Sept. 12, 1975

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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, Unit 1)	)	Docket Nos. 50-346A 50-440A 50-441A
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

APPLICANTS' BRIEF IN RESPONSE TO THE AUGUST 14, 1975 ORDER OF THE APPEAL BOARD

Applicants file this brief in response to the Order of the Appeal Board dated August 14, 1975, and in answer to the brief of the City of Cleveland filed with the Appeal Board on August 12, 1975. The appeal concerns questions relating to the Licensing Board's reference to a Special Master, with the consent of all parties hereto, of the discovery determinations regarding claims of attorney-client and attorney-work product privilege asserted by two of the five Applicants involved in this proceeding, namely, The Cleveland Electric Illuminating Company ("CEI") and Duquesne Light Company ("DL"), and by the Department of Justice ("DOJ").

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BACKGROUND STATEMENT

The privileged document controversy has been one of the most time-consuming aspects of the prehearing discovery process in this antitrust proceeding. In accordance with the Licensing Board's Order on Objections to Interrogatories and Document Requests, issued approximately one year ago on October 15, 1974, CEI, DL and DOJ asserted timely claims of privilege with respect to certain documents which they believed were entitled to protection from disclosure.[1/] The claims by CEI -- which are, in part, being challenged by the City of Cleveland ("City") on this appeal -- were ultimately made with respect to some 735 documents (approximately 3% of CEI's total document production); these claims rested on both the attorney-client and the attorney-work product privilege.[2/]

On December 6, 1974, the then Chairman of the Licensing Board, John B. Farmakides, initiated a conference

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1/ The other three Applicants, the Intervenors and the NRC Staff either claimed no documents as privileged, or, in the case of The Toledo Edison Company, made an initial privilege claim with respect to a handful of documents, but then subsequently withdrew it and produced the material.

2/ DL initially claimed protection as to 5 documents, and later added 6 more documents, all of which were said to be within the attorney-client privilege. The claims of DOJ originally dealt with 14 documents; however, by partial waiver of its claims in a letter dated April 1, 1975, a copy of which is on file with the Licensing Board, DOJ reduced this number to 11 documents, or parts thereof, being withheld from disclosure as attorney-client confidential communications and as attorneys' work product material.

telephone call involving counsel for all parties to discuss how best to handle the privilege claims. It was agreed in that phone call that the matter should be referred to a Special Master who would undertake an in camera examination of the documents and rule on the assertions of privilege. In a subsequent Order, issued on December 10, 1974, the Licensing Board appointed Marshall E. Miller, a lawyer and full-time member of the Atomic Safety and Licensing Board Panel, as Special Master and directed him "to determine whether or not such a claim of privilege is sustained" and to make a report to the Licensing Board "as to the reasons and disposition therefor." The Order clearly stated that referral of the privilege claims:

> * * * is accomplished with the express agreement of the parties to be bound by the determinations of the Master. This was discussed and agreed upon during a telephone conference call on December 6, 1974 with the Chairman of the Board. [Emphasis added.]

No party objected to the December 10, 1974 Order, either with respect to the Licensing Board's authority to make such an appointment or with respect to the Board's statement of the agreement reached among counsel regarding the binding effect of the Master's rulings.

On March 14, 1975, DOJ served upon CEI an extensive set of interrogatories relating to CEI's privilege

claims.[3] No such interrogatories were ever formulated by the City or the NRC Staff. Pursuant to agreement by counsel, the DOJ interrogatories were answered in two segments, on April 15 and 18, 1975, and copies of CEI's responses, together with the 735 documents referenced therein, were simultaneously delivered to the Special Master. DOJ's objections to the answers were thereafter resolved by written correspondence among counsel dated April 23 and May 5, 1975, copies of which were also furnished to the Special Master.

Pursuant to a prearranged schedule, all parties filed with the Special Master on April 25, 1975 extensive briefs discussing the legal principles applicable to a resolution of the privilege claims. Reply briefs were submitted on May 2, 1975. Thereafter, by leave of the Licensing Board, CEI submitted an affidavit prepared by its then Corporate Solicitor, Donald H. Hauser, clarifying certain aspects of the earlier interrogatory responses ("Hauser Affidavit"). Over objections by DOJ, the NRC Staff and the City, the Special Master was instructed by the Board to receive the Hauser Affidavit but not to accept as fact, on the basis of the affidavit alone, the conclusory

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3/ Similar interrogatories were served by DOJ upon DL and answers thereto were timely filed. This appeal does not involve any challenge to DL's privilege claims, except in the broadest sense of the Master's authority to issue a binding ruling thereon, which is discussed infra.

assertions therein "as to whether individuals [referenced in any of CEI's submitted documents] were members of the [corporate] 'control group' or were acting pursuant to direction of counsel."[4/]

Due to the fact that Mr. Miller had, since his assignment herein, been appointed to two licensing boards involved in antitrust proceedings, it became necessary to relieve him of his responsibilities as Special Master. On May 2, 1975, the Licensing Board designated Frederic J. Coufal, also a lawyer who is a full-time member of the Atomic Safety and Licensing Board Panel, "to assume the duties of Special Master." Order of the Board Designating Change in Special Master to Review Claims of Privilege, dated May 2, 1975.

The new Special Master completed his in camera review of the largest portion of the documents before him -- i.e., those submitted by CEI -- and issued his initial Report as to their privileged status on June 9, 1975.[5/] He determined that 573 of the CEI documents were entitled to pro-

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4/ Memorandum and Order of the Board with Respect To Special Master's Receipt of Affidavit by Donald Hauser of May 22, 1975 Relating to Privileged Documents, dated June 3, 1975 (pp. 3-4). See also Ruling of the Board With Respect To Motion of City of Cleveland to Strike or Reply to Affidavit of Donald H. Hauser, dated June 11, 1975.

5/ Thereafter, on July 3, 1975, two separate Reports were issued by the Special Master dealing with the privilege claims asserted by DL and DOJ, respectively. These two Reports were not challenged.

tection from disclosure; another 162 of said documents were found to be non-privileged material which should be produced.6/

In a conference telephone call initiated by the present Chairman of the Licensing Board, Douglas V. Rigler, on June 24, 1975, the City and DOJ objected to the Special Master's Report and indicated that they intended to seek review of the decision. Upon being reminded by the Applicants of the parties' prior agreement "to be bound" by the Master's ruling, as embodied in the Licensing Board's Order of December 10, 1974, a request was made and granted to have the matter returned to the Special Master for reconsideration. Additional briefs were then filed in support of the various objections to the Master's initial Report and, on June 30, 1975, the Special Master heard oral argument. He thereafter modified his original Report by reversing himself as to 5 documents.7/

Applicants, adhering to their agreement "to be bound" by the Special Master's decision, promptly delivered to the

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6/ An additional 13 documents, which the Special Master had been unable to locate in the submitted material but which were subsequently delivered to him, were treated in a later Report dated July 29, 1975. Eleven of the 13 documents were considered privileged; the two others were to be produced as non-privileged.

