UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION 10-1-75

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
The Toledo Edison Company, et al.	)	Docket Nos. 50-346A
(Davis-Besse Nuclear Power Station,	)	50-500A
Units 1, 2 and 3)	)	50-501A
	)	
The Cleveland Electric Illuminating	)	
Company, et al.	)	Docket Nos. 50-440A
(Perry Nuclear Power Plant, Units	)	50-441A
1 and 2)	)	

MOTION OF THE CITY OF CLEVELAND TO COMPEL DISCOVERY

City of Cleveland (Cleveland) deposed Mr. Donald H. Hauser, an employee of The Cleveland Electric Illuminating Company (CEI), on July 11, 12, and 18, 1975. During the course of his deposition Mr. Hauser declined to answer certain questions put to him by Cleveland's counsel claiming the attorney-client privilege. Cleveland hereby moves the Board to issue an order compelling answers to those questions.

Copies of the pages of Mr. Hauser's deposition showing the questions asked and the refusal to answer are attached hereto. Many of the questions which Mr. Hauser declined to answer pertained to documents which Applicants had also claimed to be protected by the attorney-client privilege. The Atomic Safety and Licensing Board has recently ruled against Cleveland in its attempt to obtain a review of the Special Master's decision upholding Applicants' claim

of privilege with respect to those documents. Had Cleveland obtained those documents, this motion might not have been necessary. Since it now appears that Cleveland will not obtain access to those documents in a timely fashion, it is important that Cleveland obtain answers to the questions which Mr. Hauser declined to answer.

The questions for which Cleveland seeks to compel answers do not ask for the contents of the documents themselves. The questions are not designed to illicit matters subject to a claim of privilege.

The law of attorney-client privilege demonstrates that the privilege is narrow indeed. It cannot be used as an umbrella to foreclose discovery of all matter touching upon a particular subject area.

I ATTORNEY-CLIENT PRIVILEGE

A. THE ATTORNEY-CLIENT PRIVILEGE MUST BE BALANCED AGAINST THE NEED FOR PROPER DECISION FROM AN INFORMED COURT.

The fundamental principle behind the attorney-client privilege, full and adequate representation, is basic to our judicial system. The privilege is meant to remove any subjective fear or chilling effect that possible disclosure of the contents of a communication would have upon attorney-client communications, because there can only be adequate representation when the attorney is fully informed by his client of all of the pertinent facts, both beneficial and detrimental. The privilege thus aids the client by creating the situation where the best representation can be obtained without fear of

repercussion. But the privilege as a catalyst for the free flow of information from client to attorney for the purpose of obtaining legal advice is not an end in itself, but is for the purpose of enabling the counsel to act in his legal capacity as advocate for the client.

On the other hand, a reasoned and proper disposition of litigation requires that all pertinent information be made available to the trier of fact and all parties. There is presented then the difficult situation of balancing the need for informed counsel against the need for an informed court. Dean Wigmore commented on this problem and stated that:

> [T]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. 1/

Dean Wigmore concluded:

> Nevertheless, the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with its principle. 2/ [emphasis added]

While case law recognizes that this privilege is applicable to corporations, where the requirements of the privilege are met, the fundamental principle behind the privilege -- the removal of the subjective fear in the client to permit full disclosure of the facts to his attorney -- seems to lose considerable force when it is applied to a large corporation and is balanced against the need for justice provided by an informed court.

1/ 8 Wigmore, Evidence, § 2192, at 73 (McNaughton rev. 1961); cited with approval in Falsone v. United States, 205 F.2d 734 (5th Cir.), cert. denied 346 U.S. 864 (1953).

2/ Wigmore, § 2291, at 554.

In accordance with Dean Wigmore's suggestion that the privilege be "strictly confined within the narrowest possible limits," it has been well settled that the burden of proof rests heavily upon the party objecting to the discovery. The cost of depriving a court of pertinent information must not be a mere peppercorn. The party claiming the privilege has been held to the burden of "establishing the existence of the privilege" [3] and of meeting this burden by a preponderance of the evidence, not by "mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship [attorney-client], and any spurious claims could never be exposed." [4]

B. THE ATTORNEY-CLIENT PRIVILEGE IS NOT APPLICABLE TO ALL COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.

Not all communications which emanate from the client or his agents which are directed to the attorney are deemed within the scope of the privilege. Dean Wigmore, referring to the fundamental principle behind the privilege, stated:

> Since the privilege is designed to secure subjective freedom of mind for the client in seeking legal advice . . . . it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in the conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client, nor that it came from some particular third person for the benefit of the client. [5] [emphasis in the original]

3/ 8 Wright & Miller, Federal Practice and Procedure, § 2016 at 126 (1970); United States v. Johnson, 465 F. 2d 793 (5th Cir. 1972).

