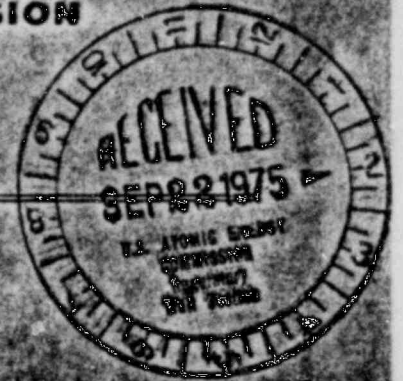


POOR ORIGINAL

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY, et al.  
(Davis-Besse Nuclear Power Station,  
Units 1, 2 and 3)

Docket Nos.

50-346A  
50-500A  
50-501A

and

CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, et al.  
(Cleveland Nuclear Power Plant, Units  
1 and 2)

50-440A  
50-441A

ORAL ARGUMENT

Place Bethesda, Maryland

Date Thursday, 16 September 1975

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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| In the matter of:                   | : | Docket Nos. |
|                                     | : |             |
| TOLEDO EDISON COMPANY and           | : | 50-346A     |
| CLEVELAND ELECTRIC ILLUMINATING     | : | 50-500A     |
| COMPANY                             | : | 50-501A     |
|                                     | : |             |
| (Davis-Besse Nuclear Power Station, | : |             |
| Units 1, 2, and 3)                  | : |             |
|                                     | : |             |
| and                                 | : |             |
|                                     | : |             |
| CLEVELAND ELECTRIC ILLUMINATING     | : |             |
| COMPANY, et al.,                    | : |             |
|                                     | : | 50-440A     |
| (Perry Nuclear Power Plant, Units   | : | 50-441A     |
| 1 and 2)                            | : |             |
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Fifth Floor Hearing Room  
4350 East-West Highway  
Bethesda, Maryland

Tuesday, 16 September 1975

Oral Argument in the above-entitled matter was convened,  
pursuant to notice, at 1:00 p.m.

BEFORE:

- ALAN S. ROSENTHAL, Chairman
- MICHAEL C. FARRAR, Member
- RICHARD S. SALZMAN, Member

APPEARANCES:

DAVID HJELMFELT and MICHAEL OLDAK, Esqs., Suite 550,  
1700 Pennsylvania Avenue, N. W., Washington, D. C.;  
on behalf of the City of Cleveland, Ohio.

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APPEARANCES: (continued)

BRADFORD REYNOLDS and GERALD CHARNOFF, Esqs., Shaw, Pittman, Pot. s & Trowbridge, 910 Seventeenth Street, N. W., Washington, D. C.; and

ROBERT ZAHLER and DONALD HAUSER, Cleveland Electric - Illuminating Company, Illuminating Building, Public Square, Cleveland, Ohio 44113; on behalf of the Applicants.

BENJAMIN H. VOGLER, ROY LESSY and JACK GOLDBERG, Esqs., Nuclear Regulatory Commission, Office of the Executive Legal Director, Washington, D. C.; on behalf of the Nuclear Regulatory Staff.

JANET URBAN and STEVEN M. CHARNO, Esqs., Antitrust Division, United States Department of Justice, Washington, D. C. 20530; on behalf of the Department of Justice.

mp

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## P R O C E E D I N G S

CHAIRMAN ROSENTHAL: Good afternoon.

This antitrust proceeding has come to us on the appeal which the City of Cleveland has attempted to take from rulings made by a Special Master who was appointed by the Licensing Board with the agreement of the parties to pass upon certain discovery matters.

The Board has already determined that in view of the general prohibition against appeals from interlocutory rulings, which is contained in 10 CFR 2.30(f), the merits of those rulings of the Special Master cannot be brought before us at this time by way of an appeal.

What remains for decision and what is being considered this afternoon is whether, one, this Board should exercise its power to direct certification of one or both of the issues identified in our order of August 14, 1975 and, two, if certification is directed, what results should be reached on the certified issue or issues.

Before proceeding further, I will ask counsel to identify themselves for the record.

For the City of Cleveland?

MR. HJELMFELT: Your Honor, my name is David Hjelmfelt and I will be arguing for the City.

I am joined today by an associate, Michael Oldak.

1 CHAIRMAN ROSENTHAL: Thank you very much,  
2 Mr. Hjelmfelt.

3 For the Applicants?

4 MR. REYNOLDS: I am Bradford Reynolds with  
5 Shaw, Pittman, Potts & Trowbridge.

6 Assisting me are Mr. Robert Zahler and  
7 Gerald Charnoff and Donald Hauser from the Cleveland  
8 Electric Illuminating Company.

9 CHAIRMAN ROSENTHAL: Thank you.

10 MR. VOGLER: Benjamin H. Vogler on behalf of  
11 of the NRC Staff.

12 I am accompanied by Mr. Lessy, Jr., and  
13 Mr. Jack Goldberg.

14 CHAIRMAN ROSENTHAL: Thank you very much.

15 For the United States Department of Justice?

16 MS. URBAN: I am Janet Urban and I represent  
17 the Department of Justice and I am joined by my colleague  
18 Steven M. Charno.

19 CHAIRMAN ROSENTHAL: The Board wishes to note  
20 for the record, although our order of August 25 had  
21 expressly provided that the Department of Justice's brief  
22 was to be in the hands no later than the close of business  
23 last Friday, that brief was not received until 11:30 today,  
24 less than two hours ago.

25 As a consequence, two members of the Board who

1 heard argument in another case all morning have not had  
2 an opportunity to do more than glance at it.

3 It is our understanding that copies of the  
4 brief were placed in the hands of a messenger last Friday  
5 for delivery to the Board, but that even though the  
6 envelopes were properly addressed, the messenger could not  
7 locate this building and, therefore, placed the envelopes  
8 in the mail.

9 We have been further told that these facts  
10 were not discovered until sometime yesterday afternoon.

11 What has not been explained is why the  
12 Department counsel did not contact either the secretary  
13 to this Board or the messenger yesterday morning to make  
14 certain the briefs had been delivered on Friday.

15 Nor do we understand why, once the failure to  
16 effect delivery on Friday had come to light, immediate  
17 arrangements were not made to have the brief delivered  
18 yesterday afternoon so that the members of the Board would  
19 have had an opportunity to examine it overnight.

20 In the totality of circumstances, it seems to this  
21 Board, all three of whose members I might add are alumni  
22 of the Department of Justice, that the Department's approach  
23 to discharge of its responsibilities was in a most cavalier  
24 fashion.

25 Despite this conclusion, the majority of the

1 Board has decided, albeit with some reluctance, to allow  
2 the Department to take part in the argument.

3 The third member voted not to allow the  
4 Department to participate.

5 All three members join, however, in expressing  
6 extreme displeasure regarding what has transpired and  
7 in admonishing the Department in the future it will be  
8 expected to take more seriously its responsibilities  
9 to the parties in this proceeding.

10 We would appreciate it, Ms. Urban, if this  
11 message were conveyed to the other Antitrust Division  
12 involved in the case, including Mr. Sanders.

13 MR. CHARNO: If I might reply to your  
14 comments also.

15 We deeply regret the inconvenience we have  
16 caused the Board. We would like to submit an affidavit  
17 from the messenger in verification of the story, and it  
18 will be served by mail upon all parties.

19 We have the original copy which was made up  
20 this morning.

21 CHAIRMAN ROSENTHAL: Mr. Charno, as should  
22 have been made clear from our statement, we were not  
23 taking issue with the representation of the Department  
24 with regard to what happened here.

25 The point of the Board simply is that where a



1 a brief is being filed under a special arrangement of  
2 this kind, at literally the 119th hour, there is some  
3 responsibility in the Department to make sure the  
4 messenger in fact delivered the brief.

5 I take it that was not done here.

6 MR. CHARNO: You are correct. That is  
7 entirely my responsibility and my error.

8 We have recommended a change in procedure  
9 which will ensure that we can verify that the brief has  
10 been served or paper has been served when it goes out  
11 by messenger, establishing a form receipt that the  
12 messenger can return to the attorney who is responsible  
13 for the filing of the brief.

14 CHAIRMAN ROSENTHAL: I think that would be  
15 a very wise procedure, because my own experience over many  
16 years in the Department — one could not always count  
17 on the reliability of the messengers.

18 I know in the Civil Division at least we as  
19 a matter of routine determined that the messenger had in  
20 fact accomplished the mission which had been assigned to  
21 be performed.

22 All right. I think there is no need to pursue  
23 that further.

24 As has been indicated, the Board has decided ,  
25

1 notwithstanding the tardy filing of the brief with it, to  
2 hear from the Department.

3 Now, our order of August 25 provided that each  
4 side would be allotted 90 minutes to be divided equally  
5 or in such other fashion as the parties on the side might  
6 see fit.

7 It appears to us from the briefs that while  
8 there is not a precise correspondence of positions, that  
9 basically the City of Cleveland, the NRC Staff and the  
10 Department of Justice constitute one side and the  
11 Applicant constitutes the other side.

12 Is there agreement to that?

13 MR. VOGLER: If I may, sir — Ben Vogler on  
14 behalf of the Staff.

15 Just prior to the start of the proceeding this  
16 afternoon we more or less agreed to let the City of  
17 Cleveland lead, to be followed by the Department, then  
18 to be followed by the Applicant, and then perhaps by the  
19 Staff to sum up.

20 However, if you prefer us to precede the  
21 Applicants, we have no objection, as to the allocation of  
22 time.

23 CHAIRMAN ROSENTHAL: Well —

24 MR. VOGLER: Your Honor, there appears to be even  
25 now a slight misunderstanding between the Staff and the

1 Applicants just now.

2 We will follow on the Department of Justice.

3 If we run over the time allotted for the  
4 people with the burden on the appeal, then the  
5 Applicant would grant us a few minutes of their time.

6 CHAIRMAN ROSENTHAL: All right.

7 MR. VOGLER: So the City will lead.

8 CHAIRMAN ROSENTHAL: So the City will lead  
9 and the Department of Justice will be next, then the  
10 NRC Staff, and then the Applicant.

11 MR. VOGLER: Yes, sir.

12 CHAIRMAN ROSENTHAL: All right.

13 That is an acceptable arrangement.

14 Thank you, Mr. Vogler.

15 We will hear now from the City of Cleveland.

16 MR. HJELMFELT: May it please the Board: in  
17 discussions with the Department of Justice and the Staff  
18 we have allocated our time with 45 minutes for the City of  
19 Cleveland, 30 minutes for the Department of Justice, and  
20 15 minutes for the Staff.

21 I would like to take 30 minutes at this point  
22 and reserve 15 minutes for rebuttal.

23 In our brief we described how this case arose.  
24 I don't propose to describe in any great detail the factual  
25 background. Suffice it to say that this case arose on an

1 appeal from a refusal to certify to this Board a decision  
2 of the Special Master with regard to a determination --

3 CHAIRMAN ROSENTHAL: Excuse me a moment. You  
4 can raise the rostrum if you wish. There is a button  
5 there.

6 MR. HJELMFELT: Thank you.

7 -- with regard to a decision of the Special  
8 Master with respect to certain claims of privilege and  
9 document discovery in this case.

10 The referral to the Special Master came about  
11 as a result of a suggestion by the then Chairman of the  
12 Board Mr. Farmakides.

13 I am unable to state when this conversation --  
14 conference call in which the suggestion was first made  
15 and what the date is. I don't know.

16 But as I recall, that is probably in November  
17 of 1974.

18 Then the reason given for the referral was that  
19 the documents which were privileged by referral to a  
20 special master, the documents which turned out to be  
21 privileged, would not be seen by the Board and the Board  
22 would be insulated from seeing documents which were in  
23 fact privileged.

24 All of the parties agreed this was a reasonable  
25 procedure to follow on and that insulating the Board in

1 this matter was a valid thing to do.

2 MR. SALZMAN: Mr. Hjelmfelt, does any provision  
3 of the rules authorize this procedure?

4 MR. HJELMFELT: I believe that referral to a  
5 Special Master is probably within the scope of the  
6 authority of the Board and perhaps it would be within  
7 Rule 2.753, although it is not clearly within it.

8 I think the question, the issue that concerns  
9 me and I believe which the Board is concerned with, is  
10 not so much the appropriateness of referral to a Special  
11 Master, but the degree or the scope of what is referred  
12 to the Special Master.

13 That is, is the Special Master merely simply  
14 to review the documents and make findings of fact and  
15 perhaps conclusions of law which he then sends up to the  
16 Board as a recommendation and the Board issues a final  
17 decision, or whether the Board itself -- I mean whether  
18 the Master himself issues the final determination.

19 MR. SALZMAN: Is there any serious question  
20 that parties agree that the Special Master's findings would  
21 not be reviewed by the Board?

22 I mean, how could the Board be insulated from  
23 seeing those documents if he was to review the documents?

24 Obviously he would have to look at the documents  
25 to do so. Wouldn't he?

1 MR. HJELMFELT: Not necessarily.

2 If the findings were spelled out with  
3 sufficient particularity, which they were not in this  
4 case, then the Board can look at the findings and see  
5 if the findings were in accord with the law.

6 For the most part, if the findings were  
7 sufficient, the Board could accept fact findings —

8 MR. SALZMAN: What do you mean by the statement  
9 that the parties shall be bound? What did it mean?

10 MR. HJELMFELT: Our understanding of being  
11 bound was there would be no de novo review, once the  
12 Special Master reviewed the documents, that we would  
13 not then go to the Board and say review these documents  
14 also.

15 What we believe should be the case is that  
16 the Board, ordinarily, would review the findings and would  
17 review the conclusions --

18 MR. SALZMAN: You are talking about findings.  
19 We are talking about whether or not some document is  
20 privileged or not.

21 You practice in the Federal Courts. What is  
22 the distinction between this procedure and an agreed  
23 procedure of discovery under Rule 29?

24 MR. HJELMFELT: Under the federal rules, if a  
25 matter is submitted to a Special Master —

1 MR. SALZMAN: Special Master has nothing to  
2 do with Rule 29 as far as I know.

3 Are you familiar with Rule 29?

4 MR. HJELMFELT: I have to plead ignorance  
5 of Rule 29.

6 MR. SALZMAN: I think you do because Rule 29  
7 describes this procedure in discovery except for the  
8 length of time and allows the parties to agree what will  
9 happen on discovery matters.

10 It is not a question of anybody delegating  
11 anything to anybody. It is an agreement among the  
12 parties to expedite proceedings.

13 Why is this any different than that?

14 Is this Commission to be stiffer in its  
15 requirements than the federal rules?

16 MR. HJELMFELT: I would suggest in the  
17 situation where there is a precise statement by the  
18 AEC manual that the authority given to the Board cannot  
19 be redelegated to a Special Master and that it is the  
20 Board's duty to make the determination with respect --

21 MR. SALZMAN: Were you aware of that  
22 regulation when you made the agreement?

23 MR. HJELMFELT: No, we were not.

24 MR. SALZMAN: Obviously you didn't have that in  
25 mind when the agreement was made.

1           Doesn't that, to the extent it applies to  
2 this case, have to be tempered with the fact that the  
3 rules provide for agreements? Don't they have to be  
4 read together?

5           MR. HJELMFELT: I think they can be read  
6 together without negating the clear statement of AEC manual  
7 that the delegated authority of the Atomic Safety and  
8 Licensing Board may not be further redelegated.

9           MR. SALZMAN: What authority has been delegated?

10           If the parties agree to discovery and are  
11 satisfied among one another what documents are to be put  
12 into evidence and not, the Licensing Board never gets  
13 into it.

14           If the parties cannot agree as to discovery and  
15 simply choose for the purpose of saving time or any other  
16 reason a third party to decide for them what documents are  
17 to be received in evidence, the Licensing Board doesn't  
18 get into it.