7/ One document which had originally been accorded privileged status was, on reconsideration, found to be subject to production. Four documents which had been ordered for production were, on reconsideration, found to be privileged. See Transcript of June 30, 1975 Hearing Before Special Master, at pp. 81-86.

Central Document Depository for inspection and copying the material which the Special Master determined to be non-privileged. Thereafter, both the City and DOJ requested that the Licensing Board certify to the Atomic Safety and Licensing Appeal Board the rulings of the Special Master sustaining a privilege. These requests for certification were denied on July 21, 1975 and August 27, 1975, respectively.[8/] The City noticed the present appeal on July 28, 1975.

STATEMENT OF ISSUES

The issues raised on this appeal, as expanded sua sponte by the Appeal Board, are set forth in the Appeal Board's Order of August 14, 1975, to wit:

1. Whether the Appeal Board should direct certification of the question of the validity of the role played by the Special Master in this proceeding.

2. Whether that role was valid.

3. Assuming that role was not valid, whether the Appeal Board should remand the matter to the Licensing Board with instructions to treat the Special Master's rulings as recommendations or reports and to entertain objections thereto.

3/ See Ruling Of The Board With Respect To The City of Cleveland's Motion For Certification Of Special Master's Decision On Claims of Privilege, dated July 21, 1975 and Ruling of The Board On Request For Certification By The Department of Justice Of An Appeal Of The Special Master's Findings Of Privilege, dated August 27, 1975.

4. Assuming that role was valid, whether the Appeal Board ought to direct certification of the merits of the Special Master's rulings.

5. If certification of the merits of the Special Master's rulings is appropriate, whether those rulings are correct.

ARGUMENT

I

THE APPEAL BOARD SHOULD NOT DIRECT THAT THE QUESTION OF THE VALIDITY OF THE SPECIAL MASTER'S ROLE BE CERTIFIED FOR APPEAL BOARD REVIEW

The certification question raised by the Appeal Board on its own motion -- as distinguished from the separate certification question to which a fleeting reference is made in the City's appeal brief (see discussion infra at pp. 28-37) -- focuses in the first instance on the procedural aspects of the consensual referral below of all privilege claims to a Special Master for a binding decision. Within this framework, the threshold consideration is whether Section 2.718(i) of the Commission's Rules of Practice should be invoked in the present circumstances to precipitate immediate appellate review of the particular reference procedure agreed upon by the parties.

Section 2.718(i) provides for certification to the Appeal Board of Licensing Board decisions either (a) at the direction of the presiding officer of the Licensing Board, or (b) at the direction of the Appeal Board itself under the authority delegated to it pursuant to Section 2.785(b)(1) of the Commission's Rules. The latter procedure is our immediate concern here. To our knowledge, the Appeal Board has not heretofore exercised its certification prerogative under Section 2.718(i) in the absence of a specific request that it do so by a complaining party. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, NRCI-75/5, 478, 481 (May 21, 1975). But compare id. at nn. 9 and 10, concerning Section 2.718(i) review by the Commission itself.

In the present situation, no such certification request has been made with respect to the question whether the Licensing Board acted properly in referring, with the consent of all parties, the privilege claims to a Special Master for a binding decision. Indeed, the City states unequivocally in its appeal brief that it "does not herein question whether the presiding officer has the authority to delegate his responsibility to a Special Master * * *" (p. 9 n. 10). It acknowledges that the reference was pursuant to an "agreement of all parties, which included [the City of] Cleveland" (ibid.); that said agreement contemplated "that there was to be no review by the [Licensing] Board of

the Special Master's decision" (p. 17); and that it was "precisely review by the Board that the parties sought to avoid" by stipulating to the referral procedure in order "to isolate the Board from the documents" (p. 23).

We alert the Appeal Board to the City's position on this point, not to suggest that a direction by the Appeal Board under Section 2.718(i) for certification of this particular issue cannot be made in the circumstances (i.e., where there is no request therefor), but rather to highlight Applicants' view that the Appeal Board should not take such action here. In this regard, we note the observation of the Appeal Board in Public Service Co. of New Hampshire, supra NRCI-75/5 at p. 482-483:

> Unlike an appeal, a request for a Section 2.718(i) certification does not invoke our jurisdiction as a matter of right but, instead, seeks simply the exercise by us of a discretionary power.

Obviously, that discretion is not unbridled. As the Appeal Board stated in Public Service Co. of New Hampshire (id. at 483):

> We believe, then, that at the very minimum, a party asking that we invoke our Section 2.718(i) certification authority must establish that a referral would have been proper; i.e., that failing a certification, the public interest will suffer or unusual delay or expense will be encountered (emphasis added).

Significantly, in the present proceeding there has been no suggestion by any party that the Special Master referral procedure has, in and of itself, had an adverse impact on the public interest or resulted in unusual delay or expense. To the contrary, the procedure was agreed upon to accommodate the parties' desire for a thorough in camera review of the privilege claims within the prescribed discovery period and without compromising the integrity of the Licensing Board. It was embodied in an interlocutory order on December 10, 1974, which, to this day, has not been challenged -- either as being contrary to the public interest or as being otherwise invalid.

In these circumstances, the Appeal Board should, we believe, be even more guarded in exercising its discretionary power under Section 2.718(i) than might be the case where a questionable procedure has actually been challenged. In analogous situations, the Appeal Board has been disinclined to review procedural rulings by the Licensing Board which have been accepted by the parties without objection. See, e.g., Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-116, RAI-73-4, 258 (April 17, 1973) (failure to object to Licensing Board ruling on motion to quash subpoena); Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear 1),

ALAB-222, RAI-74-8, 229, 240 (August 6, 1974) (failure to object to Licensing Board's use of quorum rule). Similarly, the weight of judicial authority supports the proposition that appellate review of the appointment of a Special Master is unavailable where no timely objection has been made thereto. See De Costa v Columbia Broadcasting System, Inc., ___ F.2d ___, No. 73-1391 (1st Cir., June 24, 1975); Avery Products Corp. v Morgan Adhesives Co., 496 F.2d 254, 256 (7th Cir. 1974); First Iowa Hydro Electric Coop. v Iowa-Illinois Gas & Electric Co., 245 F.2d 613 (8th Cir.), certiorari denied, 355 U.S. 871 (1955); Hart v Williams, 202 F.2d 190 (D.C. Cir. 1952); Allen Bradley Co. v Local No. 3, I.B. of E.W., 51 F. Supp. 36, 40 (S.D.N.Y.), reversed on other grounds, 145 F.2d 215 (2d Cir.), which was reversed on other grounds, 325 U.S. 797 (1943). But see Ingram v Richardson, 471 F.2d 1268, 1270 (6th Cir. 1972).

