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FEDERAL EXPRESS

In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1 and 2))

) Docket Nos. 50-329-OM
) 50-330-OM
) 50-329-OL
) 50-330-OL

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Dear Administrative Judges:

By way of an informal discovery request, Intervenor Barbara Stamiris has requested from Applicant, inter alia, "drafts or preliminary findings, to whatever extent they exist, leading up to the March 10th Consumer's response" to Item A of the NRC Staff's Notice of Violation EA 83-3, dated February 8, 1983 ("the Response") (Tr. 14188). Applicant has asserted that the materials comprehended by this discovery request are privileged on the basis of both the

attorney-client privilege and the work product privilege (Tr. 14189). In addition, Applicant has specifically stressed the cumulative nature of drafts of the Response, and their tenuous relevance to the scheduled hearings on soils quality assurance (Tr. 14190, 14194).

In its Memorandum and Order dated April 5, 1983, relating to rulings made during the course of a telephone conference call had on the same date, the Atomic Safety and Licensing Board held: (1) that the drafts of the Response are relevant to the forthcoming QA hearings; (2) that the attorney-client privilege "does not apply, since the type of information in question is not of a type properly subject to that privilege"; (3) that the drafts constitute attorney work product (trial preparation materials) within the meaning of 10 CFR § 2.740(b)(2); and (4) that there has not, as yet, been an adequate showing that Ms. Stamiris has a "substantial need" for the drafts and is "unable without undue hardship to obtain the substantial equivalent of the materials by other means" (Order, pp. 2-3). The Board ruled that if the drafts are cumulative and contain no "material facts" additional to those in the Response, the work product privilege will be upheld (Order, p. 3). As a result, the Board has required Applicant to submit an affidavit in support of its claim that the drafts are cumulative, and setting forth Applicant's basis for determining materiality (Id.).

While Applicant is acutely aware that the Board's rulings were made during the course of a teleconference established for the convenience of the parties, and thus the Board did not have the luxury of extended time to deliberate, Applicant respectfully submits that the Board's Order fails to specify the reasoning behind ruling (2), and fails to comport with the law with respect to ruling (4) and the requirement that Applicant submit affidavits.

One ruling of particular concern to Applicant is the Board's finding that the attorney-client privilege is inapplicable because the type of information in question is "not of a type properly subject to that privilege" (Order, p. 2). The Board has offered no citation or rationale in support of this conclusion, and thus has provided nothing to guide the parties in future discovery disputes. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

Applicant further takes issue with the Board's ruling that Applicant must provide an affidavit in support of its claim that the drafts are cumulative. First, this impermissibly shifts the burden of establishing "substantial need" and "undue hardship" (Fed. R. Civ. P. 26(b)(3)) from the party seeking the discovery to the party responding to the request (see Fed. R. Civ. P. 26(b)(3) Advisory Committee

Note). Second, this ruling makes no provision for the protection of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" (Fed. R. Civ. P. 26(b)(3)). This material is not discoverable even when the showing of substantial need and inability to obtain the equivalent without undue hardship is made (see Fed. R. Civ. P. 26(b)(3) Advisory Committee note; Upjohn v. United States, 449 U.S. 383, 400-401 (1981)).

Applicant suggests that, for the above reasons, the Board may desire to reconsider or supplement and/or clarify its Order dated April 5, 1983. Nevertheless, in accordance with the Board's ruling, and to expedite these discovery matters, Applicant hereby submits the following documents, attached hereto as exhibits:

- Exhibit 1: Affidavit of Sandra K. Visser
attesting to Applicant's efforts
to locate and obtain drafts of the
Response.
- Exhibit 2: Affidavit of Brian R. Gilomen
identifying the drafts located by
Applicant, setting forth Applicant's
basis for determining materiality
and attesting to the cumulative
nature of the drafts.

Applicant also submits the following list identifying other documents which may be related to Ms. Stamiris' informal discovery request, but for which Applicant asserts either or both the attorney-client or work product privilege (Tr. 14189):

Item 1: Handwritten notes from interviews of employees of Applicant and Bechtel conducted by J.E. Brunner (in-house counsel to Applicant), V.P. Provenzano (in-house counsel to Applicant), L.E. Zwisler (employee of Management Analysis Company and a member of the Task Force, who conducted interviews under the direction and control of J.E. Brunner) and F.C. Williams (counsel retained by Applicant). Applicant claims both the attorney-client and the work product privilege with respect to the notes of interviews with employees of Applicant. See Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981), regarding the attorney-client privilege claim. Applicant claims the work product privilege with respect to the notes of interviews with Bechtel employees Rutgers, Daniels and Smith.

- Item 2: Typewritten transcription of the above-referenced handwritten interview notes. This item was compiled by V.P. Provenzano. Applicant claims both the attorney-client and the work product privileges with respect to this document as discussed under Item 1.
- Item 3: Approximately ninety responses by employees of Applicant to a QC/IPIN questionnaire prepared by the Task Force under the direction and control of J.E. Brunner. Applicant claims both the attorney-client and the work product privilege with respect to these documents. See Upjohn Co. v. United States, supra at 389-97.

Respectfully submitted,



Brian R. Gilomen
One of the Attorneys for
Consumers Power Company

BRG:reg

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