4/ In re Bonanno, 344 F. 2d 830, 833 (2d Cir. 1965).

5/ Wigmore, § 2317(2), at 619.

Under this rationale many items have not been classified as communications and therefore are not subject to the sanctuary of the privilege. Some of these items include the identity of the client, the factor amount of a retainer fee arrangement, the nature of legal services performed and physical characteristics.[6/]

Essential to the privilege is the requirement that the communication to be suppressed from discovery be prepared by or in behalf of the client for the purpose of confidential communication to the attorney.[7/] Documents which do not conform with this requirement, as well as those prepared prior to the attorney's involvement in the case as counsel, have been held to lie beyond the scope of this privilege.[8/] Suppression of these documents does not aid in the promotion of attorney-client communication but significantly hinders the ends of justice.

There is no presumption that a document prepared by a client or on his behalf, even after he had retained counsel, is a privileged document. The price for obstruction of the judicial process is high and must be strictly and fully met at each instance.

Workpapers which have been compiled in strict accordance with the elements of the privilege must be deemed within the privilege. But the claimant of the privilege has the burden of showing that the documents were not prepared as a routine or policy matter, nor for reasons other than to

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6/ Colton v. United States, 306 F. 2d 633 (2d Cir. 1962, cert denied 396 U.S. 905 (1969); In Re Wasserman, 198 F. Supp. 564 (D.D.C. 1961); United States v. Kendrick, 331 F. 2d 110, 113-14 (4th Cir. 1964).

7/ United States v. Silverman, 430 F. 2d 106 (2d Cir. 1970).

8/ United States v. Judson, 322 F. 2d 460 (9th Cir. 1963); Bouschor v. United States, 316 F. 2d 451 (8th Cir. 1963).

communicate with his attorney as such documents are independent of the attorney's involvement and are not privileged. [9]

It also follows directly from these examples that documents which are not privileged in the hands of the clients do not become so when transmitted to his attorney, even when done in confidence for the purposes of professional consultation. [10]

C. ATTORNEY-CLIENT PRIVILEGE IS MORE NARROWLY CONSTRUED FOR COMMUNICATIONS FROM THE ATTORNEY TO THE CLIENT.

In providing the privilege to the client there exists, as stated earlier, a need to remove all barriers which might cause the client to withhold information from his attorney.

It has been held in certain situations that the privilege exists, to a much more limited extent, where the communications are from an attorney to his client. [11] Dean Wigmore, discussing this aspect of the privilege, stated that the privilege was not designed to secure the attorney's freedom of expression but to prevent the use of the attorney's statements as admissions of the client or as leading to inferences of the tenor of the client's communications. [12]

9/ United States v. Judson, 322 F. 2d 460 (9th Cir. 1963); United States v. Bartlett, 449 F. 2d 700 (8th Cir. 1971).

10/ Grant v. United States, 227 U.S. 74 (1913); Colton v. United States, 306 F. 2d 633 (2nd Cir. 1962).

11/ United States v. Silverman, 430 F. 2d 106 (2d Cir. 1970); Natta v. Hogan, 392 F. 2d 686 (10th Cir. 1968).

12/ Wigmore, § 2320, at 629; Accord, United States v. Silverman, 430 F. 2d 106, 122 (2d Cir. 1970); Natta v. Hogan, 392 F. 2d 686, 693 (10th Cir. 1968).

The application of these principles has lead to the suppression of documents where the attorney has adopted in his communication to his client a portion of the client's privileged disclosure. 13/ Conversely, discovery of advice by the attorney to his client is not banned where it is based on sources of information other than his client's privileged disclosures. These other sources have been described as including public records, communication from third parties, and judicial opinions. Accordingly, to protect communication from the attorney to his client, the claimant must first demonstrate that all the elements of the privilege have been satisfied, and secondly, that without the application of the privilege, disclosure of a protected communication from client to attorney would result.

D. COMMUNICATIONS MUST BE MADE IN THE COURSE OF OBTAINING LEGAL ADVICE FROM A PROFESSIONAL LEGAL ADVISOR ACTING IN HIS CAPACITY AS SUCH.

The question of privilege becomes more involved when the attorney is either acting as a business advisor or actively participating in the business itself. In these cases the philosophy of supplying the attorney with all relevant information to permit adequate representation in a legal dispute is many times without applicability. Without the presence of a need to overcome the subjective fear of a client, justice requires that there be no privileged suppression conferred on any communications. To obtain the sanctuary of the privilege when an attorney is employed by or engages in the business, the

13/ United States v. Silverman, 430 F. 2d 106 (2d Cir. 1970); American Cyanimid Co. v. Hercules Power Co., 211 F. Supp. 85, 87 (D. Del. 1962).

claimant has the additional burden of proof of showing that the attorney was acting in his legal capacity as such with respect to the communication. [14] Legal capacity has been defined in this context as the "receiving and applying rules of law to confidential information received from" the client. [15] From the application of these principles it has been held that "communications involving business, rather than legal, advice are, therefore, not privileged." [16]

E. ONLY THE CORPORATION'S "CONTROL GROUP" SHOULD BE CONSIDERED AS A "CLIENT" WITHIN THE MEANING OF THE PRIVILEGE.

The application of the attorney-client privilege to a corporation raises an important question. Who speaks for the corporation, such that his communication to the attorney should become privileged? This question has been answered by the courts for the purpose of the privilege, by the creation of a corporate sub-entity called the "control group." The courts have determined that a corporate employee is a member of this control group only if he -

> . . .is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority . . . . [17]

14/ Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954).

15/ Paper Converting Machine Co. v. FMC Corp., 215 F. Supp. 249, 252 (E.D. Wis. 1963).

16/ United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943); Colton v. United States, 306 F. 2d 633 (2d Cir. 1962); United States v. Aluminum Co. of America, 193 F. Supp. 251 (N.D.N.Y. 1960).

17/ City of Philadelphia v. Westinghouse Electric Co., 210 F. Supp. 483 (E.D. Pa. 1962).

Other courts have further narrowed this definition of control group to exclude any employee who did not participate or could not have participated in the corporation's decision on the question on which legal advice was sought. [18] Thus, having the authority to make decisions giving rise to the corporate liability is not sufficient.

The courts have narrowly construed this group so as not to allow a privilege, which is extremely limited when applied to a natural person, to be expanded by the fact that a corporation requires a person to speak for it. To expand this group would give unfair advantage to the corporate form over the partnership even without regard to its detrimental impact on the discovery process.

The theory of the "control group" as the test for the persons who speak for the corporation has run into some criticism in the Seventh Circuit in the case of Harper & Row Publishers, Inc. v. Decker. [19] In that case the privilege was expanded to non-control group employees -

> . . . where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. [20]

18/ State of Illinois v. Harper & Row Publishers, Inc. 50 F.R.D. 37 (N.D. Ill. 1969). On appeal, the Seventh Circuit recognized that while it felt the district court had properly applied the "control group" test, it felt this test was not the appropriate legal standard. Harper & Row Publishers, Inc. v. Decker, 423 F. 2d 487 (7th Cir. 1970), aff'd by equally divided court, 400 U.S. 378 (1971).

19/ 423 F. 2d 487 (7th Cir. 1970), aff'd by equally divided court, 400 U.S. 348 (1971).

20/ Id. at 491-92.

When we consider the basic principle behind the privilege, it seems as if the court in Harper & Row Publishers, Inc. v. Decker, supra, failed to take into account the real essence of the rationale behind the privilege. One commentor noted:

> When they [non-control group employees] consider how much to reveal to counsel, they are likely to be deterred more by the fear that management will be displeased when it learns of their conduct than by the fear of disclosure to opposing litigants. The attorney-client privilege does nothing to meet the fear that weighs significantly in their calculations. 21/

When these factors are placed in the balance of an informed court and reasoned decision against the more immediate fear of employer reprisal, justice demands that the former prevail as the privilege can do nothing to alleviate this fear. The use of this extension further restricts the ability of the court to come to a reasoned determination based upon all the facts without any countervailing benefit to which the privilege rightfully addresses itself.

It should be pointed out that this area of dispute in the attorney-client privilege deals with only a minor and specific factual situation. In order to invoke this extension of the privilege within the Seventh Circuit, the additional burden is upon the claimant to show that a non-control group employee's communication is (1) about the performance of his duties, and (2) the communication to the attorney had been directed by the employee's superiors. 22/

21/ Note, Attorney Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424, 429 (1970).

