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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Michael C. Farrar, Member
Richard S. Salzman, Member

In the Matter of		
THE TOLEDO EDISON COMPANY, et al. (Davis-Besse Nuclear Power Station)	)	Docket No. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al. (Perry Nuclear Power Plant, Units 1 & 2	)	Docket No. 50-440A 50-441A

Mr. David C. Hjelmfelt, Washington, D. C., argued the cause for the petitioner, City of Cleveland, Ohio; with him on the brief were Messrs. Reuben Goldberg and Michael D. Oldak, Washington D. C., and James B. Davis and Robert D. Hart, Cleveland, Ohio.

Mr. Wm. Bradford Reynolds, Washington, D. C., argued the cause for the applicants, Toledo Edison Company et al.; with him on the brief was Mr. Gerald Charnoff, Washington, D. C.

Mrs. Janet R. Urban, Washington, D. C., argued the cause for the United States Department of Justice; with her on the brief were Assistant Attorney General Kauper, Messrs. Joseph J. Saunders, Steven M. Charno, Melvin G. Berger and Anthony G. Aiuvalasit, Jr., Washington, D. C.

Mr. Benjamin H. Vogler argued the cause for the Nuclear Regulatory Commission staff; with him on the brief was Mr. Roy P. Lessy, Jr.

OPINION AND ORDER

November 26, 1975

(ALAB-300)

I.

Perhaps an antitrust litigant's most demanding task is quenching an opponent's thirst for discovery without, in the course of doing so, also disgorging legitimately privileged or confidential information. In this case, applicants Cleveland Electric Illuminating Company et al. answered their opponents' discovery requests by producing documents containing in excess of 2,300,000 pages for their inspection and copying.[1] Cleveland Electric ("the Company") declined to turn over another 735 documents, however, asserting these to be privileged from discovery under the "attorney - client" and "work product" rules.[2] Those privilege claims were disputed; the controversy now before us has its genesis in the procedure adopted by the parties to resolve the disagreement.

The undertaking to rule on the more than seven hundred privilege claims asserted by Cleveland Electric alone was not a small one.[3] To avoid diverting the Licensing

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1 / App. Tr. 24.

2 / App. Tr. 109.

3 / The Justice Department and applicant Duquesne Light Company also claimed similar privileges against the need to disclose about a dozen documents apiece. Those claims were handled in the same manner as Cleveland Electric's. The rulings made thereon are not here in dispute.

Board's attention from the merits of the proceeding, to insulate it from being influenced by documents later found privileged, and in the hope of expediting the proceeding,[4] the Licensing Board Chairman suggested during a conference call on December 6, 1974 that the parties refer the privilege claims to a "special master" for decision.[5] The parties voluntarily accepted the suggestion.[6]

The Commission's Rules of Practice do not provide expressly for the use of masters to decide contested discovery matters. The idea of doing so, however, was not novel; the procedure had been adopted at least once before in a Commission antitrust case, apparently with success.[7] In this case the parties were informed that another member of the Commission's Licensing Board Panel could

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4 / At oral argument before us the parties indicated that one or more of these considerations underlay the Chairman's suggestion to use a master. See, e.g., App. Tr. 21, 29, 51-52, 69, 81-82, 86-87.

5 / There is no dispute that the suggestion emanated from the Chairman. See App. Tr. 29, 69, 87.

6 / The parties acknowledged to us unequivocally at oral argument that the agreement was entered into voluntarily, without any coercion by the Licensing Board or its chairman. See App. Tr. 28-29 (The City); App. Tr. 76 (NRC Staff); App. Tr. 87 (The Company).

7 / App. Tr. 79-81. See Duke Power Company (Oconee-McGuire Units), Docket Nos. 50-269A, -270A, -387A, -369A, and -370A, Prehearing Order No. 8, October 25, 1973. At issue was a claim of attorney - client privilege.

be made available to serve as master. Unlike private counsel, a Panel member would not have to be paid by the parties and, moreover, could be expected to be familiar with licensing board procedures and the statute under which the proceeding was being conducted.[8] The parties' oral agreement was memorialized by the Licensing Board in its order of December 10th. Because that order -- and particularly its second paragraph -- is central to the case before us, we set it out in full:

> Pursuant to agreement among the parties, Marshall E. Miller, Esq., [9] is hereby appointed 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. As to those he determines are privileged, they shall be returned to the counsel of the party supplying said document; as to those he determines are not privileged, they shall be returned to the counsel of the party who had made the request for said document; and a report will be made to the Board as to the reasons and disposition therefore.
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> The above 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 this Board. (Emphasis supplied).

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8 / App. Tr. 81-82, 86-87.

9 / Because of the press of other business, Mr. Miller later had to step down as master. He was replaced without objection on May 2, 1975 by another member of the Licensing Board Panel.

Copies of that order were furnished to all the parties. It was not challenged; no suggestion was raised that it incorrectly represented the terms agreed upon to determine the privilege claims, that it was ambiguous or incomplete, or that its provision for "the parties to be bound by the determinations of the Master" meant other than what it said.

The documents for which privilege or confidentiality was claimed, together with briefs and other supporting and opposing papers, were then submitted to the special master in accordance with the agreement. On June 19, 1975 the master issued his initial determinations; these covered the claims asserted by the Company. He ruled that of the 735 documents submitted to him by that applicant, 162 were not privileged from disclosure on discovery.

