September 2, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

RESPONSE OF CONSUMERS POWER COMPANY TO SINCLAIR MOTION TO RECONSIDER PRIVILEGE RULING

PRELIMINARY STATEMENT

The present controversy concerns a meeting which took place on November 24, 1982 in Jackson, Michigan. Those present were James Cook, a Vice-President of Consumers Power Company ("Consumers"), Gerald Charnoff, an attorney with the law firm of Shaw, Pittman, Potts & Trowbridge, and various officials of Bechtel Power Corporation ("Bechtel"). This Licensing Board has ruled that communications made at that meeting are entitled to the protection of the attorney-client privilege, and that ruling is the subject of the present Motion to Reconsider.

It is undisputed that Mr. Charnoff represents Bechtel. It is also undisputed that at the time of the meeting, Mr. Cook was under the impression that Mr. Charnoff represented, or would represent, Consumers as well. Transcript, p. 18580 and p. 18620; July 14, 1983 Charnoff letter, attached

as Exhibit A. The Board has previously held that the fact that Mr. Charnoff was not, in fact, subsequently retained by Consumers makes no difference with respect to whether communications made at the meeting are subject to the attorney-client privilege, Transcript, pp. 19579-80, and no challenge to the Board's ruling has been made on that ground. See Transcript, p. 19580. Intervenor Mary Sinclair has, however, challenged the Board's ruling that communications made at the meeting are entitled to the protection of the privilege on three other grounds. They are:

1) That the communications are not privileged because of the presence of Bechtel officials at the meeting;

2) That the communications are not privileged because they do not contain confidential information or legal advice; and

3) That any privilege has been waived by disclosure of the privileged communications.

None of Ms. Sinclair's arguments correctly apply the law of privilege to communications made at the November 24 meeting, and her Motion to Reconsider should therefore be denied.

ARGUMENT

I. The Presence of Bechtel Officials at the November 24 Meeting Does Not Destroy The Privilege

As the Board has previously held, a client seeking legal advice from a lawyer under the reasonable but

mistaken impression that the lawyer represents him, or with the good faith but subsequently unfulfilled intention to retain the lawyer, is a "client" for purposes of the protection of the attorney-client privilege. Transcript, p. 19579-80. See, Robinson v. United States, 144 F.2d 392 (6th Cir. 1944), affirmed, 324 U.S. 282 (1945); United States v. Costanzo, 625 F.2d 465 (3d Cir. 1980); United States v. Ostrer, 422 F. Supp. 93 (S.D.N.Y.1976); VIII Wigmore, Evidence, §2303, p. 584 (McNaughton Rev. 1961). The situation before the Board, therefore, is that of two joint clients (Consumers and Bechtel) meeting with their attorney (Charnoff). The question presented, then, is whether the presence of both joint clients at the meeting destroys the confidentiality of the communications made there with respect to outsiders. To answer the question, the Board should begin with the rationale behind the general rule that the presence of third parties when an otherwise privileged communication is made will destroy the privilege.

The privilege exists to permit the client to seek and receive legal advice in confidence. VIII Wigmore, Evidence, § 2291, p. 545 (McNaughton Rev. 1961). Normally the presence of third parties at the time a communication between the client and his lawyer is made is inconsistent with the assertion that the communication was made in confidence, and such communications are therefore generally not privileged.

> The privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure... ceases when the client does not appear to have been desirous of secrecy.... One of the circumstances by which it is commonly apparent that the communication is not confidential is the presence of a third person....

VIII Wigmore, Evidence, §2311, pp. 599-601 (McNaughton Rev. 1961) (emphasis in original).

There are, however, exceptions to the general rule that the presence of third parties will destroy the privilege. The exceptions deal with particular categories of persons whose presence at the time an attorney-client communication is made is not inconsistent with an intent to make a confidential communication. Thus, the presence of an expert whose assistance is reasonably necessary to the effective rendering of legal services by the attorney to the client has been held not to destroy the necessary confidentiality. See, e.g., United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); United States v. Judson 322 F.2d 460 (9th Cir. 1963); Bauer v. Ostrer, 258 F.Supp. 338 (D.N.D. 1966); Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972). Similarly, the presence of certain others with "common interests" does not destroy the necessary confidentiality. As set forth in Proposed Rule of Evidence 503, 46 F.R.D. 161, 249-251 (1969):

> (b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications... (3) made for the purpose of facilitating the rendition of professional legal services

> to the client, by him or his lawyer to a lawyer representing another in a matter of common interest. 1/

As Weinstein has noted,

> Standard 503(b)(3) must be read in conjunction with subdivision (a)(4) which states that a communication does not lose its confidential nature if it is disclosed "in furtherence of the rendition of professional legal services." Consequently, although subdivision (b)(3) speaks only of a communication by a client or his lawyer to another lawyer, the presence of more than one client at a joint conference does not destroy the privilege and inter-client communications are protected if the communication refers to a matter of "common interest."

