

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)

Schering-Plough Corporation,)
a corporation,)

Upsher-Smith Laboratories,)
a corporation,)

and)
)

American Home Products Corporation,)
a corporation.)

Docket No. 9297

**ORDER DENYING MOTION OF AMERICAN HOME PRODUCTS CORPORATION
TO STAY ORDER, FOR CERTIFICATION FOR INTERLOCUTORY APPEAL
AND APPLICATION FOR FULL COMMISSION REVIEW**

I. PROCEDURAL HISTORY

On January 15, 2002, an Order Denying American Home Products Corporation's Motion for Protective Order and to Compel Return of Materials ("January 15th Order") was issued. American Home Products Corporation ("AHP") is no longer a respondent in this matter. AHP was a respondent at the time it filed the Motion for Protective Order and to Compel Return of Privileged and Work Product Material ("Motion for Protective Order"), on September 27, 2001.

On January 16, 2002, AHP filed an Emergency Motion to Stay Order, for Certification for Interlocutory Appeal and Application for Full Commission Review ("AHP Motion"). AHP's motion sought the following relief: (1) the stay of the order denying AHP's motion for protective order and to prohibit Complaint Counsel or Respondents from using the disputed documents in any manner pending appeal; (2) in the alternative, AHP seeks *in camera* treatment for each of the contested documents Complaint Counsel or Respondents intend to use as exhibits at the administrative hearing; (3) certification of the January 15, 2002 Order to the Commission for interlocutory review; (4) shortening of Complaint Counsel's time to respond to AHP's Motion; and (5) a ruling on AHP's request to stay or request for *in camera* treatment of AHP's documents by January 18, 2002.

By Order dated January 18, 2002, AHP's request for a stay of the order denying AHP's motion of protective order and to prohibit Complaint Counsel or Respondents from using the disputed documents was denied without prejudice, pending a determination on AHP's motion for *in camera* treatment. AHP's request in the alternative, for *in camera* treatment for the contested documents and testimony thereto was provisionally granted, pursuant to 16 C.F.R. § 3.45(g), in the Order of January 18, 2002. AHP was ordered to file a motion for *in camera* treatment of the documents within twenty days and instructed that the contested documents would be treated as *in camera* until a final ruling on whether *in camera* treatment of the material is appropriate, pursuant to Commission Rule 3.45(b).

Complaint Counsel was allowed five days to respond to AHP's Motion, pursuant to Commission Rule 3.23(b). Complaint Counsel filed its opposition on January 23, 2002. AHP then filed a reply in support of its motion on January 25, 2002.

On February 7, 2002, AHP filed a motion for *in camera* treatment, seeking indefinite *in camera* treatment for the documents that were the subject of the January 15th Order. The declaration of AHP's Litigation Counsel adequately established that the documents were privileged for purposes of AHP's motion for *in camera* treatment. Accordingly, by Order dated February 8, 2002, AHP's motion for indefinite *in camera* treatment was granted in part and denied in part. The motion was granted with respect to those documents that the parties have offered into evidence or have listed as potential exhibits. The motion was denied with respect to those documents that no party has offered into evidence.

For the reasons set forth below, AHP's motion for certification to the Commission for interlocutory review of the January 15, 2002 Order is DENIED.

In the January 18th Order, AHP's motion for the stay of the January 15th Order, to prohibit Complaint Counsel or Respondents from using the disputed documents in any manner pending appeal, was denied without prejudice. As set forth below, AHP has not demonstrated it will suffer irreparable harm because AHP does not face public disclosure of its documents. The provisional grant of *in camera* treatment in the January 18, 2002 Order and the indefinite grant of *in camera* treatment in the February 8, 2002 Order obviate AHP's need for a stay. Accordingly, AHP's request for a stay is DENIED.

II. THE ORDER FOR WHICH INTERLOCUTORY REVIEW IS SOUGHT

AHP seeks interlocutory review pursuant to Commission Rule 3.23(b), which allows review of a ruling by the Administrative Law Judge *only* upon a determination by the Administrative Law Judge: (1) that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion; *and* (2) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; *or* (3) subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b).