22/ Harper & Row Publishers, Inc. v. Decker, supra, at 491-92

Where the communication had not been directed it would not be privileged even in the Seventh Circuit.

F. THE COMMUNICATION MUST HAVE BEEN INTENDED TO BE AND MUST HAVE REMAINED CONFIDENTIAL.

The principle behind this privilege is to insure that a client will disclose information pertaining to his case to his attorney. A client who discloses the information to third parties cannot be permitted to hide this information just from the court. The privilege in such case is of negligible value as the court could with added difficulty obtain the information from other sources. The requirement has been enunciated as follows:

> It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential. "The moment confidence ceases," said Lord Eldon, "privilege ceases." [Citations omitted.] Thus it is well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated in the conversation was to be conveyed to others. 23/

In accordance with the strict construction given to this privilege, it must be clear from all the circumstances that the client intended that the communication be kept confidential. 24/

Several cases provide examples of when the intent to maintain the confidentiality of a client's communication has not been maintained and

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23/ United States v. Tellier, 255 F. 2d 441, 447 (2d Cir.), cert. denied, 358 U.S. 821 (1958).

24/ Cafritz v. Koslow, 167 F. 2d 749 (D.C. Cir. 1948); Wigmore, § 2311, at 600.

the privilege has been lost. In one case the presence of a third person destroyed the privilege [25] while the intent to transmit the information to third parties was held sufficient in another. [26] Inadvertent disclosure has also been held as a bar to the subsequent claim of the privilege. [27] Of special relevance to the corporate claim of the privilege is the factual situation in United States v. Kelsey-Hayes Wheel Co. [28] where the court refused to apply the privilege due to the mingling of the documents with other routine documents of the corporation. The court stated:

> It is difficult to be persuaded that these documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made. One measure of their continuing confidentiality is the degree of care exhibited in their keeping, and the risk of insufficient precautions must rest with the party claiming the privilege. [29]

Accordingly another burden of proof must be met by the claimant of the privilege. He must show that (1) sufficient precautions were taken to avoid the disclosure of the contents of each document and (2) this was actually achieved.

It is clear that none of the matters which Mr. Hauser declined to discuss during his deposition fall within the ambit of the attorney-client privilege.

25/ United States v. Simpson, 475 F. 2d 934 (D.C. Cir. 1973); Cafritz v. Koslow, supra.
26/ Colton v. United States, 306 F. 2d 633 (2d Cir. 1962).
27/ Fratto v. New Amsterdam Fire Insurance Co., 359 F. 2d 842 (3d Cir. 1966).
28/ 15 F.R.D. 461 (E.D. Mich. 1954).
29/ Id. at 465.

Certain other questions were not answered responsively. Cleveland also asks that Mr. Hauser be ordered to give responsive answers to the questions asked at transcript pages 114-116.

Reconvening Mr. Hauser's deposition for the purpose of compelling answers should have no effect on the present schedule of procedural dates. In addition to responding to the questions which Mr. Hauser has declined to answer, Cleveland should be permitted to ask follow-up questions based upon the information provided in compelled answers to the questions previously asked.

Since the burden of reconvening Mr. Hauser's deposition is caused solely by Mr. Hauser's unwarranted refusal to answer the questions put to him, Cleveland asks that Applicants be required to produce Mr. Hauser in Washington, D. C., at Applicants' expense for the completion of his disposition. Applicants should also bear all other expenses attributable to reconvening Mr. Hauser's deposition.

WHEREFORE, Cleveland prays that the Board enter its Order compelling Mr. Hauser to appear in Washington, D.C., to respond to questions put to him during the course of his deposition and reasonable follow-up questions and that Applicants bear all expenses attributable to reconvening Mr. Hauser's deposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion Of The City of Cleveland, Ohio, To Compel Discovery, has been made on the following parties listed on the attachment hereto this 1st day of October, 1975, by depositing copies thereof in the United States mail, first class, postage prepaid.

David C. Hjelmfelt

Attachment

ATTACHMENT

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ATTACHMENTS

A Would you read the question, please?

(Question read.)

A Yes.

Q On what occasions has that been discussed?

MR. REYNOLDS: When you say "on what occasions," do you want a date or what are you asking for?

Q Has that been discussed with other members of CAPCO on more than one occasion?

A Yes.

Q Were those discussions in meetings of CAPCO committees?

