

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

Consumers Power Company

)

Docket No. 50-329A

MEMORANDUM BY INTERVENOR MUNICIPALS AND COOPERATIVES
ON CLAIMS BY CONSUMERS POWER COMPANY
FOR WITHHOLDING PRODUCTION OF DOCUMENTS

Consumers Power Company has submitted to the Presiding Examiner in camera a large number of documents on which it asserts claims of privilege. These are mainly listed in two groups. A number of documents are listed under a general claim that they come within the purview of attorney-client privilege or that they constitute attorney work product. It has not yet submitted a list of the documents. ^{*}/ However, except for a showing of who is shown to have received copies from the documents themselves, the list of documents submitted by Consumers Power apparently will not give sufficient information with respect to any of the withheld documents, showing characterizing circumstances necessary to determine whether any of the withheld documents qualify as privileged. Not yet having the list or a showing of the characterizing circumstances

^{*}/ It did submit a list on April 26, 1973, but this list was to have been supplemented.

8006120

732

relating to each document sought to be withheld, the municipal-intervenors submit a memorandum at this time dealing generally with Consumers Power's claims and the applicable principles of law concerning privileged documents.

I

PRINCIPLES OF LAW RELATING TO EDISON'S
ASSERTIONS OF ATTORNEY-CLIENT OR
ATTORNEY WORK PRODUCT

Attorney-client privilege is narrowly limited to purely attorney-client communications. The purpose of the privilege is to promote freedom of consultation between client and attorney, by insuring that the client may make frank, confidential revelations to his attorney without fear of a forced disclosure. Hunt v. Blackburn, 128 U. S. 464, 470; Modern Woodmen of American v. Watkins, 132 F.2d 352 (CA 5); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 (D. C. Mass.). Likewise, the concept of attorney's work product is narrow in scope and is limited in application. An attorney's work product encompasses the attorney's "impressions, observations and opinions" which he records "as the product of his investigation of a case in the actual preparation for trial on behalf of a client." Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 795 (D. Del.). The concept of work

product is to protect the attorney and assure a degree of privacy, free from unnecessary or needless interference from an opposing party or counsel, allowing him to assemble information, prepare legal theories and plan strategy in order to properly prepare his client's case, Hickman v. Taylor, 329 U. S. 495. The work product concept is thus limited to this area of litigation and work in the pending case. Not all work done by an attorney falls within the work product protection. Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. As stated by the Court in Hickman v. Taylor, supra, at page 511:

"We do not mean to say that all written materials obtained or prepared by an adversary to counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non privileged facts remain hidden in an attorney's files and where production of those facts is essential to the preparation of one's case, discovery may properly be had."

It is basic that, since the work product concept as well as attorney-client privilege runs directly counter to the goal of full disclosure sought by the liberalized discovery rules in federal, as well as other, present day

litigation, United States v. Vehicular Parking, 52 F. Supp. 751 (D. Del.), they are strictly construed in application in accordance with their narrow objects stated above. United States v. United Shoe Machinery Corp., supra, at page 358.

As stated in People's Bank v. Brown, 112 Fed. 652, 654 (CA 3):

" . . . But it [the attorney-client privilege] has been forceably and vehemently assailed . . . and the suppression of evidence which it effects can be justified only when the limitations which restrict the scope of its operations are assiduously heeded. Therefore it is requisite that in every instance it shall be judicially determined whether the particular communication in question be really privileged, and, in order that such primary determination may be advisedly made, it is indispensable that the court shall be apprised, through preliminary inquiry, of the characterizing circumstances"

It follows from the exceptional nature of the privilege that the party claiming a privilege has the burden of establishing its existence with respect to each communication. Phelps Dodge Corporation v. Guerrero, 273 Fed. 415, 418 (CA 9). There is no presumption of privilege. People's Bank v. Brown, supra; Re Morrell's Estate, 277 N. Y. Supp. 262, 268. Any privilege there may be cannot be blanketed in by general assertions of privilege. A privilege must be shown to

exist by appraisal of the special relationship pertaining to each individual document, which must be separately considered and separately found to be privileged. Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794, People's Bank v. Brown, supra.