In a June 24, 1975, conference call, the City informed the Licensing Board that, in its judgment, a substantial number of the master's rulings were erroneous and that the City wanted them reviewed. The Company objected in light of the parties' agreement and stated, in accordance with that agreement, that it would promptly turn over those documents the master had determined to be unprivileged. The Licensing Board held the parties to their agreement to

be bound by the master's decision, noting, however, that they could ask the master to reconsider his rulings.[10/] The parties did so, but on reconsideration the master essentially adhered to his original determinations.[11/] (The master subsequently ruled on the privilege claims of the Justice Department and applicant Duquesne Light Company on July 3, 1975. His rulings on those claims have not been challenged.)

The City and the Department then moved before the Licensing Board to have the master's rulings "certified" for our review.[12/] The City's motion papers acknowledged that it had "agreed that there was to be no review by the Licensing Board of the Special Master's decision," but contended that it had not agreed to forgo appellate review of the decision.[13/] The Licensing Board denied the City's motion. In doing so, it pointed once again to the "express agreement of the parties to be bound by the determinations

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10/ Minutes of June 24, 1975 conference call dated June 26, 1975, passim.

11/ The master found four additional Company documents to be privileged and withdrew a finding that one other document of that applicant was privileged. See Transcript of Rehearing before Special Master, pp. 81-86 (June 30, 1975).

12/ See 10 C.F.R. §2.718(i).

13/ "City of Cleveland's Motion for Certification of Special Master's Decision, etc.", dated July 8, 1975, p. 10.

of the Master," observed that "[i]t is difficult to envision language expressing the concept of an agreement not to challenge the decisions of the Special Master in language more explicit than that * * *,"[14] and went on to hold that:

> We read the December 6 agreement 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. [15]

The City noted an appeal and filed exceptions to the Licensing Board's refusal to certify the master's discovery rulings. In its supporting brief the City asked that, should an appeal be impermissible because the Board's ruling was interlocutory,[16] we treat its papers "as a motion * * * to direct certification."[17] The NRC staff and

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14/ Ruling of July 21, 1975, NRCI-75/7, 125, 128. The Board expressed no opinion on the correctness of the master's rulings, however, deeming that question not before it. Id. at 129-30.

15/ Id. at 129.

16/ See 10 C.F.R. §2.730(f). This possibility was raised in our letter of August 4, 1975.

17/ Brief of Appellant, p. 11, August 12, 1975.

the Department of Justice supported the City's request for certification.[18/]

We heard argument on the City's motion on September 16, 1975. On September 19th, to avoid delaying the start of evidentiary hearings before the Licensing Board, we issued a decision upholding that Board's action and declining to review the master's determinations, giving our reasons for doing so in summary form. ALAB-290, NRCI-75/9, 401. That prompt (if abbreviated) decision also contained our commitment to render a fuller explanation in due course. Before we could do so, however, the City asked us to reconsider ALAB-290. Upon reconsideration, we adhere to our decision. The opinion which follows addresses both the rationale of ALAB-290 and our reasons for declining to depart from the result there reached.

18/ On August 27, 1975, the Board below also denied the Justice Department's motion for certification on basically the same grounds it had denied the City's. NRCI-75/8, 365. We have not been asked to review that order.

II.

1. The right of appeal.

Cleveland contends that it is entitled to appeal the merits of the special master's discovery rulings to us now as a matter of right. We rejected that contention in ALAB-290 but the City reasserts the argument in its rehearing petition. The City is unable to see how the master's rulings can be "final" in the sense that it is bound by them and yet "interlocutory" for purposes of appeal.

This is a short horse soon curried. Following the example of federal judicial practice, the Commission essentially restricts a party's right to appeal (as distinguished from seeking our discretionary review by referral or certification) to final decisions.[19/] This reflects the policy judgment that piecemeal appeals create more problems than they solve.[20/] The test of "finality" for appeal purposes before this agency (as in the courts[21/]) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either

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19/ Compare 10 C.F.R. §§2.730(f), 2.762 and 2.718(i) with 28 U.S.C. §§1291 and 1292.

20/ See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 169-71 (1974); Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, NRCI-75/4R, 411 (1975).

21/ See Cohen v. Beneficial Ind. Loan Corporation, 337 U.S. 541, 546 (1949).

disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.[22] Under the Commission's rules (except in limited circumstances not present here), interlocutory determinations may not be brought before us for review as a matter of right until the Board below has rendered a reviewable decision.[23]

In this case, the master's rulings upholding some of the Company's privilege claims manifestly neither end the proceeding nor sever a participant. As we have previously ruled, an order which does no more than deny discovery is wholly interlocutory.[24] Thus, no appeal of right would lie to us at this stage even were those privilege determinations made by the Licensing Board itself. Those determinations have no greater "finality" for appeal purposes because the parties agreed to their being made by a

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22/ See Pilgrim, supra, NRCI-75/4R at 413.

23/ Ibid.

24/ Commonwealth Edison Company (Zion Station, Units 1 and and 2), ALAB-116, 6 AEC 258 (1973). Compare Cobbledick v. United States, 309 U.S. 323 (1940) (Frankfurter, J.); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 796, 799 (D.C. Cir. 1972); Cohen v. Curtis Publishing Company, 333 F.2d 974, 978 (8th Cir. 1964), certiorari denied, 380 U.S. 989 (1965); 9 Moore's Federal Practice, par. 110.13[2] (2nd ed. 1973).