Such a response seems particularly appropriate here, especially when weighed against the disruption that would likely follow if the agreed referral procedure utilized by the Licensing Board were now to be set aside. In such event, the lengthy review process conducted below by the Special Master in camera, would have to be undertaken all over again by the Licensing Board, essentially on a document-by-document basis. This would inevitably result in "unusual

delay," which could not help but postpone the commencement of the hearing, currently set for October 30, 1975. Completion of the antitrust inquiry by the time the Davis-Besse No. 1 unit is scheduled for fuel-loading (second quarter of 1976), or by the time major construction of Perry Units Nos. 1 & 2 is presently anticipated to begin (March, 1976 if application for L.W. 2 is granted) -- which is, of course, a major "public interest" consideration in these consolidated proceedings -- would become a highly questionable matter. This is precisely the prospect that Congress feared most in prescribing antitrust review under Section 105c of the Atomic Energy Act, and a possible result that Applicants have strived so hard in this proceeding to head off.

When certification is so perceived, we submit that there is ample reason why the Appeal Board should not exercise its discretionary power under Section 2.718(i) to review the agreed referral procedure providing for resolution of the privilege claims by a Special Master. Not insignificantly, the Licensing Board has made it plain that it does not consider the issue worthy of certification.[9/] And, as the Appeal Board specifically noted in Public Service Co. of New Hampshire, supra, NRCI-75/5 at 483, "there is even greater cause to be chary about reaching down for an issue * * * where * * *

9/ See Ruling of the Board On Request For Certification By The Department of Justice Of An Appeal Of The Special Master's Findings of Privilege, dated August 27, 1975.

the Licensing Board has affirmatively declined upon request to refer that issue."

Moreover, Commission policy does not "favor the singling out of an issue for appellate examination during the continued pendency of the trial proceeding in which that issue came to the fore" (ibid.). To be sure, interlocutory review by the Appeal Board has occurred in "extraordinary circumstances" where there has obviously been a plain procedural error that substantially affects a party's rights. See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-231, RAI-74-10 633, 633-634 (October 2, 1974). However, as explained in the next section of this brief, we do not believe that the reference question raised here by the Appeal Board fits that mold.

II

THE ROLE OF THE SPECIAL MASTER IN THIS PROCEEDING SHOULD NOT BE DECLARED INVALID

The Licensing Board, in its Ruling of August 27, 1975, has provided an excellent account of the basis for its appointment of a Special Master. As it explained (Ruling, p. 5), the regulatory authority for taking such action can be found in Section 2.753 of the Commission's Rules. That section states that, in addition to entering into stipulations as to relevant facts:

> 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.

It is undisputed that the parties here entered into such a procedural stipulation, which at the very least contemplated in camera examination of submitted documents by a Special Master who was to make rulings on their privileged status, which rulings would be binding on the Licensing Board.[10/] We do not believe that a consensual reference of this nature should be condemned under Chapter 0106, Section 034, of the AEC (NRC) Manual as an improper delegation of authority.

There is scant precedent in NRC proceedings to guide a consideration of the proper use of a Special Master to assist in discovery matters. In antitrust hearings, only four other proceedings have, to our knowledge, progressed to the discovery stage.[11/] In three of these, Alabama, Consumers and Waterford, the possible use of a Special Master was not considered. In the other one, the Duke Power

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10/ The City's appeal relates only to the question whether the Special Master's rulings were reviewable by the Appeal Board. That issue is discussed infra at pp. 28-37.

11/ These four antitrust proceedings are: Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), Docket Nos. 50-348A and 50-364A; Consumers Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329A and 50-330A; Duke Power Company (McGuire Nuclear Station, Units 1 and 2, and Oconee Nuclear Station, Units 1, 2 and 3), Docket Nos. 50-369A, 50-370A, 50-269A, 50-270A and 50-287A; Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Units 3 and 4), Docket Nos. 50-382A and 50-383A.

antitrust inquiry, a Special Master was appointed, with the consent of all parties, to resolve claims of attorney-client and attorney-work product privilege.

Such a referral procedure seems permissible for discovery purposes under the great weight of judicial authority. Thus, many trial courts, relying upon Rule 53 of the Federal Rules of Civil Procedure,[12/] have appointed Special Masters to supervise the discovery process, including making determinations with regard to claims of privilege. See, e.g., Fisher v Harris, Upham & Co., Inc., 61 F.R.D. 447 (S.D.N.Y. 1973); Collins & Aikman Corp. v J. P. Stevens & Co., Inc., 51 F.R.D. 219, 221 (D.S.C. 1971); Tiroh Realty, Inc. v Paramount Pictures, Inc., 10 F.R.D. 201, 203 (D.Del. 1950); Pathe Laboratories, Inc. v DuPont Film Mfg. Co., 3 F.R.D. 11, 14 (S.D.N.Y. 1943); Stentor Elec. Mfg. Co. v Klaxon Co., 28 Fed. Supp. 665 (D.Del. 1939).

In other instances, the same referral procedure has been followed pursuant to the authority of the Federal Magistrates Act.[13/] See Vickers Motors, Inc. v Wallford,

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12/ Rule 53, Fed. R. Civ. P., provides for the appointment of masters by federal district courts and specifies that the order of reference may specify or limit the powers and responsibilities of the master in the particular case.

13/ The Federal Magistrates Act provides that district courts may establish rules pursuant to which U.S. Magistrates may be assigned duties "not inconsistent with the Constitution and laws of the United States," including "service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title [Title 28, U.S. Code] and the Federal

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502 F.2d 967 (6th Cir. 1974). And, the use of special masters to supervise discovery has also been sustained as a legitimate exercise of the court's inherent power to appoint a master for the administration of justice when the court deems such action essential. See First Iowa Hydro Electric Coop. v Iowa-Illinois Gas & Electric Co., supra; Schwimmer v United States, 232 F.2d 855 (8th Cir.), certiorari denied, 352 U.S. 833 (1956). See also Kaufman, Masters in the Federal Courts: Rule 53, 58 Col. L. Rev. 452, 462 (1968).[14/]

These latter cases seem particularly relevant to the present situation. The Licensing Board, after consultation with the parties, was satisfied that all participants believed the administration of justice in one particular area of discovery, namely, the rulings on "privileged" documents, could best be accomplished by a Special Master. Indeed, the consensus was that such a referral would be fairer than if the matter were left to the Licensing Board, since the Board's examination of the material could

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13/ cont'd
Rules of Civil Procedure for the United States District Courts" and "assistance to a district judge in the conduct of pretrial discovery proceedings in civil or criminal actions." 28 U.S.C. § 636(b).

14/ Other cases involve references to a Special Master for discovery purposes without any discussion as to the jurisdictional basis for the reference. See Burlington Industries v Exxon Corp., 65 F.R.D. 26 (D.Md. 1974) (determination of privileged documents); Shapiro v Freeman, 38 F.R.D. 308, 312 (S.D.N.Y. 1965); Olson Transport Co. v Socony-Vacuum Oil Co., 7 F.R.D. 134, 136 (E.D.Wisc. 1944) (materiality and relevancy of documents).

perhaps have the undesirable effect of compromising the integrity of the ultimate trier of fact. As an accommodation to the parties, therefore, the Licensing Board accepted the stipulated procedure pursuant to its authority under Section 2.753 of the Commission's Rules.

