

571

RELATED CORRESPONDENCE

LAW OFFICES OF

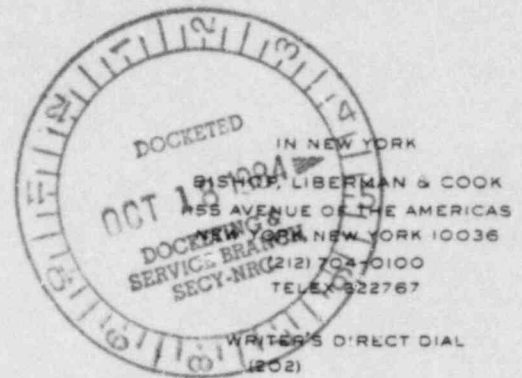
BISHOP, LIBERMAN, COOK, PURCELL & REYNOLDS

1200 SEVENTEENTH STREET, N.W.

WASHINGTON, D.C. 20036

(202) 857-9800

TELEX 440574 INTLAW UI



October 18, 1984

Peter B. Bloch, Esq.
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Walter H. Jordan
881 West Outer Drive
Oak Ridge, Tennessee 37830

Herbert Grossman, Esq.
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Texas Utilities Electric
Company, et al. (Comanche Peak
Steam Electric Station, Units 1
and 2), Docket Nos. 50-445-2,
50-446-2

Gentlemen:

Pursuant to the telephone conference on October 11, 1984, counsel for Applicants have reviewed documents proposed to be produced to the Board and the parties by Oliver B. Cannon & Son, Inc., in response to the Board's subpoenas. We reviewed the Cannon documents on the evening of October 17, 1984. Applicants' review was intended to identify documents as to which Applicants would claim a privilege, due to O.B. Cannon's status as a consultant to Applicants in connection with the license proceedings.

As we understand the Board's instructions (see tr. 19,304-305), Applicants were to file a brief in support of any claims of privilege relating to documents other than those generated in

connection with O.B. Cannon's preparation of testimony on behalf of Applicants in this proceeding.¹ Applicants' review of the O.B. Cannon materials has not identified any such documents, and we therefore believe that the requirement for a brief is moot.²

Certain documents in O.B. Cannon's possession were prepared by Applicants' representatives in anticipation of litigation, and these documents are privileged. These documents include:

1. Nicholas S. Reynolds letter to Joseph J. Lipinsky dated 12/3/83, discussing and enclosing Mr. Lipinsky's draft testimony regarding his 8/8/83 Trip Report.

2. Draft testimony of J.J. Lipinsky referred to in item 1, consisting of 12 pages, double-spaced, in question-and-answer form regarding Comanche Peak material storage, workmanship, ANSI requirements, coating integrity, morale problems, and observations/opinions.

3. Draft testimony of J.J. Lipinsky and J.J. Norris, consisting of 22 pages, double-spaced, in question-and-answer form regarding concerns noted in Lipinsky 8/8/83 Trip Report [undated, prepared between 12/1/83 and 12/23/83].

4. J.J. Lipinsky memo to file dated 1/10/84 discussing a conference with J.J. Lipinsky, Ralph A. Trallo, N.S. Reynolds and McNeill Watkins, to prepare testimony and to discuss ASLB hearings.

¹ The Board seemed to establish a temporal limitation on documents that Cannon should produce, e.g., "up until the time that you began preparing the affidavit for the motion for summary disposition" (tr. 19,304-305). As a practical matter, we believe that the issue of privilege in this context relates to the nature of the document in question, not the time that it was prepared. Accordingly, Applicants do not object to O.B. Cannon's production of numerous documents prepared during calendar 1984 that are responsive to the Board's subpoenas, where no privilege applies.

² One category of documents that does not relate to O.B. Cannon's preparation of materials for litigation may be privileged. These would include notes, letters or other writings reflecting J.J. Lipinsky's communications with counsel regarding the January 4, 1984 interview with representatives of the NRC. The attorney-client privilege that may protect these documents from disclosure is Mr. Lipinsky's privilege, and not Applicants', and counsel for Applicants have advised counsel for O.B. Cannon that the decision to invoke or waive the privilege is Mr. Lipinsky's.

5. Draft testimony of R.A. Trallo, consisting of 3 pages, double-spaced, in question-and-answer form, regarding J.J. Lipinsky's 8/8/83 Trip Report [undated, but prepared in January, 1984].

6. J.J. Lipinsky memo to Robert B. Roth dated 2/13/84, discussing preparation of attached affidavit addressing the 8/8/83 Trip Report.

7. J.J. Lipinsky memo to file dated 5/14/84 regarding conference with J.J. Lipinsky, C. Thomas Brandt, and McN. Watkins to prepare testimony for ASLB proceedings.

8. J.J. Lipinsky memo to file dated 7/5/84, discussing conferences with McN. Watkins regarding Lipinsky's testimony in ASLB proceedings.