2 J. Weinstein, Evidence ¶503(b)[06], at 503-60 (1977). See also, Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559, fn. 6 at p. 564(S.D.N.Y. 1977).

In fact, most of the cases upholding the privilege in multiple client oral communication situations deal with meetings at which more than one client was present. See,

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1/ The detailed proposed Federal Rules of Evidence on the subject of privileges were approved by the Supreme Court, but Congress deleted them in favor of a provision which merely stated that privilege questions were to be "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Federal Rule of Evidence 501, 28 U.S.C. Rule 501 (1975). Nevertheless, courts have generally found the proposed Rules and Advisory Committee Notes on the subject to be authoritative in discerning the "principles of the common law," and at least one Circuit Court of Appeals has specifically adopted the approach of proposed Rule 503(b)(3) and the Advisory Committee Notes thereto to the problem of the attorney-client privilege in multiple client situations. United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir.), cert. denied, 444 U.S. 833 (1979).

e.g., Wilson P. Abraham Construction Corporation v. Armco Steel Corporation, 559 F.2d 250 (5th Cir. 1977); Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); In The Matter of Grand Jury Subpoena, 406 F.Supp. 381 (S.D.N.Y. 1975). The theory often utilized in such situations is that

> [T]he counsel of each defendant is, in effect, the counsel of all for the purpose of invoking the attorney-client privilege in order to shield mutually shared confidences.

Wilson P. Abraham Construction Corporation v. Armco Steel Corporation, 559 F.2d 250, 253 (5th Cir. 1977). Resort to this type of legal fiction is not even necessary, of course, where, as at the November 24 meeting, only one attorney is present.

Ms. Sinclair argues that the privilege is only available in a multiple client situation where the clients not only share "common interests" but also are co-parties in a single proceeding who are "expressly planning a joint defense." 2/ Motion to Reconsider, pp. 5-7. Such a

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2/ Ms. Sinclair also suggests that the interests of Consumers and Bechtel in this licensing proceeding are not the same due to the possibility of future litigation between the two companies. Motion to Reconsider, fn. 2 at p. 6. Clearly, the possibility that litigation may take place to determine rights and liabilities as between Consumers and Bechtel under their contract in no way affects their identity of interest in this proceeding.

restriction, however, finds no support in the rationale for the "common interests" exception to the rule of destruction of the privilege by the presence of third parties. Nor is such a restriction recognized in Proposed Rule 503 or by the commentators. Nor is it supported by the cases.

The rationale behind the "common interests" exception is that if two or more clients have shared interests at stake, the fact that they seek legal advice jointly in no way diminishes either their need for "subjective freedom of mind" when seeking legal advice, VIII Wigmore, Evidence §2317, p. 619 (McNaughton Rev. 1961), or their reasonable expectation that with respect to outsiders, their communications are made in confidence. The Advisory Committee on the Proposed Federal Rules of Evidence, recognizing that there is no justification for reading "common interests" as narrowly as Ms. Sinclair would have this Board read it, stated only that:

> The rule does not apply to situations where there is no common interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis.

Advisory Committee Notes to Proposed Rule of Evidence 503, 46 F.R.D. at 255 (1969).

Commenting on the Advisory Committee's statement, Weinstein states that:

> This phrase indicates that the committee intended the privilege to be broadly construed in multi-party situations. Only if there is no common interest and the interests of the parties are totally antagonistic will the privilege be denied.

2 J. Weinstein, Evidence ¶503 (b)[06], 503-60 (1977).

Nor do the cases support the proposition that the privilege is only available in multi-client situations where the clients are co-parties in the same proceeding and are expressly planning a joint defense.

In United States v. McPartlin, 595 F.2d 1321 (7th Cir), cert. denied, 444 U.S. 833 (1979), the codefendants did not participate in a joint defense, but did have a common interest in discrediting the testimony of a particular witness. The court held that shared communications on that subject were entitled to the protection of the privilege notwithstanding that the defendants were not otherwise mounting a joint defense.

> Ingram argues that the co-defendants' defenses must be in all respects compatible if the joint-defense privilege is to be applicable. The cases do not establish such a limitation, and there is no reason to impose it. Rule 503(b)(3) of the proposed Federal Rules of Evidence, as approved by the Supreme Court, stated that the privilege applies to communications by a client "to a lawyer representing another in a matter of common interest." See 2 J. Weinstein, Evidence 503-52 (1977). The Advisory Committee's Note to proposed Rule 503(b) makes it clear that the joint-interest privilege is not limited to situations in which the positions of the parties are compatible in all respects:
>
> > The third type of communication occurs in the "joint defense" or "pooled information" situation, where different lawyers represent clients who have some interests in common.... The rule does not apply to situations where there is no common interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis.

Id. at 1336 (emphasis in original).

And in Duplan Corporation v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974), a non-party to the litigation which shared common interests with certain parties was held to be within the privilege.

While a common legal interest has been held to be necessary to support the extension of the privilege, Duplan, supra; Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1 (N.D. Ill. 1980), the existence of common business interests as well in no way defeats the privilege. SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn. 1976). In the case of Bechtel and Consumers, both are present. In addition to their common business interests, the two companies share various legal interests relating to this licensing proceeding. For example, Bechtel's contractual obligation to assist Consumers in obtaining operating licenses for the plant gives the two companies a common legal interest in attempting to obtain those licenses. Bechtel and Consumers also share various other legal interests relating to this proceeding, including the shared interest that arises out of the possible liability of both companies for alleged intentional misstatements of a Bechtel employee to the Staff.

Nor do the cases cited by Ms. Sinclair support her view that the privilege in multiple client situations is strictly limited to those situations in which the clients are co-parties engaged in a "joint defense." While some of the cited cases do recognize the existence of the privilege where there is in fact a "joint defense" and discuss it in those terms, that is merely a function of the fact that the claim of privilege in those cases happened to be raised in the context of a joint defense to criminal charges. Other

cases cited by Ms. Sinclair recognize the existence of the privilege where there is no joint defense as long as the parties share a common interest (Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965) and Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942)), and none of the cited cases refuses to recognize the privilege merely because the parties are not engaged in a joint defense, as long as there is a common interest and the other requirements of the privilege are met. 4/

4/ In Magnaleasing, Inc. v. Staten Island Mall, 76 F.R.D. 559 (S.D.N.Y. 1977) (cited in the Motion at p. 5), the court used "joint defense" language and refused to find a privilege, but not merely because of the absence of a joint defense; the holding was that the document sought to be produced-- a settlement agreement -- was simply a legal document agreeing to a transfer of assets and not a "communication" of the type protected by attorney-client privilege. Similarly, the courts in Government of the Virgin Islands v. Joseph, 685 F.2d 857 (3d Cir. 1982); United States v. Melvin, 650 F.2d 641 (5th Cir. 1981); and United States v. Cariello, 536 F.Supp. 698 (D.N.J. 1982) (all cited by Ms. Sinclair at p. 6 of her Motion) all refused to find a privilege, but not merely because there was no "joint defense."

In Joseph, supra, the attorney had identified himself to Joseph as an attorney for one Motta and sought a statement from Joseph confessing to certain crimes in order to exonerate Motta. The Court refused to find a privilege both because the statement was never intended to be confidential (it was made for the purpose of being disclosed) and because there was no common interest between Joseph and Motta. ("Motta's interests were at all times completely antagonistic to the interests of Joseph." Id. at 862).

Melvin, supra, was a Sixth Amendment case in which the defendant argued that the Government had impermissibly intruded into the attorney-client relationship by using an informer who, while not a member of the defense

Footnote 4/ Continued on Next Page

Since Bechtel and Consumers shared a common legal interest, the confidentiality necessary to the privilege was not destroyed when they jointly sought Mr. Charnoff's legal advice.5/

4/ Continued...

group, had attended certain defense group meetings. The informer later planned to testify to certain of those conversations. In addition to the fact that the defendant had not established any reasonable basis for believing that any statements made in the informer's presence would be kept confidential, this case dealt with the confidentiality of the communications as among the participants in the meetings, and not as between those present at the meetings and all outsiders. An entirely different set of considerations governs confidentiality among group members and confidentiality as between the group and outsiders. See, Proposed Rule of Evidence 503(d)(5), 46 F.R.D. at 251, and Advisory Committee Notes at 255 (1969).