"special master" in lieu of that Board. The avenue of appeal is therefore not open to obtain our review of the master's rulings.

2. Review by certification of the Master's role.

Although parties have no right to immediate appellate review of interlocutory board rulings, we have discretion in pending cases to direct the certification of legal issues to us for determination.[25] Certification is the exception, however, not the rule. Before we will use this route to bring up questions out of the ordinary course, we must be convinced at the very least that our prompt decision is needed to prevent detriment to the public interest or to avoid unnecessary delay or expense.[26] In our judgment, in light of the AEC Manual provision (still in effect) proscribing the redelegation of authority conferred on the licensing board,[27] the question of the propriety of allowing the master to decide contested discovery claims satisfied that standard. The issue was previously undecided, the procedure was one followed in the past and likely to be used again and, if the reference to the master were

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25/ 10 C.F.R. §2.718(i); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, NRCI-75/5, 478, 482-3 (1975); Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-297, NRCI-75/11 ___ (November 5, 1975).

26/ Seabrook, supra, NRCI-75/5 at 483.

27/ See pp. 12ff., infra.

impermissible, the proceeding below might have to be tried over in large part if we did not decide the question in advance of the evidentiary hearings. These reasons persuaded us to direct certification of the issue of the validity of the master's role.[28]

3. The Master and the Manual.

The federal courts have long allowed the employment of masters as an acceptable means of resolving certain narrow issues where their use is such as "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause", and not to displace them.[29] While the judicial use of masters is not unbridled,[30] their employment to supervise pretrial and discovery proceedings -- including the resolution of privilege claims -- has been permitted.[31] Although not bound to follow federal

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28/ See ALAB-290, supra, NRCI-75/9, 401.

29/ La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957), quoting Ex parte Peterson, 253 U.S. 300, 312 (1920).

30/ See Kaufman, Masters in the Federal Courts, 58 Colum. L. Rev. 452 (1968); Note, Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev, 779-96 (1975).

31/ E.g., Fisher v. Harris, Upham & Co., 61 F.R.D. 447 (S.D.N.Y. 1973); Collins & Aikman Corp. v. J. P. Stevens & Co., 51 F.R.D. 219, 221 (D.S.C. 1971); First Iowa Hydro Elec. Cooperative v. Iowa-Illinois Gas & Electric Co., 245 F.2d 613 (8th Cir.), certiorari denied, 355 U.S. 871 (1957); Schwimmer v. United States, 232 F. 2d 855 (8th Cir.), certiorari denied, 352 U.S. 833 (1956); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 10 F.R.D. 201, 203 (D.Del. 1950); Pathe Laboratories, Inc. v. Du Pont Film Mfg. Corp., 3 F.R.D. 11, 14 (S.D.N.Y. 1943); Stentor Electric Mfg. Co. v. Klaxon Co., 28 F. Supp. 655 (D. Del. 1939).

court practices in its own adjudicatory proceedings, the Commission has frequently looked to them for guidance and has done so expressly in the area of discovery.[32/] It is, therefore, against this broader judicial background that we must interpret the relevant Commission regulations and apply them to the agreement at hand.

The first issue we face is one raised ourselves. Section 034 of Chapter 0106 of the AEC Manual (which is still effective) directs that "[t]he delegated authority of the Atomic Safety and Licensing Boards may not be further redelegated." That authority includes the power to rule on discovery matters.[33/] We therefore asked the parties to address whether Section 034 invalidated the agreement to refer the privilege claims to a master for binding resolution.

The staff and the Company urge that the reference to the master does not contravene that Manual provision. They argue that the general language of Section 034 should not be read to limit Section 023 of the same Manual chapter.

32/ See Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974); Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 392 (1970).

33/ 10 C.F.R. §§2.718(f), 2.718(l), 2.740 and 2.741.

That section expressly authorizes each licensing board to "exercise the powers of a presiding officer" granted by the Commission's Rules of Practice which, in turn, provide in pertinent part (10 C.F.R. §2.753) that

> 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.

Both the Company and the staff contend that the parties' oral agreement of December 6, 1974 to refer the discovery claims to a master amounted to no more than a stipulation "to govern the conduct of the proceeding" which the Licensing Board, as "presiding officer," properly recognized in its order of December 10, 1974.[34/]

The City disagrees. Although conceding "that the parties might have resolved the privilege issues among themselves by any [manner] they chose," the City contends that once the Licensing Board's own jurisdiction was invoked, "neither the Board nor the parties could delegate that authority to another [i.e., a master] although they could

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34/ In an order entered on August 27, 1975, denying the Justice Department's motion of July 8th to certify the master's rulings to us, the Board below indicated that this was its position also. NRCI-75/8 at 368-69.

have settled the matter themselves thus rendering the decision by the Board moot."[35/] In the City's judgment, the agreement to allow the master to make binding determinations runs fatally afoul of Manual Section 034.

We think the position of the staff and the Company is the sounder one. It simply cuts against basic principles of statutory construction to read a general provision like Manual Section 034 to forbid what a more specific section of the same regulations, Section 023, permits.[36/] In our judgment, the power granted the licensing boards to approve stipulations establishing procedures to be followed "in the proceeding" encompasses authority to approve a voluntary agreement for handling pretrial discovery matters in that proceeding. We perceive no rational basis for outlawing procedures which the parties concededly could have adopted on their own solely because the Board was asked to approve them. To the extent that court practice is a guide in this area, we note that, as the Department of Justice acknowledges, Rule 29 of the Federal

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35/ Petition for Reconsideration, p. 4.

36/ Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932): "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."

Rules of Civil Procedure permits essentially the same practice as 10 C.F.R. §2.753.[37] And we take it as settled that, as a general rule, parties in court may limit the issues they will tender for decision.[38]

The City makes the additional objection that Section 2.753 says it may be invoked "on motion of all the parties" and is therefore inapplicable to the agreement before us which was initiated at the Board Chairman's suggestion.[39] That objection is insubstantial. The Commission has reiterated that its Rules of Practice are not to be applied "in an overly formalistic manner."[40] In the situation before us, all parties had actual notice of the proposal to use a "master" and all voluntarily agreed to the reference. To hold that agreement invalid because the Chairman thought of it first would invest the Commission's Rules

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37/ Rule 29 provides in pertinent part: "Unless the court orders otherwise, the parties may by written stipulation * * * (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34 and 36 for responses to discovery may be made only with approval of the court." See App. Tr. 44-45.

38/ Utah v. United States, 394 U.S. 89, 93 (1969).

39/ Petition for Reconsideration, p. 3.

40/ Consumers Power Company (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974); Consolidated Edison Company of New York, Inc. (Indian Point, Units 1-3), CLI-75-8, NRCI-75/8, 173, 177 (1975). And see American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970).

with a ritualistic significance long rejected in modern adjudicatory procedures.[41]

The City also argues that our analogy to Rule 29 of the Federal Rules is inapposite. The City points out, correctly, that Rule 53 of the Federal Rules expressly allows references to special masters. From this it reasons that "under the Federal Rules there is no need to harmonize a general rule permitting procedural stipulations with a specific prohibition against the redelegation of authority as there is in this case."[42]

We think the City's argument is not well taken for the reasons given by the First Circuit in DeCosta v. Columbia Broadcasting System, Inc., 520 F.2d 499 (1975), a case virtually on all fours on this point with the matter before us. In DeCosta, as in this case, the parties agreed to refer certain issues in a pending case to another judicial officer for determination. (In DeCosta the referee was a United States Magistrate.) In due course the referee reported his ruling. In that case, as in this one, it was

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41/ See McDowell v. Celebrezze, 310 F.2d 43, 44 (5th Cir. 1962) and cases there cited. See also Rule 1, Federal Rules of Civil Procedure: "These rules * * * shall be construed to secure the just, speedy and inexpensive determination of every action."

42/ Petition for Reconsideration, p. 4.

not until "after [the] report was filed" that the losing side "objected to the reference for the first time and argued that the parties were without authority to consent to reference" and that the referee's decision was therefore beyond his jurisdiction and "ultra vires."[43/] The trial court in DeCosta, as the Licensing Board below, rejected the argument, holding that the consensual reference granted the referee power to determine those issues voluntarily submitted to him.[44/] There, as here, the losing side sought further review, renewing on appeal its contention that the trier of fact was powerless to delegate its decision-making authority to a master notwithstanding the parties' consent (albeit the argument in DeCosta was framed in limitations assertedly found in the Constitution rather than in the AEC Manual). The court of appeals in DeCosta flatly rejected that argument for reasons equally applicable to the matter before us:

> However persuasive such an argument may be where governmental sanction is threatened, indicating a strong public interest in the outcome of litigation and creating a countervailing necessity for extending the full

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43/ 520 F.2d at 502.

44/ Compare 383 F.Supp. 326, 331-335 (D.R.I. 1974), with the Licensing Board's Order of August 27, 1975 declining to certify the master's rulings to us at the Justice Department's behest. NRCI-75/8, 365, 367-69.

> measure of judicial process to the defendant, or where parties to civil litigation properly before the federal judiciary insist on judicial resolution, quite different policy and precedent should apply where the parties to a civil dispute themselves select another forum. Under such circumstances, it is inappropriate to evaluate the problem as one of the right of the judiciary to relinquish its authority. The issue is not the power of the judge to refer, but the power of the parties to agree to another arbiter, absent overriding constitutional considerations. 45/

The court, observing that consensual references to masters long predated the Federal Rules, 46/ went on to hold that nothing in those Rules, in applicable statutes, or in the Constitution itself, precluded the parties from electing to refer issues to a "master" if they voluntarily chose to do so.47/ The court analogized a consensual referral to parties' well-recognized rights to elect arbitration over judicial resolution of issues, noting that an arbitration award is a judicially enforceable order and that "[b]oth modes of conflict resolution serve the same goals

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45/ 520 F.2d at 503-04 (footnotes omitted; emphasis added).

46/ See Hecker v. Fowler, 69 U.S.(2 Wall.) 123, 127-29 (1865); Newcomb v. Wood, 97 U.S. 581 (1878); Kimberly v. Arms, 129 U.S. 512, 524 (1889).

