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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
before the
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
TEXAS UTILITIES ELECTRIC COMPANY, et al.	Docket No. 50-445-CPA
(Comanche Peak Steam Electric Station, Unit 1)	

PERMITTEES' RESPONSE TO
"JOINT INTERVENORS' OPPOSITION
TO MOTIONS FOR PROTECTIVE ORDER
AND MOTION TO COMPEL RE: GREGORY
DISCOVERY (SETS 5 AND 6)"

The present discovery dispute between the Permittees ("Permittees") and the Joint Intervenors ("Intervenors") concerns an incomplete, retrospective prudence audit being conducted for TU Electric by Cresap, McCormick & Paget ("Cresap"), an independent consulting firm, in connection with anticipated rate proceedings before the Texas Public Utility Commission ("TPUC"). Much of the information on which the auditors will rely in forming their expert opinion has already been provided to the Intervenors in the Operating License proceeding, and no barrier has been suggested to the Intervenors' right to seek discovery of all other, unprivileged, information in TU Electric's possession which might be appropriately disclosed in this proceeding. It is therefore important to note that the present dispute solely

concerns Intervenor's right to see any documents generated in connection with the performance of Cresap's retrospective prudence audit.

The Permittees have previously demonstrated that the Cresap prudence audit was initiated for the sole purpose of preparing TU Electric for state rate case litigation. The materials created by TU Electric and Cresap pursuant to the performance of the prudence audit for TU Electric's use in forthcoming litigation are thus protected from discovery by both the work product privilege and by the similar protections afforded the efforts of non-testifying experts.

The arguments contained in Intervenors' "Opposition to Motions for a Protective Order and Motion to Compel Re: Gregory Discovery Sets 5 and 6" ("Motion to Compel") are contrary to the facts and law. They attempt to disregard the extensive discovery the Intervenors have already attained regarding the history and purpose of the Cresap audit which plainly demonstrates the applicability of the work product privilege to the Cresap audit materials, as well as to ignore the Intervenors' previous acknowledgement of the audit materials' protected character. Even if the Cresap audit materials requested are not absolutely protected from disclosure, being "preliminary and final assessments, analyses or conclusions," the Intervenors fail to make any required showing to overcome the privilege--their substantial or compelling need for the material and their inability, without undue hardship, to obtain the substantial

equivalent of the materials by other means. Permittees submit that their Motion for a Protective Order must therefore be granted and that the Intervenors' Motion to Compel must be denied.[1]

FACTUAL BACKGROUND

Intervenors first sought discovery of the materials generated in connection with the Cresap prudence audit in the Operating License Proceeding. The facts confirmed by that effort have not changed--the audit materials remain protected work product. As this Board remembers, on May 29, 1985, Permittees voluntarily disclosed that they had failed to provide the "MAC Report" in response to one of CASE's earlier discovery requests. Permittees explained that they had discovered the document "in gathering data for a prudence audit being performed for TUEC." CASE then, on June 24, 1985, filed detailed interrogatories concerning the purpose of the Cresap prudence audit and who performed it. CASE's Interrogatories to Applicants and Requests to Produce

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[1] It should be noted that the Intervenors also include in their statement of facts a vague, unsubstantiated claim that Chuck Atchison was illegally discharged. Motion to Compel p. 7. It is not clear what the Intervenors are referring to. If the Intervenors are referring to an order of the Secretary of Labor affirming an administrative law judge's finding that Brown & Root discriminated against Mr. Atchison, that order was subsequently vacated and remanded by the Court of Appeals. Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984). It is even less clear what the supposed relevance of these references might be to the privileged nature of the prudence audit materials.

(June 24, 1985). Permittees opposed CASE's discovery requests inasmuch as their audit was being prepared "for possible eventual use before the Texas [P]ublic [U]tility [C]ommission." Applicants' Response In Opposition To CASE's Motion For Immediate Hearings (July 8, 1985) at 15.

On July 22, 1985 the Board properly issued an order limiting CASE's discovery to "circumstances leading to the discovery of the MAC report" and barring CASE from engaging in "a fishing expedition for material relevant only to CASE's simultaneous appearance before the Public Utility Commission." Memo. and Order (July 22, 1985) at 2. Despite moving for reconsideration of certain aspects of the Board Order, CASE conceded that the Cresap audit was prepared "for the Public Utility Commission" and eschewed any intention of invading the protected character of such work. CASE's Motion for Reconsideration of Board's 7/22/85 Memorandum at 2 n.4 (August 5, 1985).

As we have established during this earlier inquiry, the Cresap audit was commissioned, and is being executed, solely to aid TU Electric and its counsel in anticipated rate proceedings before the Texas Public Utility Commission. Indeed, the introduction to the work specification for the audit clearly states that:

> TUEC will file a rate case with the Texas Public Utilities Commission (TPUC) to recover costs and expenses associated with the plant. In anticipation of this rate case, TUEC is initiating a retrospective audit of the project

> management decisions . . . The auditor . . . may be called to provide expert testimony at public hearings in support of its findings.

Permittees' November 27 supplemental answers to CASE's discovery explain even more fully that the purpose of the audit was to prepare for the anticipated prudence issues to be raised in TPUC proceedings.

> Answer: After amendments to PURA in the 1983 legislature and the 1984 TUEC rate case, it became apparent to TUEC regulatory services Vice Presidents Messrs. E. L. Watson and T. L. Baker that prudence would become an issue. Through senior management discussion, M. D. Spence, President of TUGCO, and E. L. Watson determined that a Project Audit Team should be formed within TUGCO to assist in preparation and conduct of a prudence audit. A senior management group was formed to oversee the prudence audit. This group presently consists of Messrs. M. D. Spence, T. L. Baker, W. G. Counsil, Executive V.P., R. L. Gary, Executive V.P., Joe B. George, V.P., and R. A. Wooldridge, Legal Counsel for TUEC. Mr. H. C. Schmidt, Manager of Nuclear Services, was appointed director of a Project Audit Team. The Project Audit Team, with assistance from Richard Metzler and Associates, a consulting firm, developed the general scope of the prudence audit. A copy of the work specification will be made available for inspection.(emphasis added)

See also, "Applicants' Responses to CASE's Interrogatories Re: The MAC Report and Issues Raised by the MAC Report" (August 17, 1985)("[audit] may form a part of TU Electric's testimony in any rate case to consider the rate-making

treatment of Commanche Peak . . ."); Schmidt Affidavit, ¶ 2-4 (same point). All materials generated in connection with the audit were made explicitly confidential in the work specification and contract. Schmidt Affidavit, ¶ 5.