A I don't know any such discussions in CAPCO committee meetings. There were some discussions at which I and other lawyers of the CAPCO companies discussed this subject in connection with this proceeding and related proceedings.

Q Do you know of any discussion of this where the possibility of wheeling power by CEI to the City of Cleveland was discussed by persons representing members of CAPCO other than lawyers?

MR. REYNOLDS: I am sorry. I am not trying to be difficult, but I am not sure whether you are asking by people, whether you are asking by people with lawyers present or discussed with people of CAPCO when lawyers were not present.

I don't know what you are asking, that's why I ask.

Q Well, let's start with when lawyers are not present.

A That I wouldn't know because I wasn't present.

Q Has it been discussed by other representatives from CAPCO companies in meetings at which lawyers were also present?

MR. REYNOLDS: I would object on the ground that the question has been asked and answered.

MR. HJELMFELT: It is different. In the earlier question he responded that it was discussed at meetings [illegible] he and other lawyers for CAPCO were present.

Now I am inquiring as to whether non-lawyers were present.

A There were some non-lawyers present.

MR. REYNOLDS: I stand corrected and I will withdraw my objection. You are right.

Q Were those discussions devoted solely to legal considerations?

MR. REYNOLDS: I will direct the witness not to answer on the ground that the nature of those discussions is privileged information and protected by the attorney-client privilege.

Q Did CEI consider the possible effect the amendment would have on the ability of the City to sell the bonds?

MR. REYNOLDS: Objection.

A I think I have already answered that.

Q What was the answer?

A The answer is that the bonds would be sold to other than the sinking fund of the City of Cleveland.

Q Would that make it more difficult or less difficult to sell bonds, if you know?

A Well, when the same people or some of the same people who are selling the bonds are buying the bonds, I think that supplies the answer to your question.

Q Is your answer that the effect of the amendment would have been to make it more difficult to sell the bonds?

MR. REYNOLDS: Objection.

A Other than what I have answered, it would have no effect on the City of Cleveland selling the bonds on the general bond market or notes.

Q Is it your opinion that it would be less difficult to sell bonds to the sinking fund than on the general market?

MR. REYNOLDS: I'll object to that question.

A Again, I have already answered that. When you are

buying your own bonds compared with selling them on the general market, it certainly would not have any effect on the ability to sell them on the general market.

Q Are you indicating that the answer to the question is so obvious it is difficult to answer?

MR. REYNOLDS: I object. I believe that the witness has already responded to the question.

MR. HJELMFELT: It seems to me the question is susceptible of a yes or no answer and we haven't gotten it.

MR. REYNOLDS: I don't think he is required to answer yes or no. I believe his answer is fully responsive.

The witness has stated two or three times now that the sale of bonds to the sinking fund would have no impact whatsoever on selling those bonds in the open market.

MR. HJELMFELT: All right. The question was to compare the sale to the sinking fund as opposed to the sale on the general market, which would be more difficult.

MR. REYNOLDS: You are asking for an opinion?

MR. HJELMFELT: That is correct.

MR. REYNOLDS: If the witness has an opinion in that area, he can give it. If he has not formulated any opinion as to that, then I feel his answer is fully responsive.

A. I would only repeat again, that the amendment as proposed would not have any effect on the Municipal Plant's ability to sell the bonds or notes on the general market.

Q. I don't believe I have received an answer to my question, but I am not going to ask it again.

MR. REYNOLDS: If you would like to restate your question, maybe we can get at it that way.

MR. HJELMFELT: I don't think there is any problem there, but I don't want to take any more time here. If necessary, we will attempt it another time.

MR. REYNOLDS: All right.

Q. Have you ever undertaken or has CEI ever undertaken to assemble a list of reasons why the City Electric System should remain or should not be interconnected with CEI?

MR. [illegible]: Since the question asks whether it has ever been done, I will direct the witness to confine his response to the period

Council or other officials of the City of Cleveland.

(Off the record.)

Q Did CEI make a study of the legal procedures for the sale by the City of Cleveland of its light system?

A Would you read that question?

(Question read.)

A Isn't that what we already talked about?

Q I am not entirely sure whether your answer may have also gone to that.

My question last time was with regard to submission of the issue to a vote of the people of Cleveland.

A Oh, I see. I made such a study or had such a study made.

Q Was that study made by someone working under your supervision?

MR. REYNOLDS: Wait just a minute.

(The witness and Mr. Reynolds conferred.)

