

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Sept 12, 1975

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )

THE TOLEDO EDISON COMPANY and )  
THE CLEVELAND ELECTRIC ILLUMINATING )  
COMPANY )  
(Davis-Besse Nuclear Power Station, )  
Units 1, 2 & 3) )

NRC Docket Nos. 50-346A  
50-500A  
50-501A

THE CLEVELAND ELECTRIC ILLUMINATING )  
COMPANY, ET AL. )  
(Perry Nuclear Power Plant, )  
Units 1 & 2) )

NRC Docket Nos. 50-440A  
50-441A

STAFF'S BRIEF IN RESPONSE TO THE ORDER  
OF THE ATOMIC SAFETY AND LICENSING  
APPEAL BOARD OF AUGUST 14, 1975

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September 12, 1975

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INTRODUCTION

This brief is filed by the NRC Staff in response to the Order of the Atomic Safety and Licensing Appeal Board, dated August 14, 1975, concerning the brief filed by the City of Cleveland in support of its "Notice of Appeal and Exceptions" of July 28, 1975. The appeal concerns the Atomic Safety and Licensing Board's appointment of a Special Master, the role played by the Special Master, and the report of the Special Master concerning claims of privilege asserted by one applicant in this proceeding, the Cleveland Electric Illuminating Co. (CEI). The Staff's brief will address itself to those issues on which the Appeal Board requested views in its Order of August 14, 1975.

STATEMENT OF THE CASE

This proceeding involves a prelicensing antitrust review, pursuant to Section 105c of the Atomic Energy Act of 1954, as amended, <sup>1/</sup> concerning 1/ 42 U.S.C. §2135(c).

the Davis-Besse Nuclear Power Station and the Perry Nuclear Power Plant, Units 1 & 2.

On September 16, 1974 a hearing was held at which the Licensing Board heard arguments with respect to numerous objections that had been raised concerning documentary discovery. On October 11, 1974, the Board issued its Order on Objections to Interrogatories and Document Requests in which the Board directed each party who asserted a privilege as a ground for withholding any document from discovery to identify each such document as follows:

The document shall be identified by date, person(s) preparing the document, recipient(s), subject matter of the document, ... and brief statement of the basis for asserting privilege. 2/

During the course of discovery a dispute arose as to certain documents which CEI claimed were privileged and accordingly withheld. In order to resolve the dispute the Licensing Board with the agreement of all the parties on December 10, 1974, appointed a Special Master -

To examine, in camera, all documents claimed to be within the attorney-client or attorney-work product privilege, and to determine whether or not such claim of privilege is sustained... The above is accomplished with the express agreement of the parties to be bound by determinations of the Master. This was discussed and agreed upon during a telephone conference call on December 6, 1974 with the Chairman of this Board. 3/

2/ Order on Objections to Interrogatories and Document Requests, October 11, 1974, p. 47.

3/ Order appointing Marshall E. Miller, Master, December 10, 1974.

On June 19, 1975, the Special Master issued his Report containing his rulings on CEI's claims of privilege.

Claiming, in r alia, that the Master had granted privilege to documents with respect to which CEI had waived their claims of privilege and had held other documents privileged on grounds other than those expressly asserted by CEI for those documents, the City and the Department of Justice requested Licensing Board review of the Special Master's rulings.<sup>4/</sup> The City also asserted that the agreement among the parties to be bound by the Special Master's determinations <sup>5/</sup> was intended to preclude review only by the Licensing Board and was never intended to constitute a waiver of review by the Appeal Board. <sup>6/</sup> The Licensing Board decided that the parties were bound by the agreement but indicated that the Special Master would reconsider his rulings after oral arguments by the interested parties. <sup>7/</sup> After oral argument on June 30, 1975, the Special Master, also on June 30, 1975, sustained the bulk of his prior findings. <sup>8/</sup>

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<sup>4/</sup> Minutes of Conference Call with Board Chairman on June 24, 1975, p. 2.

<sup>5/</sup> See Note 3, supra.

<sup>6/</sup> See Note 4, supra.

<sup>7/</sup> Conference Call of June 25, 1975.

<sup>8/</sup> Transcript of Hearing on June 30, 1975, pp. 81-86. See Report of Special Master of July 29, 1975.

On July 8, 1975, the City and the Department of Justice filed motions requesting the Licensing Board to certify to the Appeal Board the issues raised by the Special Master's findings of privilege. <sup>9/</sup> The City's Motion was denied by the Board on July 21, 1975. <sup>10/</sup> On July 28, 1975, the City filed a Notice of Appeal and Exceptions to the Appeal Board. After receiving the City's brief in support of its Notice of Appeal and Exceptions, the Appeal Board, by Order of August 14, 1975, requested, inter alia, the parties to include in their answering briefs a discussion of the question of whether the Appeal Board should direct certification of the question of the validity of the role played by the Special Master. On August 27, 1975, the Licensing Board denied the Department of Justice's request for certification.