As the discovery already provided to the Intervenors also establishes, the Cresap audit is purely retrospective. It is not intended to be used as a management tool. It examines TU Electric's decisions "during construction" of Comanche Peak. Since the expected initiation of the TPUC rate hearings has been postponed, the Cresap audit has been suspended. No date has, as yet, been set for its resumption. Moreover, Intervenors have been informed in discovery that at least to date, it is not decided whether Cresap's experts will in fact offer testimony at the rate making hearings. Indeed, as Intervenors curiously emphasize, the work specification for the audit does not include the "provision of testimony" in the initial cost estimate (though it does require that the auditor be available to provide such testimony). What seems not to have been understood is that these facts confirm that Cresap's current role is that of an expert advisor to TU Electric and its attorneys on the preparation and conduct of the rate making proceedings--viz. a representative of, or consultant to, a party who is preparing material in anticipation of litigation as well as a non-testifying expert.

ARGUMENT

I. THE CRESAP AUDIT MATERIALS ARE PROTECTED FROM DISCOVERY UNDER THE WORK PRODUCT DOCTRINE

The work product doctrine decrees that a party may only discover documents and tangible things prepared in anticipation of litigation by or for another party at a minimum "upon a showing . . . [of] substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 10 C.F.R. § 2.740(b)(2). See also Upjohn Co. v. United States, 449 U.S. 383, 400 (1981).[2] The doctrine rests on strong public policy grounds; it implements two maxims crucial to the proper functioning of our adversarial system: promotion of trial preparation and avoidance of unfairness.

First, the doctrine helps guarantee that courts will reach "a fair and accurate resolution" of the dispute by "assuring the thorough preparation and presentation of each

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[2] Permittees agree with Intervenors' statement that Fed. R. Civ. P. 26(b)(3) and 10 C.F.R. § 2.740(b)(2) are, for all intents and purposes, synonymous, and, accordingly, that cases decided under the Federal rule are relevant here. This Board has expressly adopted that view, Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 1 & 2), LBP-84-50, 20 NRC 1464, 1473 (November 16, 1984)(10 C.F.R. § 2.740(b)(2) "encompasses the attorney work product doctrine set out in Hickman v. Taylor, 329 U.S. 495 (1947) and most recently codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure").

side of the case." United States v. Nobles, 422 U.S. 225, 238 (1975). Our adversarial system requires that each side prepare, and present, the best case it can. James A. Hazard, Civil Procedure § 1.2 (1977); L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 364, 382-83 (1978). A party can do so only if it is free to analyze its own case, objectively identify and scrutinize its weaknesses, and determine how to avoid those pitfalls. This self-scrutiny will be chilled if the preparatory work can be made public. In re Murphy, 560 F.2d 326, 334 (8th Cir. 1977).[3]

Second, the privilege implements basic notions of fairness. It guarantees that one party does not free ride on another's industry by using the other's analysis and research against it. See, e.g., Compagnie Francaise d'Assurance v. Phillips Petroleum, 105 F.R.D. 16, 41 (S.D.N.Y. 1984). The privilege insures that parties do not litigate on "wits borrowed from the adversary." Hickman, supra, 329 U.S. at 516 (Jackson, J. concurring).[4]

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[3] See also Hickman v. Taylor, 329 U.S. 495, 510-11 (1947); United States v. Nobles, 422 U.S. 225, 237-38 (1975), Goldberg v. United States, 425 U.S. 94, 106 (1976); Upjohn Co. v. United States, 449 U.S. 383, 397-98 (1981); FTC v. Grolier, Inc., 103 S. Ct. 2209, 2212 (1983).

[4] See also FTC v. Grolier, Inc., 103 S. Ct. 2209, 2216 (1983)(Brennan, J. concurring); Sprock v. Peil, 759 F.2d 312, 316 (3d Cir. 1985) cert. denied, 106 S. Ct. 232

A. The Audit Materials are Protected Work Product

Documents fall within the work product privilege if they were prepared by or for a party or its representative in anticipation of litigation. 10 C.F.R. § 2.740(b)(2).[5] Clearly, the Cresap audit materials fit that definition.[6] The express language of the work

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(1985); In re Subpoenas Duces Tecum, 738 F.2d 1367, 1371 (D.C. Cir. 1984).

[5] As the Intervenors concede, and this Board has ruled, the work product privilege applies even though the audit was not prepared for this construction permit extension proceeding. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-79-430-06 at 3 (Nov. 28, 1986)("We agree with Applicants in approving of the principle that the work product privilege applies to the protection of information gathered in one case that is sought in another."). The United States Supreme Court, and every Circuit court to consider the issue, agree that a document prepared in anticipation of one case is privileged in other litigation. See, e.g., FTC v. Grolier, Inc., 103 S. Ct. 2209, 2214 (1983); Id. 2215 (Brennan, Blackman concurring); In re Murphy, 560 F.2d 326, 334 (8th Cir. 1977); United States v. Leggett & Platt, Inc., 542 F.2d 655, 659 (6th Cir.), cert. denied, 430 U.S. 945 (1976); Duplan Corp. v. Moulinage et Restorderie de Chavanoz, 509 F.2d 730, 732 (4th Cir. 1974) cert. denied, 420 U.S. 997 (1975); Kent Corp. v. N.L.R.B., 530 F.2d 612, 623-24 (5th Cir.) cert. denied, 429 U.S. 920 (1976); In re Grand Jury Subpoena Dated Nov. 8, 1979 622 F.2d 933 (6th Cir. 1980); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557 (2d Cir. 1967). Cf. In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 803 (3d Cir. 1979); (proceeding must be "related".) 8 Wright & Miller, supra § 2024 at 201 (same); 4 Moore's Federal Practice ¶ 26.64 [2] at 26-352-53 (same). Given at least some of the Intervenors' apparent intention to appear in the rate making case, Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-79-430-06, at 2 (July 22, 1985), any other rule would moot the privilege.

[6] The Intervenors suggest that the audit is not work product because it "was the creature of, controlled by, and

specifications and contract under which the audit was executed, TU Electric's sworn answers to CASE's 1985 interrogatories regarding the Cresap audit, and the attached affidavit of Homer Schmidt all demonstrate that the Cresap audit was commissioned in anticipation of TU Electric's participation in forthcoming rate-making cases.[7] Since all the documents created in connection with the performance of the Cresap audit "can fairly be said to have been prepared

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for the benefit of TUEC, not its attorneys." Motion to Compel at 12. Obviously, however, parties, not simply their attorneys, must prepare for litigation. Accordingly, the express language of both 10 C.F.R. § 2.740(b)(2) and Fed. R. Civ. P. 26(b)(3) provides that the privilege applies to documents commissioned by a party. See also Exxon Corp. v. Federal Trade Commission, 663 F.2d 120, 123, 129 (D.C. Cir. 1980) (doctrine protects report by economists which party used to furnish "advice and assistance on issues and strategic options relevant to the trial"); In re International Systems & Controls Corp., 693 F.2d 1235, 1240 (5th Cir. 1982)(doctrine applies to audit by accounting firm executed as part of corporation's internal investigation of bribery allegations). In any event, the argument is misplaced. As explained elsewhere, the factual predicate for the Intervenors' argument is lacking. See supra at 6. Schmidt Affidavit, ¶¶ 2-3.