MR. REYNOLDS: Let the record show that at my request there was a conference between counsel and the witness. The request was initiated by me because I believe we are getting into an area that involves attorney-client privilege, and I was trying to ascertain from the witness whether the particular question asked was one that was entitled to the protection of that privilege or not.

I believe that we are satisfied that the answer can be given to the last question, but I would like to have it reread before he answers just to double-check that.

(Question read.)

MR. REYNOLDS: You may answer that question.

A Yes.

Q And what was the purpose of that study?

MR. REYNOLDS: I'll object to that question as being within the area of privileged information.

MR. HJELMFELT: Are you directing him not to answer?

MR. REYNOLDS: I am directing him not to answer.

Q Was any use made of that study?

A Yes.

Q What use was made of that study?

MR. REYNOLDS: I'm not clear what you mean by use, Mr. Hjelmfelt. Is your question concerned with the circulation or distribution of the study, or is your question concerned with what internal analysis was followed as a result of the study?

If it goes to the former, I will allow the witness to answer. If you are asking him for the information in the latter area, then the claim of attorney-client privilege is applicable and I will instruct him not to answer.

MR. HJELMFELT: I am asking use in the sense was any action taken based on the information developed by that study.

MR. REYNOLDS: I will direct the witness not to answer that.

Q Was the information developed by that study, or a copy of that study -- that is two questions. I will ask it separate.

Was that study ever communicated to anyone outside of CEI?

MR. REYNOLDS: Are you including outside counsel in your question or excluding it?

MR. HJELMFELT: No, I am including it.

MR. REYNOLDS: That is included in your question?

MR. HJELMFELT: Right.

MR. REYNOLDS: You may answer that.

A [illegible] communicated to outside counsel retained by CEI but to one else.

Q Yes.

A No.

Q Has that subject been discussed at any time?

A No, not really. There have been discussions as to the effect of the amounts billed for service over the 138 KV line since it was energized in May, and particularly with regard to the amount to be billed for service provided over that interconnection in June.

Q Among whom did these discussions occur?

A Between Mr. Howley and myself and Mr. Moore and myself.

Q What was the nature of these discussions?

(The witness and Mr. Reynolds conferred.)

MR. REYNOLDS: Let the record show that I initiated a conference with Mr. Hauser and the purpose of that discussion was to inquire whether the question was getting into an area of attorney-client privilege.

Mr. Hauser has advised me that we are getting into that area, and not only in terms of the present suit but also in terms of other actions that are pending between the City and The Cleveland Electric Illuminating Company; and in view of that, I am instructing the witness not to answer the question because to do so would invade the attorney-

client privilege and we do not wish at this time to waive that privilege.

Q Did CEI take -- or its employees take any action as a result of those discussions?

MR. REYNOLDS: I will instruct the witness not to answer that question on the same ground.

Q Was the amount of the bill charged for services in June changed as a result of these discussions?

MR. REYNOLDS: I will instruct the witness not to answer that question.

(The witness and Mr. Reynolds conferred.)

MR. REYNOLDS: I'll instruct him not to answer that question. I think that you could reformulate that question so that I would not find it objectionable or intruding in the area of privilege. But as formulated I still consider it to be a question that would invade the area of privilege.

Q Was the bill for June service over the 138 KV interconnection calculated in a manner any different than the bills for service over the 138 KV interconnection in any other month?

A. I'm not so sure that it has actually been calculated as yet, but it would be calculated in the same manner as

from the study communicated to anyone outside of CEI other than outside counsel?

A Not that I recall.

Q Was any use made of the study?

A Of course, it was reviewed by me and others within my office and possibly Mr. Howley.

Q Was this study made with respect to a study of various alternatives that might be utilized for acquisition of the Cleveland Electric Light System?

A I can't recall.

Q Did CEI make a study of the need to obtain the approval of the Federal Power Commission of an acquisition by CEI of the Cleveland City Light System?

MR. REYNOLDS: Just a minute.

(The witness and Mr. Reynolds conferred.)

MR. REYNOLDS: Let the record show that I initiated a discussion with the witness because it is my understanding that the question improves on an area of claimed privilege, and even more particularly on studies which were submitted to the Special Master as being privileged, and the privileged claim was upheld; and in view of that, I will instruct the witness not to respond.

MR. HJELMFELT: Are you now asserting a privilege as to whether or not such study was made?

MR. REYNOLDS: I don't believe that was the question.