The January 15th Order, for which appeal is sought, held:

AHP has not met its burden of showing that, under the totality of these circumstances, AHP did not waive any privileges. Accordingly, AHP has waived its right to assert the work product or attorney-client privileges as to these nine documents and to Dey's testimony regarding five of the documents.

In re Schering-Plough Corp., Dkt. No. 9297, slip op. at 7 (FTC Jan. 15, 2002).

In support of its motion for interlocutory appeal, AHP asserts that the determination that AHP waived any privileges it may have held with respect to these nine documents, and Dey's related testimony, should be certified to the full Commission for interlocutory review. AHP asserts first, that the issue of whether a party waives privilege as to documents it does not know to be privileged at the time of production constitutes a controlling question of law. AHP next asserts that there is a substantial ground for difference of opinion as to whether AHP waived any privileges attached to the nine documents, as courts have diverged as to the proper methodology for determining whether inadvertent production constitutes waiver. Finally, AHP asserts that subsequent review of the January 15th Order will be an inadequate remedy because AHP, as a non-party, does not have standing to appeal an initial decision to the Commission and because the documents AHP claims are privileged will have already been used at trial.

Complaint Counsel states that the issues do not present a controlling question of law on which there is a substantial ground for difference of opinion. Although Complaint Counsel takes the position of supporting the January 15th Order, it has not opposed AHP's request for certification or AHP's request for Commission review, nor has it briefed the issue.

III. APPLICATION OF THE STANDARDS FOR INTERLOCUTORY APPEAL

AHP's request for certification fails to meet the requirements of Commission Rule 3.23(b) for granting a request for interlocutory appeal. Applications for review of a ruling by the Administrative Law Judge may be made *only* if the applicant meets both prongs of a two prong test. First, the ruling must involve "a controlling question of law or policy as to which there is substantial ground for difference of opinion." 16 C.F.R. § 3.23(b). Second, the Administrative Law Judge must determine "that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation *or* [that] subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b) (emphasis added).

A. Controlling Question of Law or Policy to Which There Is Substantial Ground for Difference of Opinion

The first prong of Commission Rule 3.23(b) contains two requirements that must be met.

First, the ruling must involve a controlling question of law or policy. Second, there must also be a substantial ground for difference of opinion. The January 15th Order, which held that AHP waived privileges it may have had to nine documents and related deposition testimony when AHP inadvertently produced the documents and failed to take reasonable precautions to protect any privileges, satisfies neither of these requirements.

1. Controlling question of law or policy

AHP asserts that the issue of whether a party waives privileges as to documents it does not know to be privileged at the time of production constitutes a controlling question of law. AHP states that a question of law is “controlling” if the determination may importantly affect the conduct of an action. However, AHP cites no Commission case that defines a controlling question of law as a determination that may importantly affect the conduct of an action. Simply because an issue is “important” does not qualify it as “controlling.” *In re Dillard Department Stores, Inc.*, 1995 FTC LEXIS 149, *21 (June 8, 1995) (“‘important’ questions of law or policy may not constitute ‘controlling questions as to which there is a substantial ground for differences of opinion’”). Instead, a controlling question of law or policy has been defined in Commission cases as “not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.” *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996); *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *2 (Nov. 20, 1979) (citations omitted) (“The question is not whether interlocutory review would resolve an ‘intellectually intriguing’ issue, the early determination of which ‘would save . . . considerable trouble and expense.’”).