47/ Accord, Fisher v. Harris, Upham & Co., 61 F.R.D. 447, 449 (S.D.N.Y. 1973).

of relieving scarce judicial resources and of accommodating the parties."[48/]

We think the court of appeals' reasoning in DeCosta is dispositive as well of the City's argument here. We find no public policy in the AEC Manual, or in the Atomic Energy Act for that matter, which creates a "countervailing necessity" for insisting on the full measure of administrative process where, for reasons satisfactory to themselves, parties to a Commission antitrust proceeding voluntarily agree to have an arbiter of their own choosing decide whether some documents are privileged or not. Whether we might reach a different result if the referral were not voluntary,[49/] or there were significant health and safety or environmental questions involved,[50/] or the entire cause were referred,[51/] are matters we need not (and

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48/ 520 F.2d at 505-06. And see Note, Masters and Magistrates, supra, 88 Harv. L. Rev. at 796: "Of course, if all parties freely consent to the reference of a case on a component issue, the problems of added expense and the need to retain respect for judgments and confidence in the outcome of litigation lose their significance. Thus, reference by consent seems unobjectionable."

49/ See LaBuy v. Howes Leather Co., supra, 352 U.S. 249.

50/ See 10 C.F.R. §2.749(d) and 37 F.R. 15127 (July 28, 1972).

51/ See Cademartori v. Marine Midland Trust Co., 18 F.R.D. 277 (S.D.N.Y. 1955).

do not) reach. It is sufficient to decide this case that the circumstances before us present no overriding considerations which precluded the consensual reference of the discovery issues.

Although the court in DeCosta did not rest the validity of the reference in that case on the Federal Rules of Civil Procedure, it reviewed the report under the standards established by those rules. It did so essentially because it construed the DeCosta reference -- "for hearing and determination" -- as "not clear enough by its own terms to support the conclusion that the parties consented to a grant of power to the [referee] greater than outlined in Rule 53 Fed. R. Civ. Pro." 520 F.2d at 508. We therefore inquire next into what (if any) review was contemplated by the parties in entering into the agreement in this case.

4. The agreement construed.

The order at issue states that the disputed privilege claims were referred "with the express agreement of the parties to be bound by the determinations of the Master."[52] Each of the parties has confirmed its understanding that the agreement was intended to waive its rights to ask the Licensing Board to review the master's rulings. Thus, for example, in asking the Licensing Board to certify the master's rulings to us, the City expressly acknowledged in its motion papers that[53]

> When the questions of discovery and privilege first arose, the City agreed with the other parties that the integrity of the [Licensing] Board should be maintained by shielding it from the contents of documents that might later be held to be privileged.
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> The City believed that since an appeal of the Special Master's report to the [Licensing] Board would require their review of the documents and thereby compromise the Board's position, they agreed that there was to be no review by the Board of the Special Master's decision. (footnote omitted.)

The City reiterated this view of the agreement when seeking similar relief directly from us.[54] And in oral argument before this Board last September 16th, each of the other parties echoed that understanding, i.e., that when the

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52/ The order embodying the full agreement appears at p. 4, supra.

53/ The City's Motion for Certification, p. 10 (July 8, 1975).

54/ The City's Brief on Appeal, p. 17 (August 12, 1975).

reference was agreed to, the parties contemplated no review of the master's rulings by the Board below.[55/] The question here, then, is not whether the parties agreed to be bound by the master's rulings in the Licensing Board proceedings -- that is admitted -- but whether they agreed to be bound by his determinations before us as well. To answer that question, we look initially to the text of the agreement itself.

a. To determine the purport of any agreement it is appropriate to begin by first ascertaining the meaning its words naturally appear to convey. To agree "to be bound" by a future determination surely suggests that the parties had consented to abide the result, favorable or not, reached by their chosen arbiter. While we would discount a literal reading of the agreement if its result were unreasonable or absurd, this understanding is hardly irrational or unknown to the law. To give but one example that comes readily to mind, deadlocks in collective bargaining negotiations are often voluntarily referred to binding arbitration. Those arbitrations regularly put to rest disputes of greater complexity and wider consequence than whether documents sought to be discovered in litigation

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55/ See App. Tr. 40-41 (Department of Justice); App. Tr. 70 (NRC Staff); App. Tr. 97 (The Company).

are within or without the "attorney client" or "work-product" privilege without permitting recourse to appellate review of the merits of the arbitrator's determinations. This result is honored by the courts even in cases where, had the dispute come before the judicial tribunals initially, they would have made some different resolution.[56/]

b. Our conclusion that the parties had waived appellate as well as Licensing Board review of the master's rulings is fortified by the manner in which the agreement was to operate. It provides that the disputed documents are to be given to the master for examination in camera, and

> [a]s to those he determines are privileged, they shall be returned to the counsel of the party supplying said document, as to those he determines are not privileged, they shall be returned to the counsel of the party who had made the request for said document, * * *. (Emphasis added.)

The requirement that the master immediately turn over to the party demanding them documents ruled unprivileged cuts strongly against the argument that the agreement contemplated appellate review. As we just pointed out, the parties themselves eliminated review by the Licensing

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56/ E.g., In re Grace Line, Inc., 38 Misc.2d 909, 239 N.Y.S.2d 293 (Sup. Ct. N.Y. Co. 1963), affirmed, 20 App. Div.2d 759, 246 N.Y.S.2d 994 (1st Dept.), appeal denied, 14 N.Y.2d 484, 199 N.E.2d 174, certiorari denied, 379 U.S. 843 (1964). The Supreme Court has reiterated a "consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration," Boys Markets v. Retail Clerks Union, 398 U.S. 235, 241 (1970).

Board, and the Commission's Rules of Practice -- to which counsel before us are no strangers -- expressly foreclose interlocutory appeals.[57] In Commission practice, as in the federal courts, rulings denying discovery are interlocutory; they are reviewable as of right only when taken up at the end of the case on appeal from the Licensing Board's decision.[58] Consequently, as an undisputed purpose of the reference agreement was to set up a reasonably swift way to find out which documents would be available for use at trial without getting the Licensing Board directly involved, that purpose would be impossible of achievement unless the agreement meant that the right to appellate review was also waived. For if not, in order to preserve its appellate rights a party would somehow have to arrange -- contrary to the express provision in the agreement -- to have the master withhold the very documents he determined to be unprivileged until after the trial was over, a decision rendered, and appellate review available, for earlier disclosure of the documents would moot any privilege claim. But manifestly this procedure would frustrate the reason for having a master decide privilege claims in the first

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57/ 10 C.F.R. §2.730(f): "No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." (Under other provisions of the Rules, this Board acts for the Commission in these matters. 10 C.F.R. §2.785)

58/ See fn. 24, supra.

place; it would render the reference to him so much waste ink. We are therefore forced to the conclusion that, in contemplated operation as well as in plain meaning, the agreement "to be bound" by the master's determinations necessarily encompassed a waiver of appellate review.

c. The City presses the further argument that, notwithstanding anything we may infer from the four corners of the agreement, the parties never intended to waive the right to appeal from the master's determinations. No contemporaneous evidence supports that contention, however, and the agreement itself reserves no right of appeal. The only backing for the City's position (aside from its ipse dixit) are some statements of counsel made six months after the referral and subsequent to the master's rulings, and even those statements are equivocal. Indeed, the Department of Justice represented in its brief on appeal that "[i]f the delegation of authority to the Special Master is valid then our agreement prevents us from objecting to his specific rulings."[59/] In these circumstances, the afterthoughts of disappointed counsel merit little weight. Neither do post hoc assertions of the City's subjective intent advance its cause. Such arguments "cannot add language not contained in the stipulation itself."[60/] As the late Judge Learned

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59/ Memorandum of the Department of Justice, p. 7 (September 12, 1975). See also App. Tr. 40-41.

60/ Rockport Yacht & Supply Company v. M/V Contessa, 209 F. Supp. 396, 399 (S.D. Tex. 1962).

Hand admonished when faced with similar arguments:

> If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. 61/

d. Before we leave this point there is one more matter which bears mentioning. Cleveland's complaint is based on documents withheld from it on the basis of the master's rulings upholding the Company's claims of privilege. The City makes little mention, however, of the more than one hundred and fifty other documents it demanded and was given -- without appeal -- solely because as to them the master rejected the Company's privilege claims. The City is thus in the position of retaining benefits of the referral agreement with one hand while attacking it with the other. That posture is not only uncomfortable but impermissible. It is "the general rule that 'one who accepts the benefits of a judgment, decree or judicial order is estopped to deny the validity thereof.'" 62/ This principle was initially articulated by the Supreme Court in the context of a contract dispute:

61/ Hotchkiss v. National City Bank of New York, 200 F. 287, 293, (S.D.N.Y. 1911), affirmed, 201 F. 664 (2nd Cir. 1912), affirmed, 231 U.S. 50 (1913).

62/ American Guaranty Corporation v. United States, 401 F.2d 1004, 1011 (Ct. Cls. 1968).

> He entered of his own accord into the second contract and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract. 63/

And it has been applied not only to contracts 64/ but to statutes, 65/ other governmental actions, 66/ judgments, 67/ and other sources of benefit. 68/ Parties who have availed

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63/ United States ex rel. International Contracting Co. v. Lamont, 155 U.S. 303, 309 (1894).

64/ Branch v. Jesup, 106 U.S. 468, 475-76 (1883); Lyle Cashion Co. v. McKendrick, 204 F.2d 609, 612 (5th Cir. 1953); Allied Steel and Conveyors, Inc. v. Ford Motor Company, 277 F.2d 907, 912 (6th Cir. 1960); Hartford Accident & Indemnity Co. v. United States, 127 F.Supp. 565, 567 (Ct. Cls. 1955).

65/ Wall v. Parrot Silver & Copper Co., 244 U.S. 407, 411-412 (1917); Pierce Oil Corp. v. Phoenix Refining Co., 259 U.S. 125, 128 (1922); Booth Fisheries v. Industrial Comm., 271 U.S. 208, 211 (1926); Fahey v. Mallonee, 332 U.S. 245, 255 (1947); Young v. Anderson, 160 F.2d 225, 226 (D.C. Cir.), certiorari denied, 331 U.S. 824 (1947).

66/ St. Louis Co. v. Prendergast Constr. Co., 260 U.S. 469, 472 (1923); Callanan Road Improvement Co. v. United States, 345 U.S. 507, 513 (1953); FPC v. Colorado Interstate Gas Co., 348 U.S. 492, 502 (1955).

67/ Livesay Industries v. Livesay Window Co., 202 F.2d 378, 382 (5th Cir.), certiorari denied, 346 U.S. 855 (1953); American National Bank & T. Co. of Chicago v. Taussig, 255 F.2d 765, 769 (7th Cir.), certiorari denied, 358 U.S. 883 (1958); American Guaranty Corporation v. United States, supra, 401 F.2d at 1011.