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<sup>9/</sup> City of Cleveland's Motion for Certification of Special Master's Decision, As Supplemented, on Claims of Privilege to the Atomic Safety and Licensing Appeal Board; Motion for Certification to the Atomic Safety and Licensing Appeal Board of an Appeal of the Special Master's Findings of Privilege.

<sup>10/</sup> Ruling of the Board with Respect to City of Cleveland's Motion For Certification of Special Master's Decision on Claim of Privilege, July 21, 1975.



STATEMENT OF THE ISSUES AS SET FORTH BY THE APPEAL BOARD

(1) Whether the Atomic Safety and Licensing Appeal Board should direct the Atomic Safety and Licensing Board to certify to the Appeal Board the question of the validity of the role played by the Special Master.

(2) Whether the role of the Special Master was valid.

(3) Whether the Licensing Board should treat the Special Master's Report as a recommendation only and entertain objections thereto.

(4) Whether the Appeal Board should direct certification of the merits of the Special Master's rulings.

(5) Whether the Special Master's rulings were correct concerning:

(a) Whether the Special Master erred in finding documents privileged and not subject to discovery on grounds other than those asserted by the party claiming the privilege.

(b) Whether the Special Master erred in sustaining claims of privilege for documents for which CEI was unable to prove the authors, the recipients, the distributees, or the addressees.

ARGUMENT

I. THE ROLE OF THE SPECIAL MASTER IN THIS PROCEEDING WAS VALID AND THE ATOMIC SAFETY AND LICENSING APPEAL BOARD SHOULD NOT DIRECT THE ATOMIC SAFETY AND LICENSING BOARD TO CERTIFY TO THE APPEAL BOARD THE QUESTION OF THE VALIDITY OF THE ROLE PLAYED BY THE SPECIAL MASTER.

It is clear that the Appeal Board has the authority under 10 CFR Sections 2.718(i) and 2.785(b) of the Rules of Practice, to direct the Licensing Board to certify issues to the Appeal Board for its determination. In the Matter of Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2) (hereinafter Seabrook). <sup>11/</sup> However, it is the Staff's position that the appointment of the Special Master to review the documents claimed to be privileged by CEI was consistent with the delegation of authority to the Licensing Board as set forth in the AEC Manual and the Commission's Rules.

The AEC Manual provides that "...the delegated authority of Atomic Safety and Licensing Boards may not be further redelegated." <sup>12/</sup> The authority delegated to the Licensing Board is set forth in the Commission's Rules of Practice at 10 CFR §2.718. Under this Section the Licensing Board is responsible for the conduct of this hearing, including, inter alia, the authority to regulate the course of the hearing and the conduct of the participants. To this end the Commission's Rules provide that the parties may among other things stipulate as to the procedure to be followed in the proceeding. 10 CFR §2.753. <sup>13/</sup>

<sup>11/</sup> ALAB-271, NRCI-75/5 478, 482 (May 19, 1975).

<sup>12/</sup> Chapter 0105, Section 034.

<sup>13/</sup> "[T]he parties may stipulate in writing...or orally during the hearing, any relevant fact.... The parties may also stipulate as to the procedure to be followed in the proceeding. Such stipulations may, on motion of all parties, be recognized by the presiding officer to govern the conduct of the proceeding."

The Staff notes that the utilization of a Special Master by a Licensing Board to handle prehearing discovery disputes is not a new or novel innovation in NRC antitrust licensing proceedings. The Licensing Board in Duke <sup>14/</sup> successfully utilized the services of Special Master to handle prehearing discovery problems. The Special Master in the Duke matter relieved the Licensing Board of the task of reviewing prehearing discovery disputes and in Staff's opinion expedited the licensing process.

The services of a Special Master to handle pretrial discovery matters has also been successfully utilized by the Courts in complex antitrust matters. For example, in First Iowa Hydro Electric Coop. v. Iowa-Illinois Gas and Electric Co., <sup>15/</sup> an action for treble damages and injunctive relief brought under the Sherman Act against ten utilities and an unincorporated association on the grounds that the defendants had acted to prevent the issuance of certain construction permits. Early in discovery the trial judge appointed a master to examine the volumes of evidence that were being submitted by the parties and ordered that the master hear the entire case and make such rulings, findings of fact, and conclusions of law as necessary and report them to the court. <sup>16/</sup> The 8th

<sup>14/</sup> In the Matter of Duke Power Company (Oconee Units 1, 2 & 3 and McGuire Units 1 and 2) Docket Nos. 50-269A, 50-270A, 50-287A, 50-369A and 50-370A. Prehearing Order Number 8 (Dated October 25, 1973) (Issue involved attorney-client privilege).