AHP criticizes the definition of a controlling question of law as stated in *Automotive Breakthrough Sciences* on the grounds that federal courts have explicitly rejected this standard. AHP Motion at 12 n.12 (citing *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2nd Cir. 1990) (a controlling question need not affect a wide range of cases)). However, *Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996), was issued subsequent to *Klinghoffer*. Commission Rule 3.23(b) is modeled after 28 U.S.C. § 1292. Other circuit courts interpreting 28 U.S.C. § 1292 have held that to be a controlling question of law, the issue must affect the course of the litigation. *Ahrenholz v. University of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000) (certification appropriate only where decision turns on a pure question of law, the resolution of which could head off other litigation). *See also Clark-Dietz and Assoc. Engineers, Inc. v. Basic Construction Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (“fact-review questions inappropriate for § 1292(b) review”); *In re Int’l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, *4 (decisions that are “fact specific” are not subject to interlocutory appeal). Indeed, in *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994), where the district court certified an order requiring the production of confidential investigative files, the court of appeals held that “the discretionary resolution of discovery issues precludes the requisite controlling question of law.” Thus, under federal precedent, the evaluation of the circumstances under which AHP waived any privileges does not present a controlling question.

Also, under Commission precedent, determinations regarding privileges have been found not to involve a controlling question of law or policy. *E.g. In re Atlantic Richfield Co.*, 1978 FTC LEXIS 568, *1 (Oct. 3, 1978) (order requiring complaint counsel to return documents to respondent which respondent had inadvertently produced did not involve a controlling question of law or policy); *In re R.J. Reynolds Tobacco Co.*, 1998 FTC LEXIS 179, *4 (Sept. 24, 1998) (order denying respondents' motion to compel complaint counsel to provide a more complete privilege log did not involve a controlling question of law or policy as to which there is substantial ground for difference of opinion). Accordingly, under Commission precedent, a determination of waiver does not present a controlling question of law.

AHP next asserts, without citing any legal authority, that whether it waived privileges is a controlling question of law because, according to Complaint Counsel, the forecasts contained in these documents speak directly to the core question of Complaint Counsel's case, that is, the ability of generic entrants to threaten Schering's power in the K-Dur product line. Simply because the documents may be important to Complaint Counsel does not elevate the determination that privileges were waived to a controlling, or even important, question of law.

AHP further asserts that whether it waived privileges is a controlling question because AHP may be irreparably injured in the absence of immediate Commission review because the January 15th Order has the practical effect of letting the parties use AHP's contested documents at a public trial. This argument fails for two reasons. First, the provisional grant of *in camera* treatment by the January 18, 2002 Order and the indefinite grant of *in camera* treatment by the February 8, 2002 Order, as well as the Protective Order Governing Discovery Material, entered on May 10, 2002, prevent public disclosure of the documents. Second, an inquiry into whether AHP faces irreparable harm has no bearing on whether the issue presents a controlling question of law or policy. Instead, this argument goes to whether AHP can satisfy the second requirement of Commission Rule 3.23(b), that subsequent review would be an inadequate remedy. Moreover, the case AHP cites to support its theory that the prospect of harm presents a controlling question of law, *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3rd Cir. 1974), provides no support because the harm sought to be avoided was in no way comparable to the harm AHP asserts it may suffer in the instant case. There, the order of the district court granting class certification included "the possibility of prejudice to a party pendente lite." *Id.* at 755. Thus, even if AHP had demonstrated some harm, this does not present a controlling question.

Since a determination that the factual circumstances surrounding the creation, production, related deposition testimony, use by experts of, and belated assertion of privilege for the documents resulted in a waiver of privileges does not involve a controlling question of law or policy, AHP has not satisfied the first requirement of the first prong of Commission Rule 3.23(b).

2. Substantial ground for difference of opinion

The January 15th Order does not present an issue for which there is a "substantial ground for difference of opinion," the second requirement of the first prong of Commission Rule

3.23(b). “The phrase ‘substantial ground for difference of opinion’ requires a finding that the question presents a novel or difficult legal issue. It is this unsettled state of the law that creates a ‘substantial ground for difference of opinion’ and triggers certification.” *Int’l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995). The January 15, 2002 Order relies on settled precedent, not on a novel theory. Although no previous Administrative Law Judge has formally delineated the standards used in determining whether inadvertent production of a privileged document waived the privileges attached to it, it is clear that similar analysis has been undertaken. For example, in *In re Atlantic Richfield Co.*, 1978 FTC LEXIS 560, *1-2 (Sept. 12, 1978), where respondents sought the return of 25 privileged documents which they claimed had been inadvertently produced in response to an investigative subpoena, the Administrative Law Judge reviewed the scope of production, the time constraints that respondent was under, and the fact that respondents did have reasonable screening procedures in place to find that respondent had not waived its privileges.

