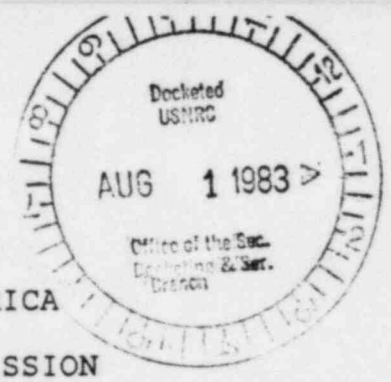
ORIGINAL

RELATED CORRESPONDENCE



UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	Docket No. 50-275 O.L.
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. 50-323 O.L.
	)	
Diablo Canyon Nuclear Power Plant Units Nos. 1 and 2	)	(Reopened Hearing -- Design Quality Assurance)

MOTION OF LICENSEE
TO COMPEL PRODUCTION OF DOCUMENTS
BY JOINT INTERVENORS

Pursuant to 10 CFR § 2.740(f)(1), Licensee moves the presiding member of this Board, and members thereof, for an order compelling Joint Intervenors to fully respond to Licensee's document production request previously served on

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the Joint Intervenors on June 10, 1983. The response of the Joint Intervenors was served on July 15, 1983. 1/

The Joint Intervenors have objected to several interrogatories on the blanket ground that the documents requested are protected by attorney client privilege and work product privilege and implicitly are not discoverable under the provisions of 10 CFR § 2.740(b)(2).

As to any document for which a privilege was to be claimed the document production request specifically asked that the Joint Intervenors identify the document, describe its nature, and identify its author, its addressee, and its custodian. (First Document Discovery Request by Pacific Gas and Electric Company to Joint Intervenors and Governor Deukmejian, page 2, lines 1-23).

The Joint Intervenors have failed to provide such information to which Licensee is clearly entitled.

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1/ Although the service list was signed July 15, 1983, the response of the Joint Intervenors was not postmarked until July 18, 1983. The zip code of Licensee was misstated, as the Board has been informed has occurred on other occasions, and Licensee did not receive Joint Intervenors' Response until July 25, 1983. No copy of the response was provided as a matter of professional courtesy to Licensee or its counsel at the hearing which took place July 19, 20, 21, and 22, 1983.

PRODUCTION REQUESTS

Request No. 1.

All writings you have taken at all meetings between the NRC and/or PG&E and/or companies involved in the Independent Design Verification Program (IDVP) from October 1, 1981 to the present.

Response:

Joint Intervenors object to this request as calling for documents protected by the attorney-client privilege and attorney work product privilege.

Request No. 2.

All documents relating to Diablo Canyon design or design quality assurance prepared by PG&E, the IDVP, or the NRC, having comments, notes, or the like on them and any writings prepared by or for you discussing, commenting on or otherwise referring to those documents.

Response:

Joint Intervenors object to this request as calling for documents protected by the attorney-client privilege and attorney work product privilege.

Request No. 3.

All documents relating to Diablo Canyon design or design quality assurance not produced in response to Request No. 2 which have been prepared or reviewed by or for you.

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Response:

Joint Intervenors object to this request as calling for documents protected by the attorney-client privilege and attorney work product privilege. All documents not covered by the above-cited privileges are part of the public record in this proceeding.

Request No. 7.

All notes, calculations, meeting minutes, computer outputs, drawings or other writings prepared by MHB Technical Associates or Dr. Rosette or any other of your technical consultants related in any way to design or design quality assurance at Diablo Canyon.

Response:

Joint Intervenors object to this request as calling for documents protected by the attorney-client and work product privilege.

Argument: (Requests 1, 2, 3, and 7)

Basic to the scope of discovery is the premise that a party is entitled to information which appears reasonably calculated to lead to admissible evidence. 10 CFR § 2.740(b)(1). Notwithstanding the claim of the Joint Intervenors that Licensee has requested documents which may be privileged, facts as to the description of such documents, their origin, their addressee, their author, and their present custodian are facts which are discoverable. 10 CFR § 2.740(b)(2) provides protection only for "documents

and tangible things." Ford v. Phillips Electronic Instruments Co. 82 F.R.D. 359, 360 (D.C. B. 1979). Courts have consistently held that the work product concept furnishes no shield against discovery of the facts that the representative of a party has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery. In re Intern. Systems 2nd Controls Corp. Securities 91 F.R.D. 552, 561 (D.C. Tex 1981). U.S. v. Glaxo Group Ltd. D.C.D.C. 1969 302 F. Supp. 1, 17; 8 Wright and Miller § 2023, page 194. Absent identification and description as requested by Licensee, it is not even possible for Licensee or this Board to ascertain whether the information contained within the documents was actually prepared for litigation or whether it could be readily obtained from some other source. As to the documents, themselves, some may be discoverable. Documents and tangible things which are not trial preparation material are routinely discoverable. Peterson v. U.S. 52 F.R.D.317, 320 (D.C. Ill, 1971).