19           Does it make a difference here that the  
20 party makes the decision that was named by the Board?

21           MR. HJELMFELT: It makes a difference in that  
22 the City of Cleveland did not agree that a final unreviewable  
23 decision would be made by the Special Master.

24           CHAIRMAN ROSENTHAL: Let me pursue that for just  
25 a moment.



1                   Were you a participant in the telephone  
2 conference calls that resulted in the Licensing Board's  
3 order?

4                   MR. HJELMFELT: No. I was not a participant  
5 in the December 6th conference call.

6                   CHAIRMAN ROSENTHAL: Do you know whether the  
7 question of the reservation of appellate rights was  
8 discussed?

9                   MR. HJELMFELT: With respect to the December 6th  
10 conference call, which was participated in for Cleveland  
11 by Mr. Goldberg of our office, I have discussed the  
12 conference call with Mr. Goldberg.

13                   All I can say is that Mr. Goldberg informs  
14 me that there was no agreement at that point. There was  
15 no discussion that the binding decision would preclude  
16 appellate review or all review of the Special Master decision.

17                   CHAIRMAN ROSENTHAL: You mean the question of  
18 reservation of the right of appeal from the Special Master's  
19 determination insofar as you know on the basis of your  
20 conversations with Mr. Goldberg never arose?

21                   MR. HJELMFELT: That is my understanding; that's  
22 correct.

23

24

25

1 CHAIRMAN ROSENTHAL: Now, when the Licensing  
2 Board issued its order of December 10th, and used the  
3 language to be bound by the determination also of the master,  
4 that didn't raise some question in your mind as to whether the  
5 effect of that order, as written, would be, as the order  
6 seems to literally provide, to make the determination of the  
7 special master final? Binding?

8 MR. HJELMFELT: No, it did not. Because we  
9 knew precisely what we meant when we made that agreement.  
10 What we meant was that the parties would not then ask the  
11 Board to look at all the documents.

12 CHAIRMAN ROSENTHAL: You didn't convey, apparently,  
13 this meaning to the other participants in the conference  
14 call, because from what you have just told me, the subject  
15 of reservation of rights of appeal was not discussed.

16 MR. HJELMFELT: That is true. We did not in the  
17 December 6th conference call tell the parties what we thought  
18 we were agreeing to, nor is it clear did they tell you --

19 CHAIRMAN ROSENTHAL: What does binding mean, if  
20 one is to be bound by the termination, in ordinary parlance;  
21 that means whatever is determined you have to live with.  
22 Isn't that the meaning of binding?

23 If you had something else in mind, why wasn't it  
24 your obligation, after the issuance of the December 10 order,  
25 to make it clear to the Board that insofar as you were

1 concerned, binding had some other meaning. It meant simply  
2 that the Licensing Board would not be called upon to review  
3 the Special Master's determination, but you would still be  
4 free to try to get out from under an adverse ruling of the  
5 Special Master by taking an appeal?

6 MR. HJELMFELT: Because at that point in time we  
7 had no reason to believe that any other party believing that  
8 the word "bound" meant anything else.

9 Even as late as June 20th and June 24th when the  
10 matter was discussed in conference calls, it was clear that  
11 even Chairman Rigler, who succeeded Chairman Farmakides,  
12 believed some review was possible.

13 CHAIRMAN ROSENTHAL: Isn't it possible that the  
14 other parties saw into the necessity to deal explicitly with  
15 the matter of reservations of rights of appeal, because they  
16 were aware of the prohibition in our rules of appeals from  
17 interlocutory rulings?

18 MR. HJELMFELT: They would still have been  
19 confronted with the question of appeal of subsequent, after  
20 the final decision, and if you look at -- I believe it is  
21 page 32 of Applicant's brief, you will find that is what  
22 they are saying this being bound means.

23 I think if we are going to talk about whether there  
24 is a stipulation and meeting of the minds of what the referral  
25 is, then we have to look and see whether Applicants believe

1 this stipulation -- if there was a stipulation meant.

2 They say no appeal, at any point.

3 MR. SALZMAN: Just one moment, Mr. Hjelmfelt.

4 I am on page 32 as I read this, in accordance with what  
5 the city now professes to be the parties' agreement, an  
6 agreement by the parties was eliminated.

7 Even if we were to subscribe to this reformulation  
8 of the previous reference, which you believe is untenable, how  
9 do you draw from that that there is one iota of truth in what  
10 you are saying? They disagree completely.

11 Is that why you didn't -- did you read page 32?

12 MR. HJELMFELT: In accordance with what the city  
13 now professes to be the parties' agreement, immediate review  
14 by the Licensing Board has eliminated, but not ultimate review  
15 by the Appeal Board.

16 Even if we were able to subscribe to this reform-  
17 ulation.

18 MR. SALZMAN: Continue.

19 MR. HJELMFELT: Okay.

20 We are saying --

21 MR. SALZMAN: Continue with the sentence.

22 MR. HJELMFELT: Even if we were to subscribe to  
23 this formulation of the reference which we believe is  
24 untenable, it leaves no room for seeking interlocutory  
25 appellant --

1 MR. SALZMAN: They think your argument is untenable.  
2 There is no slight suggestion that on a factual basis you  
3 are simply mistaken. If that is the way you read his brief,  
4 you have some problems.

5 I will leave that to Mr. Reynolds.

6 MR. HJELMFELT: I respectfully disagree. I believe  
7 the Applicants have taken the view that there is no review  
8 of this at any point —

9 CHAIRMAN ROSENTHAL: Why isn't that a fair reading  
10 of the agreement as written?

11 MR. FARRAR: Before you answer that, you were  
12 bound by the Licensing Board but not before us, that could  
13 lead to the following situation: you get the Special Master  
14 making erroneous decisions. The Licensing Board recognizes  
15 that they are erroneous decisions, being powerless to do any-  
16 thing about it, sitting through a three-year long proceeding,  
17 issuing a decision, and it comes up to review and say we  
18 are denied discovery.

19 Start all over again. I have never heard of a  
20 situation where a Licensing Board would have to go through a  
21 proceeding it knew was going to be reversed, and it would be  
22 powerless to do anything about it.

23 MR. HJELMFELT: In that instance, I would suggest  
24 the Chairman of the Licensing Board could certify the  
25 question to the Appeals Board.

1 MR. FARRAR: That is the last thing we are going  
2 to get into, except in situations like this, interlocutory  
3 reviews of discovery matters.

4 With that in mind, tell us, answer the Chairman's  
5 question.

6 MR. HJELMFELT: Perhaps the Chairman can ask me  
7 again..

8 CHAIRMAN ROSENTHAL: Again, what is your concept  
9 of the word "binding" in normal parlance? If somebody comes  
10 to you and says, "Let us submit a matter to some third party  
11 and we agree to be bound by that party's decision," isn't the  
12 normal meaning that is conveyed by the term that either  
13 way it goes, you are stuck with the decision?

14 MR. HJELMFELT: I would suggest that it is not,  
15 when you take it out of the context in which the agreement  
16 was made and what the agreement was intended to accomplish and  
17 what the agreement was.

18 I suggest that this agreement was intended to  
19 do one thing. That was to insulate the Board from reviewing  
20 the documents.

21 For that purpose, the parties agreed, including  
22 Cleveland, they would be referred to a Special Master and that  
23 the Special Master would review the individual documents  
24 and would make findings and conclusions. And that no party  
25 would then be able to come to the Board and say, "We don't

1 like the Special Master's decision. We want you to look  
2 at the individual documents."

3 The entire purpose was to keep the Board from  
4 looking at the individual documents. That can be accomplished  
5 and certainly Cleveland believed it was being accomplished  
6 by agreeing that the Board would not be asked to go back and  
7 look at those documents.

8 CHAIRMAN ROSENTHAL: Assume that you are right as  
9 to that, with the consequence that the agreement did not  
10 preclude your exercising whatever appellate rights you might  
11 have.

12 We have already determined you have no right  
13 of appeal. The question is one of our taking the extraordinary  
14 step of reaching down and taking issues up.

15 Why should we do that here?

16 MR. HJELMFELT: I believe as we pointed out in  
17 our brief, the documents at issue — not all of them, and  
18 certainly we haven't seen the documents, so we can't say  
19 positively that they are smoking guns, but on the face —

20 MR. SALZMAN: That is not quite correct. You have  
21 seen some of the documents, haven't you?

22 MR. HJELMFELT: Not the ones that are being with-  
23 held on grounds of privilege.

24 MR. SALZMAN: What are you going to do on the  
25 documents in which privilege was claimed — are you going

1 to give those back? How is the Applicant to be protected?  
2 He claimed privilege and in good faith he turned the  
3 documents over in accordance with the ruling.

4 You got those documents. What are you going to  
5 do about those?

6 MR. HJELMFELT: The Applicant proceeded to act in  
7 accordance with its understanding of what the agreement  
8 was.

9 MR. SALZMAN: The Applicant was not to turn the  
10 documents over to you?

11 MR. HJELMFELT: The Applicant is as free to  
12 contest the rulings of the Special Masters as we are.

13 MR. SALZMAN: Isn't it true the Applicant doesn't  
14 think so?

15 MR. HJELMFELT: He doesn't think so now. He didn't  
16 during the June 20 conference call. He didn't make it  
17 positively clear on the June 24th conference call and  
18 certainly on the June 24th conference call the Chairman —

19 MR. SALZMAN: That was a new Chairman. That wasn't  
20 the same Chairman.

21 When the Chairman went back to consult the two  
22 members that remained on the Licensing Board, he changed his  
23 mind. The two original members, as I read it, told him what  
24 they understood it to mean.

25 MR. HJELMFELT: That is correct. Although I am



1 not at all certain that the 20 original members he consulted  
2 were in on the conference call either.

3 MR. SALZMAN: On top of it a ruling of the Special  
4 Master -- on top of that, say, we are free to consider all  
5 of the rest of the rulings.

6 If you are going to throw out the agreement  
7 completely, how are you going to make the Applicant whole?

8 MR. HJELMFELT: One basis would be to take those  
9 documents back, and if they are found to be privileged, say  
10 we can't use them.

11 MR. SALZMAN: That is a little unrealistic. One  
12 of the reasons for looking at documents is searching for  
13 other evidence. If you know what is in the documents, you  
14 can hand them back secure in the knowledge you already gained  
15 from them.

16 MR. HJELMFELT: I would agree.

17 MR. SALZMAN: How many documents did you seek  
18 all together, Mr. Hjelmfelt? Or let me put it to you this  
19 way: how many documents were embraced within your discovery  
20 request?

21 MR. HJELMFELT: The number of pages, and I don't  
22 think we have ever had a count on the document basis, but  
23 on a page basis -- the five applicants inform us they produced  
24 2,378,000 pages.

25

1 MR. SALZMAN: Given 100,000 pages either way,  
2 they are probably right.

3 How many privileged documents did they claim?

4 MR. HJELMFELT: They claimed 700.

5 MR. SALZMAN: Then I take it they hadn't made  
6 a wholesale claim of privilege. They claimed 700 documents  
7 out of something like 2 1/2 million pages, so subsequently  
8 they seem to have made a rather small claim of privilege.

9 I take it it is just these 700 documents that  
10 are the ones on which your entire case will turn?

11 MR. HJELMFELT: I cannot say that our entire case  
12 will turn on these.

13 MR. SALZMAN: If you can't say that, why in the  
14 world do we want to hear from you?

15 What is the advantage of getting up here?

16 MR. FARRAR: The reason you can't say is because  
17 you don't know?

18 MR. HJELMFELT: Right.

19 MR. FARRAR: At this point only the Applicant knows  
20 whether those are the key 700 documents in the case?

21 CHAIRMAN ROSENTHAL: Let me get back to a question  
22 I posed to you.

23 Certification, particularly our certification in  
24 circumstances where the Licensing Board has not seen fit to  
25 do so, is, as we indicated in our Seabrook decision, an

1 extraordinary step.

2 What makes this case so extraordinary, that we  
3 should follow on that course?

4 Bearing in mind that if we were to do it here, we  
5 doubtless would be called upon to do it anytime that a party  
6 was dissatisfied with a discovery order, come up to us as you  
7 do and indicate whether it be a Special Master or Licensing  
8 Board, or whoever, that all kinds of grievous errors were  
9 made with a consequence that we have not gotten documents to  
10 which we are entitled.

11 We can't possibly, consistent with our other re-  
12 sponsibilities, sit up here as a reviewing board on discovery  
13 matters.

14 Now, that being so, you are going to have to  
15 convince me at least, that there is something that is really  
16 out of the ordinary here, that would warrant, assuming  
17 all the other conditions are met, our taking this extra-  
18 ordinary step.

19 MR. HJELMFELT: This is bound in with  
20 Mr. Saltzman's question, also. I would like to refer to that.  
21 This 2,378,000 documents, that was the number of pages the  
22 Applicant chose to give us. In fact, Chairman Farmakides went  
23 out to the Ohio Electric and Cleveland Electric Illuminating  
24 Company and looked at the documents, and he couldn't see how  
25 they were privileged.

1           Now, this doesn't say anything about the importance  
2 of these documents to this decision. Many of the pages  
3 were IBM printouts and the like.

4           With respect to the reason for taking it up  
5 at this point, in our brief we pointed out what a ponderous  
6 proceeding this is going to be, what monstrous proceedings the  
7 other anti-trust cases have been. We pointed out how these  
8 documents, at least from the files given, or the subject matter  
9 of some of them, appear to go right to the very heart of  
10 some of the principal issues. That is the takeover of the  
11 Cleveland City Electric System.

12           They are really necessary steps for a company  
13 planning to take over, to determine what kind of regulatory  
14 approvals, what kind of bonds, all the things they need to  
15 do to take over the system.

16           MR. FARRAR: Isn't that sufficient to get the case  
17 to us? Or is it the fact that there was a ruling by the  
18 Special Master rather than the Board?

19           If you had gotten the precisely same ruling out of  
20 the Board, would you have had a prayer of getting us to direct  
21 the matter as certified?

22           MR. HJELMFELT: I think that is one of the  
23 reasons —

24           MR. FARRAR: One or only?

25           MR. HJELMFELT: Another reason.

1 I think an important reason is the necessity of  
2 getting determination in light of what we feel, what we believe  
3 is obviously a clear error on the law, that the Special Master  
4 committed, that this case would fall within the holding of  
5 the Conway Corporation versus Federal Power Commission,  
6 CADC No. 73-2207, April 4, 1975, and Ecology versus United  
7 States Atomic Energy Commission, 492 Fed.2d 998. That is a  
8 Second Circuit case, 1974, in which Ecology, Inc. held if  
9 there was to be an exception with respect to an interlocutory  
10 appeal, it should be limited to cases where the exclusionary  
11 ruling is so flagrantly wrong, as to make it apparent that  
12 the agency is not courting the possibility of reversal, but —

13 MR. SALZMAN: I take it Ecology action was, the  
14 agency was not courting reversal, because the interlocutory  
15 appeal was denied.

16 MR. HJELMFELT: That is clear, but in this case it  
17 is clear that the agency is courting a reversal.

18 My 30 minutes are up.

19 CHAIRMAN ROSENTHAL: As a matter of fact, it is not,  
20 but you can reserve your time.

21 MR. FARRAR: Take this one out of my time.

22 I take it you have made no claim that there was the  
23 slightest degree of coercion utilized in getting you to agree  
24 to their agreement?

25 MR. HJELMFELT: Of course not.

1 MR. FARRAR: To me that is somewhat significant,  
2 because it makes a difference to me whether the Board refused  
3 to do its job, and said, look, if you guys want a ruling you  
4 are only going to get it from the Special Master, not from  
5 me.

6 Or, whether on the other hand, the impetus came  
7 from you people and you decided for whatever reason, it  
8 would be mutually advantageous to go outside, resolve the  
9 discovery thing among yourselves or with the help of a third  
10 party who happened to be the Special Master here, but  
11 could have been a garage mechanic.