Further, the January 15, 2002 Order is consistent with settled precedent from federal cases. Judicial decisions and precedents under the Federal Rules of Civil Procedure concerning discovery motions, though not controlling, provide helpful guidance for resolving discovery disputes in Commission proceedings. *L.G. Balfour Co., et al.*, 61 F.T.C. 1491, 1492 (Oct. 5, 1962). Although, as AHP asserts, courts have diverged as to the proper methodology for determining whether inadvertent production constitutes waiver, the “majority of courts” determine whether disclosure waives privilege by utilizing “an approach which takes into account the facts surrounding a particular disclosure.” *Alldread v. Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993). “In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered.” *United States v. De Lajara*, 973 F.2d 746, 749 (9th Cir. 1992). Under this “middle of the road,” balancing test, courts consider the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness and the protection of an appropriate privilege. *Gray v. GeneBicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996); *Alldread*, 988 F.2d at 1434-35. This precedent was adopted in *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, 4-8 (Oct. 17, 2000) and utilized in the January 15, 2002 Order.

Commission precedent also holds that to establish a “‘substantial ground’ for difference of opinion under Rule 3.23(b), a party seeking certification must make a showing of a likelihood of success on the merits.” *Int’l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995); *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *3 (Nov. 20, 1979) (The substantial ground for difference of opinion test “has been held to mean that appellant must show a probability of success on appeal of the issue.”). AHP cannot demonstrate a probability of success on appeal of the issue.

AHP argues that the holding of *Advertising to Women, Inc. v. Gianni Versace*, 1999 U.S. Dist. LEXIS 12263 (N.D. Ill. Aug. 4, 1999), an unpublished opinion of a federal district court, compels a different result than the one reached in the January 15th Order. The January 15th Order

relies on several contrary cases which compel a finding that AHP waived any privileges it may have held. Simply because AHP can cite to one, unpublished district court case that AHP believes supports its position that it did not waive any privileges does not compel certification. *See Oyster v. Johns-Manville Corp.*, 568 F. Supp. 83, 88 (E.D. Pa. 1983) (party who produces a single case supporting particular legal doctrine, as opposed to plethora of orders and decisions rejecting that doctrine fails to demonstrate substantial ground for difference of opinion as required by 28 U.S.C. § 1292(b)).

The facts of *Versace*, a case which AHP cited in its reply brief in support of its Motion for Protective Order, are quite unusual and thus do not provide compelling authority. *Versace* involved the disclosure of two letters in Italian that the putative privilege holder argued were not privileged. The dispute arose when plaintiffs attempted to use the production of these two letters as a basis to compel production of a broad category of other material - privileged documents and testimony relating to advice of counsel on a trademark. *Versace* asserted that the documents were not privileged because they contained no legal advice and thus no privilege was waived. Since the plaintiffs failed to prove that the letters were privileged (and did not provide the court with an English translation), the court denied the motion to compel. *Versace*, 1999 U.S. Dist. LEXIS 12263, *2-15. The court held that the balancing test consisting of five factors (which was applied in the January 15th Order) "does not fit well here, because the facts of this case do not fall within a traditional 'inadvertent production' analysis." *Id.* at *15-16. Thus, *Versace* does not compel a finding contrary to the January 15th Order, which reviewed a more typical situation of inadvertent disclosure.