In final analysis, determinations as to whether a privilege exists with respect to particular documents, are questions of fact to be decided by the Courts, and in the instant case by the Presiding Examiner, Phelps Dodge Corp. v. Guerrero, supra, see Steiner v. United States, 134 F.2d 931, 935 (CA 5), after inspection of each document, United States v. Vehicular Parking, supra, upon further preliminary inquiry by the Presiding Examiner, and after disclosure by Edison of the "characterizing circumstances surrounding each document, People's Bank v. Brown, supra;

A cursory perusal of the lists of documents claimed by Consumers Power to be privileged as attorney-client confidential communications indicate, from the following principles of law, that Edison should provide information showing the characterizing circumstances as to each document preliminary to a ruling by the Presiding Examiner. Such information should

include statements indicating whether any withheld document was already disclosed to intervenors, or their counsel, or consultants, in the course of discovery or negotiations, whether it was heretofore disclosed by production of a copy of the document; whether it is part of a series of documents already produced; whether it is part of a series of other documents withheld; and the subject matters covering such documents and series of documents. All such information should be provided to intervenors as well as the Hearing Board so that the intervenors may properly prepare a memorandum of their position as to whether particular documents are actually privileged or if privileged whether the privilege was waived.* The need for a presentation of all the characterizing circumstances is emphasized by the following principles relating to privilege applicable to Consumers Power's lists of documents:

1. Documents which are not written by or to an attorney are not privileged as attorney-client confidential communications. 8 Wigmore on Evidence (3rd Ed.) Sec. 2292; United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 (D. Mass.).

* We believe other parties should also receive this information so that they may advise the Hearing Board.

2. Not all documents written by or to an attorney are privileged. This is particularly true as to a corporation's "house counsel". As stated in United States v. United Shoe Machinery Corp., supra, at page 360, "No doubt a high percentage of the communications to or from them [house counsel] fall outside the privilege"

3. Where a communication is prepared for a clear business purpose, there is no privilege even though written by or addressed to house counsel or presented to house counsel for his views. As stated in Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del.), communications are not privileged which are "solely, or even largely, business advice." [Emphasis supplied]

4. Communications by or to a person who serves in a dual capacity as business executive and house counsel are particularly suspect, United States v. Vehicular Parking, 52 F. Supp. 751, 753-4 (D. Del.). Such communications must be scrutinized to determine whether they are "business" in nature and, therefore, not privileged, Radio Corp. of America v. Rauland Corporation, 18 F. A. D. 440, 443 (N. D. Ill.).

5. Not all documents in the possession of the attorney for a party are privileged. The "work product privilege is limited to the work product of the attorney with respect to the pending action and goes no further." 27 C. J. S., Section 72; Henke v. Iowa Home Mutual Casualty Cv. 87 N. W. 2d., 920, 926; Zenith Radio Corp. v. Radio Corporation of America, 21 F. Supp. 792, 795; Hickman v. Taylor, 329 U. S. 495 (emphasis supplied).

6. Even if a privilege would exist with respect to a particular document, the privilege may be waived by revealing elsewhere in any form, the same information or an attorney's opinion as is contained in the communication or document claimed to be privileged, Radio Corp. of America v. Rauland Corporation, supra, at page 444. Disclosure of a privileged document by permitting its inspection waives the privilege, Schwartz v. Travellers Insurance Company, 17 F.R.D. 320 (S.D.N.Y.); United States v. Shibley, 112 F. Supp. 734, 741 (S. D. Calif.). Where disclosure of the information is made, the purpose of the privilege to encourage frank revelation by the client without fear of disclosure ceases. The basic litigation goal of complete discovery should then be satisfied. Once the veil of secrecy is lifted by disclosure, it cannot be lowered again.

United States v. Shibley, supra. As stated In Re Associated Gas & Electric Co., 59 F. Supp. 743, 744-5 (S.D.N.Y.), "Once the confidential matter is voluntarily disclosed to the public, it is no longer a secret and the privilege which might be claimed under the statute disappears."^{*}

7. Disclosure of one of a series of communications which together constitute an integrated transaction necessarily waives the privilege as to the remaining documents in that series. Consumers Power "cannot open the door to part of the facts and close it as to the remainder". Willard C. Beach Air Brush Co. v. General Motors Corp., 118 F. Supp. 242, 247 (D. N. J.).