12 There is no claim here —

13 MR. HJELMFELT: There is no claim of coercion,  
14 but now you come back in your second question and talk about  
15 impetus.

16 I understand that to be different. No, the impetus  
17 did not come from any of the parties. The impetus came from  
18 Chairman Farmakides, who suggested we have these documents  
19 and some of them might be privileged, and it would be helpful  
20 for the Board to be insulated from reading documents also  
21 from --

22 MR. FARRAR: I take it at that point, if you did not  
23 agree, the manual would have precluded him from sending it  
24 to a Special Master. Couldn't you insist on a ruling from him,  
25 in light of what the manual says?

1 But you didn't do that. And you agreed.

2 Once you agree, I think you and Mr. Reynolds  
3 can agree to anything, you can agree to go into this anti-  
4 trust case with no discovery whatsoever. If both of you would  
5 rather not bill your clients for all that time, both of you  
6 can agree -- an unlikely agreement -- that you would just  
7 conduct no discovery. That wouldn't offend anything in the  
8 manual, or in the regulation.

9 Now, why is this situation any different than that?  
10 You and Mr. Reynolds sat down and said, we will conduct  
11 discovery, but we will be bound by what this fellow says and  
12 we won't ask the Licensing Board for a ruling.

13 MR. HJELMFELT: The difference, as I see it, if we  
14 had agreed there would be no discovery, there would be no issue  
15 on discovery to be decided by the Board.

16 In this case there was an issue for which the  
17 manual and the rules provide the determination must come from  
18 the Board.

19 MR. FARRAR: Because the discovery manual  
20 entitles you to seek a decision from the Board. But didn't  
21 you agree not to demand it without any coercion?

22 MR. HJELMFELT: We could agree not to submit to the  
23 Board -- I suggest we did not agree to do that.

24 MR. FARRAR: My problem is, I read the agreement  
25 and it looks to me like you were going to be bound. That, to

1 me means bound, and it means no appeal then or later to  
2 us, because I don't want a Licensing Board going through a  
3 proceeding where it knows there has been fatal error committed  
4 already and is powerless to do anything about it.

5 But I am concerned, as far as the initial  
6 reactions of all of the parties to the Special Master's  
7 report. It struck me that perhaps the language isn't as  
8 clear as it appears to me, because everybody on that conference  
9 call, including the Chairman, was talking about an appeal.

10 Is that your view?

11 MR. HJELMFELT: That was precisely my view.

12 I don't know if the Board has available the minutes  
13 of those conference calls, but I think those minutes clearly  
14 show that at the June 20th conference call, all the parties  
15 seemed to be thinking there was some kind of review available  
16 and no party suggested that there wasn't.

17 On June 24th --

18 MR. FARRAR: Does that mean I should say to myself  
19 that that language is not as unambiguous as it appears to me  
20 at first blush?

21 MR. HJELMFELT: What it says to me, we are not the  
22 only ones who believe we had some sort of appeal.

23 Again, even on the June 24th conference call, where  
24 Applicants then brought to the attention of the Chairman, the  
25 December 10th ruling and the language, and still the Chairman



1 indicated that he believes there was some sort of review --  
2 in fact, he stated that that December 10th conference call  
3 agreement, from the December 6th conference call did, in fact,  
4 anticipate that there would be errors, and they would be  
5 cured.

6 Now, he talked about minor errors. Again, I would  
7 argue if you are going to cure minor errors and leave the major  
8 errors, it doesn't make sense. I think it is very clear from  
9 the record that the Chairman as well as Cleveland -- and on  
10 June 25th, no party said there wasn't some sort of appeal.

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1 MR. FARRAR: What does "bound" mean, then? It  
2 can't mean you are bound only if the Special Master makes  
3 the correct decision, because you will forever be in dis-  
4 agreement on what the correct decision is.

5 I can't find the language right now. There is  
6 some suggestion in your brief that you agreed to be bound  
7 by a good decision, but there wasn't a good decision. That  
8 certainly can't be what it means.

9 MR. HJELMFELT: No. I didn't mean to convey that.  
10 What I am saying, we certainly expected a decision which was  
11 in accordance with the law, and the facts, and didn't ignore  
12 the facts and didn't ignore the law, and gave us an oppor-  
13 tunity to be heard.

14 MR. SALZMAN: Are you not allowed to be heard be-  
15 fore the Special Master? There was no argument.

16 MR. HJELMFELT: With recommendation to the docu-  
17 ments, he granted privilege on a claim not contended for by  
18 the applicants. We certainly weren't allowed to be heard.

19 We in our briefs, we argued first in general  
20 terms, the law of attorney-client privilege and we argued  
21 generally the law of work product privilege.

22 Of course, the important thing when you are in  
23 a situation like that is applying the law to the particular  
24 facts. What happened was that in March, I believe it was,  
25 the department had served interrogatories on the applicants

1 requiring them to state certain facts with respect to, one,  
2 the documents for which they claimed attorney-client privi-  
3 lege and, two, the documents for which they claimed work  
4 product privilege.

5 It was on the basis of those facts that were then  
6 a part of the record that we argued with respect to one privi-  
7 lege on the one hand and with respect to the other privilege  
8 on the other.

9 Now, when the Special Master comes over and says  
10 they aren't Special Master privilege, but client privilege,  
11 we have had no opportunity to develop the facts which would  
12 be relevant to making that sort of argument or determination  
13 by the Special Master.

14 MR. SALZMAN: What sort of proceedings did you ex-  
15 pect before the Special Master?

16 MR. HJELMFELT: I certainly would have anticipated  
17 a proceeding in which we would be permitted to brief fully on  
18 the facts as they were on the record, each issue before him.  
19 We were denied that, because we had no opportunity to develop  
20 the facts on the unclaimed privilege, or to argue how those  
21 facts —

22 MR. SALZMAN: How would you normally claim privi-  
23 lege?

24 MR. HJELMFELT: The way they did this case, they  
25 filed a list of documents and they said these documents

1 we claim under an attorney-client privilege and filed another  
2 bunch and said we claim these under the work product privi-  
3 lege.

4 MR. SALZMAN: Without seeing those documents, how  
5 would you decide?

6 MR. HJELMFELT: That is what the interrogatories  
7 were for. They asked such questions as who wrote the docu-  
8 ment, who was it shown to, what were the circumstances.

9 The questions were different for the attorney-  
10 client privilege documents and this was by document number.

11 MR. SALZMAN: Your interrogatories?

12 MR. HJELMFELT: They were the Department of  
13 Justice's, but all the parties relied upon them in argument.

14 MR. SALZMAN: They were argued to the Master.

15 MR. HJELMFELT: They were argued in our brief.

16 MR. SALZMAN: Then they were argued to the Master?

17 MR. HJELMFELT: Only documents where they claimed  
18 privilege. Where the Special Master claimed a different  
19 privilege applied before didn't have any interrogatories.

20 MR. SALZMAN: You just told me one of the things  
21 you agreed not to be bound by was the Special Master, only if  
22 he were right. That being so, is it that the Special Master  
23 made too many mistakes?

24 MR. HJELMFELT: I think an error of fact, possibly,  
25 is binding, but when the errors go to the point before the

1 law is clearly inapplicably applied, or the procedure is such  
2 that a party does not have an opportunity to be heard on an  
3 issue, then I don't think that you should be bound.

4 MR. FARRAR: You are saying you agreed to be bound  
5 if he did a workman like job, right or wrong, but there was  
6 not a workman like job.

7 MR. HJELMFELT: I think that is a fair way to put  
8 what we are saying. We had a fair hearing with a workman  
9 like job, that would be one thing.

10 MR. SALZMAN: Does the Applicant agree? I take it  
11 the Applicant has no problem with it. They too have some  
12 rights in this proceeding.

13 "They are just as bound," and I take it the major  
14 difference is that they prevailed upon most of your claims  
15 and you didn't.

16 MR. HJELMFELT: I think the major difference, the  
17 reason we are raising this and they are not, is we were the  
18 ones that were denied the hearing. We were the ones who had  
19 the law inappropriately applied.

20 If he had applied the correct rule of law, and  
21 if he had made a determination of the facts, and then he  
22 would have found against us, right or wrong, if he found  
23 against us and applied the right rules of law, I don't —  
24 even if we had —

25 MR. SALZMAN: Bound, I take, it, means you are

1 bound on issues of fact, but not bound on issues of law?

2 MR. HJELMFELT: I think in our understanding, that  
3 that basically is correct. Because we were agreeing that  
4 the Board itself would not look at the documents. That is  
5 basically what we agreed to.

6 MR. SALZMAN: That is a meaning of "bound" I have  
7 not seen in any dictionary.

8 MR. FARRAR: If the errors were of that nature,  
9 errors of law rather than facts, do you think this agreement  
10 permitted you to go to the Licensing Board and ask that Board  
11 to correct them?

12 MR. HJELMFELT: I think it would have. Because  
13 we are still preserving the insulation of the Board. Cer-  
14 tainly, I think it shouldn't preclude appeal forever, and —

15 MR. FARRAR: To me the two are inexplicably inter-  
16 twined because you can't tie agreement in public policy, to  
17 tie the Licensing Board's hands, and have to go through a  
18 proceeding like this so we can sit back 3 years later and  
19 tell you to start all over again.

20 The agreement is valid and permits appeal to the  
21 Licensing Board and us, or permits nothing else. I think you  
22 are saying it permits appeal to both levels.

23 MR. HJELMFELT: Yes, I am.

24 MR. FARRAR: On errors of law.

25 MR. HJELMFELT: Yes. That is what we would be

1 asking, what we are asking for this Board to do is, I would  
2 ask that this Board certify or direct certification on the  
3 merits and make a ruling on the merits.

4 MR. SALZMAN: You want us to go through the 700  
5 documents?

6 MR. HJELMFELT: Not at all. I don't think that  
7 is necessary at all. I think you can rule on the issues of  
8 law that we have presented, and then issue your orders to the  
9 Board to enter an order in accordance with the law as found  
10 out.

11 MR. SALZMAN: Without looking at any of the 700  
12 documents?

13 MR. HJELMFELT: Yes.

14 MR. FARRAR: Everybody knows what the law is.

15 MR. HJELMFELT: I think the law is clear.

16 MR. FARRAR: Why don't we send it back to the  
17 Board and tell the Board to review whatever errors you want  
18 to bring to its attention?

19 MR. HJELMFELT: If the direction --

20 MR. FARRAR: You say these are errors of law, but  
21 I take it there is general agreement on what the law of privi-  
22 lege is. Not total, but general agreement on the law princi-  
23 ple.

24 You said these are errors of law, but are they?  
25 Or are they errors of fact, failure to recognize a particular

1 document is covered by one privilege rather than another.  
2 What type of error is that?

3 MR. HJELMFELT: I think the error here we are  
4 talking about is the error in applying, finding that the  
5 document was privileged under attorney-client when attorney-  
6 client wasn't claimed, when what was claimed was work  
7 product.

8 I think the other error, major error we are  
9 talking about is the Natta v. Hogan error in which  
10 Natta v. Hogan -- which says even if you have a docu-  
11 ment clearly written by a lawyer, if you can't determine who  
12 that lawyer was, it is not privileged.

13 Another group of documents is identifiable without  
14 going back now and relooking at all the documents, and that  
15 ties in with a series of documents where it was not known who  
16 had seen the document, who the addressees were, who the  
17 distributees were, who the author was. That sort of thing.

18 Again, I think as a matter of law, in Natta v.  
19 Hogan, and the obvious inability to sustain a burden of proof  
20 of showing the confidentiality, that can be determined as a  
21 matter of law.

22 CHAIRMAN ROSENTHAL: We will hear from you on  
23 rebuttal.

24 Mrs. Urban.

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CHAIRMAN ROSENTHAL: Did you participate in telephone call of December 6th?

MS. URBAN: No, I didn't. I was not on board the Department until February.

CHAIRMAN ROSENTHAL: I take it you have conferred with the participants in that conversation at the Department.

MS. URBAN: Yes.

CHAIRMAN ROSENTHAL: You are prepared to testify what the Department's understanding was.

MS. URBAN: Our understanding was that we had agreed to be bound by the ruling of the Special Master.

CHAIRMAN ROSENTHAL: Meaning what?

MS. URBAN: Meaning that the Licensing Board did not review the documents and we did not contemplate attempting to take any time of interlocutory appeal.

MR. FARRAR: Later appeal?

MS. URBAN: I think in the event a ruling of the Licensing Board was adverse to us, I think that would be a question of appeal, if there were clear errors of law, in fact, in the Master's decision.

You are talking about the exclusion of evidence where it shouldn't have been excluded.

CHAIRMAN ROSENTHAL: Meaning that the Department's understanding of the agreement was that the Special Master's determinations would be binding for a while, but not at the

1 CHAIRMAN ROSENTHAL: Did you participate in the  
2 telephone call of December 6th?

3 MS. URBAN: No, I didn't. I was not on board with  
4 the Department until February.

5 CHAIRMAN ROSENTHAL: I take it you have consulted  
6 with the participants in that conversation at the Department?

7 MS. URBAN: Yes.

8 CHAIRMAN ROSENTHAL: You are prepared to tell us  
9 what the Department's understanding was.

10 MS. URBAN: Our understanding was that we had  
11 agreed to be bound by the ruling of the Special Master.

12 CHAIRMAN ROSENTHAL: Meaning what?

13 MS. URBAN: Meaning that the Licensing Board was  
14 not to review the documents and we did not contemplate  
15 attempting to take any time of interlocutory appeal.

16 MR. FARRAR: Later appeal?

17 MS. URBAN: I think in the event a ruling of the  
18 Licensing Board was adverse to us, I think that would be a  
19 question of appeal, if there were clear errors of law, in  
20 fact, in the Master's decision.

21 You are talking about the exclusion of evidence  
22 where it shouldn't have been excluded.

23 CHAIRMAN ROSENTHAL: Meaning that the Department's  
24 understanding of the agreement was that the Special Master's  
25 determinations would be binding for a while, but not at the

1 bottom of the pit or the end of the row.

2 MS. URBAN: Let me revise my statement. I am  
3 not, quite frankly, sure whether when the agreement was  
4 made those people participating in it had actually seen down  
5 the road a couple of years.

6 I know we had contemplated an appeal or review  
7 by the Licensing Board at this time, or an attempted certifi-  
8 cation under 2.718(i).

9 I really can't answer as to the future.

10 CHAIRMAN ROSENTHAL: Is it your understanding  
11 that the question of a possible immediate appeal remedy  
12 was not raised during the course of the total conversation?

13 MS. URBAN: It was not.

14 CHAIRMAN ROSENTHAL: As far as you are aware.

15 MS. URBAN: As far as I am aware.

16 MR. FARRAR: Assume everybody here agreed with  
17 you that was what the agreement really meant, binding, no  
18 appeal to the Licensing Board, possibly later appeal to us,  
19 three years later.

20 Why should we permit an agreement such as that  
21 to stand?

22 MS. URBAN: Because the agreement and order in-  
23 corporating it was simply beyond the power of the parties and  
24 of the Licensing Board.

25 MR. FARRAR: That is a reason why it should not

1 stand.

2 MS. URBAN: I am sorry.

3 MR. FARRAR: Why should we allow it to stand?

4 MS. URBAN: I don't think you should allow the  
5 agreement to stand. I think that --

6 CHAIRMAN ROSENTHAL: Aren't you estopped from  
7 arguing at this point that it shouldn't be allowed to stand?

8 MS. URBAN: I believe we are not. Unfortunately,  
9 when the agreement was made, we were not aware of the specific  
10 chapter in the NRC manual or the section of the Rules of  
11 Practice which made reference to it.

12 Obviously, we would have not entered into such an  
13 agreement had we known at that time it was prohibited.  
14 Although we made the agreement in good faith, it should never-  
15 theless be overturned because it was simply invalid.

