

4-25-75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
The Toledo Edison Company)	
and the Cleveland Electric Illuminating)	Docket No. 50-346A
Company)	
(Davis-Besse Nuclear Power Station))	
)	
The Cleveland Electric Illuminating)	Docket Nos. 50-440A
Company, et al.)	and 50-441A
(Perry Plant, Units 1 and 2))	

MEMORANDUM OF THE DEPARTMENT OF JUSTICE
IN SUPPORT OF CLAIMS OF PRIVILEGE

Introduction

Pursuant to the agreement of counsel for the Department of Justice and for the Applicants, briefs in support of each party's claims of privilege are to be submitted on April 25, 1975. Briefs challenging the other party's claims of privilege will be submitted on the date set for filing reply briefs, May 2, 1975. It is the belief of counsel for both parties that this procedure will be most helpful to the Master in his determination of the validity of the outstanding claims of privilege.

Submitted herewith is the memorandum of the United States in support of its assertions of attorney-client and work-product privilege.

Claims of Privilege

The government asserts a claim of privilege with respect to the following documents:

8002130 683

M

1. July 1, 1971 memorandum from Joseph J. Saunders and received by Richard W. McLaren regarding antitrust advice on Dav's-Besse application. Privileges asserted: attorney-client, attorney's work product.

2. July 17, 1973 memorandum by Steven M. Charno received by Joseph J. Saunders, files, and correspondence, discussing and evaluating negotiations with the Cleveland Electric Illuminating Company. Privilege is claimed only as to those portions of the document containing communications between Mr. Charno and members of the then Atomic Energy Commission staff. Privilege claimed: attorney's work product.

3. August 2, 1973 memorandum by Steven M. Charno received by Joseph J. Saunders, files and correspondence, relating to an evaluation of the activities of the Cleveland Electric Illuminating Company. Privilege claimed: attorney-client, attorney's work product.

4. August 17, 1973 memorandum from Steven M. Charno (attaching a memorandum of even date) received by Joseph J. Saunders, files and correspondence. These documents outline and evaluate the results of the inquiry and make recommendations concerning litigation. Privilege claimed: attorney-client, attorney's work product.

A. Attorney-Client Privilege

The classic statement of the attorney-client privilege was made by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for purposes of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

The privilege has been held to apply to internal communications made by government attorneys and to communications between attorneys of one government agency and attorneys of another agency. United States v. Anderson, 34 F.R.D. 518 (D. Colo. 1964); Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133 (E.D. Wis. 1972).

Document numbers one and three, and the portion of document number two for which the United States claims privilege contain confidential communications between attorneys for the Department of Justice and between attorneys for the Department of Justice and the then Energy Commission. The confidentiality of these documents has been preserved. They have been maintained in restricted files and have been made available only to counsel directly concerned with the litigation in this proceeding. As such they are within the privilege and should be afforded its protection.

B. Attorney's Work Product

The work product of an attorney in a hearing before the Nuclear Regulatory Commission is protected under §2.740(b)(2) of the Atomic Energy Commission Rules of Practice, 10 C.F.R. 2.1 et seq. This section reads as follows:

Trial preparation materials. A party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

It has been held that the privilege protects the work product of government attorneys as well as private counsel. United States v. Anderson, 34 F.R.D. 518 (D. Colo. 1964); Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133 (E.D. Wis. 1972). Document numbers one, three, four and the portion of document number two for which the United States claims privilege are clearly within the protection of the privilege. The documents contain the mental impressions of the attorney-authors with respect to meetings and negotiations with various parties to the proceedings, as well as


the attorneys' comments and policy suggestions as to the course of the litigation.