Because it is well settled that courts evaluate the circumstances surrounding disclosure to determine if there has been waiver and because AHP cannot demonstrate a probability of success on appeal of the issue, AHP has not presented an issue for which there is substantial ground for difference of opinion. Thus, AHP has not satisfied the second requirement of the first prong of Commission Rule 3.23(b).

For the above stated reasons, the issue for which AHP seeks review does not involve "a controlling question of law or policy as to which there is substantial ground for difference of opinion." 16 C.F.R. § 3.23(b). Therefore, the first prong of Commission Rule 3.23(b) has not been met.

B. Whether Subsequent Review Would Be An Inadequate Remedy

Even if AHP's request for certification did meet the first prong of Commission Rule 3.23(b), AHP's request for certification fails to meet the second prong as well. The second prong of Commission Rule 3.23(b) requires a determination by the Administrative Law Judge that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b).

A review of the determination that AHP waived any privileges with respect to nine documents unquestionably would not materially advance the ultimate termination of the litigation, and AHP does not attempt to make this argument. AHP does, however, argue that subsequent review of the January 15th Order would be an inadequate remedy. AHP argues that, without Commission review, the right sought to be protected will have already been destroyed through the further disclosure of the nine documents at the trial in this matter. Further, AHP argues, that since it is no longer a party, it does not have standing to appeal from the Initial Decision to be entered in this matter.

AHP's arguments that subsequent review would be an inadequate remedy do not withstand scrutiny for two reasons. First, AHP will not suffer any additional harm if the Commission does not immediately review its request because it does not face further disclosure of the contested documents. Second, the cases on which AHP relies arise in federal courts which lack the Commission's procedure for allowing parties and non-parties to move for *in camera* treatment of their most sensitive materials.

First, by Order dated January 18, 2002, AHP was granted provisional *in camera* treatment for the nine documents and deposition testimony thereto. AHP was ordered to file a motion for *in camera* treatment within twenty days and was informed that its documents would be treated as *in camera* until a final ruling on whether *in camera* treatment of the material is appropriate pursuant to 16 C.F.R. § 3.45(b). AHP did file its motion for *in camera* treatment on February 7, 2002. By Order dated February 8, 2002, AHP was granted indefinite *in camera* treatment for those documents that any party has offered into evidence or listed as a potential exhibit to be offered into evidence. Because AHP has *in camera* protection for the contested documents offered into evidence, only persons subject to the Protective Order Governing Discovery Material - persons who have already seen the contested documents during discovery - have been permitted to remain in the courtroom when the contested documents are discussed at trial. All other members of the public, including FTC staff who are not subject to the Protective Order, have been instructed to leave the courtroom and have left the courtroom when AHP's contested documents have been discussed. For those documents which did not receive *in camera* status in the February 8, 2002 Order on the grounds that no party had listed them on their exhibit lists, AHP was directed that in the event that any party did offer such documents into evidence, provisional *in camera* treatment would be granted at that time pursuant to Commission Rule 3.45(g), in order to prevent public disclosure. In addition, the Protective Order Governing Discovery Material prevents public disclosure of the contested documents which have not received *in camera* treatment. Because AHP has the protection of the February 8, 2002 *in camera* order and the May 10, 2001 Protective Order Governing Discovery Material, AHP has not demonstrated that subsequent review would be inadequate and the second prong of Rule 3.23(b) is not met.

Second, the cases which AHP relies upon to argue that further disclosure of its documents will further erode any privileges it may have are not Commission cases, but from federal courts which lack the Commission's *in camera* treatment practice. For example, *In re Ford Motor Co.*,

110 F.3d 954, 963 (3rd Cir. 1997) held that “once putatively protected material is disclosed, the very ‘right sought to be protected’ has been destroyed.” Here, however, the documents have previously been disclosed to Complaint Counsel, Respondents’ counsel, and Complaint Counsel’s expert. There is no further erosion as the only persons allowed to remain in the courtroom under the *in camera* procedures in place in Commission proceedings are those who have already viewed the documents. Hence, AHP’s claim of further erosion of its privileges does not support a finding that subsequent review would be an inadequate remedy.