In this regard, we think that an analogy to the resolution of discovery matters by settlement discussions, as articulated by the Licensing Board in its Ruling of August 27, 1975 (Slip Op. 6-7), is well taken. Just as an agreement among adversaries regarding their disputes about interrogatory or document requests is entitled to enforcement without Board scrutiny into the legal correctness of negotiated concessions, so too is an agreement of the parties to a procedure requiring submission of a discovery matter to a Special Master for binding resolution.[15/] As a practical matter, such a referral procedure is akin to an agreement to submit a controversy to arbitration. The First Circuit recognized this similarity in its recent De Costa decision, supra, No. 74-1391, wherein it stated (Slip Op. at p. 8):

> From a constitutional viewpoint, we can see no significant difference between arbitration and consensual reference for decision

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15 Section 2.759 of the Commission's Rules encourages the settlement of "particular issues in a proceeding" and the taking of appropriate steps to implement that purpose. Although "particular issues" could be read a referring only to contested, substantive issues, it might also apply to procedural issues such as those involved herein.

> by magistrates. In both situations, the parties have freely, and knowlingly [sic] agreed to waive their access to an Article III judge in the first instance. Or put another way, they have chosen another forum.

While the Court of Appeals in De Costa ordered limited review of the Special Master's decision for "manifest error" of fact and law, notwithstanding that the parties had consented to the referral procedure, its decision was largely guided by the reference involved in that case, which

> * * * was not clear enough by its own terms to support the conclusion that the parties consented to a grant of power to the magistrate greater than that outlined in Rule 53, Fed. R. Civ. Pro. [Slip op. p. 14][16/]

By contrast, the consensual referral in the present proceeding was, as the Licensing Board stated (Ruling of August 27, 1975, at p. 8), "unequivocal and unambiguous." The parties explicitly agreed "to be bound by the determinations of the Master" (Order of December 10, 1974). Not even the City disputes the fact that this reference was, at the very least, intended by all to insulate the "privileged"

16/ The De Costa referral agreement assigned to the Special Master all issues for "hearing and determination." In the Court of Appeals' opinion (Slip op. at p. 14), the Special Master's role was thus "fully compatible with [that of] the magistrate as trier of fact whose rulings on the facts are final under Rule 53(e)(4), but whose legal rulings have no binding force."

documents from Licensing Board review (see pp. 9-10, supra), and for very legitimate reasons.[17/]

In these circumstances, it is our belief that the role played by the Special Master in this proceeding should not be declared invalid. If the reference had involved ultimate questions of fact and law on the case in chief, the Licensing Board's use of a Special Master, even with the consent of all parties, could perhaps be considered suspect.[18/] But where, as here, consensual referral

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17/ As accurately set forth in the Licensing Board's Ruling of August 27, 1975 (pp. 4-5; footnote omitted):

> At the time referral of 'privileged' documents to a Special Master was proposed, the advantages were conceived to be (1) an opportunity for prompt and independent review of a considerable volume of documents, (2) the assurance that members of the Board would not be exposed to documents which ultimately were rejected from discovery through application of privilege, and (3) finality. All of these advantages were evident to the parties at the time of the December 1974 agreement.

18/ There appears to be some difference of opinion in judicial circles concerning the extent to which parties can consent to a referral to a Special Master of the entire case for a binding decision on both the facts and the law. Compare Allen Bradley Co. v Local No. 3, I.B. of E.W., supra, 51 F. Supp. at 39 ("I consider that I am wholly without power to nullify or to deprive either party of the effect of the stipulation or of the order") with Cademartori v Marine Midland Trust Co. of New York, 18 F.R.D. 277 (S.D.N.Y. 1955) (consensual referral to Special Master of entire case disapproved as inconsistent with the purposes of Rule 53, Fed. R. Civ. P.). In De Costa, supra, which involved a consensual reference of the issues, the First Circuit observed in dictum (Slip op. at p. 14): "* * * in the present state of the law we would

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relates only to a narrow discovery question, the procedure agreed upon should be upheld. See Vickers Motors, Inc. v Wallford, supra. This is especially so when the parties' procedural stipulation has been entered into so as to insure (rather than compromise) the integrity of the fact-finding process. The Licensing Board's adherence to an agreed procedure in such circumstances hardly can be considered a clear abuse of discretion; nor, in view of the affirmative commitment to Special Master review by all parties, can it reasonably be argued that the referral process used here has intruded upon anyone's substantial rights. Accordingly, there is, we submit, no legitimate reason to fault the Licensing Board's sensible approach to resolving the privilege claims or invalidate the procedure agreed upon as being an impermissible delegation of authority.

18/ Cont'd
be reluctant to approve even a clearly worded consensual reference to a magistrate which purports to finally bind the parties to his rulings of law." See also Rule 53(e)(4), Fed. R. Civ. Pro.; and see 5A Moore's Federal Practice ¶53.12[5]. Other federal court decisions expressing a similar reluctance have often based their conclusion, at least in part, on the Supreme Court decision in LaBuy v Howes Leather Co., 352 U.S. 249 (1957). That case, however, has limited application to the present inquiry, since it not only involved the reference to a Special Master of the entire case (as distinguished from a narrow discovery question), but also involved a reference made by the trial court over the objections of all parties (i.e., a non-consensual referral).

III

EVEN IF THE SPECIAL MASTER'S ROLE WAS INVALID, A REMAND TO THE LICENSING BOARD WOULD SEEM INAPPROPRIATE; BUT IF ORDERED, SUCH A REMAND SHOULD AFFORD ONLY LIMITED REVIEW

Even if the Appeal Board disagrees with our conclusions in the first two sections of this brief, we seriously question the appropriateness of remanding this matter to the Licensing Board with instructions that it entertain objections to the Special Master's Reports. There are, we believe, three fundamental considerations sustaining this position: (1) the parties' agreement; (2) the impact on the hearing schedule; and (3) the concept of fairness.

We have already discussed at length the nature of the procedural stipulation which is the subject of this appeal. Whatever other differences the parties may have regarding the proper interpretation of their agreement "to be bound," no one disputes that it was intended as a waiver of all rights to Licensing Board review of the privilege claims (see pp. 9-10 , supra). This considered agreement to forego such scrutiny of the Special Master's rulings -- whether ill-advised or not -- should, in our view weigh heavily against the issuance now of a remand order to the Licensing Board.