<sup>15/</sup> 245 F.2d 613 (8th Cir.), cert. denied, 355 U.S. 871 (1957).

<sup>16/</sup> Id. at 626.

Circuit held that there was an obvious possibility of oppression and hardship unless discovery proceedings were expeditiously and continually supervised by a master, and therefore the appointment was appropriate. <sup>17/</sup>

Accordingly, the Staff submits: (1) there is no conflict between the procedure employed by the Licensing Board and the AEC Manual, (2) the stipulation was agreed to by all parties and (3) the Licensing Board properly exercised its authority in appointing a Special Master pursuant to the stipulation of the parties.

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<sup>17/</sup> Id.

II. THE LICENSING BOARD SHOULD TREAT THE SPECIAL MASTER'S REPORT AS A RECOMMENDATION ONLY.

As discussed above in Part II, the NRC Staff believes that the Licensing Board did not err in appointing the Special Master and ruling that his report was binding on the parties. However, in view of the nature of the objections by the City and the Department concerning the findings of the Special Master, (See Part IV, infra.) the misunderstanding of the parties as to the meaning of "the agreement", <sup>18/</sup> and the fact that in the absence of the stipulation to refer the privilege claims to the Special Master the Licensing Board would have had the sole responsibility to rule on the privilege claims, the Staff believes that the Licensing Board should review the Special Master's Reports, treating them as recommendations only. <sup>19/</sup>

The Staff has argued that the role of the Special Master was valid. Assuming arguendo that the Appeal Board rules that it was not, the Staff believes, that the Licensing Board should independently review the contested documents.

<sup>18/</sup> See Notes 3 and 4, supra.

<sup>19/</sup> The Staff believes that any suggestion that the members of the Licensing Board should not be exposed to documents which ultimately are protected from discovery through application of privilege is unnecessary. In all trials without a jury, the judge is considered able to exclude evidence before him and yet render a fair decision unaffected by the known but excluded evidence. The members of the Licensing Board are no less able.

III. THE APPEAL BOARD SHOULD NOT DIRECT CERTIFICATION OF THE MERITS OF THE SPECIAL MASTER'S RULINGS

The Staff believes that any consideration now by the Appeal Board of the merits of the Special Master's rulings would be premature. The Licensing Board is responsible for ruling on matters of evidence, 20/ and should have the opportunity to issue its rulings. In short, Staff asserts that the issue of the merits of the Special Master's rulings are not ripe for appellate review at this time.

IV. THE SPECIAL MASTER ERRED AS A MATTER OF LAW

A. THE SPECIAL MASTER ERRED IN FINDING DOCUMENTS PRIVILEGED AND NOT SUBJECT TO DISCOVERY ON GROUNDS OTHER THAN THOSE ASSERTED BY THE PARTY CLAIMING THE PRIVILEGE

CEI has claimed that numerous documents sought in discovery are privileged and thus not discoverable. For the purpose of this brief two categories of such documents will be considered: (1) those documents claimed by CEI to be protected only by the attorney-client privilege, and (2) those documents claimed by CEI to be privileged only by virtue of the work product rule. Certain documents claimed by CEI to be protected only by the attorney-client privilege were found by the Master to be privileged under the work product rule. Certain documents claimed by CEI to be protected only by the work product rule were found by the Master to be privileged under the attorney-client privilege.

20/ 10 CFR §§2.718(c), (1).

Both the attorney-client privilege and the attorney's "work product" privilege are available to parties in proceedings before the Nuclear Regulatory Commission. Section 2.740(b)(1) of the Rules of Practice specifically excepts privileged matters from the scope of discovery. <sup>21/</sup> And Section 2.740(b)(2) provides for protection of disclosure during discovery of the attorney's work product. <sup>22/</sup>

It is well established that the attorney-client privilege can be claimed only by the client, <sup>23/</sup> and can be considered waived if not asserted. <sup>24/</sup> Furthermore, the client has the burden of establishing the existence of the privilege. <sup>25/</sup> It is clear, then, that CEI waived the attorney-client privilege when it failed to specifically assert it. Having failed to specifically assert the attorney-client privilege when claiming it for other documents, CEI cannot now claim its benefit. The privilege is "personal" to CEI, and the Special Master cannot find it on behalf of CEI.

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<sup>21/</sup> 10 CFR §2.740(b)(1).

<sup>22/</sup> 10 CFR §2.740(b)(2).