A review of the determination that AHP waived any privileges with respect to nine documents would not materially advance the ultimate termination of the litigation. Subsequent review of the January 15th Order would not be an inadequate remedy because the February 8, 2002 *in camera* order and May 10, 2001 Protective Order adequately prevent further disclosure of AHP’s documents. Accordingly, AHP also has not met the second prong of Rule 3.23(b).

C. Commission Precedent Does Not Support Interlocutory Review

The two cases AHP relies upon to argue that the January 15th Order are appropriate for interlocutory review also do not compel certification for the January 15th Order. In the first case, *In re General Foods, Corp.*, 96 F.T.C. 168 (Aug. 19, 1980), the Commission reviewed on interlocutory appeal the Administrative Law Judge’s order denying continued *in camera* treatment of certain exhibits and related testimony. The Commission held that if the administrative law judge had properly interpreted the Commission’s *in camera* standards and applied them clearly to the facts in issue, the Commission would be reluctant to question his conclusions. *Id.* at 170. “At the interlocutory stage, we are neither familiar with the broad contours of the case below or the specifics of the information in question, and we are therefore ill-equipped to second-guess an ALJ’s factual findings on *in camera* motions.” *Id.* The reasoning of *General Foods*, in fact, precludes interlocutory appeal of this issue: the January 15th Order examined carefully the factual circumstances surrounding the creation, production, deposition testimony of, use by experts of and belated assertion of privilege of the nine documents. It is inappropriate to ask the Commission to examine these factual circumstances and reach a different result.

In the second Commission case AHP relies upon, *In re Thompson Medical Co.*, 101 F.T.C. 385 (Mar. 11, 1983), the Commission decided to grant review of an order by the Administrative Law Judge which held that prior statements of respondent’s expert witnesses were “Jencks-type” statements and required respondent to produce them. At the time, there was a division among the courts as to the appropriate scope of discovery from experts. The Commission enunciated the standard for discovery from experts and held that, although the ALJ had analyzed the issue under a different standard, his analysis was appropriate. *Id.* at 389. “An ALJ has broad discretion to rule on discovery requests, and his determinations will be reversed only on a showing of clear abuse.” *Id.*

The overwhelming majority of decisions by Administrative Law Judges deny requests for certification. Requests for certification by non-parties have not received special consideration. *E.g., In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 478 (Oct. 30, 1991); *In re American Medical Assoc.*, 1977 FTC LEXIS 89 (Sept. 30, 1977). Furthermore, Commission precedent makes it abundantly clear that interlocutory appeals from discovery rulings are disfavored. *In re Gillette Co.*, 98 F.T.C. 875, 875 (Dec. 1, 1981). Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception because they are particularly suited for resolution by the Administrative Law Judge on the scene and particularly conducive to repetitive delay. *In re Bristol Myers Co.*, 90 F.T.C. 273, 273 (Oct. 7, 1977). In the instant case, a determination that the circumstances surrounding the creation of, production of, deposition testimony about, and belated assertion of privilege for nine documents constitutes a ruling on discovery. *See Power Conversion, Inc. v. Saft America, Inc.*, 1985 U.S. Dist. LEXIS 20219, *2 (May 1, 1985) (determination of waiver of privilege described as a discovery ruling); *In re Atlantic Richfield Co.*, 1978 FTC LEXIS 562, *7-8 (July 20, 1978) (review of withheld documents by ALJ to determine whether privilege applies constitutes a discovery ruling). The fact that the ruling for which AHP seeks appeal is a discovery ruling further supports denial of AHP's motion for interlocutory appeal.

IV. CONCLUSION

For the above stated reasons, AHP's motion for certification to the Commission for interlocutory review is DENIED.

In addition, because the February 8, 2002 Order granting *in camera* treatment prevents public disclosure of AHP's documents, AHP faces no irreparable harm. Accordingly, AHP's motion for a stay of the January 15, 2002 Order is DENIED.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: February 12, 2002