Also not to be overlooked in this connection is the fact that, but for the parties' agreement regarding this

matter, Licensing Board review of the Special Master's Reports would undoubtedly have been completed by now without any significant interruption to the hearing schedule. A remand at this late date, however -- even if narrowly confined (see discussion infra, at pp. 25-27) -- would necessarily require a revision in that schedule in order to accommodate the additional review function with regard to the privilege claims. As our earlier discussion points out (pp. 12-13, supra), a lengthy postponement of the hearing date will plainly jeopardize the chance -- already remote -- of completing this antitrust proceeding prior to the critical dates for commencing operation of Davis-Besse No. 1 on schedule and launching major construction of Perry Nos. 1 and 2 on schedule.[19/] Thus, there is a strong public-interest factor involved here which argues forcefully against a remand of this matter to the Licensing Board, especially in view of the fact that no party is claiming that such a remand is necessary to protect its private interests.

Indeed, as the Licensing Board accurately observed in its August 27, 1975 Ruling (pp. 7-8), when one evaluates the parties' private interests in this context, there is yet another reason for rejecting the remand alternative in

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19/ Applicants tend to agree with the observation made by the City in its appeal brief (pp. 12-13) that the hearing before the Licensing Board in this consolidated proceeding will be every bit as long as the Consumers hearing, if not longer.

the present circumstances. Applicants' claims of privilege were denied by the Special Master with respect to some 162 documents. Notwithstanding their disagreement with these rulings -- first registered with the Licensing Board in the conference telephone call of June 24, 1975 -- Applicants promptly produced the material in question pursuant to their agreement "to be bound" by the Master's determinations, an agreement which the Licensing Board had earlier confirmed "the parties should be held to" (Minutes of June 24, 1975 Confernce Call, p. 6). As noted in the August 27 Ruling (p. 7; footnote omitted):

> Prior to turnover, [Applicants] indicated that they felt bound by the decision of the Master and that they were aware that their agreement to be bound relinquished voluntarily any rights for further appeal.

In view of this document production, Applicants are now no longer in a position to contest the Special Master's decisions that were adverse to them; the arguably privileged material has already been fully disclosed. Fundamental fairness would suggest in these circumstances that Licensing Board review of only the material still being withheld should not be allowed. Review of the Special Master's Reports, if available at all, should properly apply as the Licensing Board stated in its August 27 Ruling (p. 8),

"to all challenged decisions of the Master." To provide further review to certain parties in abrogation of their express agreement to the contrary, after such review has been precluded for other parties who felt compelled to adhere to that agreement as a matter of professional responsibility, runs contrary to the most basic concepts of fairness and due process.

For the foregoing reasons, it is our opinion that a remand by the Appeal Board of this matter as an exercise of its discretionary power under Section 2.718(i) of the Commission's Rules would be inappropriate -- even if it should conclude that the Special Master's role here was suspect. On the other hand, if (contrary to our view) the remand procedure is ultimately deemed to be appropriate, we would urge the Appeal Board to confine Licensing Board review of the Special Master's Reports to the specific documents challenged in the City's objections to the rulings (see n. 28, infra), and, as to those documents, to permit review of alleged errors of law only, but not allow any reevaluation of the Special Master's fact determinations.

Such an approach is not without authoritative support. Under Rule 53(e)(4) of the Federal Rules, fact determinations of a Special Master, at least when the parties agree that they shall be binding, are usually not reviewable.[20/]

20/ Where there is no stipulation regarding the binding effect of a Special Master's fact findings, such determinations
(Cont'd next page)

As the Rule succinctly states:

> The effect of a master's report is the same whether or not the parties have consented to the reference; but when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

Interestingly, Rule 53 does not address the situation where the parties stipulate to be bound by the Special Master's rulings of law, as well as to his fact determinations -- which is, of course, what occurred in the present proceeding. It is fairly well established that, in the absence of such a stipulation, conclusions of law by a Special Master are generally not entitled to a particular deference except as they are correct propositions of law. Carpenter v Union Insurance Society of Canton, Ltd., 284 F.2d 155, 159 (4th Cir. 1960); United States v International Business Machines Corp. 66 F.R.D. 154, 159 (S.D.N.Y. 1974); Clark v Atlanta Newspapers, Inc., 366 F. Supp. 886, 890 (N.D. Ga. 1973); McGraw Edison Co. v Central Transformer Co., 196 F. Supp. 664, 667 (E.D. Ark. 1961), affirmed, 308 F.2d 70 (8th Cir. 1962). Moreover, at least one federal appellate court (the First Circuit) seems inclined to reach

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20/ Cont'd
are subject to review by the trial court under the "clearly erroneous" review standard. Rule 53(e)(2), Fed. R. Civ. P. This standard obviously has no application in the present circumstances, however, since the parties agreed "to be bound" by all determinations of the Special Master, both fact and law.

a similar result -- at least where the whole case has been assigned to the Special Master -- even where there has been a consensual reference which contemplates that the Special Master's rulings of law will be binding. See De Costa v Columbia Broadcasting Systems, Inc., supra, No. 74-1391 (Slip Op. at p. 13).

We have, of course, already explained why we believe that the aforesaid judicial precedents tending to support review of a Special Master's decisions of law, notwithstanding a consensual referral to the contrary, should have no real application in the discovery context presented here (see pp. 19-21, supra). However, in the event that the Appeal Board should decide to remand this matter to the Licensing Board, it is our view that this authority does offer appropriate guidelines for defining the scope of review, if such review is indeed warranted. And for this reason, we urge that, if a remand order is forthcoming, it be formulated within the narrow confines outlined above.

IV

THE APPEAL BOARD SHOULD NOT DIRECT THAT THE MERITS OF THE SPECIAL MASTER'S RULINGS BE CERTIFIED FOR APPEAL BOARD REVIEW

Turning next to the separate certification question mentioned briefly in the City's appeal brief (p. 11), Applicants believe that it would be inappropriate in the present circumstances for the Appeal Board to direct, under Section 2.718(i) of the Commission's Rules, that objections on the merits of the Special Master's rulings be certified to it for review. In addressing this issue, we presume that the interlocutory nature of the Special Master's determinations is already established to the satisfaction of the Appeal Board in light of its announcement of the unavailability at this time under 10 C.F.R. §2.730(f) of a review of the merits by way of an appeal (Appeal Board Order of August 14, 1975, n. 3).