[7] Intervenors suggest that TU Electric must identify every document it claims is privileged and explain the basis for the claim. The cases Intervenors cite, however, only require that the party asserting the privilege must provide enough information to allow the court to determine if the disputed documents are indeed covered by the work product privilege. In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299, 306 (S.D.N.Y. 1982); Compangnie Francaise d' Assurance v. Phillips Petroleum, 105 F.R.D. 16, 41 (S.D.N.Y. 1984). Permittees have more than fulfilled that requirement. Indeed to be required to produce even a list of which documents Cresap selected for review or a list of documents generated by Cresap would itself destroy the work product privilege. Such a list would reveal the protected process of selection and evaluation.

or obtained because of the prospect of litigation," 8 Wright & Miller, Federal Practice and Procedure § 2024 at 198 (1986), they are protected from discovery.[8]

Indeed, the audit materials so clearly warrant work product protection as to illustrate the wisdom of the privilege. It would be unfair indeed to allow the Intervenors to examine the Cresap audit materials and use them against the Permittees. The same historical project information and data which Cresap examined is available to the Intervenors (unless otherwise privileged or immune from discovery). After properly discovering such information the Intervenors may employ their own expert to interpret, assess, evaluate and analyze what that information means. Allowing the Intervenors to escape their obligation to conduct discovery or to prepare their case by hiring their own expert and to rely instead on Cresap's labor would

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[8] This language is generally accepted as the definition of "anticipation of litigation". See, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979); Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1977). Intervenors' brief notes that the Temporary Emergency Court of Appeals words the definition differently. United States v. Gulf Oil Corp., 760 F.2d 292, 296 (TECA 1985)(the "primary motivating purpose behind the creation of a document or investigative report must be to aid in possible future litigation"). The difference between the tests is in practice semantic and in any event, since the audit was commissioned solely to prepare for litigation, the Cresap work product satisfies both statements.

permit the Intervenors to litigate improperly on their opponent's wits and toil.

Allowing the Intervenors to view the Cresap audit materials is unfair for another reason. By viewing the audit documents, the Intervenors may learn intimate information on how the Permittees--or their representative--plan, prepare and litigate rate and licensing cases, and what the Permittees consider the relationship between the two to be. As Justice Brennan observed: "Any litigants who face litigation of a commonly recurring type . . . [including] regulated industries . . . have an acute interest in keeping private the manner in which they construct and settle their recurring legal disputes. [Allowing discovery of work product in such a circumstance creates] . . . precisely the danger of 'inefficiency, unfairness, . . . sharp practices' and demoralization that Hickman warned against." Grolier, supra, 103 S. Ct. at 2216 (Brennan, J. concurring).

Furthermore, the concern that litigants should not be chilled in developing their arguments and defenses is particularly strong in this case. "The State's concern that rates be fair and efficient represents a clear and substantial governmental interest." Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190, 205 (1983) (quoting Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 569 (1980)). The

Texas Public Utility Commission implements that substantial government interest, in part, through its definition of the work product privilege, emphasizing that "[p]reparation for, and evaluation of, proceedings before this Commission would likely suffer if attorneys knew that they would have to turn over their work product to their opponents in the next subsequent proceeding." Application of Gulf States Utilities Company for Authority to Charge Rates, Doc. Nos. 7195 and 6755, Order No. 19 at 5 (Feb. 20, 1987) (incorporating HL & P Order No. 7/Order No. 19 at 14 by reference) (attached). If the Licensing Board allows the Intervenors to discover work TU Electric has prepared for its next rate making case, the Texas rate making proceedings will be prejudiced in exactly the way the Public Utility Commission feared.[9] The need for litigants to prepare their case fully and without fear that their preparatory work will

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[9] For this reason, the failure to recognize a valid privilege works a harm beyond its immediate consequences to TU Electric and, rather, has implications of federal/state comity. The Supreme Court has emphasized that "the regulation of utilities is one of the most important functions traditionally associated with the police power of the States." Arkansas Elec. Coop. v. Ark. Public Ser. Comm'n, 461 U.S. 375, 377 (1983). Federalism dictates that federal courts avoid "disrupt[ing] . . . state efforts to establish a coherent policy with respect to a matter of substantial public concern," Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 814 (1976). Energy regulation is just such an area, Burford v. Sun Oil Co., 319 U.S. 315, 318-20, 332 (1943), and a ruling by this Board reordering how Texas governs its rate-making proceedings can be viewed as just such an impermissible disruption.

be used against them is, of course, equally strong in an NRC proceeding.

Intervenors' bald assertions that the Cresap audit materials were prepared "in the ordinary course of business" and are a "management tool," thereby presumably falling outside the work product privilege, simply cannot withstand scrutiny. Intervenors speculate that the Cresap documents could not constitute work product because they were designed to provide "an objective view of the management of the plant," Motion to Compel at 12, and then jump to the conclusion that they could not be used as "material for litigation." But Intervenors cannot carry the day by virtue of their own unsubstantiated assertions. See, e.g., Bouta v. American Federation of State, County & Municipal Employees, 746 F.2d 453, 454 (8th Cir. 1984) cert. denied, 470 U.S. 1056 (1985). The facts, moreover, flatly contradict the supposed logic that an objective, retrospective prudence audit is not germane to the Permittees' preparation for the proceeding before the Texas Public Utility Commission. To the contrary, retrospective prudence audits are designed to be useful in connection with the types of historical prudence issues raised in rate-making and other adversarial litigation proceedings. A retrospective prudence audit by its nature and terms is not the tool employed to obtain guidance to management on current or prospective issues arising in the course of

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business. The Intervenors' argument, that the audit in question is (as a matter of fact) a management tool and (as a matter of law) management tools are unlikely candidates for trial preparation privileges--therefore fails for lack of a factual premise.