16 CHAIRMAN ROSENTHAL: Let's pursue the matter of  
17 invalidity a moment.

18 Are you saying that the appointment of a Special  
19 Master is -- per se -- is invalid in light of the prohibition  
20 against redelegation, or is it the appointment of a Special  
21 Master, coupled with the proviso that his decision is binding?

22 MS. URBAN: I am saying the appointment of a  
23 Special Master to make binding decisions is invalid.

24 CHAIRMAN ROSENTHAL: So the Special Master could  
25 have been appointed to consider this matter, review all the

1 documents and make a recommended decision.

2 MS. URBAN: I believe that he could have. I think  
3 there might be some question of the permissibility of that  
4 if the recommendations were to be given the weight of a  
5 binding agreement.

6 I think it would have to be made clear that he  
7 was only to make recommendations and he was to submit  
8 extensive conclusions of law and findings of fact so that  
9 the Board could actually make a review and make its own  
10 order based on his recommendations, rather than just a type  
11 of rubber stamp process.

12 Then you would be getting into an impermissible  
13 delegation again.

14 MR. SALZMAN: If the Board may not delegate any of  
15 its duties, I presume it can't delegate the obligation to  
16 hear the witnesses, if there were to be any.

17 Indeed, how could it delegate anything to the  
18 Special Master? I presume what you are saying, all the Board  
19 would look at would be those matters -- what authority is  
20 there to appoint a Special Master at all under these rules?

21 MS. URBAN: I think in terms of recommendations  
22 I am talking about a situation in which the Special Master is  
23 actually serving the function somewhat of a law clerk, where  
24 he is aiding the Board by doing some of the basic work, where  
25 he is going through documents and saying Document "X" does

1 indeed contain a confidential statement, or Document "X"  
2 does not, and dealing with it as a recommendation.

3 MR. SALZMAN: The assumption in this case was that  
4 the Board would never look at those documents. That was  
5 the underlying presumption. Even under your theory, I don't  
6 see how that can be valid.

7 The Board is supposed to take the characterizations  
8 of some law clerk and use that as binding? How is the Board  
9 to decide?

10 MS. URBAN: The only way I personally can see  
11 that a Master could be used would be to examine the documents  
12 and make very detailed findings of fact so that instead of  
13 having to read the documents, the Licensing Board could look  
14 at these findings and say, "This is what the document  
15 contains."

16 MR. SALZMAN: If he can't say what the document  
17 contains, what is the purpose of having the agreement so that  
18 the Licensing Board didn't have to look at the documents?

19 MS. URBAN: That is one of the reasons the  
20 agreement is invalid.

21 MR. SALZMAN: Are you familiar with Rule 29 of the  
22 Federal Rules of Civil Procedure?

23 MS. URBAN: Yes.  
24  
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1 MR. SALZMAN: Under Rule 29, can a procedure such  
2 as this be adopted?

3 MS. URBAN: Yes.

4 But that also allows the appointment of a Master.,

5 MR. SALZMAN: Instead of calling this man the  
6 Special Master, we called him an "Unspecial Master." Suppose  
7 we called him a person to decide discoveries. Isn't it  
8 perfectly acceptable to put discovery matters to arbitration  
9 by a third party and be bound by it?

10 Nothing in the federal rules prohibits that.

11 MS. URBAN: We are not in the federal rules now,  
12 your Honor.

13 MR. SALZMAN: If the federal rules allow it under  
14 the practice in the United States District Court, why should  
15 practice before an Administrative Law Agency, where it is  
16 supposed to be easier, be more stringent?

17 MS. URBAN: Because, the AEC manual contains such a  
18 provision which prohibits.

19 If the federal rules contained such a provision, I  
20 am sure the appointment of a Special Master would be  
21 prohibited.

22 MR. SALZMAN: Isn't that up in the Supreme Court  
23 now?

24 Isn't there a case questioning the right of  
25 magistrates to make decisions in cases?

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1 MS. URBAN: I am not familiar with that, your  
2 Honor.

3 MR. SALZMAN: If one of the rules said, the  
4 parties may stipulate the procedures they followed in pro-  
5 ceeding, such stipulation and all parties may be recognized  
6 by the presiding officer in the conduct of the proceeding,  
7 why doesn't an agreement fall within that?

8 MS. URBAN: Section 1.2 of the NRC manual states  
9 this manual contains the definitive statement of the delegation  
10 of authority.

11 MR. SALZMAN: Are you talking about NRC, or AEC?

12 MS. URBAN: I believe when it was changed, that  
13 section became the NRC.

14 CHAIRMAN ROSENTHAL: That section was repealed.  
15 Don't ask us why.

16 MS. URBAN: In any case, I still have the manual --  
17 unless the manual has been repealed.

18 MR. FARRAR: There is no way you can know about it.

19 MR. SALZMAN: Don't look for rational explanations.  
20 What I would like to know is, does what this  
21 section mean, the parties may stipulate procedures and  
22 the stipulations may be recognized by the presiding officer?

23 Isn't that an express permit for the Licensing Board  
24 to do what it did here?

25 Aren't we supposed to read all the regulations as a



1 unit? And say if it is not covered by the rules of practice,  
2 you may not do it?

3 MS. URBAN: I think that section means the parties  
4 can agree to a procedure that would be otherwise permitted, and  
5 that the Licensing Board may make an order incorporating that  
6 agreement. But only if the order itself is within the  
7 Licensing Board's power.

8 MR. SALZMAN: Let us suppose the parties here had  
9 agreed instead of a Special Master, the decisions on discovery  
10 would be made by a professor of law at whatever law school  
11 you attended, and that decision would be binding. Would that  
12 be permissible?

13 MS. URBAN: I don't believe it would.

14 MR. SALZMAN: The parties had gotten together and  
15 said, we will agree as to what documents will be discovered  
16 and what will not, and so stipulated, would that be binding?

17 MS. URBAN: Yes.

18 I think that would because the Licensing Board has  
19 the power to make an order to governing discovery. The  
20 Licensing Board could then incorporate the agreements of the  
21 parties into an order.

22 MR. SALZMAN: What is the difference between  
23 agreeing between yourselves and being bound by what Joe Dokes  
24 says?

25 Isn't the policy of the government to favor

1 arbitration?

2 MS. URBAN: I believe that was the policy, but you  
3 still have that section of the manual. I don't know why it is  
4 there, but it is there, and although, you know --

5 MR. SALZMAN: Rules are rules.

6 MR. FARRAR: The reason it is there, when Congress  
7 set up these Licensing Boards and maybe the reason doesn't  
8 apply to anti-trust cases, but at the time they set up these  
9 Licensing Boards, there was a new departure; instead of having  
10 the Hearing Examiners or tribunals; one lawyer and two  
11 scientists.

12 For that reason there would be a provision in the  
13 manual saying, these are the characters we want to have  
14 decide the thing, not some Master, special tribunal of  
15 Congress.

16 MS. URBAN: That certainly sounds like a rational  
17 reason.

18 MR. FARRAR: If it is, what does it have to do with  
19 an anti-trust -- what difference is there in an anti-trust  
20 case where you have three lawyers --

21 MS. URBAN: I can only state that is the rule.  
22 There is a clear statement that delegated authority can not  
23 be redelegated.

24 I think the rule has to be followed, because it  
25 exists. It shouldn't apply to anti-trust proceedings, and

1 perhaps it, you know, should be rewritten.

2 CHAIRMAN ROSENTHAL: Do you think that the limita-  
3 tions proposed by the prohibition against redelegation, would  
4 be satisfied here if we were to say that the agreement  
5 notwithstanding, the Licensing Board was free to consider such  
6 requests as to whether privilege had been found on grounds that  
7 were not asserted?

8 In other words, the Licensing Board was free to  
9 go into what can be described as basic questions of law,  
10 relating to the manner in which the Special Master had  
11 approached or discharged his task?

12 MS. URBAN: In other words, you are asking whether  
13 the report should be treated as a recommendation basically?

14 CHAIRMAN ROSENTHAL: I saw in your brief, which,  
15 for reasons which have already been indicated, was read with  
16 some haste, some suggestion that if the Master's report were  
17 treated as a recommendation, and exceptions or objections were  
18 allowed to it by the parties, that the Department would be  
19 denied due process.

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1           Maybe if I had a chance to read your brief more  
2 carefully, the reason underlying that would have become  
3 clearer to me. It seems to me here that the major thrust  
4 of the objection to what this Master has done is that he  
5 has allegedly, at least, granted privilege status to docu-  
6 ments on a basis that was not claimed by the Applicant.

7           Now, that, it seems to me, is something that  
8 assuming that we agree that this redelegation prohibition  
9 comes into play, that that is something that could be easily  
10 taken care of by simply saying, okay, Licensing Board, look  
11 to see if that is so.

12           If it is so, then make a legal determination as  
13 to whether that was permissible or not. I don't understand  
14 why that would be terribly time-consuming. I don't under-  
15 stand why that would deprive the Department of due process.

16           Maybe you can help me out on that.

17           MS. URBAN: Of course, we would obviously like  
18 that issue reviewed and reversed, but the Master's report  
19 was very, very brief. He had about 2 pages of findings of  
20 fact and conclusions of law which gave about 3 sentences  
21 per claim of privilege.

22           Then he had several attachments listing the  
23 number of documents that fell into the categories enunciated  
24 in his report. Because of this, we were only able in the  
25 reargument and now, to point out the very obvious argument

1 such as the grant of privilege where it wasn't claimed. We  
2 are very concerned because of the brevity of his report  
3 and because of what we consider obvious errors that have  
4 been revealed, that there are very significant errors as to  
5 documents where we have no knowledge.

6 For example, the Master in finding the attorney-  
7 client's privilege said he used the control group test. The  
8 control group test says the document has not been abridged  
9 if the document is associated with somebody within the con-  
10 trol group. That is, someone within the corporation to make  
11 the decision.

12 We have no knowledge how the Master took this  
13 test and applied it to the documents. He made no findings  
14 such as the vice president is obviously within the control  
15 group. This engineer supplied data; he had no authority  
16 within the corporation, so he could not have been.

17 CHAIRMAN ROSENTHAL: What should we do about that  
18 not, as you see it?

19 MS. URBAN: I think, unfortunately, that the only  
20 way a real solution can be had is to have a reexamination of  
21 the documents.

22 CHAIRMAN ROSENTHAL: By whom?

23 MS. URBAN: By the Licensing Board.

24 MR. SALZMAN: I think the one thing you agreed  
25 upon was that the Licensing Board wasn't to see these

1 documents. Wasn't that what the agreement was about?

2 MS. URBAN: The agreement was the Licensing  
3 Board was not going to set documents. I think since we  
4 have an invalid agreement, we have to start all over  
5 again.

6 I think under normal circumstances, the report  
7 could be a recommendation.

8 CHAIRMAN ROSENTHAL: Why is the  
9 agreement invalid? It is invalid, because as you see it,  
10 because of the binding effect that was given to the Special  
11 Master's decision?

12 If that is the case, why couldn't we say, okay,  
13 the manual, the prohibition against redelegation precludes  
14 attaching binding effect to the Licensing -- to the Special  
15 Master's findings. Therefore, the Licensing Board has to  
16 entertain objections.

17 And you could, I suppose, raise before the Licens-  
18 ing Board the same objection to the Special Master's deter-  
19 mination that you have just outlined before us.

20 MS. URBAN: But I think for the Licensing Board  
21 to rule on those objections, they would have to look at the  
22 documents again. I don't think they can answer the objections  
23 that we have without reexamining them.

24 I believe that just would be impossible for them to  
25 use the report and say, "We agree with these findings and

1 disagree with those findings."

2 CHAIRMAN ROSENTHAL: Can the Borad call upon the  
3 Master, Special Master for elaboration of the findings to  
4 enable it to pass more intelligently upon any rulings?

5 MS. URBAN: That would be one way.

6 MR. FARRAR: How important is it that the Board  
7 not see the documents?

8 MS. URBAN: I don't think it is that important.  
9 I think the members of the Licensing Board are capable of  
10 making a finding. By the time they are looking at the  
11 transcript, the evidence is going to be so substantial, I  
12 don't think they will remember. I say this and take it into  
13 consideration even though it hasn't been introduced.

14 MR. SALZMAN: Instead of what has occurred, the  
15 Special Master had made all of the wonderful findings that you  
16 think would be so helpful, albeit incorrectly, given the  
17 apparent view of the Special Master.

18 I think it is a reasonable thing that he could  
19 make all the findings, but wrong. What happens then? Would  
20 the delegation have been invalid then?

21 MS. URBAN: Certainly.

22 MR. SALZMAN: It still would have been invalid,  
23 even if he made all of these findings incorrectly?

24 MS. URBAN: Yes.

25 MR. SALZMAN: Then I ask you what I asked

1 Mr. Hjelmfelt, what are you going to do with the documents  
2 you received from the Applicant pursuant to the agreement?  
3 Once you waive your rights including constitutional rights,  
4 once the other side has changed its posture, there are cases  
5 by the thousands holding everybody, one right down to the  
6 government to be bound by them.

7 MS. URBAN: I think a solution to this problem  
8 would be to have the documents returned in the event they  
9 are found to be privileged and make the ruling that the  
10 documents are not admissible into evidence.

11 MR. SALZMAN: A ruling like the fruit of the  
12 poisonous tree, nothing that can come from those documents  
13 can be allowed.

14 MS. URBAN: I think that would be one solution.  
15 The government also turned over our documents we found to be  
16 privileged. We would like a ruling, nevertheless, again on if  
17 they have ever seen what might turn out to be privileged  
18 documents.

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1 MR. FARRAR: Let me ask you a question.

2 You said your understanding of the agreement  
3 was that it was invalid but it was originally intended to  
4 be binding, and viewed that way you think it is invalid.

5 If the agreement had been bound for all times,  
6 do you think that also would be invalid? My point is there,  
7 can't the parties agree -- they are certainly free to insist  
8 on rulings from the Licensing Board on any matter they want  
9 a ruling on.

10 The manual provision seems to at least require  
11 that can't they agree in the absence of coercion that they  
12 just don't want to take discovery matters to the Licensing  
13 Board, wheth. it is a law clerk or garage mechanic, that  
14 he can handle it.

15 If we read it that way, would it be valid?

16 MS. URBAN: I think they can as long as the parties  
17 are not involving the Licensing Board.

18 I think they can say we will toss all the documents  
19 in the air and those that land in the circle are privileged  
20 and those outside aren't.

21 But when somebody else can toss them into the  
22 air --

23 MR. FARRAR: Is the problem there they can make  
24 that agreement privately but as soon as they ask the Licensing  
25 Board to put its blessing on it, the agreement becomes

1       invalid? Everybody is afraid of the Licensing Board and  
2       the Appeal Board because we have the different responsibilities  
3       that parties can't take safety matters out of our hands, even  
4       an uncontested case.

5                 Are you saying that that type of an agreement, if  
6       you get entirely out of the Licensing Board process, it  
7       becomes invalid once you ask the Board to approve the  
8       agreement?

9                 MS. URBAN: Once again, I think an agreement that  
10       the Board could have ordered itself, if it was within its  
11       authority, that is to say, the Board could have made a  
12       binding discovery ruling on a substantive issue of discovery,  
13       these documents can be discovered and these can't, I think the  
14       Board could have validated by order that type of agreement,  
15       but I think the Board could not validate by order an agreement  
16       to appoint a third party because then we are taking a step  
17       outside of the Board's authority and again running counter  
18       to the manual.

19                MR. SALZMAN: What does it mean when it says the  
20       parties can also stipulate as to the procedures to be  
21       followed in the proceeding?

22                MS. URBAN: I think it has to be assumed that the  
23       presiding officer can only recognize stipulations which are  
24       within his power to recognize.

25                MR. SALZMAN: I suppose that is true all the time.

1           But the question I have for you: if this gentleman  
2 and that gentleman can agree to throw documents up in  
3 the air and only those that fall within the circle will be  
4 bound, what is so evil about them agreeing that you will be  
5 the one to throw the documents?

6           MS. URBAN: The Board has no authority for agreeing  
7 for me to do it. And also we don't have any Board input in  
8 that manner.

9           MR. SALZMAN: Do you have any idea when these  
10 two -- anymore input when these two gentlemen agree among  
11 themselves and you throw them up?

12           MS. URBAN: When the gentleman's documents who  
13 landed outside the circle comes in and says he wants a  
14 ruling --

15           MR. SALZMAN: Well, suppose they had, Ms. Urban,  
16 suppose they had a machine to throw them in the air. Isn't  
17 the important distinction here, as it appears to me at the  
18 moment, between whether the Board has ordered somebody to do  
19 something that is beyond his authority and has ordered  
20 somebody to do something it will have to do itself or the  
21 parties who said, look, we would rather do it this way. All  
22 of it. And the Board agrees.

23           I agree, but there is a line where you  
24 can't. But when no one objects to an agreement between the  
25 parties, that doesn't strike me as being any different, no

1 matter who throws the documents.

2 I can't see any distinction. I think that is  
3 what all those Special Master cases turn on.

4 MS. URBAN: The distinction is the Board enforcing  
5 an agreement which it could have itself ordered and the  
6 Board enforcing an agreement which it did not have the power  
7 to order.

8 I think it is clear the Board on its own could  
9 not have said, "We would like to appoint a Special Master  
10 and we are going to."

11 MR. SALZMAN: I agree.

12 MS. URBAN: I think the parties stipulating to that  
13 cannot give the Board power they don't have.

14 MR. SALZMAN: If the Board now says, "Ms. Urban,  
15 you and the lawyer for the other side will agree on the  
16 documents to be submitted. I so order."

17 Yet you have already told me that if the two of  
18 you agree voluntarily, the Board may enter such an order.

19 MS. URBAN: The Board cannot enter an order saying  
20 we should agree. The Board can enter an order that  
21 incorporates our agreement.

22 MR. SALZMAN: Then what is the difference? What  
23 has the Board done any more than that here?

24 MS. URBAN: The Board has entered an order to have  
25 a third person look at it.

1                   MR. SALZMAN: What is wrong with having a  
2 third person looking at it? Isn't that the normal way  
3 these matters are handled?

4                   If the dispute could have been handled between  
5 these two gentlemen in a bar, I suspect they would have been.

6                   MS. URBAN: Well, the rule says the licensing  
7 authority of the NRC Board cannot be redelegated.

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1                   CHAIRMAN ROSENTHAL: Let me pursue that a short  
2 distance.

3                   There are on the Licensing Board panel, a number of  
4 lawyers who serve part-time and maintain private law practices.  
5 Now, if the parties in their case, for example, had decided  
6 that they wanted to submit their discovery problems to their  
7 Board member in his private capacity and pay him a fee to  
8 allow him to decide this, and they didn't involve the Licensing  
9 Board at all, they just agreed among themselves in a written  
10 document that it would be submitted to Mr. X and his decision  
11 would be binding.

12                   Now, would that involve an improper delegation of  
13 Licensing Board responsibilities?

14                   MS. URBAN: I don't think that type stipulation  
15 would be enforceable by the Licensing Board.

16                   CHAIRMAN ROSENTHAL: Wouldn't be enforceable?

17                   The parties go and submit it, following on down  
18 the line, submit the dispute to Mr. X in his private capacity,  
19 and Mr. X comes down with his ruling, and one of the parties  
20 then endeavors to repudiate the agreement and tell the  
21 Licensing Board it should now order some additional documents  
22 discovered, beyond those which Mr. X had authorized.

23                   Do you mean to tell me that the Licensing Board  
24 wouldn't be free to say, absolutely not, you parties agreed  
25 among yourselves to have Mr. X resolve this dispute and Mr. X

1 has resolved it and you are stuck with your agreement?

2 MS. URBAN: I think at the time of agreement  
3 the Licensing Board could have reexamined the documents to  
4 be discovered. I think -- let me try to sort this out for  
5 a second.

6 I believe the Board could enforce the actual sub-  
7 stance of an agreement. The parties go outside and they make  
8 some sort of procedure and then they come in and say, "Okay,  
9 Licensing Board, we have determined that these documents are  
10 privileged and these documents aren't."

11 The Licensing Board then goes on and makes an  
12 order saying, pursuant to the agreement of the parties,  
13 documents 1 through 10 are privileged and documents 10 through  
14 100 are not privileged.

15 I think that time of order -- I do not think  
16 then the parties could go back and say, well, we changed our  
17 minds. We didn't have the stipulation.

18 You are dealing with a different type of thing. In  
19 your case, in the case of the parties going out and coming in  
20 to the Licensing Board with the discovery decisions already  
21 made, you have the Licensing Board being asked to make an order  
22 that it has the power to make. It has the power to say these  
23 documents are privileged and these documents are not.

24 Here we have the parties agreeing to ask the  
25 Licensing Board to make a decision it doesn't have the

1 authority to make. It doesn't because of the manual have  
2 the authority to redelegate its authority.

3 CHAIRMAN ROSENTHAL: When you say redelegate its  
4 authority, the next step -- and you agreed apparently that  
5 parties could go and select Mr. X themselves -- supposing  
6 Mr. X decides he wants to do it government time, as it  
7 were, rather than on his private time for a private fee, and  
8 what Mr. X says to the parties is, "Yes, I am perfectly willing  
9 to do it, but I would like you to get an order out of the  
10 Licensing Board, which formally designates me to do it, and the  
11 order can provide that my determination would be binding."

12 Now, you are telling me in that circumstance, even  
13 though it is still the same Mr. X, even though the same  
14 consideration on which his determination is to be binding, that  
15 the prohibition against re delegation is offended?

16 MR. URBAN: Yes.

17 CHAIRMAN ROSENTHAL: Why?

18 MR. URBAN: Because the Licensing Board is given  
19 the authority to rule on delegated authorities.

20 In making an order -- I'm sorry. Given the  
21 authority to rule on questions of privilege, in making an  
22 order that Mr. X is to rule on questions of privilege, they  
23 have re delegated their power to make those rulings.

24 CHAIRMAN ROSENTHAL: So it all hinges on the fact  
25 that the Licensing Board issues this piece of paper, that if



1 the parties get Mr. X to do it without the Licensing Board  
2 issuing a piece of paper, then that is not an impermissible  
3 delegation. Once the Licensing Board, itself, gets into the  
4 act to the extent of saying, okay, Mr. X, do this, then  
5 the manual provision is violated?

6 MS. URBAN: Yes.

7 MR. FARRAR: When elevating discovery matters  
8 beyond the level they deserve, I can see you making that on  
9 safety matters. The Intervenors cannot go out and find  
10 somebody to make a ruling on a safety matter. That was the  
11 Licensing Board's job. It has to decide whether a proposed  
12 reactor is safe.

13 District Courts and Licensing Boards, I suppose,  
14 are happy when they are not asked to pass on discovery matters.  
15 Those aren't things where there is policy demanding -- you see,  
16 that is the trouble I have.

17 If you made your statement with respect to safety  
18 matters, but discovery matters --

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1 MS. URBAN: Certainly we think questions involving  
2 anticompetitive activities are very important and we have been  
3 fighting for a while over these documents, and we want them  
4 and they don't want us to have them.

5 I think that these documents are probative to our  
6 case. Of course, I don't know; I haven't seen them. But I  
7 don't think they would fight as hard and I don't think we  
8 would fight as hard if we thought they weren't.

9 You are talking about things that affect a  
10 licensing procedure --

11 MR. SALZMAN: Everytime somebody resists discovery,  
12 you don't know what is in those documents. Maybe it might  
13 be that the president of the company is maintaining more than  
14 the authorized number of mistresses.

15 I have seen cases where it was fought tooth and  
16 nail, but because of something perhaps the senior officer did  
17 or something like that, so they didn't want to disclose it.  
18 If everytime discovery was resisted strongly, you would be  
19 up here on appeal everytime discovery was denied.

20 I can't see that argument.

21 MS. URBAN: We certainly can't decide what is in  
22 the documents, but we have a duty to the public to present  
23 our case in the best manner possible and in order to go for-  
24 ward and present our case, we are attempting to get all  
25 information that we think is relevant and probative to that

1 case.

2 Again, of course, the documents may contain  
3 information of a nature that is totally irrelevant, but we  
4 can't know that. Unfortunately, there is no procedure for  
5 determining relevance so that we can limit privilege by only  
6 those documents that we want and they don't want us to have  
7 because of our case.

8 CHAIRMAN ROSENTHAL: Do you think, Mrs. Urban, if  
9 there had not been a Special Master question here, if the  
10 Licensing Board had made the rulings which the Special Master  
11 made, that there would be warrant for us to exercise our  
12 extraordinary power to direct certification?

13 MS. URBAN: I do not think certification would have  
14 been directed. We feel the rulings are erroneous. We feel  
15 the rulings contain reversible error. We would hope that  
16 certification had been directed, but to be honest, I doubt  
17 very much that would have occurred.

18 CHAIRMAN ROSENTHAL: I am not asking whether it  
19 would have occurred or not. I am asking when the standards  
20 for certification which were laid down by us in our Seabrook  
21 decision would be met, if all that we had here was an  
22 attempt to obtain review of the merits of the ruling?

23 MS. URBAN: I think the standard that there be  
24 a detriment to the public interest and that there be delay,  
25 if certifications had been met, I think I have met that

1 argument in terms of the presentation of our case.

2 MR. SALZMAN: Every time the government can't get  
3 a document, it can't present its case and that is a detriment  
4 to the public interest?

5 MS. URBAN: I think it is if we cannot present the  
6 fullest case possible.

7 MR. SALZMAN: You can always present the fullest  
8 case possible if every document you demand is turned over to  
9 you. You mean every time a document is not turned over to  
10 you on a grounds of privilege and you think that privilege  
11 is wrong, that that is sufficient public interest to come up  
12 and demand that we intervene?

13 MS. URBAN: I think that the privilege is a  
14 limited concept, as stated by Wigmore, its intent, the intent  
15 of the privilege, of the attorney-client privilege is to  
16 protect communications between attorneys and clients, but also  
17 Wigmore stated, this privilege is a detriment to the full  
18 examination of the truth and it should be limited.

19 What we are dealing with is balancing the need to  
20 promote attorney-client conversations and communications and  
21 the need to have a full examination of all the relevant  
22 evidence.

23 We believe that privilege should not be erroneously  
24 granted and we believe that if documents claimed as privileged  
25 are not privileged, they should be turned over to us. We hope

1 those documents which we see would be helpful to those cases.

2 MR. SALZMAN: Of course, that's the law of privi-  
3 lege. The problem is, the person who doesn't get the docu-  
4 ments always thinks the decision is wrong and always wants to  
5 appeal.

6 I think you are quite correct when you stated if  
7 there hadn't been a Special Master here, there would not have  
8 been much chance -- I believe this Board has always turned  
9 down an attempt to take an interrogatory appeal in a dis-  
10 covery case.

11 The question is, what is there about the Special  
12 Master that makes it different. The Special Master is just  
13 another licensing board chairman. There is no guarantee that  
14 you would have gotten a better ruling had the Board ruled  
15 itself.

16 MS. URBAN: If it isn't permissible for a licensing  
17 board to make use of Special Masters to make binding decisions,  
18 I think that should be settled now. We already know a Master  
19 has been used in one case. There are certainly going to be  
20 other cases with large amounts of documents where the question  
21 of privilege is going to come up.

22 We certainly don't want to be going through every  
23 appeal where the party is saying the Master wasn't valid.  
24 That should be settled now.

25 MR. FARRAR: In somebody's brief, I guess the

1 Staff's, maybe it was Mr. Reynolds', pointed out there were a  
2 number of other cases in which this practice had been fol-  
3 lowed.

4 If we invalidate it here, what are we doing to  
5 the 2 or 3 other cases in which it has happened already?

6 MS. URBAN: I believe there has only been one  
7 case. Although I am not certain.

8 MR. SALZMAN: If there is only one case, should  
9 we invalidate that, too?

10 MS. URBAN: Frankly, I am not aware what stage of  
11 the proceeding that is in.

12 CHAIRMAN ROSENTHAL: Your time has expired,  
13 Mrs. Urban. Thank you.

14 We will now hear from Mr. Vogler.  
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1 CHAIRMAN ROSENTHAL: You may proceed.

2 Were you a party to that telephone conversation,  
3 on December 6th?

4 MR. VOGLER: I am going to have to go along  
5 with the rest of them. My associate Mr. Lessy was a  
6 party to that telephone conversation.

7 I was, your Honor, present at several of the  
8 executive meetings, for lack of a better word.

9 The meeting was not recorded with then Chairman  
10 Farmakides that led up to the telephone conversation.

11 This was in late 1974 when we were having  
12 problems with discovery, as to what we meant by discovery.  
13 And we had a series of meetings just before Christmas.

14 Mr. Farmakides was the Chairman on several  
15 panels at that time and it looked like we were leading into  
16 a storm over discovery and he broached the subject of a  
17 Special Master so he could continue to push this case  
18 on the issues and on the merits and perhaps have someone  
19 else look at this fight that was beginning to brew over  
20 which documents should be turned over and which should not

21 I did take part in those.

22 Subsequently there was a conference call and  
23 Mr. Lessy took the call and he and I have discussed it.

24 As far as the Staffis concerned, the way the  
25 order reads is the way the conference call went.

1                   CHAIRMAN ROSENTHAL: What was your under-  
2 standing or --

3                   MR. VOGLER: That it was binding, yes, sir.

4                   CHAIRMAN FARMAKIDES: What is --

5                   MR. VOGLER: That the parties would be held,  
6 sir, to the rulings and findings of the Master.

7                   CHAIRMAN ROSENTHAL: Forevermore?

8                   MR. VOGLER: To be very frank, appellate  
9 review was not discussed. That was the meaning of it.

10                   I considered that when the Master would make  
11 his findings that we would abide by them at that point.  
12 I assumed.

13                   CHAIRMAN ROSENTHAL: You considered the other  
14 parties were obligated to do the same thing, abide by  
15 them?

16                   MR. VOGLER: It is extremely difficult to  
17 say what the other party was thinking. We most certainly  
18 agreed that the findings of the Master would be binding.

19                   I have a little caveat here. I don't believe  
20 that the parties meant that they would be binding if on  
21 the face of the findings there were potential errors of  
22 law as opposed to fact.

23                   CHAIRMAN ROSENTHAL: I have a great deal of  
24 difficulty assessing that. I think I heard something along  
25 the same line come out of the mouths of Cleveland's counsel



1 earlier.

2           The concept here as I understand it is if  
3 there was some error of law, at least something which  
4 one of the parties regarded as an error of law, that  
5 that party would be free to come to the Licensing Board  
6 and complain about it.

7           On the other hand, if the errors were, at  
8 most, errors of fact, then the party would be bound.

9           MR. VOGLER: Yes, sir.

10           The reason I go back, I go back to the order  
11 and the agreement, it is not there. We can only go on  
12 what the parties stipulated.

13           CHAIRMAN ROSENTHAL: This is an impression  
14 that you garnered from what?

15           MR. VOGLER: One or two meetings that were  
16 held with the parties at the Commission's offices on  
17 H Street, just before Christmas in 1974 when we were  
18 having some severe disputes over discovery and there  
19 appeared to be a lengthy drawn-out struggle, but  
20 in view of the licensing proceeding we could proceed  
21 and solve this matter.

22           Chairman Farmakides brought up the subject  
23 of a Special Master. Subsequently there was a telephone  
24 conference call which I did not take part in in which the  
25 parties agreed as set forth in the order of December 10th.