Licensee would also respectfully point out that the issues at hand involve an extremely complex subject matter. Where, for example, the use of computers is involved regardless of whether an expert is involved, Licensee may be entitled to access to calculations or computer outputs under modern theory:

> "In order to prepare to defend against the conclusions that are said to flow from these efforts, the discovering party not only must be given access to the data that represents the computer's 'work product,' but he also must see the data put into the computer, the programs used to manipulate the data produced the conclusions, and the theory or logic employed by those who planned and executed the experiment." 8 Miller & Wright § 2218, page 660.

Counsel for the Joint Intervenors has sought to universally immunize all documents from discovery. Just because certain information may be contained in the files of counsel or a representative of a party does not, in itself, make such information work product. As the U. S. Supreme Court stated in the landmark case of Hickman v. Taylor (1947) 329 U. S. 495, 511, 67 S.Ct. 385, 394:

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.

Licensee acknowledges the immunity of work-product set forth in 10 C.F.R. 2.740(b)(2). However, notwithstanding such rule, documents containing relevant information are subject to review by this Board in camera:

> Our ruling that opinion work product is discoverable only in rare and extraordinary circumstances does not shield these materials from judicial scrutiny. An attorney may be ordered to deliver his opinion work product to the court for in camera inspection. In re Fish & Neave, 519 F.2d 116 (8th Cir. 1975); see United States v. Nixon 418 U.S. 683, 713-14, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The court can categorize the material according to its nature and issue any discovery orders that are justified under Rule 26(b)(3), giving due protection to those portions containing an attorney's mental impressions, opinions and legal theories. Furthermore, our ruling does not undermine the integrity of the fact-finding process. Under Rule 26(b)(3), any relevant facts contained in non-discoverable opinion work product are discoverable upon a proper showing. Advisory Committee's Notes to Rule 26(b)(3), 48 F.R.D. 487, 501 (1975); see 8 C. Wright & A. Miller, Federal Practice and Procedure § 2023, at 194-96 (1970). (In re Murphy 560 F.2d 326, 336-337, n. 20, (8th Cir. 1977)).

Finally, the Joint Intervenors have failed to satisfy the necessary procedural requirements in order to claim either the work-product or attorney-client privilege.

> A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality. Unless the affidavit is precise to bring the document within the rule, the Court has no basis on which to weigh the applicability of the claim of privilege. An improperly asserted claim is no claim at all. . . .In short, a party resisting disclosure on the ground of attorney-client privilege must by affidavit show sufficient facts as to bring the identified and described document within

the narrow confines of the privilege. International Paper Co. v. Fibreboard Corp. 63 F.R.D. 88, 94 (D.Del. 1974).

Request No. 5.

All correspondence or records of meetings or telephone conversations between Mr. Hubbard (or his associates) and Dr. Rosette [Sic.] (or his associates) related in any way to design of structures, systems, or components at Diablo Canyon.

Response:

Joint Intervenors object to this request based on the fact that PGandE has been provided with copies of all correspondence between Joint Intervenors and the NRC.

Argument:

Joint Intervenors' response to Request No. 5 is incomplete because it speaks only to documents which are not the subject of the document request. Pursuant to 10 CFR § 2.740(f), an evasive or incomplete response is to be treated as a failure to respond.

CONCLUSION

Accordingly, Counsel for the Joint Intervenors should not, with the waivé of a pen, be able to cloak all documents in their possession from review or production expecially without describing and fully identifying those documents for Licensee and the Board.

Licensee respectfuly requests that the Board order the Joint Intervenors to deliver documents requested or in

the alternative that the Joint Intervenors fully respond to the instructions of the request and identify, describe, and locate each such document for which immunity is claimed.

Respectfully submitted,

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Bruce Norton

DATED: July 27, 1983.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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PACIFIC GAS AND ELECTRIC COMPANY	)	Docket No. 50-275
	)	Docket No. 50-323
Diablo Canyon Nuclear Power Plant, Units 1 and 2	)	
	)	

CERTIFICATE OF SERVICE

The foregoing document(s) of Pacific Gas and Electric Company has (have) been served today on the following by deposit in the United States mail, properly stamped and addressed:

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