Moreover, there is no requirement, as Intervenors suggest, that work product must be "biased" in order to be protected.[10] It is precisely "candid, dispassionate opinions" which the work product privilege protects. Duplan Corp. v. Moulinage et Retordierie de Chavanaz, 509 F.2d 730, 736 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975). The privilege exists, in part, to allow litigants to explore the weak points in their case without fear that their ruminations will be used against them, see discussion supra at 7, and, of course, must therefore protect both "objective" and subjective statements.

Finally, Intervenors suggest the privilege does not apply because "filing requests for [rate] increases . . . are not litigation." Motion to Compel at 12-13. Intervenors' claim is devoid of citation to authority: For

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[10] Indeed one cannot help noting that Intervenors' implicit assumption that only biased studies may be offered in evidence reflects an unwarranted cynicism about litigation.

good reason--rate proceedings are indisputably litigation.[11] See e.g., Arkansas Public Service Commission v. Continental Tel. Co., 561 S.W.2d 645, 262 Ark. 821 (1978). Accordingly, the Texas Public Utility Commission vigorously safeguards work product materials developed in those proceedings from discovery. See, e.g., Application of Gulf States Utilities Company, supra, at 5.

B. Intervenors Have Failed to Demonstrate Any Basis to Override the Work Product Protection Applicable to the Cresap Audit Materials

The Intervenors specifically request the production of "preliminary and final assessments, analyses or conclusions" of the Cresap audit, which are the very types of work product given virtually absolute immunity from discovery.[12] At a minimum, the Intervenors may only examine

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[11] Intervenors seem to suggest that the prudence audit must be filed as part of TU Electric's application for a rate increase. There is no such requirement under Texas law.

[12] In Re Murphy, 560 F.2d 326, 336 (8th Cir. 1977). Documents which reveal a representative's opinions or analysis of a case may only be discovered if the party seeking discovery makes the more stringent showing, Upjohn, supra, 449 U.S. at 401, that "very rare and extraordinary circumstances" exist. In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977). See also United States v. Brown, 478 F.2d 1038, 1041 (7th Cir. 1973); In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979); In re Doe, 662 F.2d 1073, 1080 (4th Cir. 1981) cert. denied 455 U.S. 1000 (1982). Cf. Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 733 (4th Cir. 1974) cert. denied, 420 U.S. 997 (1975)(attorney's mental process absolutely protected).

work product materials upon "a showing of substantial need and inability to obtain the equivalent information without undue hardship." Upjohn, supra, 449 U.S. at 401. Intervenors bear the burden of proving that such "extraordinary" circumstances exist. FTC v. Grolier Inc., 103 S. Ct. 2209, 2212 (1983); Texas Utilities, supra, 20 NRC at 1474. They cannot meet that burden.

When a party can discover the "substantial equivalent of the material [protected by work product] by alternate means" it has no "substantial need" for the privileged document and is not entitled to view it. See, e.g., Murphy, supra, 560 F.2d at 336, see also Hickman, supra 329 U.S. at 509; Sprague, supra, 668 F.2d at 870; Gay v. P. K. Lindsay Co., Inc., 666 F.2d 710, 713 (1st Cir. 1981) cert. denied, 456 U.S. 975 (1982); In re International Systems & Controls Corp., 693 F.2d 1235, 1240 (5th Cir. 1982). Intervenors can easily seek to obtain the same historical materials and information reviewed by Cresap. There is no reason why Intervenors cannot commission their own expert to formulate conclusions on what the evidence properly obtained in discovery means. Cresap's collection of the data, its analysis and its opinions are, however, exactly what the work product privilege protects.

The Intervenors' concluding assertion--that a "compelling need" to override the Permittees' work product and expert opinion privileges has been shown to exist

(Motion to Compel at 13-14)--replicates the fundamental flaw in most of their arguments. It is devoid of citation to relevant authority and is logically bankrupt. In essence, Intervenors' contention is that the work of experts hired by a party to assist it in preparing for litigation forms by definition a virtually irreplaceable source of information desirable to that party's adversaries. While this may well be true, it is too tautological. One may accept that the information used or created by litigation representatives would be extremely attractive to their principal's opponents, but employing that test of "need" as a basis for overriding widely recognized and approved privileges would render them entirely nonexistent. It is therefore not surprising that Intervenors cannot find a single case which supports such a remarkable proposition.[13]

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[13] Intervenors also suggest discovery is necessary to explore alleged discrepancies between Permittees' statement that the audit work specification "did not contemplate the receipt or review by Applicants of any 'tentative conclusions' since only a final conclusion is relevant or material to the purposes of the audit", and the work specification's provision for "project progress reports," "interim technical briefings," or a "final draft report". In the first place, there is no discrepancy. The "project progress reports" would only inform TU Electric of the progress of the work done by Cresap; they clearly would not contain "conclusions." No final draft report exists, since the audit has been suspended. See Permittees' Supplemental Responses to Meddie Gregory Interrogatories (sets 5 and 6)(February 10, 1987).

The Intervenors' syllogism is, moreover, severly flawed. An alleged discrepancy in a factual presentation offered to

II. THE CRESAP AUDIT MATERIALS ARE PRIVILEGED FROM DISCOVERY AS THE WORK OF A NON-TESTIFYING EXPERT

The "non-testifying expert" privilege also precludes the Intervenors from examining any documents which Cresap may have generated in connection with the prudence audit. The privilege provides that a party may not discover "facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation . . . and who is not expected to be called as a witness at trial" unless the party makes "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 other means." Fed. R. Civ. P. 26(b)(4)(B). The rule insures "that one side will not benefit unduly from the other's better preparation." Adv. Committee Notes to Rule 26(b)(4). See also Ager v. Jane C. Stormont Hospital Training, 622 F.2d 496, 502 (10th Cir. 1980)(aim of rule is "to prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more agressive preparation").[14] This

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demonstrate the non-discoverability of certain information can hardly be bootstrapped into authority to order its discovery. It remains Intervenors' burden, not to attempt to create discrepancies in the statement of facts, but to demonstrate that the discovery be disclosed on neutral principles of law.

[14] See also Hoover v. United States Dept. of Interior, 611 F.2d 1132, 1142 (5th Cir. 1980)(same); Tahoe Ins. Co.

rule applies in NRC licensing proceedings. See e.g., Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), LBP-85-38, 22 NRC 604, 609 (1985).[15] Indeed, in licensing proceedings the very existence and identity of non-testifying experts is privileged. Kerr-McGee Chemical Corp., supra 22 NRC at 616-617 (citing cases).[16]

The need for the "non-testifying expert" privilege is particularly evident in this case. TU Electric employed Cresap to help TU Electric prepare its argument to the TPUC that TU Electric's management decisions regarding Comanche Peak were prudent, and therefore should be included in its rate base. Allowing the Intervenors to build their case (in this or the rate making proceeding) around Cresap's work

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v. Morrison-Knudsen Co., Inc., 84 F.R.D. 362, 363 (D. Idaho 1979)(same).