9. McN. Watkins letter to J.J. Lipinsky dated 9/26/84 discussing and enclosing drafts of affidavit of J.J. Lipinsky, Applicants' motion for summary disposition regarding Trip Report of J.J. Lipinsky, and Applicants' statement of material facts regarding Trip Report of J.J. Lipinsky as to which there is no genuine issue.³

10. Draft affidavit of J.J. Lipinsky, consisting of 18 double-spaced pages, identified in item 8.

11. J.J. Lipinsky handwritten notes, one page, regarding changes and corrections to draft affidavit identified in item 9 [undated, but prepared between 9/27/84 and 9/29/84].

12. Applicants' draft motion for summary disposition, consisting of 14 double-spaced pages, identified in item 8.

13. Applicants' draft statement of material facts, consisting of 2 double-spaced pages, identified in item 8.

Federal Rule of Civil Procedure 26(b)(3) provides a privilege as to materials prepared for trial by a party's attorneys and consultants, and requires a special showing by the parties seeking discovery of these documents. See Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 410 ("In essence, if anyone prepares documents for a party in anticipation of litigation or for trial, documents so prepared are not discoverable except upon a showing of 'substantial need' and 'undue hardship'"). The Commission has expressly adopted Rule 23(b)(3)'s principles:

³ Also enclosed with this package was the affidavit of C. Thomas Brandt regarding Trip Report of J.J. Lipinsky, with Attachments A through N, executed September 26, 1984. Mr. Brandt's affidavit was filed with the Board on October 1, 1984.

A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this [sic] 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). Each of the documents listed above was prepared by Applicants' attorneys or by employees of its consultant, O.B. Cannon. Each of the documents was prepared in anticipation of the Board's hearings in this proceeding. Accordingly, Applicants claim the privilege for trial preparation materials applicable to these documents. Moreover, the documents identified in items 1, 9, 12 and 13 are also subject to the privilege for attorney work product. Hickman v. Taylor, 329 U.S. 495 (1947). See also Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 N.R.C. 897, 917 (1982) (privilege for attorney work product could extend to drafts of testimony).

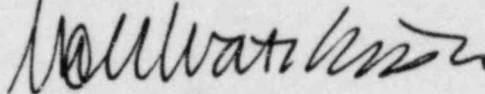
Applicants claim the attorney work product privilege for one remaining document:

14. McN. Watkins memorandum regarding 8/8/83 Trip Report of J.J. Lipinsky, consisting of two single-spaced pages [undated, prepared during period 11/19/83-11/22/83]. Attached to the memorandum are the transcribed notes by McN. Watkins of interviews conducted by McN. Watkins and other Applicant counsel of site employees on 10/31/83, 11/1/83, 11/16/83, and 11/18/83.

Both the memorandum and the interview notes constitute attorney work product, and as such are privileged from disclosure. Hickman v. Taylor, supra. These materials were taken, apparently inadvertently, from Applicants' counsel's offices by someone from O.B. Cannon after a meeting on November 22, 1983. Applicants' counsel requested R.B. Roth, President of Cannon, to return the original and any copies of the document, and Mr. Roth's letter dated November 23, 1983 (a copy of which Cannon is producing to the Board and the parties) indicates that he did so. On reviewing the Cannon materials in response to the Board's subpoenas, however, we discovered that Cannon had retained at least one copy. We believe that the inadvertent, and

certainly unintentional, disclosure of these materials to O.B. Cannon representatives did not operate to waive the work product privilege.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "McNeill Watkins II", written in a cursive style.

McNeill Watkins II
Counsel for Applicant.

cc: All parties

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
TEXAS UTILITIES ELECTRIC)	Docket Nos. 50-445-2 and
COMPANY, <u>et al.</u>)	50-446-2
)	
(Comanche Peak Steam Electric)	(Application for
Station, Units 1 and 2))	Operating Licenses)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document in the above-captioned matter was served upon the following persons by hand-delivery,* overnight delivery,** or by deposit in the United States mail,*** first class, postage prepaid, this 18th day of October, 1984:

*Peter B. Bloch, Esq.
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

**Dr. Walter H. Jordan
881 West Outer Drive
Oak Ridge, Tennessee 37830

*Herbert Grossman, Esq.
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

***Mr. John Collins
Regional Administrator
Region IV
U.S. Nuclear Regulatory
Commission
611 Ryan Plaza Drive
Suite 1000
Arlington, Texas 76011

***Chairman, Atomic Safety and
Licensing Appeal Panel
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

*Mr. William L. Clements
Docketing & Services Branch
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

*Stuart A. Treby, Esq.
Office of the Executive
Legal Director
U. S. Nuclear Regulatory
Commission
Washington, D. C. 20555

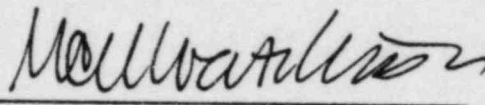
***Chairman, Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

***Renea Hicks, Esq.
Assistant Attorney General
Environmental Protection
Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711

***Lanny A. Sinkin
114 W. 7th Street
Suite 220
Austin, Texas 73701

*Anthony Z. Roisman, Esq.
Executive Director
Trial Lawyers for Public Justice
2000 P. Street, N.W.
Suite 600
Washington, D. C. 20036

*Ellen Ginsberg, Esq.
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory
Commission
Washington, D. C. 20555


McNeill Watkins II

cc: Homer C. Schmidt
John W. Beck
Robert Wooldridge, Esq.