CONCLUSION

The above cases show that doctrines of privilege are limited and must be specifically supported in light of the circumstances both to affirmatively demonstrate the existence of a privilege and to demonstrate the absence of waiver. Hence, Consumers Power has failed to do this, the documents should be

^{*} For these purposes one need not determine whether a waiver can result, as Consumers Power claims, from revelation under protest, pursuant to court order.

turned over to the parties. At the least, the Company should have to fully justify its claim.

Respectfully submitted,


Robert A. Jablon

One of the attorneys for Traverse City, Coldwater, Holland, Grand Haven and Zeeland, Michigan, the Michigan Municipal Electric Association, Wolverine Electric Cooperative, and Northern Michigan Electric Cooperative

September 19, 1973

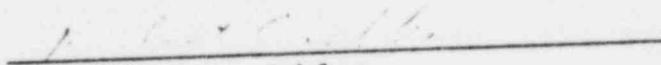
Law Offices:

Spiegel & McDiarmid
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

Robert A. Jablon, being first duly sworn, deposes and says that he is one of the attorneys for the Cities of Traverse City, Coldwater, Holland, Grand Haven and Zeeland, Michigan, the Michigan Municipal Electric Association, Wolverine Electric Cooperative, and Northern Michigan Electric Cooperative and that as such he has signed the foregoing Memorandum by Intervenor Municipals and Cooperatives on Claims by Consumers Power Company for Withholding Production of Documents for and on behalf of said parties; that he is authorized so to do; that he has read said Memorandum and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.



Robert A. Jablon

Subscribed and sworn to
before me this 19th day of
September, 1973.

Notary Public

My commission expires: September 30, 1974

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of)
) Docket No. 50-329A
Consumers Power Company)

CERTIFICATE OF SERVICE

I hereby certify that the Memtoandum by Intervenor Municipals and Cooperatives on Claims by Consumers Power Company for Withholding Production of Documents in the above-captioned matter was served upon the following by deposit in the United States mail, first class or air mail, this 19th day of September, 1973.

Alan Rosenthal, Esq., Chairman
Atomic Safety and Licensing
Board Panel
U. S. Atomic Energy Commission
1717 H Street, N. W.
Washington, D. C. 20545

Mr. Frank W. Karas, Chief
Public Proceedings Branch
Office of the Secretary
U. S. Atomic Energy Commission
1717 H Street, N. W.
Washington, D. C. 20545

Abraham Braitman, Chief
Office of Antitrust and
Indemnity
U. S. Atomic Energy Commission
1717 H Street, N. W.
Washington, D. C. 20545

Atomic Safety and Licensing
Board Panel
U. S. Atomic Energy Commission
1717 H Street, N. W.
Washington, D. C. 20545

Robert J. Verdisco, Esq.
Counsel for AEC Regulatory
Staff
U. S. Atomic Energy Commission
1717 H Street, N. W.
Washington, D. C. 20545

Harold P. Graves, Esq.
Vice President and General Counsel
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

Jerome Garfinkel, Esq., Chairman
Atomic Safety and Licensing Board
U. S. Atomic Energy Commission
1717 H Street, N. W.
Washington, D. C. 20545

Wallace E. Brand, Esq.
Antitrust Public Counsel
Department of Justice
P. O. Box 7513
Washington, D. C. 20044

Joseph Rutberg, Esq.
U. S. Atomic Energy Commission
7920 Norfolk Avenue
Bethesda, Maryland

Hugh K. Clark, Esq.
P. O. Box 127 A
Kennedyville, Maryland

William T. Clabault, Esq.
David A. Leckie, Esq.
Department of Justice
Antitrust Division
P. O. Box 7513
Washington, D. C. 20044

Mr. James B. Falahee
General Attorney
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

Joseph J. Saunders, Esq.
Antitrust Division
Department of Justice
P. O. Box 7513
Washington, D. C. 20044

Honorable Frank Kelly
Attorney General
State of Michigan
Lansing, Michigan 49813

Dr. J. Venn Leeds, Jr.
P. O. Box 941
Houston, Texas 77001

William W. Ross, Esq.
Wald, Harkrader and Ross
1320 - 19th Street, N. W.
Washington, D. C.

Robert A. Jablon

Law Offices:

Spiegel & McDiarmid
2600 Virginia Avenue, N. W.
Washington, D. C. 20037