[15] See also Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 & 2), LBP-86-7, 23 NRC 176, 178-79 (1986); Carolina Power and Light Co., (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-83-27A, 17 NRC 971, 976-80 (1983); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), LBP-83-17, 17 NRC 490, 496-97 (1983); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-42, 2 NRC 159, 161 (1975). But see General Electric Co. (Vallecitos Nuclear Center, General Electric Test Reactor) LBP-78-33, 8 NRC 461, 465-66 (1978).

[16] It would be absurd to suggest that Permittees should be sanctioned for a decision to forego the strict protection available under Kerr - McGee, and disclose Cresap's identity in the Operating License case. Yet the Intervenors' argument is effectively the same -- viz.: now that Cresap's identity is known, Intervenors are entitled to examine the work it has done or is doing. Acceptance of such logic would effectively require Permittees to forfeit altogether the protection of the "non-testifying expert" privilege.

would, accordingly, be exactly the sort of free riding the privilege is designed to prevent. Furthermore, the Intervenors have utterly failed to demonstrate that "exceptional circumstances" exist which would justify its viewing Cresap's work. Ager, supra, 622 F.2d at 503; Hoover, supra, 611 F.2d at 1142 n.13. Intervenors are free to pursue access to the same material reviewed by Cresap by propounding proper discovery requests. Exceptional circumstances simply do not exist if a litigant, like the Intervenors here, can obtain the evidence another party's expert is reviewing and "employ its own experts to formulate opinions thereon." Marine Petroleum Co., supra, 641 F.2d at 494. See also Crockett v. Virginia Folding Box Co., 61 F.R.D. 312, 320 (D. Va. 1974).[17]

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[17] In addition to requesting material that is protected by the privileges afforded work product and non-testifying expert opinion, the Intervenors' requests for discovery are also deficient because the requests are overbroad and seek material that by the Intervenors' own contention is not relevant. For example, the Intervenors' request that the Permittees "produce a copy of all documents generated by Cresap, McCormick & Paget or any of its employees, contractors, or consultants in the course of conducting their investigation." Meddie Gregory Request for Production of Documents (set 6), no. 4. (emphasis added). Yet, the Intervenors themselves demonstrate that only half of the subjects defined in the audit work specification are even arguably relevant. Motion to Compel p. 4-6.

III. IN CAMERA REVIEW OF THE DOCUMENTS IS UNNECESSARY

Intervenors complete their arguments by suggesting that the Board should review in camera any documents Cresap has generated to determine whether they are privileged. No such review is necessary, or proper. To the contrary, Intervenors advancement of such a suggestion is indicative of their attempt to turn the law regarding work product and expert opinion privileges on its head.

In camera reviews are nonadversarial and, accordingly, "are extraordinary events in the constitutional framework" which can only be justified by "compelling state interests." In re Taylor, 567 F.2d 1183. 1187 (2d Cir. 1977); In re John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982). See also Dennis v. United States, 384 U.S. 855, 874-75 (1966); Briscoe v. Kusper, 435 F.2d 1046, 1057 (7th Cir. 1970). Accordingly, courts only examine documents in camera if they cannot determine, by external evidence, whether the documents are privileged. See, e.g., EPA v. Mink, 410 U.S. 73, 92-93 (1973); Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978); Baker v. Central Intelligence Agency, 580 F.2d 664, 669 (D.C. Cir. 1978). The issue here--whether the work product and non-testifying expert privileges apply--turns on factual questions such as who generated or collected the documents and why. Permittees have submitted probative evidence on those questions.

Intervenors have provided nothing in reply. Reviewing the documents is, therefore, unnecessary and inappropriate.[18]

IV. CONCLUSION

A ruling on this motion is dictated by findings of fact. The Permittees have adduced substantial, substantive proof of the facts that render the sought materials privileged: the affidavit of Mr. Schmidt, the sworn answers to interrogatories and the documentary evidence produced and accepted as authentic. The Intervenors can (and do) counter with no proof but only speculation and disbelief. Given, however, that neither can a party carry its burdens of proof by offering mere speculation and disbelief nor can a tribunal premise factual findings on that same spare fare, only one factual conclusion--and hence only one ruling--is

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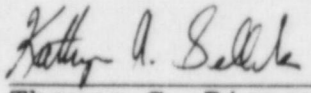
[18] Intervenors may be suggesting that an in camera review is necessary to determine whether extraordinary circumstances exist which would justify disclosing the documents. Intervenors, however, bear the burden of producing substantial support for that suggestion. See, e.g., Commonwealth v. The Juveniles, 397 Mass. 261, 267 (1986); Hammarley v. Superior Court in and for Sacramento County, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (1979); State v. Siel, 444 A.2d 499, 503, 122 N.H. 254 (1982). Not only have the Intervenors failed to do so - but it is obvious that no such circumstances exist.

permissible on the assembled record. The motion to compel should be and must be denied.

TEXAS UTILITIES ELECTRIC COMPANY
For the Owners of CPSES



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	:	
	:	
TEXAS UTILITIES ELECTRIC COMPANY, et al	:	Docket No. 50-445-CPA
	:	
(Comanche Peak Steam Electric Station, Units 1 and 2)	:	

AFFIDAVIT OF HOMER C. SCHMIDT

1. I have been employed by Texas Utilities since 1953. Beginning in 1971, I began to serve in the effort to design and construct a Nuclear Power Plant at Comanche Peak, and I have had several jobs in connection with that effort. I am currently Director of Nuclear Services for TU Electric. As such, I have personal knowledge of the facts recited herein.

2. Beginning in 1984, and following changes to the Texas P.U.R.A., TU Electric's senior management and upon the advice of its counsel recognized that the prudence of its decisions in the construction of Comanche Peak Steam Electric Station would become an issue in rate-making proceedings before the Texas Public Utility Commission in the future. It was therefore decided, upon advice of counsel, that data and information preparatory to probable evidentiary submissions regarding such an issue should be collected and analyzed to assist counsel in presenting TU Electric's case to the PUC.

3. In furtherance of that decision, I was appointed director of a Project Audit Team, the initial assignment of which was to develop a program for the conduct of a retrospective prudence audit. This team at all relevant times reported to a Management Review Committee, one of the members of which was TU Electric's attorney responsible for rate case litigation.

