UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

In the Matter of	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269A, 50-270A
(Oconee Units 1, 2 and 3	)	50-287A, 50-369A
McGuire Units 1 and 2)	)	50-370A

ANSWER OF THE DEPARTMENT OF JUSTICE TO APPLICANT'S MOTION FOR A PROTECTIVE ORDER

On December 19, 1973, Applicant filed a motion seeking a protective order preventing the Department of Justice from making further use of an allegedly privileged document and requiring the return of all copies of the document thus far circulated by the Department. Furthermore, Applicant moved that the question be referred to the Special Master designated in Prehearing Order Number 8 for resolution. Pursuant to Section 2.730(c), the Department files this answer opposing Applicant's motion in all respects.

I. BACKGROUND

The document in question, numbered 19137-19138, was received from Applicant in May, 1973, as part of Applicant's response to the First Joint Request for Production of Documents which was filed September 5, 1972. On December 17, 1973, six months after the production of the document, Applicant notified the Department that document No. 19137-19138 had been

inadvertantly produced and that this document was one of those listed by Applicant as protected by the attorney-client privilege Until this point, the Department was not aware, and could not reasonably have been expected to be aware, that the document was subject to any claim of privilege. Applicant has requested that the Department return the document. The Department has refused this request in the belief that (1) the document is not privileged, and (2) if it were, the privilege was waived by Applicant's production of the document and its failure to request the return of the document for over six months.

II. THE ROLE OF THE SPECIAL MASTER

We turn first to Applicant's request that the entire matter be referred to the Special Master for determination. The Department opposes this request. The Special Master was appointed in order to allow a determination of Applicant's claim that several documents were protected by the attorney-client privilege without revealing to the Board the contents of those documents. However, the document in question is already a matter of public record since it was an attachment to the Department's Answers to Applicant's Interrogatories and Document Production Request, filed November 30, 1973, and served on each of the Board members at that time. 1/ Accordingly since the primary reason for utilizing the Special Master has

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1/ The Department was not aware, at that time, that the document was subject to any claim of privilege.

now been rendered moot, no useful purpose can be served by referring the question to him.

Moreover, even if the Board members have not in fact read the document, it is unnecessary to do so to resolve this issue. It is the Department's position that even if the documents were once privileged, that privilege has been waived by the production of the documents, its subsequent dissemination and the failure of Applicant to promptly request its return. A decision as to waiver is unrelated to the task assigned to the Special Master, and it would be inappropriate to refer this matter to him.

Finally, the Department believes that referring this matter to the Special Master will only result in unnecessary delay in resolving the legal issue involved. 2/

III. THE APPLICABLE CASE LAW

A. Recent Rulings in the IBM Cases

In support of its motion, Applicant relies on recent decisions in the antitrust actions brought by the Department of Justice and Control Data Corporation against the International Business Machines Corporation. 3/ The Department

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2/ The Department will not repeat here its agruments made before the Special Master that the document is not privileged since that determination is not relevant to the issue of waiver presented here.

3/ International Business Machines Corp. v. United States, 471 F.2d, 507 (2d cir., 1973), rev'd en banc 480 F.2d 293 (2d cir., 1973) petition for cert. filed, 42 U.S.L.W. 3031 and 3033 (June 11, 1973); also United States v. IBM Corp., 1973-2 Trade Cases ¶74,632; also Control Data Corp. v. International Business Machines Corp., 16 Fed. Rules Serv. 2d 1233 (D. Minn., 1972).

agrees with the Applicant that the Board should follow the recent rulings in the IBM cases in resolving this question. However, the Department and Applicant do not agree as to the meaning of these cases.

In the IBM cases, IBM inadvertantly produced to the Control Data Corporation, in a private antitrust action, documents which it later alleged were protected by the attorney-client privilege. IBM refused to produce these same documents to the Department of Justice in a separate action. The Department thereupon moved to compel the production of these documents. Chief Judge Edelstein ordered production. 4/ IBM took an appeal from this order to the United States Court of Appeals for the Second Circuit. A divided three-judge panel vacated the order. 5/ On application by the Department, the court reheard the appeal en banc and reversed the panel's decision on grounds that under the Expediting Act the only

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4/ United States v. International Business Machines Corp., Civil Action No. 69 Civ. 200 (S.D.N.Y.). Pretrial Order No. 5 issued September 26, 1972. Judge Edelstein did not write an opinion to accompany the order, nor make any findings of fact.

5/ International Business Machines Corp. v. United States, 471 F.2 507 (2d Cir., 1972), rev'd en banc 480 F.2d 293 (2d Cir., 1973). The majority of the three-judge panel assumed that the production of the privileged documents by IBM to Control Data were protected from inadvertant waiver by an order of the U. S. District Court in Minnesota.

appeal was in the Supreme Court. 6/ Accordingly, the panel's earlier decision was voided. Nevertheless, Applicant relies on the earlier decision, now void, to support its position that production of a document does not constitute waiver of the privilege. The Supreme Court refused to stay the effectiveness of the Edelstein order pending interlocutory appeals to it by IBM. Since IBM has refused to produce the documents, Judge Edelstein found IBM in civil contempt.

Applicant also relies on a pretial order of Judge Neville in the Control Data case to support its position. 7/ There Judge Neville ruled that since reasonable precautions were taken to prevent disclosure of privileged material, there was no waiver. Judge Edelstein was aware of this ruling, but declined to follow it. Moreover, the magnitude of discovery conducted in the CDC case does not compare to that conducted in this proceeding. IBM itself copied or microfilmed some 80 million CDC documents and CDC sent a staff of some 61 persons to IBM offices to inspect and copy documents.