MR. HJELMFELT: The question was: Did CEI or its employees make a study for the need to obtain Federal Power Commission approval of acquisition by CEI of the City Electric Light System, or at least that is the question now.

MR. REYNOLDS: If the question is whether -- let me have the question one more time.

(Question read.)

MR. REYNOLDS: To the extent you are asking whether a study was made in this area, I will permit the witness to answer that question.

A Yes. Such a study was made either by attorneys in my office or outside counsel retained by CEI.

Q Who requested that the study be made?

MR. REYNOLDS: I will instruct the witness not to answer that.

Q Was the study shown to any persons or communicated to any persons outside of CEI other than outside counsel?

A It was not shown or communicated to anyone outside of attorneys in my office; and, of course, if one of these was prepared by outside counsel, they would have seen it. But if it was prepared internally, I don't

believe it was even shown to outside counsel.

Q Was any use made of that study?

MR. REYNOLDS: I will instruct the witness not to answer that.

Q Was any action taken based upon that study?

MR. REYNOLDS: I will instruct the witness not to answer that.

Q Did CEI or any of its employees make a study of SEC regulations or statutes with regard to acquisition of the Cleveland City Electric System by CEI?

A Such a study was made, I believe, by an attorney or attorneys in my office -- or in our office I should say.

Q At whose request was the study made?

MR. REYNOLDS: I will instruct the witness not to answer that.

Q Was the study communicated or shown to any persons outside of CEI other than outside counsel?

A No.

Q What was the occasion for making such a study?

MR. REYNOLDS: Are you asking when the study was made or are you asking what circumstances precipitated? If it is the former I will permit him to answer. If it is the latter I will ask him not to answer.

MR. HULLIHELT: I am asking the latter: What were the circumstances that precipitated the

study?

MR. REYNOLDS: I will instruct the witness not to answer that.

Q Were any actions taken by CEI or its employees as a result of that study?

MR. REYNOLDS: I will instruct the witness not to answer that.

Q Did CEI make a study or --

MR. REYNOLDS: Let me, just so the record is clear, when I am instructing the witness not to answer, it is based on a claim of privilege, just so it is clear on the record.

I didn't want to go through the whole routine every time.

MR. HJELMFELT: I understand.

MR. REYNOLDS: Okay.

Q Did CEI or its employees make a study of the Cleveland City Light public employees' retirement system?

A I recall such a study being made by an attorney in an outside law firm retained by CEI.

Q Was that study or the results of that study communicated to any person or group outside of CEI other than outside counsel?

A It was not communicated to anyone outside of CEI or anyone within CEI except in our office.

Q What were the circumstances which occasioned that study to be made?

MR. REYNOLDS: I will instruct the witness not to answer that.

Q Was any action taken as a result of that study by employees of CEI?

MR. REYNOLDS: I will instruct the witness not to answer that.

Q Was any use made of the information obtained in that study by employees of CEI?

MR. REYNOLDS: I will instruct the witness not to answer that question.

Q Was more than one such study made?

A I can only specifically recall the one that I have referred to.

Q Did CEI or its employees make a study of a lease purchase agreement of the City Electric Light System?

MR. REYNOLDS: Arrangement you said?

MR. HJELMFELT: Arrangement.

A Such a study was made by myself and attorneys in an outside law firm retained by CEI.

Q Was that study or the results of that study communicated to any persons outside of CEI other than outside counsel?

A No.

Q What were the circumstances which occasioned that study to be made?

MR. REYNOLDS: I will direct the witness not to answer that.

Q Was any use made of the information obtained in that study?

MR. REYNOLDS: Same instruction.

Q Were any actions taken by employees of CEI based upon the information obtained in that study?

MR. REYNOLDS: Same instruction.

(Off the record.)

Q Did CEI or its employees make a study of the legality of transferring City Light Plant debt obligations to the sinking fund and the legality of reimbursing the sinking fund from the City Light operating revenues?

MR. REYNOLDS: Let me have that again.

(Question read.)

A I can't recall that.

Q Did CEI or its employees make a study of the remedies available to bondholders under the Cleveland City Light [illegible] first mortgage indenture?

MR. REYNOLDS: Does your question relate to a possible study between the period '65 to '75?

MR. HJELMFELT: My question is broader than that. I assume you are going to restrict the witness to answer as to that period?

MR. REYNOLDS: I am so instructing him. My understanding of the question is that it relates to the 1948 bond issue, is that right or wrong?