4. As reflected in the work specification developed by the Team, the purpose of the retrospective prudence audit was to develop, through an independent third party expert, potential evidence and testimony which could be used during the preparation for and conduct of rate-making hearings.

5. It was never expected or intended that the retrospective prudence audit described by the work specification would be used as a management tool. Instead, it was expressly contemplated and understood that the work done by the chosen expert would be for the use of TU Electric's lawyers in the rate-making hearings, would be kept confidential by those expert auditors, and that no interim reports on the experts' conclusions or assessments would be received by TU Electric until the entire audit had been completed.

6. These conditions were further confirmed to Cresap, McCormick & Paget.

Signed this 17TH day of March, 1987.

Homer C Schmidt

HOMER C. SCHMIDT

SUBSCRIBED AND SWORN TO before me by the said HOMER C. SCHMIDT on this, the 17TH day of March, 1987.

Kay W Whittemore

Notary Public in and for
Dallas County, Texas

My Commission Expires:
7-1-89

DOCKET NOS. 7195 and 6755

APPLICATION OF GULF STATES UTILITIES COMPANY FOR AUTHORITY TO CHANGE RATES INQUIRY OF THE PUBLIC UTILITY COMMISSION OF TEXAS INTO THE PRUDENCE AND EFFICIENCY OF THE PLANNING AND MANAGEMENT OF THE RIVER BEND NUCLEAR GENERATING STATION	PUBLIC UTILITY COMMISSION OF TEXAS '87 FEB 20 PM 4:48

ORDER NO. 19

DENYING PUBLIC COUNSEL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO PUBLIC PARTIES COMMITTEE RFI NO. 141

I. Procedural History

On January 16, 1987, the Office of Public Utility Counsel (OPC) filed a motion to compel Gulf States Utilities Company (GSU) to answer certain requests for information (RFIs), among them Public Parties Committee (PPC) RFI No. 141, which states:

> PPC-141 Provide all documents which describe direct or delay costs of efforts conducted by or for Gulf States Utilities or Stone and Webster to resolve the TDI issues.

GSU refuses to provide OPC the two documents which respond to the RFI on the ground that they are exempt from discovery under the attorney-client privilege and attorney work-product exemptions.

OPC pointed out in its motion that GSU had not filed a timely objection to PPC-141 or a timely index to privileged documents which included the documents responsive to PPC-141. OPC moved that GSU be required to provide the answers to that request and that PPC witness Richard Hubbard be allowed to file supplemental testimony on the prudence of GSU's dealings with TDI (Trans America Delaval, Inc.). OPC filed a brief on January 28, 1987, in response to GSU's general assertion of privilege.

OPC's motion was discussed January 29, 1987, at the hearing on GSU's request for interim rate relief. GSU essentially stated that it had not been able to identify the privileged documents in time to object within five working days and had inadvertently failed to include the documents on its January 12, 1987, index to privileged documents, because of its counsels' many other responsibilities in the interim and permanent rate cases. GSU also pointed to the general assertion of privilege which has accompanied all of its RFI responses and which was included in its "answer and objection" to PPC-141.

On February 2, 1987, GSU submitted two documents responsive to PPC-141 to the examiners for in camera inspection. It filed a supplemental index listing those documents on February 5, 1987.

II. Discussion

One of two documents claimed to be privileged is a July 10, 1986, memorandum from J. C. Deddens to C. Brownman of GSU's legal department requesting assistance in planning actions to settle potential claims against TDI for diesel generator problems. The second document, dated July 29, 1986, is Mr. Brownman's analysis of the potential claims. The examiners find the first document to be exempt from discovery under section 14a of the Administrative Procedure and Texas Register Act (APTRA), Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon Supp. 1987); Tex. R. Civ. P. 166b(e); and Tex. R. Evid. 503 (attorney-client privilege exemption). They find the second to be exempt under those authorities and also under Tex. R. Civ. P. 166b(a) (attorney work-product exemption). Moreover, production of the second document would not be calculated to lead to the discovery of admissible evidence.

A. Failure to Comply with Procedures

OPC correctly states that GSU did not follow the procedures established by the examiners for asserting its claim of privilege. It did not make a timely objection, did not timely file a index, and did not provide the documents for

in camera inspection within the time limits set out in that order. The examiners could therefore consider the privilege waived and order the documents produced. Peeples v. Hon. Fourth Supreme Judicial District, 701 S.W.2d 635, 637 (Tex. 1985). Such a ruling is not mandatory, however, and is within the examiners' discretion. Id. at 637. The examiners are aware that GSU has answered some RFIs late and has been reluctant to submit documents for in camera review. They do not find a ruling that GSU has waived its privilege to be warranted, however, in light of the short time the company had to prepare for the hearing on its emergency request and the potential harmful effect that disclosure of the documents would have on GSU's legal position against TDI.

B. Attorney-Client Privilege Exemption

The July 10, 1986, memorandum from Mr. Deddens to Mr. Brownman and Mr. Brownman's July 29, 1986, memorandum to Mr. M. F. Sankovich are protected by the attorney-client privilege exemption, Tex. R. Civ. P. 166b(3)(e). Both are confidential communications between GSU representatives and a company attorney, meant to facilitate rendition of professional legal services to GSU. The only question is whether GSU is attempting to use the privilege offensively to shield material information and is therefore prohibited from asserting the privilege. See Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105 (Tex. 1985). Ginsberg dealt with the attempt of a plaintiff, in an action to set aside a conveyance of real property, to invoke the psychotherapist-patient privilege to prevent the defendants from discovering medical records of the plaintiff's deceased psychiatrist. The Texas Supreme Court, quoting Pavlinko v. Yale-New Haven Hospital, 192 Conn. 138, 470 A.2d 246 (1984), held,

> "A plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action." Pavlinko, 470 A.2d at 251. This theory has also been applied in cases involving privileges other than the Fifth Amendment. . . . We find these cases, and those involving the Fifth Amendment, persuasive.

686 S.W.2d at 108 (citations omitted).

The court in DeWitt and Rearick, Inc. v. Ferguson, 699 S.W.2d 692 (Tex. App.--El Paso 1985, no writ), applied the Ginsberg concept to the attorney-client privilege. In DeWitt three sisters were approached by two groups interested in purchasing their land. Too many contracts were signed; litigation ensued. The sisters settled with the first group on investors, then attempted to recover the settlement costs from the second group. They "rejected all efforts to learn the basis and theories upon which the settlement was made, claiming the attorney-client privilege and that the information is protected by the work-product rule." DeWitt, 699 S.W.2d at 693. The court rejected those claims, stating, "We believe the reasoning in Ginsberg v. Fifth Court of Appeals, 686 S.W.2d. 105 (Tex. 1985) is applicable to this case." Id. at 694.

