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RELATED CORRESPONDENCE

November 7, 1984

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
TEXAS UTILITIES ELECTRIC	)	Dockets Nos. 50-445-2 and
COMPANY, <u>et al.</u>	)	50-446-2
	)	
(Comanche Peak Steam Electric	)	(Application for
Station, Units 1 and 2)	)	Operating Licenses)

APPLICANTS' MEMORANDUM IN SUPPORT  
OF THE PRIVILEGE FOR MATERIALS  
PREPARED IN ANTICIPATION OF LITIGATION

Intervenor agrees (brief dated October 26, 1984, pp. 1-2) that it may only have discovery of documents prepared in anticipation of litigation if Intervenor shows (1) that it has substantial need of the materials, and (2) that it is unable to obtain the substantial equivalent of these materials by other means without undue hardship. Intervenor's brief certainly reflects that it wants to examine these documents, but that showing does not meet the standard set forth in 10 C.F.R. §2.740(b)(2). In particular, Intervenor fails to show that it cannot acquire the substantial equivalent of the materials by other means.

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1. Intervenor may acquire the information it seeks by other means.

Intervenor's theory is that J.J. Lipinsky was "pressured, coerced, or influenced" by Applicants or Applicants' counsel to change his views. Intervenor speculates that drafts of testimony and related documents will tend to confirm that theory.

Mr. Lipinsky has submitted prefiled testimony. He is subject to deposition and to interrogatories. He will be subject to cross-examination. Intervenor may test its theory by any of these means. If, for example, Intervenor assumes that Applicants or Applicants' counsel dictated "exactly what Mr. Lipinsky would or would not say" (Intervenor brief p. 3), Intervenor may simply ask Mr. Lipinsky whether that is so. Intervenor may inquire of Mr. Lipinsky as to the circumstances under which drafts of his testimony were prepared, and underwent further revision. Intervenor is free to elicit from Mr. Lipinsky the atmosphere attending conferences at which he prepared his testimony. Intervenor's right to depose or to cross-examine Mr. Lipinsky is the means by which it may acquire the information it seeks. Intervenor's right to elicit this information hardly presents "undue hardship," as required by the standard of 10 C.F.R. §2.740(b)(2).

2. Sound policy consideration underlie the privilege for trial preparation materials.

The privilege for trial preparation materials derives from the Supreme Court's analysis of the effect disclosure of such materials would have on the judicial process:

Were such materials open to opposing counsel on demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 511 (1947). As the Advisory Committee notes on F.R.C.P. 26(b)(3) state, "the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side."

Trial preparation materials reflect the strategies, thoughts, lines of inquiry, and judgments of counsel and of witnesses. Forced disclosure of those materials would chill communications between and among a party's representatives. Such disclosure serves neither the interests of justice nor of the parties, especially where, as here, the information sought may be elicited by other means.

3. Certain documents are protected by the privilege for attorney work product.

Applicants' letter to the Board dated October 18, 1984, noted that the documents identified in items 1, 9, 12, 13 and 14 consist of attorney work product, and are privileged on that basis. Under Hickman v. Taylor, 329 U.S. at 511, the privilege applies to "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible" things and activities. These documents are not subject to discovery even under the standard of 10 C.F.R. §2.740(b)(2). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ("Opinion work product is not discoverable, so long as the material was in fact prepared by an attorney or other agent in anticipation of litigation \* \* \* ").

4. Applicants should not be required to disclose certain materials even if the Board rules that Intervenor has met the standard for disclosure.

10 C.F.R. §2.740(b)(2) includes a special instruction regarding the disclosure of certain materials:

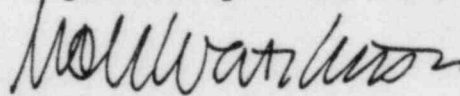
In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

Even if the Board rules that Intervenor has meet its burden for discovery of trial preparation materials, Applicants should not be required to produce materials

reflecting the specified matters. The questions that will arise in that event would be, first, what documents or portions of documents are protected from disclosure, and second, who should decide what is protected.

Should the Board rule that we must produce any or all of the trial preparation materials, Applicants request leave to file a motion with the Chairman of the Atomic Safety and Licensing Board Panel, pursuant to 10 C.F.R. §2.721, for the appointment of an alternate Board, alternate or special master to screen the documents prior to their release to the parties.

Respectfully submitted,



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(Comanche Peak Steam Electric ) (Application for  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document in the above-captioned matter was served upon the following persons by hand-delivery,\* overnight delivery,\*\* or by deposit in the United States mail,\*\*\* first class, postage prepaid, this 7th day of November, 1984:

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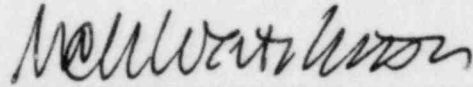
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