The only case cited by Ms. Sinclair which seems to rely upon a distinction between joint defense and non-joint defense situations is Cariello, supra. Even that case, however, is of doubtful authority due to the court's holding that the issue had been waived by Cariello's failure to raise it at trial, and the court's observation that, in any event, "nothing... reveals any circumstances from which it could be concluded that Palmieri intended the communication to be confidential." Id. at 702. In addition, although the Cariello court employs "joint defense" language, it is clear from the opinion that the two defendants' interests were "totally antagonistic," i.e., there was no common interest in this case.

5/ This Board has previously held the privilege to be applicable in a "common interest" situation where there was no "joint defense." In its August 31, 1983 Memorandum and Order the Board held that the privilege applied to communications among Intervenors Sinclair and Stamiris and counsel for Ms. Stamiris.

II. The Character of The Communications Made In the Meeting was Confidential

Ms. Sinclair argues at page 7 and again at pages 9 and 10 of her Motion that even if the presence of both Consumers and Bechtel personnel at the November 24 meeting does not destroy the privilege, that the communications made at that meeting are not privileged because of their content. Ms. Sinclair speculates as to what information and advice was conveyed at the meeting, and decides that the information was "derived from the public record" (p.7), and that any advice given based on such information was not legal advice, but rather was "political, business, or perhaps public relations" advice (p.10). Both her clairvoyance and her legal analysis leave something to be desired.

To determine what types of information and advice are protected by the privilege, resort should once again be had to the basic purpose of the privilege. That purpose is to permit the client to give his attorney, in confidence, any and all information he believes necessary or helpful to effective representation, and to permit him to receive his attorney's advice based thereon in confidence. VIII Wigmore, Evidence § 2291 p. 545 (McNaughton Rev. 1961). Whether the information which the client transmits to his attorney in confidence was itself obtained by the client from a confidential source or from a public source is irrelevant. If the information was obtained from a public source, it is still discoverable from that source. It is not the information which becomes privileged by transmission to an attorney; it

is the communication that is privileged. Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); Advisory Committee Notes to Proposed Rule of Evidence 511, 46 F.R.D. at 280 (1969). In fact, most of what is communicated to an attorney by a client seeking legal advice is factual matter about what other parties have done or agreed to do or failed to do, etc. The privilege exists to permit the client to confidentially disclose all such facts to his attorney in order to obtain legal advice.

Ms. Sinclair's confusion is probably grounded in the rule that since the privilege exists to protect the client's confidential communications with his attorney, communications between the attorney and third parties, even though they may relate to the attorney's representation of his client, are not within the privilege. VIII Wigmore, Evidence, §2317, p. 619 (McNaughton Rev. 1961). Thus, communications between Mr. Charnoff and third parties concerning GAP are not privileged communications. 5/

Nor was the advice sought from Mr. Charnoff political, business, or public relations advice. Mr. Charnoff was consulted in his capacity as a lawyer for the purpose of obtaining legal advice. 6/ See J. Cook affidavit, attached as Exhibit B. That being the case, the communications made

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5/ Such communications would not, however, be relevant to any issue before this Board.

6/ While what was sought by Consumers and Bechtel at the November 24 meeting was Mr. Charnoff's legal advice, even if incidental non-legal considerations had entered into the formulation of that advice the privilege would continue to exist, as long as what was primarily sought and given was legal advice. Barr Marine Products Co., Inc. v. Borg-Warner Corp., 84 F.R.D. 631 (E.D.Pa. 1979); United States v. United Shoe Machinery Corporation, 89 F. Supp. 357 (D. Mass. 1950).

at the November 24 meeting are within the scope of the attorney-client privilege.

III. There Has Been No Waiver of the Privilege By Disclosure of the Substance of the Communications

Ms. Sinclair's final argument is that any privilege which otherwise existed has been waived by disclosure of the substance of the communications. What has thus far been disclosed are the time and place of the meeting, the identities of the participants, and the fact that it concerned "GAP's involvement in connection with QA related matters at Midland." (Motion, p. 8). To argue that disclosure of the time, place, participants and general subject matter of a meeting waives any privilege as to communications made at that meeting borders on the absurd. As Ms. Sinclair herself points out (Motion, p. 4), a party asserting attorney-client privilege must establish the factual basis for the claim of privilege. That is done precisely by identifying the participants and general subject matter, as has been done in this case.

Waiver does occur by the disclosure of the substance of a privileged communication, but not merely by disclosure of its general subject matter. Proposed Rule of Evidence 511 states the rule in terms of disclosure of "any significant part" of the communication. 46 F.R.D. at 280 (1969). The Advisory Committee Notes to the Rule (which are cited by Ms. Sinclair at p. 3 of her Motion) explicitly state that,

> [A] client, merely by disclosing a subject which he had discussed with his attorney, would not waive the applicable privilege; he would have to make disclosure of the communication itself in order to effect a waiver.