68/ Schloss Bros. & Co. v. Charles Stern Co., 53 F.2d 574, 575 (5th Cir. 1931).

themselves of benefits have been precluded from challenging conditions attached to those benefits regardless of the ground of attack. Such a person is estopped from arguing that a condition is unconstitutional,[69] that it was imposed without authority,[70] that it is contrary to law,[71] that the agreement containing the conditions is invalid,[72] and that no agreement existed.[73] Therefore, irrespective of the correctness of the master's individual privilege rulings, the City is estopped to challenge them. It cannot now be allowed to attack the express condition under which the privilege claims were referred -- "to be bound by the determinations of the Master" -- while retaining at the same time the documents it received from the

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69/ Booth Fisheries v. Industrial Comm., supra, 271 U.S. at 211; Fahey v. Mallonee, supra, 332 U.S. at 255; Young v. Anderson, supra, 160 F.2d at 226.

70/ Branch v. Jesup, supra, 106 U.S. at 475-76; Hartford Accident & Indemnity Co. v. United States, supra, 127 F. Supp. at 567.

71/ Callanan Road Improvement Co. v. United States, supra, 345 U.S. at 513; F.P.C. v. Colorado Interstate Gas Co., supra, 348 U.S. at 502; Schloss Bros. & Co. v. Charles Stern Co., supra, 53 F.2d at 575.

72/ United States ex rel. International Contracting Co. v. Lamont, supra, 155 U.S. at 309.

73/ Allied Steel and Conveyers, Inc. v. Ford Motor Company, supra, 277 F.2d at 912.

Company as a result of his rulings.[74] There is thus nothing inequitable in holding the City to its voluntary agreement to be bound by those rulings.[74a]

5. Review by certification of the master's rulings.

In the preceding points we have developed that, in the circumstances presented, resort to a master was not precluded by regulation or statute and that the agreement to be bound by his determinations included a waiver of the right ever to appeal his rulings. The referral agreement was, of course, strictly an arrangement among the parties; it neither bound nor purported to bind anyone else. Therefore, even assuming arguendo that any such intra-party compact could oust this agency's tribunals of jurisdiction to review the master's rulings, the particular agreement at bar did not do so. Both the Licensing Board and this Board's discretion to review those discovery rulings sua sponte remain untouched.[75] As to the Licensing Board, all parties agreed that they referred the privilege claims to the master for

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74/ Nor could the City avoid the application of this rule by returning the documents to the Company. The Company's claim -- rejected by the master -- was that they were of a confidential nature. Once their confidentiality was breached it could not be restored.

74a/ In light of the foregoing discussion, we do not reach the question whether (jurisdictional matters to one side) parties may ever raise issues on appeal which they intentionally and voluntarily agreed not to present to the trial board.

75/ See Consolidated Edison Co. of New York (Indian Point, Unit 3), CLI-74-28, RAI-74-7, 7, 8-9 (1974); Vermont Nuclear Power Corp. (Vermont Yankee Station), ALAB-124, 6 AEC 358, 361-62 (1973).

the very purpose of eliminating the need for that Board to see the contested papers. Accordingly, the Board below cannot be faulted for declining to review the privileged status of documents the parties stipulated should be kept from it.[76/]

There remains, then, only the question whether we should exercise our discretion to direct certification of the master's individual privilege rulings in order to review them ourselves. We decline to undertake that task. The rule in the federal courts is that discovery orders involving the scope of an attorney's work product -- even in the so-called "big case" -- are not appealable,[77/] and the contention that the denial of a claim of privilege (much less its grant) enjoys a special status deserving of interlocutory review has been expressly rejected by the Supreme Court.[78/] We think it wisest to continue our own adherence to that same practice.[79/] It is one thing to relax the rule against interlocutory appeals by exercising

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76/ See First National Bank v. Cities Service Co., 391 U.S. 253, 291-92 (1968).

77/ American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277 (2nd Cir. 1967). See also International Business Machines Corp. v. United States, 480 F.2d 293, 298 (2nd Cir. 1973)(in banc), certiorari denied, 416 U.S. 980 (1974).

78/ Will v. United States, 389 U.S. 90 (1967); Accord, City of Los Angeles v. Williams, 438 F.2d 522 (9th Cir. 1971).

79/ Zion, supra, ALAB-116, 6 AEC at 259-60.

our certification powers to settle a legal point of general applicability. This in effect is what we did in this case by taking up the validity of the master's role. But it is quite a different matter to grant interlocutory review simply to reexamine sui generis rulings on individual privilege claims. Aside from the obvious fact that to do so would stall the proceeding below until we acted, the simple truth is that we are no better equipped to rule on such matters than the Licensing Board. Indeed, perhaps less so, for that Board has at least been educated on the relevant issues by participation in the proceeding before it; we would have to begin afresh.

Our hesitation to allow interlocutory review of these discovery claims rests in no small part on the fact that doing so would invite our inundation with demands for similar treatment in other cases. This Board is simply not prepared to handle such a flood. To be sure, absent an agreement not to do so, a party has the right to appeal denials of discovery demands by filing exceptions at the end of the case. But our disinclination to allow interlocutory review of such matters is not a practice which merely puts off judgment day. In the interim, the dissatisfied party may prevail, or the information sought become available elsewhere, or

the subject of the discovery mooted, or the cause settled, or, as the old story goes, "the horse may learn to fly." In short, effective and efficient administration of the appellate process -- indeed the entire licensing process -- is served best by exercising our certification powers sparingly. Discovery orders are rarely likely to give cause for that exercise.