1 MR. SALZMAN: Mr. Vogler, what is the  
2 ruling on whether a given document is privileged?  
3 Is that a question of fact or a question of law?

4 MR. VOGLER: I can't answer that.

5 I am saying that if the — in view of the  
6 Staff and we have not been a party to the discovery dispute  
7 between the City of Cleveland and the Applicants, inasmuch  
8 as it involves documents primarily relating to retail  
9 competition within the City of Cleveland, we have money  
10 toward the dispute.

11 But it would appear, without having access  
12 to the documents or reviewing documents or reviewing the  
13 descriptions thereof, that if a party asserts attorney-  
14 client privilege and the finder of fact says it is not  
15 attorney-client, it is attorney work product and attorney-  
16 client has not been asserted, it would appear, with nothing  
17 else, that there is an error there of law as opposed to fact.

18 MR. SALZMAN: But your interpretation of an  
19 agreement would have to work for all situations.

20 What value would there be to have such an  
21 agreement if you were going to substitute for the discovery  
22 argument an argument about whether it is a law or a fact?

23 We have a letter written by an attorney that  
24 represents a client in several matters. Some confidential.  
25 Some not.

1           How would you decide which way to go? Would  
2 that be a question of fact or a question of law?

3           I don't see how you can tell.

4           Aren't they all mixed questions?

5           MR. VOGLER: Not necessarily.

6           Again, let me restate. I don't want to  
7 necessarily get into the document by document review.  
8 It would appear that the attorney-client privilege must  
9 be asserted and that it belongs to the client to assert  
10 it.

11           If you don't assert it, I don't really believe,  
12 sir, that the finder of fact can find it for you.

13           MR. SALZMAN: At what point must it be asserted?

14           MR. VOGLER: Most certainly when you gather  
15 before the Master to have your briefing and oral argument.

16           This matter has been briefed three times.

17           MR. SALZMAN: Can privilege be asserted before  
18 the document after the documents are turned over?

19           I suggested in the Applicant's brief if you  
20 claim privilege A, and the ruling is not A, you can then claim  
21 privilege B if the document has not been disclosed.

22           Well, they now claim the other privilege.

23           MR. VOGLER: I have read the Applicants' brief.  
24 I don't know whether you can now claim the privilege. If  
25 so, I would like to see that litigated before either the

1 Board or the Special Master.

2 CHAIRMAN ROSENTHAL: Mr. Vogler, in your  
3 brief, the conclusion that you reach is that the  
4 Licensing Board should now review the Special Master's  
5 report treating them as recommendations.

6 MR. VOGLER: Yes, sir.

7 CHAIRMAN ROSENTHAL: You would say that that  
8 is true with respect to legal issues that are raised,  
9 factual issues, or both?

10 MR. VOGLER: Questions of law.

11 CHAIRMAN ROSENTHAL: Questions of law.

12 MR. VOGLER: Only on the disputed documents,  
13 your Honor. On page 9 of our brief we put forth three  
14 reasons why we think that the Licensing Board should  
15 treat the findings of the Master as a recommendation.

16 One is the nature of the objections of the  
17 City and the Department, which Mr. Salzman and I have  
18 just been discussing, the attorney-client privilege.

19 Two is the fact that their apparently is a  
20 misunderstanding as to what they agreed to in December  
21 and January, and the fact that the Licensing Board has  
22 sole responsibility to rule on privilege claims, that  
23 maybe they should review those findings that are in  
24 dispute.

25 MR. SALZMAN: Do I take that last point to

1 mean that you think the Licensing Board didn't want the  
2 authority?

3 MR. VOGLER: We are in disagreement with the  
4 party that the ruling of the Special Master was valid.

5 It is not inconsistent with the AEC manual  
6 and, in fact, is inconsistent with the Rules of Practice.

7 MR. FARRAR: Do you agree or do you believe  
8 that if the manual means anything, it means that the  
9 Licensing Board could not over the parties' objections  
10 refer this matter to a Special Master who would make a  
11 finding?

12 MR. VOGLER: If there was disagreement among  
13 the parties, there could be no delegation as we have here,  
14 or the creation of a Special Master.

15 I would like to point out that although the  
16 Manual Section 034 advises that the delegated authority  
17 of the Atomic Safety and Licensing Boards may not be  
18 further redelegated, Section 023, the preceding page,  
19 advises that in performing its functions each Board  
20 exercises the powers of a Presiding Officer, as granted  
21 by 10 CFR Part 2.

22 There was the basis upon which Mr. Farmakides  
23 broached his discussion on the stipulation of 2.73, I  
24 believe it is, in 10 CFR 2.753.

25 CHAIRMAN ROSENTHAL: Mr Vogler, the Department

1 of Justice suggested pages 5 through 67 of its brief, if  
2 the Master's report is to be used as a recommendation,  
3 the Licensing Board entertains challenges to it, the  
4 Department would be in the position of attempting to  
5 call legitimate conclusions of privilege without having  
6 access to specific documents, which will result in the  
7 department being denied due process of law.

8 I gather it is precisely this procedure that  
9 the Staff is suggesting be followed.

10 I would like your views on the Department's  
11 suggestion that this would deny it due process.

12 MR. VOGLER: I cannot agree that they would  
13 be denied due process.

14 They have been represented throughout this  
15 proceeding by competent counsel. They have briefed  
16 this matter three times now. And we still have here  
17 another dispute, not with the Department per se, but  
18 all of us here, we are again airing — and I don't think  
19 due process will be denied and part of that stems from  
20 the fact, your Honor, that we feel — the Staff feels  
21 very strongly that the role of the Special Master was valid.  
22 And we all agreed to it.

23 We all agreed to be bound.

24 MR. FARRAR: What the Department is saying, not  
25 that they would be denied due process —

1 MR. VOGLER: That is what they say.

2 MR. FARRAR: You will need a de novo review.  
3 The Special Master didn't specify the particular reasons  
4 why he ruled this way or that way.

5 MR. VOGLER: I feel, sir, that most  
6 certainly the Department is more able to answer this  
7 than I.

8 We have briefed this thing three times now.  
9 I feel they have had their crack, as well as the City of  
10 Cleveland and the Applicant. I can't go along with the  
11 due process argument any more than I can go along with  
12 the appointment of the Special Master being invalid  
13 because of the manual which is turned around on the  
14 preceding page.

15 CHAIRMAN ROSENTHAL: Even though, as the  
16 Staff sees it, the manual provision is in question, does  
17 not preclude giving binding effect on questions of fact  
18 and questions of law for the Special Master, to the  
19 Special Master, that in the circumstances of this case,  
20 the Licensing Board should now be called upon to consider  
21 any attacks of a legal rather than a factual character upon  
22 the matters the Special Master ruled on.

23 What would that embrace? Whether the Licensing  
24 Board granted privilege status on the basis of claims of  
25 privilege not made. If so, can it do that?

1                   MR. VOGLER: The documents, sir, that are  
2 still in dispute. What hasn't been mentioned today,  
3 and there has been a discussion as to millions of  
4 documents, et cetera -- I don't know how many documents  
5 are left.

6                   We had a count at one time, but the Master  
7 has reviewed and disposed of a considerable number of  
8 documents.

9                   We are down under a thousand left that are  
10 still in dispute here today.

11                   So he has performed and I think that those  
12 questions that remain should be --

13                   CHAIRMAN ROSENTHAL: Some of these documents are  
14 no longer in dispute because the Applicants in the vernacular  
15 could have had them up after the Special Master's decision?

16                   MR. VOGLER: I believe there are more documents  
17 than that. There were documents which he ruled upon in  
18 which issue was not taken.

19                   If we get into numbers, I am terribly weak.  
20 I can run it down for you.

21                   MR. SALZMAN: One of the things I don't quite  
22 follow. Of the millions of documents, privilege was only  
23 claimed on about a thousand documents. What has the  
24 Special Master done?

25                   MR. VOGLER: I am advised of 686 documents left.



1           That does not include the documents turned  
2 over upon the ruling by the Special Master.

3           MR. SALZMAN: What are we going to do with  
4 Special Master? He acted in good faith as well. Is  
5 there no way that these documents can be made whole?

6           MR. VOGLER: I would at this point follow the  
7 suggestion of Ms. Urban, to give them back.

8           MR. SALZMAN: That is not very realistic, in  
9 a Xerox age.

10          MR. VOGLER: They can't use them in the trial.  
11 Discovery has been concluded. Prehearing discovery.

12          MR. SALZMAN: If it is reopened, why, witnesses  
13 can't be pursued, cross-examination —

14          MR. VOGLER: Cross-examination and direct  
15 examination, yes.

16          MR. SALZMAN: Do you think the Applicant hasn't  
17 been injured in any way?

18                 Can we say that?

19          MR. VOGLER: I can't say that, no.

20                 I would like to get back to the point of the  
21 Special Master.

22                 I was also counsel for the AEC Staff in the  
23 Duke proceeding. That is the Oconee-McGuire. We cite that  
24 in our brief. We give you the citation.

25                 There, as here, we were in an antitrust matter

1 involving a considerable amount of documents and the  
2 Chairman of that Board, who is no longer with us,  
3 appointed a Special Master and he performed his  
4 functions and it was accepted by all of the parties.

5 MR. SALZMAN: That was the decision?

6 MR. VOGLER: Yes.

7 CHAIRMAN ROSENTHAL: That was to be binding?

8 MR. VOGLER: Yes.

9 CHAMAN ROSENTHAL: The parties all sought the  
10 Special Master's decision as binding and sought review of  
11 either the Licensing Board or of this Board?

12 MR. VOGLER: That's correct.

13 The count in Duke was over 100,000 documents.  
14 He did free up the panel Licensing Board members to pursue  
15 other matters.

16 MR. FARRAR: We don't have the guarantee that  
17 the parties in that proceeding won't come to us --

18 MR. VOGLER: Duke, as far as the antitrust  
19 matters are concerned, has been decided.

20 MR. SALZMAN: Was the agreement to appoint a  
21 Special Master anymore elaborate than the one we have here?

22 MR. VOGLER: Not to my knowledge. I can go back  
23 and check.

24 MR. SALZMAN: Can you get a copy of the agreement?

25 MR. VOGLER: I believe it is an order.

1 MR. SALZMAN: And send it to us.

2 MR. VOGLER: Prehearing Order Number 8.

3 I will see you get a copy.

4 MR. SALZMAN: All the parties.

5 MR. VOGLER: Yes.

6 CHAIRMAN ROSENTHAL: As far as you are aware,  
7 at the time that agreement was entered into in the Duke  
8 Case no one focused on the possible impact of the manual  
9 prohibitions?

10 MR. VOGLER: No, sir.

11 MR. FARRAR: Let me ask you, Mr. Vogler,  
12 if we were to read the agreement as intending to prevent  
13 review by the Licensing Board to preserve review by us,  
14 either at the moment if we chose to take it, or three  
15 years later, do you think we should permit an agreement  
16 like that to stand?

17 Forgetting the manual. Just on the ground  
18 that is not the way to do business.

19 MR. VOGLER: My understanding of the agreement,  
20 sir, there was a little bit more to it than insulating  
21 the Board from review of the documents.

22 All of the panel members at that time -- two  
23 were in private practice, and one was the Chairman of several  
24 health and safety proceedings.

25 Although the insulation of the Licensing Board

1 from review of the documents was discussed, there was  
2 also the very urgent need to free up the Licensing Board  
3 members so they could focus on issues in controversy  
4 which we were arguing about at that time and the main  
5 thrust of the case and permit someone else competent  
6 to take care of this dispute over pretrial proceedings  
7 and pretrial discovery.

8 That, too, was an issue.

9 MR. FARRAR: That is fine.

10 MR. VOGLER: I haven't answered your question.

11 MR. FARRAR: Those are all good reasons. But  
12 if you appoint a Special Master and then preserve a right  
13 of appeal to us later on, it just strikes me that that  
14 type of an agreement should not be permitted because it  
15 ties the Licensing Board's hands to go through with the  
16 proceeding because there may be fatal errors --

17 MR. VOGLER: You mean to rubberstamp --

18 MR. FARRAR: No. You are bound by the Special  
19 Master's findings, then it strikes me that if the  
20 Licensing Board thinks it got a rotten decision out of the  
21 Special Master, the Appeal Board is sure to reverse three  
22 years later, and having the Licensing Board go through  
23 this proceeding only to face reversal.

24 If you agree with it that way, do you think we  
25 should uphold it?

1 MR VOGLER: I don't regard the Licensing Board  
2 as being bound by the Master's findings.

3 MR. FARRAR: What I am saying, if we read it  
4 that way, binding on the Licensing Board but not on the  
5 Appeal Board. If that is what we find the parties intended.

6 MR. VOGLER: That Licensing Board was bound?

7 MR. FARRAR: The parties were bound before the  
8 Licensing Board but not before the Appeal Board.

9 MR. VOGLER: But was the Licensing Board bound?  
10 I don't understand. I am sorry.

11 CHAIRMAN ROSENTHAL: If we read it to the  
12 following effect: one, that the parties could not take the  
13 Special Master's recommendation to the Licensing Board,  
14 so far as the Licensing Board review was concerned, the  
15 parties were bound by it; two, that the Licensing Board  
16 itself could not disturb the Special Master's determina-  
17 tion, but; three, down at the end of the line, when the  
18 case was all over, we would be free to review the Special  
19 Master's determination, whether if we read the agreement  
20 as having that intended meaning we should uphold it.

21 MR. VOGLER: No, sir.

22 I believe the Special Master was performing  
23 a function for the Licensing Board -- was subserviant to and  
24  
25

1 was performing a function for the Licensing Board.

2 CHAIRMAN ROSENTHAL: I think your time is up. -

3 We will now recess for ten minutes.

4 We will then hear from the Applicants.

5 (Recess.)

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1 MR. ROSENTHAL: Mr. Reynolds, we will start off by  
2 asking you whether you were a participant to that telephone  
3 conversation?

4 MR. REYNOLDS: I was, indeed, a participant in that  
5 telephone conversation. And that telephone conversation I have  
6 had occasion to reflect on since then, and quite recently,  
7 and my clear recollection is that the Applicants were the  
8 reluctant partner in this arrangement.

9 The Applicants were not at all excited about  
10 entering into any kind of agreement that would foreclose  
11 appeal rights and so stated in the context of appeal rights.

12 Also, the Applicants saw the same problems that  
13 Mr. Vogler indicated, as far as long discovery and long  
14 hearing, and the prospect of this anti-trust proceeding  
15 impacting on the schedule for commencing construction and  
16 operation of these nuclear facilities.

17 MR. SALZMAN: Not all these facilities would be  
18 impacted, would they?

19 MR. REYNOLDS: At that time, Mr. Salzman, all of  
20 them would have been.

21 Since the telephone call, and in fact quite recently  
22 Davis-Besse 2 and 3 were consolidated into this proceeding,  
23 but at the time the Davis-Besse 1 plant was very seriously a  
24 concern because the operating license was projected to issue  
25 in April or in the second quarter of '76, and the Perry 1 and 2

m2  
1 plants which involved construction permits were also scheduled  
2 around the same period of time.

3 MR. SALZMAN: None of these were grandfathered?

4 MR. REYNOLDS: Davis-Besse 1 was grandfathered  
5 and the anti-trust proceeding around the Davis-Besse  
6 proceeding, was with regard to the construction permit.  
7 And because of that concern, and the very extensive discovery  
8 and document requests, the Applicant saw a means of expediting  
9 the proceeding and expediting the discovery by agreeing to be  
10 bound and to be bound in all respects by the Special Master's  
11 ruling.

12 And it was in that context that this conference call  
13 took place and came to fruition. It was initiated by the then  
14 Chairman of the Licensing Board, Chairman Farmakides and it  
15 was his suggestion.