Recognizing that the operation of Section 2.718(i) depends in this context upon an exercise by the Appeal Board of its "discretionary power" (Public Service Co. of New Hampshire, supra, NRCI-75/5 at 483), the inquiry once again (see pp. 9-10, supra) is, "at the very minimum," whether "the public interest will suffer or unusual delay or expense will be encountered" if the Appeal Board, in its discretion,

should decline to direct certification of the merits of the Special Master's rulings. Public Service Co. of New Hampshire, supra. A negative response to this question in terms of Section 2.718(i) review would, we submit, similarly dispose of the City's request (City's Brief, p. 10) that the Appeal Board review, as a separate matter, the Licensing Board's denial of certification. For, the same standard applies in connection with the question of the availability of interlocutory review of a referral determination by the Licensing Board. Ibid.[21/]

Focusing first on the "public interest" evaluation, it is important to assess that element of the present inquiry in a proper context. As we have expressed in earlier sections of this brief, a major concern from a "public interest" standpoint is that this antitrust proceeding not be prolonged unduly so as to result in an unnecessary delay in the operation of Davis-Besse No. 1 or the construction of Perry Nos. 1 and 2. With energy needs today being so acute, it would decidedly be inconsistent with the public interest, and the interests of all private participants in this proceeding, if, for example, the

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21/ The Appeal Board stated in Public Service Co. of New Hampshire, supra, NRCI-75/5 at 483 that "at the very minimum, a party asking that we invoke our Section 2.718(i) certification authority must establish that a referral would have been proper * * *." It also made clear in the same opinion, that review of "the refusal of a licensing board to refer an interlocutory ruling" would not be available by way of an appeal in view of the prohibition in Section 2.730(f). Id. at 481, n. 8.

Davis-Besse plant, which has already been built but is involved here by virtue of the "grandfather" clause in the statute (42 U.S.C. §2135c(8)), should have to sit idle for a period of time awaiting the conclusion of the antitrust inquiry.[22/]

It was, in part, the very real prospect of being faced with just such a situation that prompted an agreement among the parties to submit their "privileged" documents to the Special Master for a binding ruling. At the time, the antitrust proceeding was well over a year old; interrogatories and document requests had produced a mass of material -- in excess of some 2,378,000 document pages from Applicants' files alone -- which still had to be inspected and analyzed; and a deposition discovery program, which all parties recognized would be extensive, had yet to be launched. In an effort to expedite the discovery process, as well as for other good reasons (see n. 17, supra), the parties thus agreed "to be bound by the determinations of the Master" (Board Order of December 10, 1974). As the

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22/ The safety and environmental reviews held in connection with the Davis-Besse No. 1 application for an operating permit are completed and fuel-loading is presently scheduled to take place in the second quarter of 1976. However, Section 105c of the Atomic Energy Act (42 U.S.C. §2135c) plainly contemplates pre-licensing antitrust review, and the Commission has indicated that it is disinclined to issue a license prior to completion of an antitrust hearing in the absence of consent of all parties. See In the Matter of Louisiana Power & Light Company (Waterford Steam Electric Generating Plant, Unit 3), CLI 73-25, RAI-73-9-619, 622 (September 28, 1973).

Licensing Board accurately pointed out,[23/] in the circumstances the agreement can only be read:

> * * * as an unequivocal waiver by all parties of possible appeals in order to obtain the specific benefit of prompt and final review of the privileged documents. Since these parties repeatedly have impressed upon the Board their desire for expeditious resolution of the issues in these proceedings, the December 6 agreement is consistent with this objective.

We would submit that, in the face of such an explicit and unambiguous agreement not to seek review in this area, the Appeal Board should exercise its discretionary certification power under Section 2.718(i) in a manner which is consistent with the stipulated reference. If any of the parties had truly harbored any notions of an interlocutory review of the Special Master's determinations, it should have alerted the Licensing Board -- and all other participants who thought an agreement had been entered into forestalling such a possibility -- by disputing the December 10, 1974 Order in a timely fashion. Having failed to do so, it is difficult for us to see any legitimate justification now to ignore the express waiver of appeal rights. Plainly, there are no overriding public policy considerations under-

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23/ See Ruling of the Board With Respect to City of Cleveland's Motion For Certification of Special Master's Decision On Claims of Privilege, dated July 21, 1975, at p. 6.

mining such waivers. See Jersey Central Power & Light Co. (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (July 31, 1973).[24/]

In this connection, it should not be overlooked that, even now, the City places a construction on the agreement which reflects their appreciation of the fact that the parties intended to eliminate a piecemeal review of the Special Master's rulings. In accordance with what the City now professes to be its understanding of the parties' agreement, immediate review by the Licensing Board was eliminated; but not ultimate review by the Appeal Board. Even if we were able to subscribe to this reformulation of the consensual reference -- which we believe is untenable -- it leaves no room for seeking interlocutory appellate review. We cannot believe, in view of the clear prohibition in Section 2.730(f), that the City thought such an avenue was open to it as a matter of course. Nor do we think that the clear terms of the agreement "to be bound," in the absence of some express qualification, leaves room for possible resort to the unusual review procedure prescribed in Section 2.718(i). Possible interruptions of this sort in the hearing schedule were precisely what the parties sought to avoid,

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24/ In ALAB-139, the Licensing Board admitted several intervenors to the proceeding, notwithstanding their untimely petition to intervene for the limited purpose of presenting testimony and cross-examining witnesses on a single, specified issue and without any rights of discovery or appeal. The Appeal Board held that the waiver of appeal rights was enforceable, implying that the appeal rights were given up because the intervenors would have been unable to show good cause for their untimely petition.

consistent with the overriding "public interest" not to delay through lengthy antitrust proceedings bringing the nuclear plants on line as scheduled -- even assuming arguendo that the City understood the agreement as not eliminating altogether the possibility of eventually seeking review by the Appeal Board of the Special Master's rulings.

This "public interest" consideration is, of course, to be weighed against the "public interest" highlighted by the City in having a comprehensive NRC antitrust inquiry prior to issuance of any license. We do not discount the importance of the latter objective. It is not likely to be compromised in any material respect, however, by the Appeal Board's refusal here to exercise its certification authority. As pointed out by the Licensing Board in its July 21, 1975 Ruling (pp. 8-9):

> [The parties] have had the benefit of substantial discovery which has resulted in the production of tens of thousands of document pages. They have had the benefit of a deposition program involving scores of potential witnesses. We conclude that even if there were errors with respect to certain of the Master's classfications, there is little likelihood of any substantial effect upon the parties' preparation for the hearings.[25/]

25/ We note in passing that on September 5, 1975, the City, DOJ and the NRC Staff filed with the Licensing Board lengthy statements containing their allegations and outlining the nature of the evidence they intend to introduce.

The City's conclusory assertions to the contrary are unpersuasive. They rest largely upon sheer speculation as to the possible probative value of a handful of documents which the Special Master, upon careful examination, has determined to be entitled to protection from disclosure (City Appeal Brief, pp. 19-20, 23-24). Such a focus is misdirected. Presumably, the speculative argument can always be made in this context that the material withheld is likely to be helpful to the development of the adversary's case. Confidential communications between attorney and client, and an attorney's work product, can, almost by definition, be presumed to have some significant probative value; even so, strong policy considerations have long sustained the protection of such privileged material from disclosure. See 8 Wigmore, Evidence §2292, at p. 554 (McNaughton Rev. Ed. 1961).

