UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
The Toledo Edison Company and	)	Docket Nos. 50-346A
The Cleveland Electric Illuminating Company	)	50-500A
	)	50-501A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	)	
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A
	)	50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	)	

RULING OF THE BOARD ON REQUEST FOR CERTIFICATION BY THE DEPARTMENT OF JUSTICE OF AN APPEAL OF THE SPECIAL MASTER'S FINDINGS OF PRIVILEGE

By Motion of July 8, 1975, the Department of Justice (Justice) requested the Board to certify to the Atomic Safety and Licensing Appeal Board an appeal of the Special Master's findings relating to claims of privilege. A narrative summary of the events leading to this request is set forth in this Board's July 21, 1975 Ruling in which a similar request for certification filed by the City of Cleveland (City) was denied. On July 28, 1975, the City filed a Notice of Appeals and Exceptions before the Appeal Board. By Order of August 14, 1975, the Appeal Board required parties filing answering briefs to the City's Notice of Appeals to direct their attention to certain issues including the threshhold question of whether certification should be directed

on the question of the validity of the role played by the Special Master in this case.

As we consider Justice's parallel Motion for Certification, we have before us the Appeal Board Order of August 14, 1975 and we may take into account the question raised by the Appeal Board as to whether in light of AEC Manual, Chapter 0106, Section 034, restricting the delegation of authority by Safety and Licensing Boards "an inquiry into legitimacy of the role played by the Special Master is warranted."

I. The Licensing Board's Responsibility

We agree that the responsibility for ruling on discovery requests is that of the Board. In our Memorandum and Opinion of July 21, 1975 denying the City's Request for Appeal, we indicated that one reason for rejecting any claim of ambiguity in the parties' agreement memorialized in the Board's Order of December 10, 1974 was that it was the Licensing Board's responsibility rather than that of the Appeal Board to make initial discovery rulings. The procedural regularity of prior Licensing Board review seemed sufficiently obvious as to negate the City's assertion that its intent in December 1974 was to apply directly to the Appeal Board for review of the Master's recommendation.*

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* City of Cleveland's Motion for Certification of July 8, 1975 p. 10. The City opined that since an appeal of the Special Master's report to the Board would require Board review of the documents "and thereby compromise the Board's position," the City agreed that there was to be no review by the Board of the Special Master's decision. The City's Motion continued: "There was never an agreement, and none was ever intended, to give up the right of review by an Appeals Board and ultimately by the courts."

As stated in our Ruling of July 21, 1975:

> There is nothing so unique about a claim of privilege as to require that the ordinary procedures be abandoned. Thus, no error would have attached to review by the Board of the privileged documents. That being so, an unusual appellate procedure designed to bypass the Board would be unnecessary. This undercuts the City's claim that opportunity for appellate review to the exclusion of this Board was a logical though unspoken condition of the December 10 Order.

Thus, as we decide whether to grant Justice's Motion for Certification, we adhere to the proposition that responsibility for review, if any, of the Master's recommendations and decision properly is that of the Safety and Licensing Board in the initial instance.*

II. The Parties' December 1974 Stipulation

Although this Board is satisfied that the responsibility for review of the Master's decision properly should be lodged with it in the first instance, and although as indicated in our prior ruling, we are unable to express any opinion as to the correctness of the Master's ruling since we have made no independent review of the documents, we continue to believe that these factors are not central to the resolution of the controversy. We are presented with a situation where the present Board must construe the plain and to us unambiguous terms of an Order resulting from

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* This issue is incorporated in the third question the parties to the appeal were asked to address by the Appeal Board in its Order of August 14, 1975.

a telephone conference call conducted among the parties and the prior Chairman of the Board. In the interval between the entry of that Order and the release by the Master of his written decision, no party brought to the attention of the present Board any claim of ambiguity, latent or otherwise, in that Order. Our reading of that Order has convinced us that the parties voluntarily made an agreement or stipulation that the decision of the Master would be binding.

As we stated in our July 21, 1975 Opinion relating to the City's Request for Certification, we do not question that no party may be stripped of any right of appeal or review over its objection. That is not to say, however, that a party may not voluntarily enter into a stipulation or agreement relating to discovery in which it waives or relinquishes certain rights otherwise available in return for concessions and considerations made by other parties to the agreement. At the time referral of "privileged" documents to a Special Master was proposed, the advantages were conceived to be (1) an opportunity for prompt and independent review of a considerable volume of documents, (2) the assurance that members of the Board would not be exposed to documents which ultimately were rejected from discovery through application of privilege,* and (3) finality. All of these

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* We reiterate that this may be considered desirable but in no sense mandatory. In any judicial proceeding, it often is necessary to examine documents ultimately rejected in order to determine if they are properly subject to discovery.

advantages were evident to the parties at the time of the December 1974 agreement. Conversely, the Board believes certain disadvantages were apparent, one of which was relinquishment of the right of review in the event of dissatisfaction with the Master's decision. In any contest over the discoverability of any documents, there must be a winner and a loser, and this fact was well known to the parties at the time they entered into an agreement which provided for a final resolution of the issue.

As a result of the Appeal Board's August 14 Order, we recognize a concern that an Atomic Safety and Licensing Board not subdelegate its authority in contradiction to the language of the AEC Manual. However, 10 CFR Section 2.753 of the Commission's Rules seems applicable to the present situation. Section 2.753 provides that the parties may stipulate in writing at any stage of a proceeding certain relevant facts and that such stipulations may be received in evidence. The Rule continues:

> The parties may also stipulate as to the procedure to be followed in the proceeding. Such stipulations may, on motion of all parties, be recognized by the presiding officer to govern the conduct of the proceeding.

Viewed as a stipulation as to the procedure to be followed, the appointment of the Special Master in December 1974 appears to conform to the procedures authorized by this Rule. The Board's Order of December 10, 1974 may be considered as a stipulation, on the motion of all parties, recognized by the presiding officer - i.e., incorporated in the December 10 Order - to govern the conduct

of the proceeding. As such, we see no conflict between the procedure employed and the referenced language in the AEC Manual.

An analogy to the resolution of other discovery matters in this proceeding and other proceedings may be helpful. Not infrequently, motions to produce documents and interrogatories of broad scale, both in terms of the number of documents sought and the duration of events for which discovery is sought, are served upon the parties. The scale of these discovery requests frequently leads to the filing of objections; and a decision as to the proper scope of discovery plainly is within the authority of the Licensing Board. Notwithstanding the authority of the Licensing Board to rule upon these objections, however, it is customary for the parties to attempt to resolve these controversies by discussions among themselves. In the instant proceedings, the Board has directed the parties to conduct such discussions before requesting argument to the Board with respect to any unresolved discovery issues. It is our observation that this practice, adhered to both in judicial and administrative proceedings, is of substantial benefit in reducing the amount of time necessary to conclude prehearing discovery.

To the extent that parties make agreements or stipulations among themselves which have the effect of eliminating objections or amending the scope of discovery requests, the Board, in most instances, is prepared to take into account and, if necessary, to enforce these agreements. The basis of this

enforcement would not rest upon the legal correctness of the concessions made during the parties' negotiations, but rather upon the principle that one making a bargain ought to fulfill his obligation, particularly where there appears to have been a reasonable quid pro quo associated with the agreement. The situation described above is not substantially different from the controversy relating to privileged documents now before this Board.

III. Fairness and Due Process

There is yet another troublesome aspect involved in overcoming the agreement of the parties to be bound by the decision of the Master to which we have not addressed ourselves. That issue is one of fairness and of according due process to the parties who have adhered strictly to the terms of the December 10, 1974 agreement and Order. In response to the Master's decision, at least some parties have turned over documents despite their professed concern that the Master erred in reaching his conclusions. Prior to turnover, these parties indicated that they felt bound by the decision of the Master and that they were aware that their agreement to be bound relinquished voluntarily any rights for further appeal.*

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* Once again, we emphasize that we do not hold that rights of appeal did not exist; we say instead that the parties gave up those rights in order to secure what they must have seen as compensating advantages. (In judicial proceedings, by further analogy, a party may waive, by formal consent, its right to a jury trial).

If this Board or the Appeal Board were to find the Board's December 10 Order not to preclude possibility of further review, that review properly should apply to all challenged decisions of the Master. Such a review would be frustrated, however, since those parties who have complied with the Master's decision effectively would be deprived of the opportunity to safeguard or withhold documents which they contend never should have come into the possession of other parties to these proceedings.

IV. Conclusion

As has become evident, we feel compelled to reject the Request for Certification of Justice. In doing so, we adhere to the opinion expressed in our Memorandum and Order of July 21, 1975, denying certification to the City, that the result is mandated by the language of the Board's December 10, 1974 Order which we continue to regard as unequivocal and unambiguous. We regard the enforcement of this agreement, which the Order recites was entered into by agreement of all of the parties, as being within the provision of Rule 2.753 which permits stipulation as to procedures to be finalized by recognition of the presiding officer. The Rule reads broadly in terms of the subject matter permitting, as it does, stipulations as to "any relevant fact." To us this encompasses stipulations affecting documents subject to claim of privilege.

Our decision with respect to the intent and meaning of the December 10, 1974 Order is dispositive. Assuming, however,

that we are in error as to the enforceability of the consensual stipulations, we would not deny that this Board is the logical and appropriate review forum with respect to the Master's decision. We are unable to express any opinion with respect to the merits of the Master's decision for the reasons stated above.

Although we decline to certify the privilege question, we serve copies of this Memorandum and Order upon the Appeal Board because of the relationship of this decision to the issues already set for briefing by the Appeal Board in its August 14, 1975 Order. We do so in order that the Appeal Board be fully apprised of our thinking and in order to compress to the minimum the time necessary for the Appeal Board to reach its decision. We note for the record that without objection from any party, we recently have revised the schedule in these proceedings to provide for commencement of hearings on or abour October 30, 1975.

ATOMIC SAFETY AND LICENSING BOARD

John H. Brebbia, Member

John M. Frysiak, Member

Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 27th day of August 1975.

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NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C. this
28th day of Aug 1975.

Peggy A. Dawring
Office of the Secretary of the Commission

* 1 - Ruling of the Bd w/Respect to Motion of the City of Cleveland... dtd 8/27/75

2 - Ruling of the Bd on Request for Certification ... dtd 8/27/75

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(Perry Units 1 and 2)	)	
TOLEDO EDISON COMPANY, ET AL.	)	50-500A
(Davis-Besse Units 2 and 3)	)	50-501A

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