5/4/73

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
CONSUMERS POWER COMPANY	)	and 50-330A
(Midland Units 1 and 2)	)	

APPLICANT'S ANSWER TO
INTERVENORS MOTION TO COMPEL

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, Consumers Power Company ("Applicant") files its answer in opposition to the Motion to Compel, dated May 1, 1973, filed by the intervening parties. Said Motion "requests" Applicant to provide information relating to the internal processes by which Applicant complied with the Joint Document Request, filed July 26, 1972.

Similar efforts by the Intervenors to obtain such information were rejected by the Board in an order dated April 4, 1973. There, the Board held, inter alia, that the Intervenors had made "no showing of a compelling need" for a document index relating to the Joint Document Request (p.1). Applicant submits that, for the reasons set forth below, the instant Motion seeks essentially the same information as the previous motion denied by the Board and that this Motion should be summarily denied.

I. The Information Intervenors Seek is not Relevant to Any Issue Raised in this Proceeding.

According to Section 2.740(b)(1) of the Rules, the scope of discovery is limited to "matters in controversy"

which have been identified by the hearing Board. This Board set forth the contraverted matters in this proceeding in its Order of August 7, 1972 (p.3). The processes by which Applicant decided which of the four million documents it reviewed were responsive to the Joint Document Request does not present an issue with regard to the "access to coordination" issues set forth in the Board's Order. Hence, since the discovery sought here does not relate to an issue with which discovery can be had, it must be denied as irrelevant.

The instant situation is directly in point with Giordani v. Hoffman, 278 F. Supp. 886 (E.D. Pa.) where the defendant sought to discover "the mode" in which the plaintiff prepared to respond to discovery. 278 F. Supp. at 891. The court held that it failed

> "to see how information regarding the actions which transpired in preparation for a deposition have any relationship to the merits . . . ." 278 F. Supp. at 892.

Thus, it is clear that the Motion seeks information which is not relevant to this proceeding.

II. Applicant's Efforts to Comply with the Joint Document Request are Work Product and/or Privileged.

Each of the documents furnished in response to the Joint Document Request was extracted from the files either by Applicant's counsel, or by individuals working under the direct supervision of counsel, in preparation for this pro-

ceeding. Similarly, all produced documents were reviewed by Applicant's counsel and reflect counsel's conclusion that they are called for by one or more discovery demands.

Thus, "instructions given to all persons involved in the gathering and supplying of documents" (p.1) which the Intervenors seek would in most, if not all, instances constitute privileged attorney-client communications.[1/] Even where not privileged communications, the Motion to Compel obviously contemplates an inquiry into work product undertaken in preparation for this proceeding and also seeks to inquire into the mental impressions and conclusions of Applicant's counsel concerning the Joint Document Request.

The Commission's Rules direct the hearing Board to prevent "disclosure of the mental impressions, conclusions, opinion or legal theories of any attorney . . . concerning the proceeding." Section 2.740(b)(2) of the Rules of Practice. These Rules confirm the basic principles set forth in Hickman v. Taylor, 329 U.S. 495 (1947) which "made it plain that the 'work product' doctrine protected the party against discovery of information within its purview regardless of the method by which the information was sought." 4 Moore's Federal Practice, p. 26-452 (1970 ed.). Thus, in Bercow v. Kidder, Peabody & Co.,

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1/ Similarly, the "handwritten numbers on the bottom of the discovery document" about which the Motion inquires (p.4) were prepared by or for counsel for Applicant's internal use in preparation for this proceeding.

similar information, the Intervenors' Motion is devoid of any showing of need for the material they seek.

IV. The Intervenors Would Have Applicant Prepare Their Case.

As demonstrated in Part III, supra, the Intervenors have the ability to ascertain the extent of compliance with the Joint Document Request, but prefer to shift this task to the Applicant. Since the subject of the Intervenors' inquiry relates to their discovery, the Motion to Compel is apparently an effort to have Applicant prepare the Intervenors' case. It is well-settled that discovery cannot be utilized for such purposes. Hickman v. Taylor, 329 U.S. 495 (1947).

V. The Board Should Reject Intervenors Innuendos About Non-Compliance.

The Intervenors' effort to discredit Applicant's statement of compliance by innuendo and surmise only demonstrates the weakness of their position. On April 2, 1973, counsel for Applicant wrote the other parties that it had fully complied with the Joint Document Request. The only qualification to this statement was that compliance had taken account of the Board's Orders and understandings of counsel about the Request. Since counsel for the Intervenors are, of course, aware of these orders and understandings, Applicant cannot fathom what further "explanation" (p.2) Intervenors seek about Applicant's compliance.

In the face of Intervenors' suggestion that Appli-

39 F.R.D. 357 (S.D.N.Y. 1965), the court denied discovery inquiring into the method by which a defendant prepared for a deposition, holding that the discovery represented "an indirect attempt to ascertain the manner in which an adversary is preparing for trial." 39 F.R.D. at 358.

Thus, the Intervenors' efforts to inquire into the internal processes by which Applicant responded to the Joint Document Request flies in the face of the Commission's Rules and well-settled "work product" principles, and should therefore be denied by the Board.

III. The Intervenors Do Not Need the Information They Seek.

According to the Intervenors, they require the information sought because they "have no way of ascertaining the [Applicant's] extent of compliance" with the Joint Document Request (p.2). This statement is without basis in fact.

As the Board observed in its order of April 9, 1973, Applicant has responded to Joint Document Request "on a piecemeal basis", thus affording the Intervenors "substantial time" to prepare an index or any other method of ascertaining compliance (p.1). Moreover, since the Intervenors jointly authored the Joint Document Request, they are in a better position than Applicant to ascertain whether the Joint Document Request has been fully satisfied.

In short, as in their previous efforts to seek

cant has not complied fully with the Joint Document Request, [2] we attach hereto an affidavit affirming that document production has been completed. This affidavit should dispel any alleged concerns about Applicant's compliance with the Request.

WHEREFORE, Applicant urges the Board to deny the Motion to Compel of May 1, 1973.

Respectfully submitted,

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May 4, 1973

2/ The Motion (p.3) makes much of the fact that Applicant sent more documents to its Washington counsel than Applicant made available to the Intervenors. In view of the intense time pressure, no indexes were maintained by Applicant which would have permitted elimination of duplicate copies. Where such duplicate copies came to light during the final review process, they were not produced -- as directed in the instructions to the Joint Document Request. In addition, the number of documents responsive to the Joint Document Request was substantially reduced pursuant to orders of the Board and understandings of counsel; and other documents were properly withheld as privileged. Thus, it is hardly surprising that Applicant sent more documents to its Washington counsel than were eventually produced for inspection.

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S ANSWER TO INTERVENORS MOTION TO COMPEL, dated May 4, 1973, 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 May, 1973:

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