We see no reason to depart from that practice in this case. To be sure, the rulings complained of were made by a "master" rather than a licensing board. But that "master" was in fact a member of the Commission's Licensing Board Panel. He was qualified in the conduct of administrative proceedings and is currently presiding over other Commission cases where he is called upon to make similar rulings. That he ruled as "master" in this case and will do so as "chairman" in others is to our minds a distinction without a difference.

Nor are we persuaded by the City's claims that it was denied "a fair hearing" before the master. Without going into chapter and verse, it is sufficient to note that the City was allowed -- and took -- the opportunity to file several rounds of briefs before the master, to present oral argument before him, and to ask that he reconsider his ruling. In short, it was given ample opportunity to support

and argue its position before its claims were finally determined. What the City is unhappy about is that the master rejected its views on the privileged status of the majority of the documents it demanded. The master may well have erred in his rulings; he did not, however, deny the City its day in court. A question about the latter might merit interlocutory review on certification; in our judgment one about the former does not.

On petition for reconsideration, ALAB-290 adhered to. It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Margaret E. Du Flo
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

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

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

Peggy C. Dewing
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
TOLEDO EDISON COMPANY, ET AL	)	Docket No.(s) 50-346A
(Davis-Besse Unit 1)	)	
CLEVELAND ELECTRIC ILLUMINATING	)	50-440A
COMPANY, ET AL.	)	50-441A
(Perry Units 1 and 2)	)	
TOLEDO EDISON COMPANY, ET AL.	)	50-500A
(Davis-Besse Units 2 and 3)	)	50-501A

SERVICE LIST

Douglas Rigler, Esq., Chairman
Foley, Lardner, Hollabaugh & Jacobs
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Ivan W. Smith, Esq.
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

John M. Frysiak, Esq.
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Alan S. Rosenthal, Esq., Chairman
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Michael C. Farrar
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Richard R. Salzman, Esq.
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Joseph Rutberg, Esq.
Antitrust Counsel
Counsel for NRC Staff
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Office of Antitrust & Indemnity
Office of Nuclear Reactor Regulation
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Benjamin H. Vogler, Esq.
Roy P. Lessy, Jr., Esq.
Antitrust Counsel
Counsel for NRC Staff
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Donald H. Hauser, Esq.
Victor F. Greenslade, Jr., Esq.
Cleveland Electric Illuminating Company
P. O. Box 5000
Cleveland, Ohio 44101

Joseph J. Saunders, Esq., Chief
Public Counsel and Legislative Section
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Gerald Charnoff, Esq.
Shaw, Pittman, Potts, Trowbridge
and Madden
910 -17th Street, N. W.
Washington, D. C. 20006

Lee C. Howley, Esq., Vice President
and General Counsel
Cleveland Electric Illuminating
Company
P. O. Box 5000
Cleveland, Ohio 44101

David C. Hjelmfelt, Esq.
Michael Oldak, Esq.
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Reuben Goldberg, Esq.
Arnold Fieldman, Esq.
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Steven M. Charno, Esq.
Melvin G. Berger, Esq.
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

Honorable Thomas E. Kauper
Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Washington, D. C. 20530

John C. Engle, President
AMP-O, Inc.
Municipal Building
20 High Street
Hamilton, Ohio 45012

Honorable Richard M. Firestone
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Honorable William J. Brown
Attorney General
State of Ohio
Columbus, Ohio 43215

Honorable Edward A. Matto
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Honorable Deborah P. Highsmith
Assistant Attorney General
Antitrust Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Honorable Christopher R. Schraff
Assistant Attorney General
Environmental Law Section
351 East Broad Street
Columbus, Ohio 43215

Duncan, Brown, Weinberg & Palmer
1700 Pennsylvania Avenue, N W.
Washington, D. C. 20006

John Lansdale, Jr., Esq.
Cox, Langford & Brown
21 Dupont Circle, N. W.
Washington, D. C. 20036

Leslie Henry, Esq.
W. Snyder, Esq.
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Mr. George B. Crosby
Director of Utilities
Piqua, Ohio 45350

William M. Lewis, Jr.
W. M. Lewis & Associates
P. O. Box 1383
Portsmouth, Ohio 45662

Robert D. Hart, Esq.
Assistant Law Director
City Hall
Cleveland, Ohio 44114

Anthony G. Aiuvalasit, Jr., Esq.
Antitrust Division
Department of Justice
P. O. Box 7513
Washington, D. C. 20044

Susan B. Cyphert, Esq.
Antitrust Division
Department of Justice
727 New Federal Building
2140 East Ninth Street
Cleveland, Ohio 44199

David M. Olds, Esq.
Reed, Smith, Shaw and McClay
P. O. Box 2009
Pittsburgh, Pennsylvania 15230

Thomas A. Kayuha, Esq.
47 North Main Street
Akron, Ohio 44308

Perry Public Library
3753 Main Street
Perry, Ohio 44081

Director
Ida Rupp Public Library
301 Madison Street
Port Clinton, Ohio 43452

Joseph A. Rieser, Jr., Esq.
Lee A. Rau, Esq.
Reed, Smith, Shaw & McClay
Madison Building, Suite 404
Washington, D. C. 20005

Terence H. Benbow, Esq.
A. Edward Grashof, Esq.
Winthrop, Stimson, Putnam
and Roberts
40 Wall Street
New York, New York 10005

Ruth G. Bell, Esq.
Janet R. Urban, Esq.
Antitrust Division
Department of Justice
Washington, D. C. 20530