Thus, the City's conjectural argument provides an insufficient basis "to depart from the usual practice, recognized by this agency and the courts alike, of allowing a trial proceeding to run its course before entertaining complaints on the appellate level." Public Service Co. of New Hampshire, supra, NRCI 75/5, at 486. If the potential probative weight of the withheld material were determinative in this context, interlocutory review of a ruling sustaining

claims of privilege would be commonplace. This, however, is clearly not the case. Indeed, in most instances, immediate review of a discovery order in this area is afforded only where there has been a direction to produce documents over a claim of attorney-client privilege. Interlocutory review is then deemed necessary to protect the sanctity of the attorney-client relationship. See Pfizer v Lord, 456 F.2d 545 (8th Cir. 1972); Harper & Row Publishers, Inc. v Decker, 423 F.2d 487 (7th Cir. 1970), affirmed by an equally divided court, 400 U. S. 384 (1971).

Here, by contrast, we are concerned with relatively few documents which the Special Master is satisfied, both on the basis of his initial review and a reconsideration thereof, are entitled to privileged status. For the reasons set forth in the next section of this brief (see discussion infra, at pp. 38-46), we believe the Special Master's rulings on the merits are correct. However, even in the unlikely event that they should be considered suspect, we agree with the Licensing Board's conclusion that the "public interest" in having a full and complete antitrust inquiry will not suffer by proceeding to hearing without first obtaining prompt Appeal Board review of the questioned material. The massive document production by Applicants, together with their comprehensive responses to

several sets of extensive interrogatories, and their voluminous deposition testimony involving the questioning of more than 40 witnesses, provides ample assurance that the integrity of the hearing process will not be undermined by a refusal of the Appeal Board to exercise its certification authority here.

In terms of the "public interest" consideration, therefore, the balance leans heavily toward a denial of the City's request for a direction of certification. Nor has a convincing argument been made that an exercise by the Appeal Board of its Section 2.718(i) authority is necessary to prevent unusual delay or expense. The argument is made that without interlocutory review, there exists the prospect of a possible reversal when the issue ultimately comes before the Appeal Board, "which would cause exceptional delay or expense in reaching a final decision on the issues presented" (City's Appeal Brief, p. 13).

We explain below (pp. 38-46, infra) why we feel that such a prospect is not very real. Even more to the point, however, is that this argument proves too much; it can be advanced as a reason for entertaining piecemeal review of every interlocutory ruling or discovery order in an extended NRC proceeding. Such a license for wholesale interruption of the hearing process would plainly undermine the general

policy of the Commission to view precipitous appellate action of this sort with disfavor. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, RAI-73-4, 258, 259 (April 7, 1973). It is to avoid just such a result that the applicable standard looks only to "unusual delay or expense" as a basis for the Appeal Board's exercise of discretionary authority in this area. Public Service Co. of New Hampshire, NRCI 75/5 at 483 (emphasis added).

The City has failed to satisfy this strict standard. Indeed, with the commencement of the antitrust hearing "almost at hand [, a] certification would * * *, if anything, cause rather than prevent delay" (id. at 486). In these circumstances, there is every reason for the Appeal Board to stay its hand. Moreover, the fact that the Licensing Board reached just such a conclusion on the basis of a careful and thoughtful analysis of the particular factors involved here is, as we noted earlier, not without significance. See Public Service Co. of New Hampshire, supra, NRCI-75/5 at 483.

V

THE RULINGS OF THE SPECIAL MASTER
ON THE MERITS WERE CORRECT

On the basis of the prior discussion, we believe no legitimate purpose is to be served by arguing the merits of the Special Master's ruling before the Appeal Board at this time. Since the City's appeal brief addresses specific objections to the Master's Reports, however, which, if left unanswered, tend to color the fundamental issues under consideration, we feel compelled to respond to the contentions set forth in Sections IV and V thereof.

The City first asserts that as to 110 documents, CEI advanced a claim of privilege -- either attorney-client or attorney-work product -- which differed from the privilege which the Special Master found to exist.[26/] The argument made is that CEI's failure to specify the privilege which was deemed to be applicable by the Special Master constitutes a waiver of that privilege.

We have been unable to find any authority to support such a waiver concept. The so-called "numerous cases" cited by the City to sustain this proposition consist only of Steen v First National Bank, 298 F.36 (8th Cir. 1924) and Hill v Hill, 106 Colo. 492, 107 P.2d 597 (1940). Steen, how-

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26/ For the record, we would simply point out that, contrary to the City's listing in p. 27 of its brief, CEI did in fact specifically identify documents 110, 2147 and 2161-2166 as attorneys-work product in the Hauser Affidavit or the interrogatory responses.

ever, involved a waiver of the attorney-client privilege due to the client's testimony at a preliminary hearing about his confidential conversations with counsel. Hill consisted of a waiver of the attorney-client privilege based upon the actual production of a document at a hearing for purposes of refreshing the client's memory. In both cases -- which are, so far as we can determine, consistent with the general state of the law in this area -- the result was based on the fact that the failure to assert the privilege in timely fashion has resulted in public disclosure of the privileged communication.

Such is not the case here. Indeed, CEI has made it abundantly clear that it does not intend to waive any privilege in this proceeding. Its submission of the questioned documents to the Special Master in confidence and solely for purposes of an in camera examination, together with its assertion of privilege with respect to all deposition interrogation directed at the submitted material (City Appeal Brief, Appendix), leaves no room for doubt in this regard.

The controlling legal principle in such circumstances was articulated in precise terms in United States v Jacobs, 322 F. Supp. 1299, 1303 (C.D.Cal. 1971):

> A person does not waive the attorney-client privilege merely by failure to assert

> it. Waiver occurs only when the privileged matter is disclosed without assertion of the privilege. It is the disclosure of the privileged matter which gives rise to the waiver, not the failure to assert the privilege. For example, if the client testifies to the confidential communication or remains silent while the attorney testifies, there is a waiver by the client's voluntary disclosure or by permitting the attorney to voluntarily disclose. Steen v First National Bank, 298 F 36 (8th Cir. 1924). But mere failure to assert the privilege without a disclosure is not a waiver. If a witness refuses to testify on some other ground, such as self-incrimination, and that ground is held invalid, he may then assert the attorney-client privilege though he did not assert it when first called to testify. [Emphasis added.]

See also Tillotson v Boughner, 350 F.2d 663 (7th Cir.), reversing 238 F. Supp. 621 (N.D. Ill. 1965).

Consistent with this principle, CEI can appropriately assert even now -- and it specifically does so -- a claim of attorney-work product privilege with respect to each of those documents within the first listing on page 27 of the City's appeal brief which the Special Master has found to be entitled to protection on that basis. Similarly, a claim of attorney-client privilege can -- and will -- now be made by CEI with respect to each of those documents within

the second listing on page 27 of the City's appeal brief which the Special Master has found to be entitled to protection on that basis. In this connection, it is important not to lose sight of the fact that no challenge is being made here to the Special Master's determinations per se, based on his in camera examination of the documents. In short, but for the strained "waiver" argument, no one is disputing that the documents are in fact of a privileged nature. Production of this heretofore undisclosed material should, therefore, not be required.