Id.

All of the cases cited by Ms. Sinclair in support of her waiver by disclosure argument involve disclosures of the substance of the communications themselves, and not merely the general topic of the communications. See cases cited in Motion, p.8.

The reason for the rule of waiver by partial disclosure is that it would be unfair to permit a party to disclose only those self-serving portions of a communication which he sees fit to disclose, and to refuse to disclose the remainder on a claim of privilege. VIII Wigmore, Evidence § 2327, p. 636 (McNaughton Rev. 1961). That has not occurred in this case. The substance of the communications made at the November 24 meeting has not been disclosed. No waiver has thus occurred, and any communications made at the meeting remain subject to the privilege. The Board should therefore deny the present Motion to Reconsider its earlier ruling.

Respectfully submitted,

Philip P. Steptoe III
One of the Attorneys for
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GERALD CHARNOFF, P.C.

July 14, 1983

Michael E. Miller, Esq.
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Dear Mike:

Thank you for calling my attention to the portions of the Midland transcript relating to my meeting with Jim Cook on Wednesday, November 24, 1982. I have also reviewed Sinclair Exhibit No. 6, which apparently is the notes of meeting held on November 27, 1982. Those notes contain a cryptic report that I had met with CPco on "Wed at GAP". None of the other items in those notes have any apparent reference to me.

My recollection of the November 24, 1982 meeting is at variance with the transcript discussion. As a result I should appreciate it if you would call this matter to the attention of the Midland Licensing Board.

As you know, my law firm has provided legal advice to Bechtel and its personnel in a number of NRC Licensing proceedings. In that context, shortly before the November 24, 1982 meeting, Bechtel officials invited me to Ann Arbor on the morning of November 24, 1982 to brief me on the licensing status of the Midland project. Later we drove to Jackson to have an introductory meeting with Jim Cook. At either or both of those meetings I was told of GAP's involvement in connection with QA related matters at Midland. Because it was the eve of Thanksgiving, the meetings were not extended. The meeting with Jim Cook was brief, and primarily introductory. I recall noting that you were not present and telling Jim that I would call you to discuss the case with you and how we could be of assistance in connection with the proceedings before the Licensing Board.

You may recall that on the Monday after Thanksgiving, I did telephone you to tell you of my brief meeting with Jim and to discuss the status of the Midland proceedings in some detail with you.

EXHIBIT A

The transcript accurately reflects the confusion in Jim's mind which continued for several weeks on the matter of whether I would be retained by Consumers or Bechtel or both. Jim's confusion, I believe, had its origin in some earlier legal work I had performed for Consumers. This confusion was not resolved to Jim's satisfaction, I recall, until sometime early in 1983. While I was, and have always been, retained by Bechtel in connection with the Midland project, Jim Cook and some of his people were conducting themselves as if I were representing Consumers until the matter was explicitly clarified to the contrary.

While there was little substance to the November 24, 1982 meeting, I believe record accuracy requires me to have the matter corrected before the Licensing Board. I should appreciate it if you would take care of this for me.

Sincerely,

Gerald Charnoff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT

James W. Cook, being first duly sworn upon oath, deposes and states as follows:

1. I am, and since October of 1980 have been, Vice-President of Projects, Engineering and Construction for Consumers Power Company.

2. On November 24, 1982 I met, in my capacity as an official of Consumers, with Mr. Gerald Charnoff, an attorney, and certain executives of Bechtel Power Corporation.

3. The purpose of the meeting was to seek Mr. Charnoff's legal advice in connection with obtaining NRC operating licenses for Consumers' Midland Plant.

_____
James W. Cook

SUBSCRIBED AND SWORN to
before me this _____ day
of _____, 1983.

_____
NOTARY PUBLIC

Note: This affidavit is unsigned due to the fact that Mr. Cook has been ill. Immediately upon his return to work he will execute a copy of this affidavit which will then be provided to the Board.

EXHIBIT B

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT

I, Philip P. Steptoe, one of the attorneys for Consumers Power Company, hereby certify that a copy of the "Response of Consumers Power Company to Sinclair Motion to Reconsider Privileges Rulings" was served upon all persons shown on the attached service list by deposit in the United States mail, first class, this 2nd day of September, 1983.

Philip P. Steptoe

SUBSCRIBED AND SWORN before
me this 2nd day of September,
1983.

_____
Notary Public

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