598

SERVED MAR 31 1986

SERVED MAR 31 1986

LBP-86-17

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Herbert Grossman, Chairman
Richard F. Cole
A. Dixon Callihan

In the Matter of	Docket Nos. 50-456-OL 50-457-OL
COMMONWEALTH EDISON COMPANY	ASLBP No. 79-410-03-OL
(Braidwood Station, Unit Nos. 1 and 2)	March 28, 1986

MEMORANDUM AND ORDER
(Granting, In Part, And Denying, In Part,
Intervenors' Motion To Compel)

By Motion dated March 11, 1986, Intervenors Bridget Little Rorem, et al., moved to compel Applicant to fully respond to Interrogatory Nos. 10 and 13 to which Applicant had objected. Interrogatory No. 10, in general, requests the identification and description in detail of studies evaluating the "Braidwood Construction Assessment Program" (BCAP), certain "corrective action programs", and a "Ongoing Corrective Action Program." Interrogatory No. 13 asks for a description in detail of all work performed by Torrey Pines Technology with respect to quality assurance or corrective action programs.

DS02

Applicant's opposition to Intervenor's motion to compel, dated March 21, 1986, contends that portions of the interrogatories to be answered (by narrative or through the production of pertinent documents) fall under attorney-client or attorney work product privilege, for which Intervenors have not made the requisite showing of substantial need to overcome privilege.

We agree with Applicant that Intervenors have made no showing of substantial need for privileged material, and grant Intervenor's motion only with respect to those documents that we determine are not privileged.

MEMORANDUM

As a threshold matter, Applicant urges us to adopt the reasoning (and application) of Rule 26(b)(4) of the Federal Rules of Civil Procedure, which permits the discovery of the facts or opinions of a nontestifying expert only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by any other means." Applicant cites three Licensing Board opinions [1] that have adopted

---

1 Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), (Footnote Continued)

the provisions of Federal Rule 26(b)(4), and only one [2] that has refused. Applicant's Response at 3-4. Having read those four cases, it is clear to us that the decision on whether to adopt Rule 26(b)(4), in the absence of a parallel NRC rule or decision by higher authority, is still open to the interpretation of this Board. We are satisfied that the system adopted by Federal Civil Procedure Rule 26(b)(4) makes good sense in keeping discovery to the essentials of the adversary's case without encroaching upon that party's ability to seek expert assistance, and that a decision by us to adopt that procedure, consistent with all the recent Licensing Board opinions, would promote a desired uniformity in application. We therefore apply the substance of Rule 26(b)(4) of the Rules of Civil Procedure to this proceeding. Accordingly, on the assurance of Applicant (Response at 6), based upon the affidavit of its counsel, that Torrey Pines Technology, Inc. was employed exclusively by counsel to provide expert assistance in counsel's preparation for litigation in this case, that Applicant has no present intention of calling any employee of that organization as a witness, and that no information concerning conclusions reached by

---

(Footnote Continued)
LBP-85-38, 22 NRC 604, 609-10 (1985); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-83-27A, 17 NRC 971, 976-79 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-83-17, 17 NRC 490, 497 (1983).

2 General Electric Co. (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-79-33, 8 NRC 462, 465-68 (1978).

Torrey Pines has been communicated by counsel to any of Applicant's employees, we determine that Interrogatory No. 13, which relates solely to work performed by Torrey Pines, need not be answered. If, however, our further discussion indicates that Applicant's definition of "preparation for litigation" is too broad, Applicant should reevaluate its withholding of the requested information.

Applicant objects to describing or producing drafts of documents relating to the "BCAP" (Braidwood Construction Assessment Program), "BCAP Quality Assurance," "corrective action reports," and "Corrective Action Program." Applicant asserts either the attorney-client or work product privilege on the grounds that its counsel played a substantial role in preparing these documents and that they were prepared in the anticipation of litigating the issues which they address. Applicant's Response at 10. Nowhere in the motion papers is there a description of the aforementioned programs or reports. As we understand them, however, these programs and reports were assumed by Applicant under its obligations to NRC Staff and the Commission's regulations. That the drafts may have been prepared with an eye towards litigation and by Applicant's attorneys, rather than its technical staff and consultants, should be of more interest to NRC's technical staff than to the Licensing Board. The input of counsel to documents required under the regulatory process and otherwise discoverable cannot immunize these documents from discovery. Counsel in this case were assisting

in a management function that is outside the scope of both attorney-client and work product privilege. To the extent that these drafts and other documents relate to the quality assurance issues admitted in this proceeding, they should be divulged. We do not decide whether counsel's handwritten notes and comments on any of the drafts (Applicant's Response at 12) need be divulged, since Intervenors have declined to "seek the disclosure of mental expressions, conclusions, opinions or legal theories of Applicant's counsel" (Motion at 3). Counsel may delete those handwritten notes and comments from the produced copies.

A further category of documents withheld by Applicant consists of compilations of materials and conclusions of an evaluation of various programs at the Braidwood site performed by a Special Assistant to the company's Manager of Projects, the purpose of which was to aid Applicant's counsel in preparing for licensing hearing. The results of the Special Assistant's analysis were communicated only to counsel, the Braidwood Project Manager, and Commonwealth Edison's Manager of Projects. Applicant asserts the work product privilege for these documents and assures that all factual matters set forth in these reports had been made available to Intervenors during the discovery process. Applicant's Response at 13. On the facts stated, as sworn to by Applicant's counsel and uncontradicted by Intervenors, we agree that these documents would be privileged as "prepared in the

anticipation of litigation or for trial by or for another party or by or for that other party's representative ***" (emphasis added) under Rule 26(b)(3) of the Federal Rules of Civil Procedure. Since, however, 10 C.F.R. § 2.740(b)(2) establishes the privilege for trial preparation materials only if the documents are prepared "by or for another party's representative" and omits the phrase "by or for another party," it is debatable whether our regulations intended to depart from the Federal Rules by making documents prepared by a party itself in preparation for trial discoverable, or whether it assumed that if they were prepared "for" its representative they already fit under the privilege. While we gravitate towards the latter interpretation, we find it unnecessary to decide since, in this instance, under the circumstances set forth by Applicant and its affiant, we determine that these documents are covered by the attorney-client privilege, in any event.

In summary, we determine that Intervenors have failed to make the showing required under 10 C.F.R. § 2.740(b)(2) that they have "substantial need of the materials in the preparation of this case." To the extent that the documents are privileged, discovery is denied. On the other hand, we have determined, above, that certain of the documents which relate to the admitted quality assurance issues should not be considered as trial preparation materials where they have been

prepared to satisfy Applicant's obligations to NRC Staff and under the regulations.

ORDER

For all the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 28th day of March, 1986,

ORDERED,

1. That the parties apply the principles enunciated in the foregoing memorandum to the disputed documents; and

2. That any documents remaining in dispute be brought to the Chairman's attention immediately by any party so that the matter can be resolved expeditiously through a conference call.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland.