UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

MEMORANDUM IN SUPPORT OF CONSUMERS POWER COMPANY'S OBJECTION TO THE PRODUCTION OF DOCUMENTS

On December 1, 1976, the Intervenors in the above-referenced proceeding requested that drafts of the testimony and affidavit submitted by Joseph G. Temple, Jr. in the above-referenced proceeding be produced for their inspection and copying by The Dow Chemical Company. Consumers Power Company (Licensee) has objected to the production of these documents on the ground that they are the work product of counsel. This memorandum will set forth the legal basis for the objection.

These drafts were identified in letters between counsel for Licensee and counsel for The Dow Chemical Company dated October 6, 22, and 29. The letters were produced for the Intervenors. It is clear from these cover letters that the documents were prepared by counsel for the respective parties. In Hickman v. Taylor, 329 U.S. 495 (1947), the United States Supreme Court ruled that the work product of counsel was privileged and as such did not have to be produced pursuant to a discovery request. That court explained that work product was reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways". Id. at 511. Thus, it is clear that the drafts in question are work product of counsel.

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The only dispute among the parties is whether the disclosure of the documents prepared by an attorney for one party and disclosed to attorneys representing other interested individuals will remove the immunity of the documents from discovery. Case law clearly provides that such disclosures do not prevent a valid claim of the work product privilege. For example, in Stanley Works v. Haeger Potteries, Inc., 35 F.R.D. 551 (N.D. Ill., 1964), the plaintiff objected to interrogatories requesting identification of all correspondence and documents relating to the suit between Arthur D. Little, Inc. and plaintiff. Little was plaintiff's partner in a joint licensing program for the patent in suit. The court held that Little's "close relationship to plaintiff and the suit at bar must be recognized" even though Little was not a party. 35 F.R.D. at 554. The court added: "Where attorneys having a mutual interest in litigation exchange their work product, it remains protected by a qualified privilege." 35 F.R.D. at 555. The court also noted that Little was "equally concerned with the outcome" of the suit, so that any communications made "with an eye towards possible litigation" between plaintiff's counsel and Little need only be identified and not produced. 35 F.R.D. at 555. Accord: Stix Products, Inc. v. United Merchants & Mfrs., Inc., 47 F.R.D. 334 (S.D.N.Y. 1969); Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572 (S.D.N.Y 1960); Lichter v. Mellon-Stuart Co., 24 F.R.D. 334 (S.D.N.Y. 1959). Therefore, Licensee respectfully requests that this Board deny Intervenor's motion to produce the drafts in question.

Respectfully submitted,

R. Rex Renfrow III
David J. Rosso
Caryl A. Bartelman
Attorneys for Consumers
Power Company

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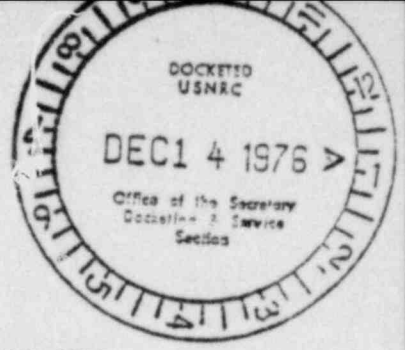

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached "Memorandum In Support of Consumers Power Company's Objection To the Production of Documents" dated December 2, 1976 in the above-captioned proceeding, have been served on the following by hand delivery this 2nd day of December, 1976:

Daniel M. Head, Esq., Chairman
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Emmeth A. Luebke, Esq.
Atomic Safety and Licensing
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Lawrence Brenner, Esq.
Nuclear Regulatory Commission
Washington, D.C. 20555

The following have been served by deposit in the United States mail, first-class, this 2nd day of December 1976:

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

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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