The Commission has considered this issue before, in Houston Lighting & Power Company's most recent rate case, Docket Nos. 6668, 6765, and 6766. There, as here, intervenors argued that the utility had waived its attorney-client privilege in certain documents by filing its rate change request. The examiners rejected that argument in their Order No. 7/Order No. 19, issued on June 4, 1986. The Commission declined to hear OPC's appeal of that order, which therefore was upheld by operation of law.

A major difference between the HL&P case and this one is that HL&P requested no CWIP for its South Texas Nuclear Project, while GSU here is attempting to place River Bend Unit One into its rate base. This case is directly concerned with River Bend prudence issues, the subject of these documents, while the HL&P case did not directly involve STNP prudence issues, the subject of the Marc Victor documents. A better argument can be made here that GSU is in an offensive stance as regards River Bend. Nevertheless, the most persuasive argument advanced by the examiners in HL&P is equally applicable to this case:

> If the simple filing of a request for rate relief puts a utility in an "offensive position" with regards to any decision made by management that impacts the utility sometime during the test year, a utility,

> under DeWitt, effectively chooses to waive its right to claim a privilege by filing such a rate request. The result would be, in effect, the total elimination of all privileges for all regulated utilities, since it is hard to imagine any major management decision which will not impact the utility in some manner, no matter how slight. Further, since the reasoning underlying DeWitt and Ginsberg logically applies to all privileges, a utility would lose all of its privileges and exemptions against discovery. It should also be noted that, while not the immediate concern of this Commission, the elimination of all privileges of a regulated entity would apply not only to utilities, but to all entities which are under the rate setting jurisdiction of an administrative agency.

The examiners do not believe that Ginsberg and DeWitt stand for the proposition that a utility can never maintain the attorney-client privilege in a rate case. GSU's desire to place River Bend in rate base does not open to discovery all relevant confidential communications between the company and its attorneys. The examiners agree with the examiners in HL&P that the DeWitt court's holding in the extraordinary circumstances of that case should not be interpreted to strip utilities of the protection of the attorney-client privilege.

C. Attorney Work Product

The first document, the memorandum from Mr. Deddens to Mr. Brownman, is obviously not exempt from discovery as attorney work product, because it was not produced by an attorney. Just as obviously, Mr. Brownman's July 29 memo is attorney work product prepared in anticipation of litigation. Although the document was not prepared in anticipation of this particular case, the attorney work-product exemption nevertheless applies.

The examiners in the recent HL&P case also discussed this issue at length, reaching the conclusion that papers prepared in connection with the STNP Brown & Root litigation were protected from discovery as attorney work product in that rate case. The examiners in this docket agree with the analysis of the HL&P examiners. Because the examiners see no need to restate the argument, they have simply attached the relevant portion (pages 11-14) of the HL&P Order No. 7/Order No. 19 to this order as Appendix A. The examiners have discovered no new court decisions which would undermine the conclusions reached in the HL&P case.

D. Tex. R. Civ. P. 166b(2)(a)

The first document, from Mr. Deddens to Mr. Brownman, is clearly relevant and its production calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 166b(2)(a). Production of the second, however, from Mr. Brownman to Mr. Sankovich, is not calculated to lead to the discovery of admissible evidence. That document is not a factual analysis of GSU's dispute with TDI, but rather a discussion of possible legal theories and strategies. It is irrelevant to the issue of whether the costs associated with the construction and management of River Bend were in fact prudent. It is not discoverable for that reason as well.

E. Procedure

Having found the two documents to be exempt from discovery, the examiners will return them to GSU on the condition that GSU will provide them under seal to the Commission in full for in camera review in the event of an appeal of this Order.

SIGNED AT AUSTIN, TEXAS, on this the 20th day of February 1987.

PUBLIC UTILITY COMMISSION OF TEXAS

HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

MARK W. SMITH
ADMINISTRATIVE LAW JUDGE

CHARLES J. SMAISTRLA
HEARINGS EXAMINER

bdb

~~rules were rewritten. Rule 166b(3)(c) deals only with an expert who "will not~~ be called as a witness, except that the identity, mental impressions and opinions of an expert who will not be called to testify . . . are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a witness. . . ."

As with legislative actions and amendments to statutes, it is to be presumed that the Supreme Court of Texas is aware of its own interpretations of the Rules of Civil Procedure, and that by modifying or amending them, the Supreme Court is aware that deletion of language held by a decision to have significance or be controlling on a particular issue will result in that decision no longer being applicable to the rule and issue in question. So it must be presumed here. The phrase "in the case" was given a particular meaning and affect in Ex Parte Shepperd. That language has been deleted, and thus the effectiveness of the exclusion contained in the rule is no longer limited by that language. Quite simply, removal of limiting language indicates that the limitation is no longer present. The exclusion from discovery contained in Rule 166b(3)(c) thus is not limited to the proceeding for which the expert was consulted or retained.

Attached to their May 12, 1986 filing entitled "Identification of Privileged Documents and Specification of Privileges Claimed," HL&P and CP&L have included three sworn affidavits. Two are by Mr. Finis E. Cowan, lead attorney for HL&P in the Matagorda County litigation, and one is by Mr. Ralph B. Weston, lead attorney for CP&L in the Matagorda County litigation. All three affidavits, dated August 27, 1985, May 6, 1986, and May 6, 1986, respectively, positively aver that HL&P and CP&L did not intend to call Mr. Victor as a witness in the Matagorda County litigation, or Public Utility Commission Docket No. 6325, and that Mr. Victor will not be called as a witness in Docket Nos. 6668, 6765 and 6766. The affidavits also aver that Mr. Victor's work product will not serve as the basis, in whole or in part, for the testimony of any other expert witness to be called by either HL&P or CP&L in Docket Nos. 6668, 6765 or 6766.

The examiners find that Mr. Victor's work product falls within the ambit of ~~Tex. R. Civ. P. 166b(3)(c), and thus is not discoverable.~~

C. Attorney Work Product Privilege

The attorney work product privilege was developed by the federal judiciary. The seminal case setting out the existence of the privilege and the rationale underlying it is Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947). The purpose of the privilege was set out as follows:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he

> considers to be the relevant from the irrelevant acts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly but roughly termed . . . the "work product of the lawyer."
>
> . . . Were such materials open to opposing counsel on mere 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.

329 U.S. at 510-511, 67 S.Ct. at 393-394.

The Texas Rules of Civil Procedure make do with a simple reference to the privilege. In Rule 166b(3)(a), an exemption is created for "the work product of an attorney." The identical language was used prior to April 1984 in Rule 186a (Rule 167 did not reference the privilege).

