them.

23 There being nothing more, then we will adjourn.

24 (Whereupon, at 1:15 p.m., the oral argument
25 was concluded.)