<sup>23/</sup> 8 Wigmore, Evidence §2321, at 629 (McNaughten rev. 1961).

<sup>24/</sup> Magida v. Continental Can Co., 12 F.R.D. 74, 77 (S.D.N.Y. 1951) held that the intent to waive may be expressed by an "omission to speak and act."

<sup>25/</sup> International Paper Co. v. Fireboard Corp., 63 F.R.D. 88, 94 (D. Del. 1974); McLeice v. Oil Carriers Joint Venture, 22 F.R.D. 14 (E.D. Pa. 1958).

The Special Master also found that certain documents claimed by CEI to be protected from discovery under the attorney-client privilege were not so protected but were within the work product doctrine and so not discoverable for that reason. For the reasons noted below it is submitted that the Special Master's protection of the documents on the ground of work product not asserted by CEI was erroneous.

When CEI asserted only the attorney-client privilege with respect to one category of documents and the work product rule with respect to a different category, the only reasonable inference is that CEI was not claiming protection under both the work product and the attorney-client doctrine. Surely, CEI could have asserted both privileges. But CEI deliberately chose not to assert both, and therefore should be held to have waived the unasserted work product rule with respect to this category of documents.

B. THE SPECIAL MASTER ERRED IN SUSTAINING CLAIMS OF PRIVILEGE FOR DOCUMENTS FOR WHICH CEI WAS UNABLE TO PROVE THE AUTHORS, THE RECIPIENTS, THE DISTRIBUTEES OR THE ADDRESSEES

The party asserting a privilege to withhold a document from discovery has the burden of showing the existence of the privilege with respect to that particular document. <sup>26/</sup> Thus the party asserting that

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<sup>26/</sup> Id.



the attorney-client privilege protects a document from discovery must show that the document was a confidential communication by that party as a client to his attorney for a purpose of receiving professional legal services. <sup>27/</sup> And the party asserting the protection of a document under the work product doctrine as embodied in §2.740(b)(2) of the Rules of Practice must establish that the document will disclose the mental impressions, legal theories, conclusions or opinions of that party's attorney concerning the proceeding, or was prepared in anticipation of or for a hearing. <sup>28/</sup>

CEI has been unable to identify the authors of certain documents claimed by it to be privileged. Thus with respect to these documents it is not known whether they were written by either the client or the attorney. That being so, it is hard to see how such documents can be protected under either the attorney-client privilege or the work product rule. <sup>29/</sup> Staff's position therefore is that when CEI cannot specifically identify the author of a document, that document is discoverable.

<sup>27/</sup> See 8 Wigmore, Evidence (McNaughton ed. 1961) §2292 at 554.

<sup>28/</sup> 10 CFR §2.740(b)(2).

<sup>29/</sup> The case of Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) is particularly pertinent with respect to CEI's work product claim when the author of the document is admittedly unknown. In that case documents were claimed to be authored by the client's attorneys, but were held by the court not protected from discovery because the client could not identify which particular attorney was the author. Id. at 693-94.

Similarly, CEI has been unable to identify the persons to whom certain other documents were distributed. The Staff believes that this fact alone, like unknown authorship alone, should be sufficient to render the documents discoverable.

#### CONCLUSION

Accordingly, the Staff submits that:

(1) The Atomic Safety and Licensing Appeal Board should not direct the Atomic Safety and Licensing Board to certify to the Appeal Board the question of the validity of the role played by the Special Master.

(2) The role of the Special Master was valid.

(3) The Licensing Board should treat the Special Master's Report as a recommendation only.

(4) The Appeal Board should not direct certification of the merits of the Special Master's rulings.

(5) The Special Master's rulings were incorrect as a matter of law.

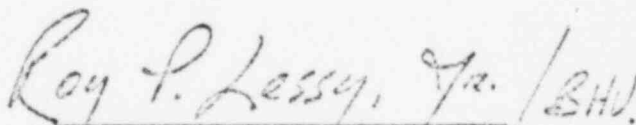
(a) The Special Master erred in finding documents privileged and not subject to discovery on grounds other than those asserted by the party claiming the privilege.

- (b) The Special Master erred in sustaining claims of privilege for documents for which CEI was unable to prove the authors, the recipients, the distributees, or the addressees.

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CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF'S BRIEF IN RESPONSE TO THE ORDER OF THE ATOMIC SAFETY AND LICENSING APPEAL BOARD OF AUGUST 14, 1975, dated September 12, 1975, in the captioned matter, have been served upon the following by deposit in the United States mail, first class, or air mail this 12th day of September 1975:

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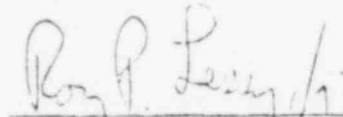
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