The issue to be decided in this proceeding, as with the non-testifying expert issue, is the temporal scope of the privilege. By 1970, that issue had been litigated to some extent in the federal district courts, with varying results. Only one court of appeals had addressed the issue, holding that the privilege applied in a related case. In 1970, Federal Rule of Civil Procedure 26(b)(3) was amended to clarify the scope of discoverability of trial preparation materials. The United States Supreme Court has interpreted that rule as follows:

> Rule 26(b)(3) does not in so many words address the temporal scope of the work product immunity and a review of the Advisory Committee's comments reveals no express concern for that issue. Notes of Advisory Committee on 1970 Amendments, 28 U.S.C.App. 441-442 (1976). But the literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation.

F.T.C. v. Grolier Inc., 103 S. Ct. 2209 at 2213 (1983)(emphasis in the original).

There is only one Texas case directly on point: the case of DeWitt and Rearick, Inc. v. Ferguson, 699 S.W.2d 692 (Tex. App.--El Paso 1985, mand. overr.). The DeWitt case makes short work of the issue:

> Although Rule 166b, sec. 3a, Tex.R.Civ.P., does provide an exemption for the work product of an attorney, that exemption is limited to the work in the suit in which discovery is sought. Allen v. Humphreys, 559 S.W. 2d 798 (Tex. 1977).

699 S.W.2d at 694. The DeWitt case indicates that the issue was decided in Allen v. Humphreys. The DeWitt court did not expand the holding in Allen v. Humphreys by logical extension, setting out the rationale by which such an extension was reasonable, but instead indicated that the very issue was decided

in Allen v. Humphreys. As noted in the previous section of this Order, Allen v. Humphreys did not expressly apply to all of Rule 186a, but only the non-testifying expert sub-proviso. There is nothing in the language of the Supreme Court in that case that indicates or even suggests that the attorney work product privilege was at issue before the Court. Indeed, the types of information requested by Mrs. Allen were medical in nature: "[A]ll medical reports, laboratory reports or any reports containing the opinions of experts . . . including physicians, engineers, industrial hygienists, or any expert person" dealing with one possible cause of lung cancer. 559 S.W.2d at 803. There is no indication attorney work product was involved. With regard to Rule 167, the Court noted that "all traditional rules of testimonial privilege can be invoked to prevent discovery of items under Rule 167." 559 S.W.2d at 801-802. As to Rule 186a, the attorney work product sub-proviso was never even mentioned.

The examiners would also note that there are no other Texas cases dealing with the attorney work product privilege. As such, if Allen v. Humphreys does touch upon attorney work product, it is amazing that there is no discussion by the Texas Supreme Court as to the fact that its holding as to the temporal scope of the privilege was contrary to that given by the federal judiciary, which originally expounded the privilege (by 1977, three federal courts of appeals had decided that the privilege extended to cases other than the one in which the information had been created, thus resolving the earlier conflict among the district courts). It could be that the federal case law was not brought to the Texas Supreme Court's attention; a possible but unlikely scenario. It could be that the Texas Supreme Court simply decided not to discuss the federal case law; also an unlikely scenario. While the examiners hesitate to draw too many conclusions from the absence of discussion of an issue, the most logical reason why the issue was not discussed in Allen v. Humphreys is not that the attorneys forgot to brief it, or that the Supreme Court purposely decided not to address it, but that the issue was simply not before the Court because no claim of attorney work product privilege had been made.

Quite simply, Allen v. Humphreys did not and does not apply to the attorney work product privilege, and DeWitt incorrectly relied upon it. There thus being no reasoned Texas case law dealing with the issue of the temporal scope of the attorney work product privilege, it is necessary to reach some rational conclusion herein.

The examiners believe that the privilege should apply to later cases, for three general reasons. First, there is the language of the rule itself. Rule 166b(3)(a) imposes no limitations of any kind on the privilege. There is no language restricting it to "a case" or "the case" or "the occurrence or transaction out of which the claim or defense arose." In fact, there is no language even limiting it to work product related to some litigation. The language of Rule 166(b)(3) is simple and absolute:

3. Exemptions. The following matters are not discoverable:

a. the work product of any attorney;

The second reason for not restricting use of the privilege to the case in which the work product was created is that the federal courts have considered the issue and reached a rational conclusion thereon. The reason for the privilege, as set out in Hickman v. Taylor, applies not only in the initial litigation, but with regards to subsequent litigation also:

> Were such materials open to opposing counsel on mere 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 interest of the clients and the cause of justice would be poorly served.

329 U.S. at 511-512, 69 S.Ct. at 393-394. The very set of circumstances found here demonstrates that the rationale behind the privilege calls for its applicability to later cases. The STNP owners' suit against B&R was not the only STNP-related litigation brought. The City of Austin brought suit against HL&P. Settlement of the lawsuit against B&R for any amount would have been unlikely if, as soon as the suit was settled, all of HL&P's attorney's innermost thoughts concerning that lawsuit, including opinions as to the defenses B&R could have put forward, would become available for use by the City of Austin against HL&P in that lawsuit. Litigation is not necessarily conducted in a vacuum. The need for privacy extends beyond the confines of the one given case at hand. The examiners would note that such is certainly the case for administrative proceedings. If the privilege does not apply in later cases, the work product of all of the attorneys to this docket will become available in the next HL&P rate case, if not sooner. Preparation for, and evaluation of, proceedings before this Commission would likely suffer if attorneys knew that they would have to turn over their work product to their opponents in the next subsequent proceeding.

Finally, the examiners would note that the Commission has already decided this issue once. In Docket No. 6325, with regards to a taxonomic code, the attorney work product privilege claimed by HL&P and CP&L was upheld. Docket No. 6325, Third Prehearing Order (October 1, 1985). While that decision was made prior to DeWitt, the Commission's decision in Docket No. 6325 must be interpreted as concluding that Allen v. Humphreys did not apply to the attorney work product privilege, as that case was argued by both OPC and HL&P. As has already been detailed, the examiners subscribe to the same view, and believe DeWitt read more into Allen v. Humphreys than is actually there.

In sum, the examiners find that the attorney work product privilege set out in Rule 166b(3)(a) is applicable. The examiners also find that the Marc Victor materials constitute attorney work product, both of Mr. Victor and of the attorneys with whom he worked.

CERTIFICATE OF SERVICE

I, Kathryn A. Selleck, one of the attorneys for the Applicants herein, hereby certify that on March 18, 1987, I made service of the within document by mailing copies thereof, postage prepaid, to:

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