While the City tries to raise a due process question regarding its ability to argue effectively before the Special Master "with respect to privileges not claimed by Applicants" (City Appeal Brief, p. 33), this is a specious contention. The initial brief which the City submitted to the Special Master discussed at length both the attorney-client and the attorney-work product privileges; the approach there taken was to treat in summary fashion the legal standards which the City thought the Special Master generally should apply. In a second brief submitted on May 2, 1975, the City expanded some on its legal arguments and made reference to specific documents identified in the interrogatory responses. Following issuance of the Master's original Report, the City filed with the Special Master a third brief addressing the

identical substantive issues it raises here, again with reference to specific documents. It also presented oral argument on its objections. Thus, the City's complaint that it did not have a full and fair opportunity to be heard is no more than empty rhetoric.

The Special Master, who alone had access to the challenged documents, on reconsideration adhered in most respects to his initial decision that the contested correspondence and memoranda before him were by nature confidential communications within the attorney-client privilege, or were work product of the attorneys involved in this proceeding; as such, they were entitled to protection from scrutiny by the other parties unless voluntarily disclosed by CEI.[27/] CEI has plainly resisted disclosure on every possible occasion. It would, therefore, be contrary to the basic philosophy underlying the "privilege" concept to direct that material which is concededly of a privileged nature be surrendered.

The City's second basic quarrel with the Special Master's rulings is similarly unfounded. Essentially, the claim is that CEI failed to meet its burden of proof in certain specified areas, and, therefore, some of the documents

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27/ We note in passing that as to a number of environmental documents requested by the City, DOJ and the NRC Staff, and a few other documents, CEI did voluntarily waive its attorney-client or attorney-work product privilege by producing the material for examination and copying.

should not have been clothed with the mantle of privilege.[28/] For reasons we have already articulated in earlier portions of this brief, this argument takes exception with precisely the sort of fact determinations by the Special Master that should not be open to review -- especially interlocutory review -- in light of the parties' explicit agreement "to be bound" by the Special Master's determinations.

In any event, the several objections of the City in this area are not well taken. In meeting its burden of proof, CEI submitted to the Special Master the best evidence available in this context, i.e., the documents themselves, plus extensive interrogatory answers, and the Hauser Affidavit. During the course of his review, the Special Master stated that, with respect to some documents, he drew certain inferences from the material before him (June 30, 1975 Transcript, pp. 84-87). We disagree with the City that this provides sufficient reason to fault the Special Master's rulings, for it is plain from the face of the documents under attack here and the sworn interrogatory and affidavit statements by Mr. Hauser, that the inferences drawn were compelling.

28/ While the City makes a footnote reference to documents listed in filings prior to the Master's rulings (City Appeal Brief, p. 34, n. 40), we do not understand the present appeal to relate to any documents other than those specifically identified on page 27 of the City's appeal brief and those enumerated in the City's filings objecting to the Master's Reports and seeking certification by the Licensing Board.

For example, the Special Master drew the inference in some instances that documents which on their face requested legal advice of a confidential nature and which had limited distribution outside CEI to co-counsel or to CEI consultants only were not circulated to other unknown persons by the recipients thereof. This inference is fully supported by CEI's answers to interrogatories, as explained in the letter of clarification to counsel for DOJ dated April 23, 1975:

> Where a copy of a "privileged" document was distributed to someone in addition to the addressee, the identity of the recipient thereof is contained in column 6 on page one of CEI's chart-response to Interrogatory One. CEI has no direct knowledge whether the person(s) receiving a copy of the document distributed it in any fashion, but it is CEI's belief that no such distribution occurred.

As for the inference drawn by the Special Master with regard to who prepared legal memoranda taken from Mr. Hauser's files, it also was fully warranted in view of the nature of the submitted material. As reflected in the Hauser Affidavit and the interrogatory answers, where such legal memoranda did not bear the name of the author, they had been prepared by Mr. Hauser himself or a member of his staff at his direction. Moreover, as explicitly stated in

the interrogatory answers (pp. 2-3), the documents in question had at all times been kept "in the files of CEI's Corporate Solicitor, and are and have been available for viewing only by CEI's legal personnel or those persons specifically so authorized by CEI's legal personnel."

Nor do we think the Special Master can be faulted for inferring "that legal opinions on the letterhead of a particular law firm were prepared by some member of that firm." The practice of providing legal opinions on firm letterhead is widespread in private practice. Indeed, as a matter of professional ethics, such legal opinions cannot properly be prepared by anyone but a member of the firm. In this regard, the City's reliance on Natta v Hogan, 392 F.2d 686 (10th Cir. 1968), is entirely misplaced. The materials at issue in that case could not on their face be readily identified as a lawyer's work product because there was nothing in the documents themselves to indicate that they had been prepared by an attorney. By contrast, there can be no real question that legal opinions involved here are the mental processes of a member of the firm identified on the letterhead and thus entitled to protection as an attorney's work product.

Of course, the most effective way to sustain the Special Master's fact determinations is on the basis of a

document-by-document *in camera* examination of the challenged material. Such an exercise would, we submit, fully support the rulings on privilege. The appropriateness of undertaking such a time-consuming task on appeal is, as earlier stated, highly questionable in this case; it is even less appropriate to engage in the effort by way of an *interlocutory* appeal.

CONCLUSION

The Special Master is a lawyer and full-time member of the Atomic Safety and Licensing Board Panel. No good reason exists to assume he did not accept his assignment in this proceeding in a careful and responsible manner. The job he was given was of mammoth proportions. It was performed efficiently and expeditiously, with a full opportunity for all parties to be heard, both in written and oral argument. With commencement of the hearing now upon us, the parties should direct their attention to the mass of materials and testimony that have been uncovered on discovery. It serves no legitimate purpose to go back at this late date and tackle all over again the privileged documents. The parties explicitly agreed at the outset not to provoke such interruptions in the hearing process; the schedule set by the Licensing Board has little tolerance at this stage for piecemeal review of this sort; and there is no real likelihood

that the ultimate result will differ materially from the Special Master's determinations or have any substantial impact on the outcome of the antitrust inquiry.

For the foregoing reasons, the City's interlocutory appeal and request for a direction of certification by the Appeal Board should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Gerald Charnoff

Counsel for Applicants

Dated: September 12, 1975.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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, Unit 1)	)	Docket Nos. 50-346A 50-440A
	)	50-441A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	)	
(Perry Nuclear Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Brief In Response To The August 14, 1975 Order Of The Appeal Board" were served upon each of the persons listed on the attached Service List, by hand delivering a copy to those persons in the Washington, D. C. area and by mailing a copy, postage prepaid, to all others, all on this 12th day of September, 1975.

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: _____
Wm. Bradford Reynolds
Counsel for Applicants

Dated: September 12, 1975.

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