16 There was a discussion that followed as to  
17 who would pay the fees of the Special Master and the  
18 Applicants were of a mind that if we wanted to go outside the  
19 Board, that we could go outside the Board, and that would incur  
20 an additional expense, but it would be a means of expediting  
21 the process.

22 The decision to give the responsibility to a Master,  
23 who was a member of the Licensing Board, was primarily  
24 motivated by the concern of others over the expense and this  
25 was a way we could accomplish the same result without incurring



1 that additional expense.

2 MR. FARRAR: Should it matter to us that the  
3 impetus for the agreement came from the Board rather than the  
4 parties?

5 MR. REYNOLDS: I think it should matter not at  
6 all that the suggestion first came from the Board. I don't  
7 think, as Mr. Hjelmfelt expressed earlier, there was any  
8 coercion whatsoever by the Chairman of the Board. I think he  
9 did suggest it, and it was considered by all the parties and  
10 it was then agreed to by the parties.

11 As I say, the reluctant was counsel for the  
12 Applicant. But I don't feel that we had a situation here  
13 where the Board reached down and foisted upon the parties  
14 an agreement that they did not accept. I think that is the  
15 crucial matter here.

16 I think what we are talking about, we are talking  
17 about 2753 is a stipulated procedure in which the Board, as  
18 the rule requires, then accepts or adopts, once the parties  
19 have consented to it, which is something far different than  
20 everything the Board on its own volition or over the  
21 objections of the party, impose by delegation of some of  
22 the Board's authority on somebody else, and has that other  
23 party then perform the function.

24 CHAIRMAN ROSENTHAL: Well, the agreement does not  
25 speak directly one way or the other to the question as to

1 whether the parties were foreclosing possible Appellate  
2 review of the Special Master's determination.

3 There seems to be a disagreement between the parties  
4 as to whether it was intended to foreclose that kind of  
5 review. What we have heard from the other parties was that  
6 Appellate review was never specifically addressed.

7 Now, assuming that the agreement should be read  
8 as not foreclosing Appellate review, thus leaving the  
9 Appeal Board and indeed the Commission itself, as possibly  
10 in the act, why wouldn't there be in those circumstances, an  
11 impermissible delegation? Because the functions that were  
12 being performed by the Special Master are ones which eventually  
13 will be reviewed by an Appeal Board.

14 Therefore, in a real sense they perform an  
15 adjudicatory function and the Licensing Board may not delegate  
16 its adjudicatory function.

17 MR. REYNOLDS: I think we have to focus on the  
18 nature of the reference here, which does not go to the  
19 substantive issues of the case, the final result. It goes to  
20 a discovery matter of an interlocutory nature, and I think  
21 that that is really the most telling point in terms of what  
22 your question is addressing.

23 I don't think that it is impermissible for the  
24 Licensing Board, assuming consent, and I assume that you are  
25 assuming consent.

1 CHAIRMAN ROSENTHAL: I am assuming consent.

2 MR. REYNOLDS: To delegate its responsibility under  
3 2753 to somebody else to perform a discovery function.

4 I think that -- and whether or not that agreement  
5 constitutes the appeal level, turns to me on a different  
6 question which basically is whether the parties can waive  
7 their appeal rights, and I think that it is quite clear  
8 under the law, and we have cited cases in our brief, that  
9 indicate that the parties can indeed waive their appeal rights.

10 CHAIRMAN ROSENTHAL: That may be so.

11 The position of the City of Cleveland is that  
12 it hadn't waived its appeal rights.

13 My question to you was in the context of an  
14 assumed decision on our part, that that is right; that the  
15 City of Cleveland is right when it says that this agreement  
16 must be interpreted as rendering the Special Master  
17 determination binding only upon the Licensing Board.

18 Now, if that is the way the agreement was to be  
19 read, would then the agreement run afoul of the proscription  
20 respecting redelegation of the Licensing Board adjudicatory  
21 function?

22 MR. REYNOLDS: Well, I think that is a difficult  
23 question. My own view is no, it would not be, because I  
24 think you have to differentiate between what is an adjudicatory  
25 function and a ruling in a discovery matter.

1 I think if the parties were to agree to a decision  
2 at the Licensing Board level, 2753 which talks in terms of  
3 procedures at the licensing level, would permit the  
4 Licensing Board to accept that agreement by the parties as a  
5 stipulation, notwithstanding the fact that that agreement did  
6 not contemplate being bound, that is at the Appeal Board  
7 level.

8 To address Mr. Farrar's, I assume, next question,  
9 the matter of whether you did that if you would run up against  
10 a situation where you would then have to go through the course  
11 of a three-year trial and come back at the end on appeal, I  
12 think that that probably is something that could very properly  
13 and should very properly be taken into consideration as far  
14 as the interlocutory review procedure and standard is  
15 concerned.

16 It may well be if you have a grievous error,  
17 given Mr. Rosenthal's procedure and the Licensing Board feels  
18 that it is in no position to redress that, that it would then  
19 be appropriate in that circumstance for the Appeal Board to  
20 take that into consideration as a factor.

21 MR. FARRAR: But, in doing that -- go ahead.

22 MR. REYNOLDS: Well, I think that would be highly  
23 unusual and it would not be, to me, conceptually difficult to  
24 accept waiting to the end of the line if you are talking about  
25 the kind of procedural errors in discovery that normally you

1 get -- well, don't get but come to you as challenges on  
2 appeal.

3 MR. FARRAR: Let's take the most grievous error  
4 you can imagine. If we see something like that, wouldn't we  
5 be forced to take it, wouldn't we then be doing the job the  
6 Licensing Board should have done and then, doesn't that answer  
7 your question about the delegation, the License Board dele-  
8 gated to a Special Master and because it did it, we have to  
9 do it?

10 I think the crucial difference here, maybe this  
11 is where the manual provision makes a good deal of sense,  
12 if the parties want to get the matter completely out of the  
13 adjudicatory framework, that is fine. They agree to that.  
14 That is their business as long as it is not safety or  
15 environment; it is just a discovery matter, let them work it  
16 out by agreement.

17 But, they can't take it out for a short time because  
18 once they have taken it out for a little while, or before the  
19 Licensing Board hadn't really taken it out, the Licensing  
20 Board is not doing the job they have been told to do in meeting  
21 their delegation of authority.

22 MR. REYNOLDS: I guess that I think if you put it  
23 in those terms, that is a forceful argument.

24 I think what it does, it does not come to grips  
25 with what are the obvious other factors that come into play

1 when the Appeal Board is looking at this kind of a problem.

2 I am not sure that the mere fact that you may be  
3 addressing at the Appeal Board level, a question which a  
4 Licensing Board should have looked at, I am not sure that that  
5 is reason enough to fault the consensual stipulation, if you  
6 are doing it -- if what you are really coming down to in your  
7 conclusion is that we have got a standard to apply for  
8 interlocutory review and that the error is a mainly procedural  
9 error which affects some substantive right of one of the  
10 parties. And I think that would be a factor here difficult to  
11 find.

12 But I think we are now hypothesizing. I feel if you  
13 have all those factors that come into play that the kind  
14 of question that the Appeal Board on interlocutory review  
15 would be looking at, would probably be not unlike the kind  
16 of question it would take on interlocutory review in any case.

17 MR. SALZMAN With all deference, isn't there at  
18 least one Appeal Board decision in which the Board refused to  
19 intervene on some discovery question, and then promptly  
20 reversed when it came for the regular course of appeal?

21 I am thinking of Zion. Are you familiar with that?

22 MR. REYNOLDS: I guess I am not sure -- well, the  
23 fact that they declined to take in an interlocutory appeal,  
24 it doesn't mean they can't reverse when it comes up. There  
25 are factors which turn on public interest and delay which are

1 different than the merits.

2 MR. SALZMAN: Anti-trust proceedings are not the  
3 regular grist of the mill for this agency. Some of it is  
4 in federal court.

5 Are you familiar with Rule 29?

6 MR. REYNOLDS: I am much more familiar now than  
7 I was when you first asked the others, because I had a  
8 chance to look at it during the break.

9 MR. SALZMAN: This is commonplace.

10 The background of the agreement being entered  
11 into here by a board composed of anti-trust lawyers, I would  
12 think would be assumed to reflect what normal anti-practices  
13 are in the federal court. This sort of agreement would be  
14 invalid in the federal court, would it not?

15 MR. REYNOLDS: I don't think this is an abnormal  
16 agreement by any stretch of the imagination.

17 We are back reading it in toto rather than what  
18 Mr. Rosenthal was suggesting.

19 MR. SALZMAN: It is not an extraordinary agreement  
20 at all, if you look outside the small circle of the Nuclear  
21 Regulatory Commission.

22 MR. REYNOLDS: And I believe we have cited to this  
23 Appeal Board a number of cases where this type of procedure  
24 has been used, some of which are large complex anti-trust  
25 issues.

1 MR. SALZMAN: A procedure which is valid enough for  
2 anti-trust proceedings in the court, it should be good enough  
3 to be accepted by the Appeal Board.

4 MR. REYNOLDS: That would be another way to phrase  
5 the issue, yes.

6 MR. SALZMAN: I assume you would phrase it that way,  
7 if you had the opportunity.

8 MR. REYNOLDS: I would.

9 CHAIRMAN ROSENTHAL: What would you do with the  
10 fact, Mr. Reynolds, that there seems to be a wide difference  
11 of opinion among the various gladiators as to what this  
12 agreement means?

13 You have told us that it means that the parties must  
14 accept the Special Master determination, period.

15 One of the other parties has suggested that it was  
16 open under the agreement to the Licensing Board, to review  
17 claims of a grievous error.

18 Still another party was telling us that the line  
19 is drawn between alleged errors of law, and alleged errors of  
20 fact.

21 What are we supposed to do here?

22 We were not participants to the conference call.  
23 It would be inappropriate for us to discuss the matter with  
24 our present colleague, Mr. Farmakides. We can't get into the  
25 minds of the various counsel.



1                   What, given the situation, should we do in  
2 determining at the threshold what the agreement means in  
3 terms of either Licensing Board review, or Appeal Board  
4 review of the Master's decision?

5                   MR. REYNOLDS: Well, I think that at the very least  
6 we have an agreement among the parties that they were to be  
7 bound to something that the Master was going to do.

8                   CHAIRMAN ROSENTHAL: But what?

9                   MR. REYNOLDS: I think that the problem that —  
10 that there are two questions:

11                   One is, are we looking at a consensual reference  
12 here, which falls under the manual because it is a delegation  
13 for which, whatever the scope, can be recognized under 2753?

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1                   CHAIRMAN ROSENTHAL: Before you get to the  
2 question of whether the manual comes into play, you have  
3 got to determine what the agreement is. Because it is  
4 against that background, I would think, that you would  
5 determine whether it does or does not represent an impermis-  
6 sible delegation by the Licensing Board.

7                   So isn't the starting point, really, what have the  
8 parties agreed to, in terms of what the Special Master is  
9 to do; what review, if any, by a Licensing Board is permitted;  
10 what review, if any, is permitted by the Appeal Board.

11                   Once you decide that question, then you get into  
12 the question of whether the agreement as construed runs afoul  
13 of the redelegation prohibition or is valid.

14                   How are we to decide, given what we have been  
15 told today, what the agreement means?

16                   MR. REYNOLDS: Well, I guess, certainly where I  
17 come out is the Board put out an order on December 10th,  
18 very explicit, unequivocal language.

19                   Nobody at that time -- and I think that language  
20 to the extent there is disagreement with the Applicant's  
21 position -- all the disagreement is in terms of some  
22 qualification of that language. There is a qualifier some-  
23 where. Somebody has to be bound, but, or except.

24                   We went through a very lengthy procedure. We went  
25 through briefing. We went through oral argument on

1 reconsideration. We went through months of the Special  
2 Master's performing his responsibility without one peep  
3 out of anybody that somehow this language is not what it  
4 says it is.

5 CHAIRMAN ROSENTHAL: You say the language is  
6 clear on its face, that as stated in the order, it carries  
7 the clear, unequivocal message that the decision of the  
8 Special Master is to be binding upon the parties forever more?

9 MR. REYNOLDS: I think it is, and I agree in that  
10 respect with the Licensing Board's conclusion when it read  
11 the language.

12 I think it is the only permissible way to read that  
13 language, unless somebody comes in at an appropriate time  
14 and either questions or objects to it.

15 The thing we are doing now, we are coming up  
16 on interlocutory review in a very unusual situation. We are  
17 not trying to look at a procedure that is just about to be  
18 launched to see whether there is unusual delay or if it is  
19 against the public interest to perform this procedure.

20 What happened was everybody sat back and waited  
21 for it to run its course. Then we come back at this time,  
22 when we have a hearing scheduled right around the corner  
23 and we have this tight problem with the scheduling of the  
24 plant, suddenly we come back at this late date and we  
25 start looking at that procedure for the first time to see

1 whether that procedure warrants interlocutory review under  
2 the standard that I think we are all familiar with.

3 MR. SALZMAN: Before you go on on how you explain  
4 the document, the document doesn't say the Licensing Board  
5 is bound by the Special Master's ruling.

6 MR. REYNOLDS: I think that makes it all-inclusive.

7 What we are talking about when we say the parties  
8 are bound is something that perhaps -- I think if the  
9 Licensing Board were bound, perhaps there would be more  
10 ambiguity in the language.

11 I don't see any room for ambiguity when you are  
12 saying the parties are to be bound.

13 MR. SALZMAN: Can the Licensing Board review the  
14 document on its own, on the grounds of procedure error? The  
15 document doesn't say that it can't. It says no parties  
16 shall challenge the findings of the Special Master.

17 Suppose some Licensing Board said, "Ye gods, if  
18 we let that thing stand, some major evidence is going to  
19 be cut out and we will make a wrong decision. That document  
20 has to go."

21 I have read that line four or five times. It  
22 doesn't say that the Board can't do it, or that the Safety  
23 Appeal Board can't do it.

24 Moreover, I thought the context of this document  
25 was we were going to take something out of the busy Licensing

1 Board's process and substitute an independent party to  
2 decide it.

3 But one thing that was said, there was no focus on  
4 appellate rights. If we read the documents, I suppose we  
5 have to give it its full breadth. It may be binding on all  
6 the parties, but it doesn't say it is binding on us or the  
7 Licensing Board.

8 You can't have it both ways.

9 MR. REYNOLDS: My personal view is it is binding  
10 on all the parties and on the Licensing Board and the Appeal  
11 Board.

12 MR. SALZMAN: I have a copy here.

13 MR. REYNOLDS: It says the parties are to be bound  
14 by the Master's determination.

15 MR. SALZMAN: I agree it says that. It says the  
16 above, which merely means a description of what the parties  
17 can do, is accomplished with the express agreement of the  
18 parties to be bound by the determination of the Master.

19 That is the entire substance of the document being  
20 bound.

21 MR. REYNOLDS: I guess when parties enter into  
22 an agreement, there is no way they can bind somebody not a  
23 party to that agreement. I can't stand here and tell you  
24 that you can't sua sponte and take any issue  
25 you want to --

av3  
1 MR. FARRAR: Why not, if it is discovery? Why  
2 can't you go outside and make any agreement you want to  
3 on discovery?

4 MR. REYNOLDS: I agree with that, but I am not  
5 sure I can take the next step, which is, if you exert your  
6 own authority to reach down on your own and pull up an  
7 issue that my agreement -- that I won't bring it to you  
8 and I want appeal and it's not going to be reviewed, I  
9 am not satisfied and I am not sure I am going to go all the  
10 way on it, but I am not satisfied. I can stand here and  
11 tell you that you don't have the authority to do that.

12 MR. FARRAR: I can see you can't with safety and  
13 environmental matters, but can I say -- agree -- this case  
14 looks pretty good, except Mr. Reynolds didn't know what he  
15 was doing. He didn't file enough interrogatories with the  
16 other people and I instruct you, Mr. Reynolds, to file 800  
17 more interrogatories.