6/ In a 4-2 decision the court ruled that the Expediting Act, 15 U.S.C. §29 required that appellate review of the order be had, if at all, in the Supreme Court. However, the court did state the following at p. 299: "Suffice it is to say that the record does not establish clearly that all of the documents for which privilege is now claimed were surrendered in reliance on Judge Neville's ruling. Furthermore, we were not persuaded that the Government, which agreed to receive the edited listing, therefore agreed to forego the position that the initial surrender to CDC constituted a waiver."

7/ See Control Data v. International Business Machines Corp., 16 Fed. Rules Serv. 2d 1233 (D. Minn., 1972).

From this morass of legal decisions, one thing is clear: The Edelstein order remains in effect and that order calls for the production of privileged documents which were inadvertantly produced to a person not a party to the action. Moreover, even if IBM should achieve a favorable decision on appeal, Applicant's motion should still be denied. The IBM fact situation is unlike the one here in several significant ways: Document No. 19137-19138 was produced to a party to the action, not to a third party, and the discovery process here was not protected by any order directed to the inadvertant waiver problem as may have been the case in IBM. The significance of the production of the document to a party rather than a third person is that the confidentiality of this communication is irreparably breached. There is no feasible way to erase the information in this document from the minds of the attorneys who have read it. It is inevitable that the fruits of this knowledge will flavor the subsequent proceedings in this action to a certain but undefinable extent. Furthermore, the document has been made a part of a widely disseminated public filing which included all Board members. Thus if the Board members have read or considered the document, its content and thrust cannot be erased from their memory either.

B. Other Lower Court Decisions

Aside from the IBM cases, the issue of inadvertant waiver has been the subject of only limited lower court scrutiny, presumably because once the documents are disseminated there

is little that can be done to restore the confidentiality of the communication which is the essence of the privilege. See McCormick on Evidence, p. 187. The case of United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich., 1954) closely resembles the current fact situation. There the Department came into possession of about a thousand documents of the Budd Company as the result of a review of voluminous company files in connection with an antitrust investigation. The claim was, as to some 29 of the documents selected and copied by the Department, that the documents were privileged and the possession by the Department of the documents was the result of inadvertance. Judge Levin rejected this claim stating at pp. 464-465:

> Thus, even if the privilege once attached to these twenty-nine documents, it was lifted when Budd voluntarily made them available to the Government. Plaintiff now knows the contents of the documents and has photostatic copies of them. As a result of the claimant's own acts, the context in which the rule is intended to serve, the protection of confidential communications is no longer present. Since the privilege exists in derogation of the overriding interest in full disclosure of all competent evidence, where the policy underlying the rule can no longer be served, it would amount to no more than mechanical obedience to a formula to continue to recognize it . . . .
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> Nor is the result affected by Budd's assertion that the privileged documents were inadvertantly handed over to the Government's representatives; that the mass of documents in its files were so voluminous that it did not know, nor did it have time to discover, that privileged ones were among them.

Applicant made this document available to the Department more than six months ago. The Department noted the

contents of the document and has already used this document in this case. Thus, this once confidential communication, having been widely disseminated, is no longer confidential. Therefore, the Department agrees with Judge Levin that to prevent full disclosure of this document where the underlying policy of the privilege can no longer be served would be "no more than mechanical obedience to a formula."

Applicant also relies on the holding of the court in Connecticut Mutual Life Insurance Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y., 1955) to support its claim that inadvertant production of a privileged document, without the intent to waive the attorney-client privilege, does not constitute a waiver. The Department believes that this case was incorrectly decided and it is clearly inconsistent with Judge Edelstein's order and the holding in the Kelsey-Hayes case.

IV. APPLICANT'S AGENCY RELATIONSHIP WITH ITS COUNSEL

Applicant's attorneys maintain that they had no authority to waive the privilege and therefore their inadvertance cannot constitute a waiver; only Applicant can waive the privilege. The Department agrees that only the holder of the privilege or his agents can waive the privilege. But this is not relevant to a determination of this issue. What is relevant is that Applicant's attorneys, its agent, had the explicit authority to produce documents called for in the Joint Document Request. (See Affidavit

of Toni K. Golden.) If Applicant itself had inadvertantly produced the document, the privilege would have been waived regardless of its subjective intent. Therefore, under established agency principles the production of the document by Applicant's attorneys also constitute a waiver of the privilege. As Judge Edelstein's order and the Kelsey-Hayes cases hold, the subjective intent of the holder of the privilege is not relevant if the document has been produced. Allegations of inadvertance can not prevent a finding of a waiver. For by the act of production, the confidential nature of the document, the preservation of which is the purpose of the privilege, is destroyed.

CONCLUSION

More than six months ago the Applicant produced Document No. 19137-19138. The document has since been studied by the Department and incorporated in a publicly filed pleading in this proceeding. The confidentiality of the document has been irrevocably breached. Applicant has waived any claim of privilege and its motion should be rejected.

Respectfully submitted,

Mark M. Levin

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Attorney
Department of Justice

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CERTIFICATE OF SERVICE

I hereby certify that copies of Answer of the Department of Justice to Applicant's Motion for a Protective Order, dated January 4, 1974, in the above captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 4th day of January:

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