MR. HJELMFELT: No. My question relates to any bond issue. His answer might relate to the '48.

MR. REYNOLDS: I thought you said that first.

MR. HART: We are still operating under that indenture agreement.

MR. REYNOLDS: I appreciate that, but the reason I asked the question was, the time period is -- if we are going back that far, there might have been studies in an earlier time frame, that is all.

Let me have the question so I know what he is talking about.

(Question read.)

MR. REYNOLDS: You may respond but confining your response from '65 to the present.

A Yes; such a study was made in our office.

Q What were the circumstances which led to that study being made?

(The witness and Mr. Reynolds conferred.)

MR. REYNOLDS: Let the record show that I initiated a discussion with the witness and, again, concerning the matter of attorney-client work product, privilege, and on the basis of that discussion I will instruct the witness not to answer the question because it invades the area that it is entitled to protection under our claim of privilege.

Q Was the information obtained as a result of that study ever communicated to Mr. James Nolan?

A No.

Q Was the information obtained as a result of that study or copy of that study ever been made available to or discussed with any persons outside of CEI or its outside counsel?

A No.

Q Was any use made of that study by CEI or its employees?

MR. REYNOLDS: I will direct the witness not to answer that question on the grounds of privilege.

Q Was any action taken by employees of CEI based

upon the information obtained from that study?

MR. REYNOLDS: Same instruction.

Q What was the CEI-MELP Lease Project?

A I don't know.

Q I am referring to the title or the subject matter listing of Document No. 2098, for which a claim of privilege was made, and that is CEI's document number.

Does that refresh your recollection?

A No.

MR. REYNOLDS: Off the record.

(Discussion off the record.)

Q Did CEI make a study or its employees make a study regarding the effect on the CEI mortgage of having a CEI subsidiary acquire the Cleveland Electric Light System?

A Yes. Such a study was made in our office. And when I refer to "our office," it was either the office of Corporate Solicitor, Managing Attorney, or Manager.

MR. GREENSLADE: General Attorney.

A General Attorney, right, or Managing Attorney of the Legal Department. And that has been true when I referred to "our office."

Q And that would mean under your supervision or by you?

A Yes.

Q What were the circumstances occasioning such study to be made?

MR. REYNOLDS: Just for clarification, since you interjected "under your supervision," may I ask the witness a question on voir dire?

Do you, when you say "under your supervision," you mean by lawyers who were on your staff within the offices that you have described?

THE WITNESS: Yes.

MR. REYNOLDS: Go ahead.

Q Did CEI or its employees study the effect of the CEI mortgage of having a CEI subsidiary buy the Cleveland City Light?

Oh, that one was answered.

A Yes, I believe that was covered.

Q What were the circumstances which occasioned such study to be made?

MR. REYNOLDS: I will direct the witness not to answer.

Q Were the results of that study, the information from that study, communicated to any persons outside of CEI other than outside counsel?

A No.

Q Was any use made of the information developed by

study?

MR. REYNOLDS: I will direct the witness not to answer.

Q Were any actions taken by CEI employees predicated upon the results of that study?

MR. REYNOLDS: I will direct the witness not to answer.

Q Who requested that that study be made?

MR. REYNOLDS: Same direction.

Q Did that study have any effect on the corporate policies of CEI?

MR. REYNOLDS: What was that question again?

(Question read.)

MR. REYNOLDS: Let's go off the record for a minute.

(Discussion off the record.)

MR. REYNOLDS: I will instruct the witness not to answer that question.

Maybe, for the record, I ought to explain that the instruction is based on the claim of privilege that has been asserted heretofore.

I understand the question, it inevitably [illegible] into an area which would require a waiver of the privilege to answer that question

responsively and any following questions that might result from those answers.

MR. HJELMFELT: Might I inquire whether, if I asked the same question with respect to other studies I have asked about this morning, on which various occasions privilege has been asserted, that privilege would also be asserted?

MR. REYNOLDS: It would. That was the reason that I took time to consider the matter. It seems to me that if we are going to claim the privilege, to be consistent and to claim it fully we would have to claim it with respect to that question as to each of the prior studies as well as to this study.

So I would direct the witness not to respond to that same question were it addressed to each of the prior studies we have mentioned as well as this one.

MR. HJELMFELT: Thank you.

Q Did CEI or its employees study the possible reactions of City Light employees to a leasing of the City Light System by CEI?

A Could I have that question again, please?

(Question read.)

A I can't recall such a study.