18 Can I get into that? If the way you wanted to  
19 handle your case was not to depose anybody, can I tell you  
20 you had to do that?

21 MR. REYNOLDS: I think you can tell me I had to.  
22 I may be wrong.

23 What I am saying is, I don't think if you properly  
24 applied the standard for interlocutory review that that would  
25 be a correct ruling.

av6  
1 MR. FARRAR: Never mind interlocutory.

2 Do I have any business saying at the end that  
3 Reynolds blew the case; he didn't conduct enough discovery.  
4 He might have one. He might have one for his client had he  
5 been smart enough to get enough discovery, and I am going  
6 to step in and tell him to do that.

7 MR. REYNOLDS: You should not be permitted to do  
8 that. Where I come out is, if I enter into a stipulated  
9 settlement to settle the issue and resolve the matter, I don't  
10 want to use that as a fundamental issue as opposed to  
11 discovery, but I think I would walk over and say in a discovery  
12 area I may have to come back and say maybe I misspoke,  
13 because I think when you are talking about a fundamental  
14 issue to finally resolve the case, I can see that you have  
15 overriding supervision.

16 MR. SALZMAN: Suppose two parties have decided  
17 they are not going to present any evidence or a particular  
18 point and the Board, the Licensing Board, says, "I am sorry,  
19 but I want to hear evidence on that point, and if you are  
20 not going to call A, B, C, and D, I will"?

21 MR. REYNOLDS: I would have to say you can't do  
22 that.

23 MR. SALZMAN: I would have to say you haven't read  
24 our decisions lately.

25 MR. REYNOLDS: I have to admit the decision you

1 are thinking about I have not read lately.

2 MR. SALZMAN: Not only that, but some of the  
3 members apparently are rethinking it.

4 As I understood you to say just now, you can't  
5 bind the Safety Board or this Board to an agreement to which  
6 we are not a party. There are many court cases like that.  
7 The question it comes down to is we can look behind this  
8 agreement and the errors that are alleged to have been  
9 caused by the Special Master, at least what looks at first  
10 glance not to be inconsequential.

11 Would it not be of the best interest of your  
12 client, saying, well, it is best to start over. In the long  
13 turn, it is best to hang on to what we can because somewhere  
14 down the road we might be sorry we did this.

15 Is it necessarily in your client's interest? I  
16 think you are saying what I am saying.

17 MR. REYNOLDS: I do understand what you are  
18 saying. I think the factor we have to include in the  
19 equation when we consider my client's best interest is the  
20 overriding public interest and interest of our client in  
21 getting this plant, this Davis-Besse plant, for example,  
22 which is due for an operating permit in the second quarter of  
23 '76, on line on schedule.

24 One of the things that terrifies me more than  
25 anything else about this exercise we are going through today



1 is that we are impacting on the hearing schedule and by  
2 virtue of that, threatening to impact on the plant schedule.

3 You asked me whether it is in my client's best  
4 interest to say, well, perhaps I should back off and walk  
5 away. I guess my first reaction is I don't think that the  
6 errors that have been alleged by the city are ones that they  
7 would succeed on, when ultimately it came before the Appeal  
8 Board, if it ever could come before the Appeal Board.

9 But I think separate and apart from that, what  
10 you are talking about here is balancing of different public  
11 interest and delay, and it seems to me on an interlocutory  
12 basis that that balance comes out clearly on the side of  
13 letting things go forward as they are now scheduled to go  
14 forward without interruption on an interlocutory appeal  
15 basis.

16 CHAIRMAN ROSENTHAL: When is the hearing scheduled  
17 to commence?

18 MR. REYNOLDS: October 30, 1975.

19 CHAIRMAN ROSENTHAL: If the Licensing Board were  
20 called upon to pass upon the question as to whether the  
21 Special Master improperly granted privileged status to  
22 documents on a basis that was not asserted, how long do you  
23 think it would take the Licensing Board to pass upon that  
24 matter?

25 MR. REYNOLDS: I guess your question assumes I

1 have lost arguments all the way up to that point.

2 CHAIRMAN ROSENTHAL: Well, you are telling us  
3 that there is a decided public interest consideration here  
4 in terms of the Perry proceeding moving forward.

5 I gather Davis-Besse -- we are talking about Perry.  
6 I am trying to get your estimate of the delay.

7 MR. REYNOLDS: You are asking how long it would  
8 take the Licensing Board to rule on that isolated question  
9 alone? That question is an easy one, as a matter of law.

10 I think the Master did his job correctly. I would  
11 say to the extent we are talking about additional briefing  
12 and so on that it is bound to interrupt the present schedule  
13 by a couple of weeks at minimum.

14 MR. FARRAR: Why do you need things in briefs?

15 MR. REYNOLDS: From the arguments I hear about  
16 briefs, the parties feel due process is still due somebody  
17 in that regard.

18 MR. FARRAR: If we said the Licensing Board should  
19 review all these claims and see if the Master was right, the  
20 Licensing Board could start tomorrow and we would never have to  
21 hear from you people again.

22 MR. REYNOLDS: On that isolated basis, it may well  
23 be, if the Appeal Board can get to that point, that that would  
24 not take that long.

25 Where I really have difficulty is how you get to

1 that point in view of the other questions that the Appeal  
2 Board asked and have been raised in this proceeding.  
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1 MR. SALZMAN: I assume we can find a way to get  
2 to that expeditiously. If you assume that, would it be  
3 agreeable to all here that we submitted this to the Licens-  
4 ing Board on the existing papers tomorrow?

5 Perhaps we might consider that.

6 MR. REYNOLDS: I guess what I have been asked to  
7 do is quantify the time it's going to take the Licensing  
8 Board to do something at a time when there are a lot of  
9 other things going on before the Licensing Board in connec-  
10 tion with this prehearing.

11 I really thing you have to calculate that whatever  
12 is sent back to the Licensing Board is going to cause some  
13 interruption in the schedule. I think we are very tight under  
14 that schedule now.

15 Now, I guess one way that we could solve the  
16 problem is if all the parties would agree to consent to have  
17 the Davis-Besse Plant licensed and continue with its post-  
18 antitrust review and have its subject — and have that license  
19 subject to the outcome of the antitrust hearing that we would  
20 not have to be quite as concerned.

21 I think Davis-Besse is grandfathered, but it is  
22 not altogether clear under the statute or the law. I believe  
23 there is a dispute in this case as to whether the grandfather-  
24 ing of Davis-Besse is sufficient to permit the license to  
25 issue prior to determination of antitrust review.

1           Of course, we also have the same problem with  
2 Perry and the construction permit which is not grandfathered.  
3 It seems to me the parties would recognize the public interest  
4 that is paramount in that regard and consent, which  
5 Walter Ford has recognized as a permissible procedure, then  
6 this question that you have asked as to how much delay we can  
7 afford is one that becomes less significant.

8           MR. SALZMAN: I would not like to trade horses with  
9 you, Mr. Reynolds.

10           MR. FARRAR: Let me ask you something. To be very  
11 frank, if I wasn't sitting up here and you saw me on the  
12 street and you handed me this document, called "Orders," ap-  
13 pointing Marshal A. Miller a Master, and asked me what that  
14 sentence meant, I would say to you what it meant was the  
15 parties are bound by the ruling of the Special Master to the  
16 extent they shall do whatever he says.

17           They shall not go to the Licensing Board then or  
18 later and they shall not go to the Appeal Board then or  
19 later. They have taken it out of the adjudicatory arena.

20           To that extent, it is plain to me. But I begin  
21 to wonder whether I know how to read. I agree with your  
22 reading of it, but 3 other people tell me it is wrong.

23           Then I look at the minutes, maybe it is res  
24 gestae that only lawyers know about, but I look at  
25 these conference calls and out came the Special Master's

1 report and the new licensing board chairman and the parties  
2 and everybody is talking about an appeal, when can we have an  
3 appeal.

4 I apologize for reading there.

5 Mr. Reynolds stated he wanted a right to reserve  
6 an appeal by the Applicant. That may be because everybody  
7 else was talking about an appeal. I begin to wonder if my  
8 reading is correct.

9 Are you and I the only ones out of step?

10 MR. REYNOLDS: I have a copy of that. If you look  
11 at page 3 of the minutes, it indicates that I stated that I  
12 thought that the order was as plain as you and I have indi-  
13 cated it is.

14 In fact, during that conference call I raised the  
15 matter of the orders, which seems to come as quite a bit of  
16 a surprise to some of the parties that I don't believe had  
17 recalled that the orders had been entered, but passing that,  
18 I think when we started talking about review or appeals or  
19 reconsideration and it becomes clear that Chairman Rigler was  
20 inclined to favor some reconsideration and he indeed pointed  
21 out that he was inclined to do so, not because of those rul-  
22 ings that had sustained privilege, but because in moving  
23 documents, he had seen some documents where the privilege  
24 had been denied and he questioned those rulings.

25 He, then, indicated reconsideration might well be

1 appropriate in limited areas.

2 I stated, while I felt I was bound and I believe  
3 these minutes reflect that, that if everybody else was going  
4 to get reconsideration, then certainly applicants are en-  
5 titled to reconsideration.

6 In terms of Mr. Salzman's question about taking  
7 certain documents and have them reconsidered, what that does,  
8 that sort of links to the facts that were brought out here by  
9 Mr. Salzman, that the applicants feeling bound, turned over  
10 some 600-something documents. We did not agree with a number  
11 of his rulings, but we turned these documents over. We turned  
12 them over immediately.

13 We advised we were going to turn them over  
14 immediately right from the outset. We are talking about  
15 going back --

16 MR. SALZMAN: Let me interrupt, again. How many  
17 documents were there turned over by your client?

18 MR. REYNOLDS: 2537 -- I am sorry, that is not  
19 -- 735.

20 MR. SALZMAN: How many disputed? 160?

21 MR. REYNOLDS: How many rulings were against our  
22 claim of privilege?

23 162.

24 MR. SALZMAN: No, not, the other way around.

25 MR. REYNOLDS: 537 upheld the claim of privilege.

1 MR. SALZMAN: How many of those rulings upholding  
2 privilege are in dispute now?

3 MR. REYNOLDS: The number I heard earlier was  
4 118 -- or 186 or 189 was the number that Mr. Vogler indicated  
5 earlier.

6 I would have to go back and count, but that  
7 roughly, I think, is the ball park figure.

8 MR. VOGLER: 186.

9 MR. REYNOLDS: 186 is the number disputed, or that  
10 are being challenged.

11 CHAIRMAN ROSENTHAL: Mr. Reynolds, we are going  
12 to at this point take a 10-minute recess to enable the Board  
13 to confer on a point Mr. Salzman raised.

14 (Recess.)

15 CHAIRMAN ROSENTHAL: Mr. Reynolds, you may  
16 continue.

17 MR. REYNOLDS: I guess I am not altogether clear  
18 why I am still up here unless there are more questions. I  
19 think that we have touched on all the issues. We have briefed  
20 them very thoroughly.

21 I feel that, certainly if anybody has any ques-  
22 tions that I would be more than happy to answer them, but I  
23 don't know that there is something in addition.

24 CHAIRMAN ROSENTHAL: Thank you, Mr. Reynolds.  
25 Mr. Hjelmfelt, you may have your rebuttal. You



1 have about 17 minutes left. There is not a necessity that you  
2 use all of them.

3 I think the issue has been fairly thoroughly  
4 explored. Your rebuttal should be confined to responding  
5 to points that may have been made by other counsel.

6

7

8 MR. HJELMFELT: Thank you.

9 I will not need nearly 17 minutes.

10 I would like to comment on the time frame of  
11 the present proceeding. It is my understanding and I haven't  
12 seen the document, that the Department has filed a motion re-  
13 questing a 30-day delay in the procedural dates in this pro-  
14 ceeding for reasons unrelated to this issue with respect to  
15 the question that Mr. Salzman raised as to whether, if that  
16 was remanded, Cleveland would want to file any more briefs.

17 With respect to the law on attorney-client privi-  
18 lege and work product, Cleveland has said all it's got to say  
19 and would not need an opportunity to file another brief.

20 With respect to the question raised by the  
21 Applicant's having already released the documents, but only  
22 making the additional comment at the time they did release  
23 those documents they were aware that at least the City of  
24 Cleveland was talking about some sort of review of the Special  
25 Master's decision.

1           With respect to the question of waiver of the  
2 privilege for being not only -- not being made at the  
3 appropriate time that the waiver should have been made, the  
4 Applicant cites 2 cases. In both instances, those cases in-  
5 volve a situation in which the parties who are now later  
6 claiming the attorney-client privilege did not have an oppor-  
7 tunity at the earlier stage in the proceeding to raise that  
8 issue, that they had never got to a point where it was appro-  
9 priate to raise an attorney-client issue.

10           Those cases are different from this case where  
11 we were squarely faced with a time for stating just what  
12 privileges were being claimed.

13           I have nothing further I need to say at this  
14 point.

15           MR. FARRAR: Mr. Hjelmfelt, let me ask you some-  
16 thing, the same question I asked Mr. Reynolds.

17           Why shouldn't I just decide the case in terms of  
18 what looks like to me to be the plain language of the agree-  
19 ment? Because besides deciding this case, it may be useful  
20 for the future, because then I won't have to listen to 4  
21 people telling me what they thought they meant when they  
22 entered into an argeement.

23           I will encourage the parties in the future if they  
24 think the Licensing Board has erroneously reflected the  
25 agreement, to file something with the Licensing Board. The

1     worst thing we can do here to me, is to get what people  
2     meant about some language that seems to be unambiguous.

3             MR. HJELMFELT: I don't think you need to guess,  
4     because I think the subsequent events as memorialized in the  
5     minutes of the 2 conference calls on June 20th and June 24th,  
6     clearly demonstrate there was no meeting of the minds as to  
7     exactly what that language meant.

8             MR. FARRAR: Mr. Rigler says it is now unambiguous.

9             MR. HJELMFELT: Yes, but on June 24th, did he not  
10    believe so.

11            CHAIRMAN ROSENTHAL: Thank you.

12            Miss Urban, do you have any rebuttal?

13            MS. URBAN: I have no rebuttal, but I would also  
14    like to state if there is a remand, the Department of Justice  
15    feels there is no question to rebrief the question of privi-  
16    lege.

17            MR. VOGLER: The Staff has already recommended  
18    that on oral argument and we have nothing further, your Honor.

19            CHAIRMAN ROSENTHAL: Thank you.

20            I wish to thank counsel for all of the parties  
21    for their helpful presentations.

22            I wish further to request at least one counsel for  
23    each party, if at all possible, to remain here for approxi-  
24    mately one-half an hour. It is possible that within that  
25    period of time, the Board will be prepared to announce a

1 decision in the matter. If not, you will be so advised, and  
2 released.

3 So we will take a recess at this point.

4 MR. REYNOLDS: Could I just, before you recess,  
5 Mr. Salzman asked for a copy of the orders which appointed  
6 the Special Master. I don't know if everybody else has one.

7 I happen to have a copy here. If you are  
8 interested in seeing it, we can make it available and not --

9 MR. SALZMAN: It is not really necessary now.  
10 Thank you.

11 CHAIRMAN ROSENTHAL: We will recess for one-half  
12 hour.

13 (Recess.)

14 CHAIRMAN ROSENTHAL: The Board has determined that  
15 it is not in a position to render its determination on the  
16 issues before it this afternoon. It will, however, issue an  
17 order on the questions before it no later than this Friday.  
18 The order may very well simply state the Board's conclusions  
19 with the indication that an opinion setting forth the Board's  
20 reasoning will follow. Upon the entry of the order, counsel  
21 will be notified of its content by telephone.

22 The case is under submission.

23 (Whereupon, at 4:32 p.m., the oral argument was  
24 concluded.)

25