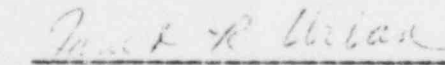
Although document number one was prepared prior to the rendering of adverse antitrust advice, it is still within the privilege. This document was prepared in anticipation of an antitrust hearing in that it contained the author's opinions as to whether such hearing should be held. It would clearly violate the purpose of the privilege, that of allowing an attorney to prepare his case without the fear that his work product will later be used by opposing counsel, Hickman v. Taylor, 329 U.S. 495 (1947), to exclude from its protection documents prepared with an eye towards the litigation and which discuss the advantages and disadvantages of litigating.

In conclusion, we urge that the Master affirm the Department's claims of privilege as described herein.

Respectfully submitted,


STEVEN M. CHARNO


MELVIN G. BERGER


JANET R. URBAN

Attorneys
Department of Justice
Washington, D.C. 20530

April 25, 1975

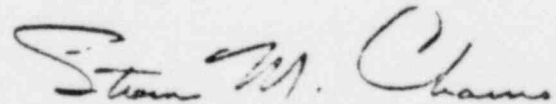
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
The Toledo Edison Company)	
The Cleveland Electric Illuminating)	Docket No. 50-346A
Company)	
(Davis-Besse Nuclear Power Station))	
)	
The Cleveland Electric Illuminating)	Docket Nos. 50-440A
Company, et al.)	and 50-441A
(Perry Plant, Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of MEMORANDUM OF THE DEPARTMENT OF JUSTICE IN SUPPORT OF CLAIMS OF PRIVILEGE have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class or airmail, with the exception of Honorable Marshall E. Miller and counsel for the Applicants, whose copies were delivered by hand, this 25th day of April 1975.



Steven M. Charno
Attorney, Department of
Justice
Antitrust Division

ATTACHMENT

Honorable Marshall E. Miller
Master
Atomic Safety and Licensing
Board
Nuclear Regulatory Commission
Washington, D.C. 20555

Douglas Rigler, Esquire
Chairman
Atomic Safety and Licensing
Board
Foley, Lardner, Hollabaugh
& Jacobs
815 Connecticut Ave., N.W.
Washington, D.C. 20006

John H. Brebbia, Esquire
Atomic Safety and Licensing
Board
Alston, Miller & Gaines
1776 K Street, N.W.
Washington, D.C. 20006

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

Atomic Safety and Licensing
Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

Frank W. Karas
Chief, Public Proceedings
Staff
Office of the Secretary
Nuclear Regulatory Commission
Washington, D.C. 20555

Abraham Braitman
Office of Antitrust and
Indemnity
Nuclear Regulatory Commission
Washington, D.C. 20555

Herbert R. Whitting, Esquire
Robert D. Hart, Esquire
Law Department
City Hall
Cleveland, Ohio 44114

Reuben Goldberg, Esquire
David C. Hjelmfelt, Esquire
1700 Pennsylvania Avenue, N.W.
Suite 550
Washington, D.C. 20006

Benjamin H. Vogler, Esquire
Roy P. Lessy, Jr., Esquire
Office of the General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

Gerald Charnoff, Esquire
William Bradford Reynolds, Esquire
Shaw, Pittman, Potts & Trowbridge
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Lee C. Howley, Esquire
Vice President & General Counsel
The Cleveland Electric
Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

Donald H. Hauser, Esquire
Corporate Solicitor
The Cleveland Electric
Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

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

Chris Schraff, Esquire
Office of Attorney General
State of Ohio
State House
Columbus, Ohio 43215

Deborah Powell Highsmith, Esquire
Assistant Attorney General
Antitrust Section
30 East Broad Street
15th Floor
Columbus, Ohio 43215

Leslie Henry, Esquire
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Thomas A. Kayuha, Esquire
Executive Vice President
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

David M. Olds, Esquire
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Mr. Raymond Kudukis
Director of Utilities
City of Cleveland
1201 Lakeside Avenue
Cleveland, Ohio 44114

Wallace L. Duncan, Esquire
Jon T. Brown, Esquire
Duncan, Brown, Weinberg
& Palmer
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

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

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