336

RELATED CORRESPONDENCE

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
U.S. NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'85 AUG 26 A11 :36

In the Matter of	)	
	)	Docket No. 40-2061
KERR-McGEE CHEMICAL CORPORATION	)	
(Kress Creek Decontamination)	)	

OFFICE OF SECRETARY
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BRANCH

PEOPLE'S REPLY TO KERR-McGEE
RESPONSE TO MOTION TO COMPEL

INTERROGATORY 17.

The dispute here concerns Kerr-McGee's attempt to withhold information on the costs of disposing of the West Chicago waste, in particular, a memorandum on the subject prepared by a Kerr-McGee employee, Mr. Brad Snow, and work performed by unnamed outside consultants. The company argues that the Snow memorandum is covered by the attorney-client and work-product privileges and that the work of outside consultants is covered by the non-witness expert consultant privilege of F.R.Civ.P. 26(b)(4).

The company misstates our argument about waiver of privilege. The People do not argue, as Kerr-McGee implies (KM Response 4), that the Snow memorandum is discoverable if it has been released to third parties. The People argue that it[1] is discoverable because Kerr-McGee has already released information, favorable to itself,concerning the identical subject matter. For the purpose of obtaining a benefit from a federal agency (i.e., permission to decommission in the company's preferred manner) Kerr-McGee voluntarily waived any privileges over information

[1]As well as related material prepared by anyone else, inside or outside the company.

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gathered on the subject of disposal costs and provided it in the Environmental Report to the NRC. Now the company seeks to claim privileges and withhold related, and very possibly impeaching or inconsistent, information on that very same subject. Nondisclosure in these circumstances would be unfair, contrary to the holdings or implications of the cases the People have cited, and an impediment to the ascertainment of the truth.

With respect to the work-product privilege Kerr-McGee cites U.S. v. Nobles, 422 U.S. 225 (1975), for the proposition that facts, like legal conclusions and opinions, are protected where the document was prepared for litigation. U.S. v. Nobles does not address this question at all. Hickman v. Taylor, 329 U.S. 492 (1947), remains the touchstone on the question whether a party may withhold relevant and non-privileged (i.e., not privileged under the attorney-client privilege) facts in its possession by claiming they were obtained in anticipation of litigation or in preparation for trial. "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." Id. at 511.

Kerr-McGee assigns a motive to our attempt to discover information on the costs of decommissioning: by obtaining the Snow memorandum the People "can avoid the work required to analyze the relevant cost data, while at the same time gaining an insight into the thought processes and opinions formed by Kerr-McGee and its counsel as they prepare for the hearing in this case" (KM Response 6). To the contrary, we are not looking for Kerr-McGee's "thought processes" or for Kerr-McGee's "analysis"

of cost data. We are looking for the data themselves, i.e., for facts in the company's possession gathered by, inter alia, a company employee relating to a material issue in this proceeding.

Kerr-McGee goes on to assert that it has already released information on the costs of decommissioning and that, in any event, the People should have such information "readily at hand" since "the State is engaged in construction projects throughout the State" (KM Response 6). We can only say in response that Kerr-McGee has not given us information on these matters, and that we do not have it readily at hand, State construction projects notwithstanding, since much of this information is specific to Kerr-McGee (e.g., Kerr-McGee's pay scales, source of raw materials, the equipment it owns and the equipment it will need to buy, the arrangements it can make to save money or effort, the location of Kerr-McGee-owned land potentially usable for offsite disposal, and so forth).

Finally, we stand on our contention that even if company information on this subject is privileged (whether under R. 26(b)(3) or (b)(4)), the People have substantial need of it for the reasons set out in our motion. To avoid unfairness we have offered, pursuant to R. 26(b)(4)(C), to pay Kerr-McGee the reasonable cost of obtaining any such material from outside experts.

INTERROGATORIES 21, 22, 23, 24, 28, 29.

These interrogatories ask various questions about post-closure matters, including maintenance, monitoring, and security, the costs associated with same, and uses of disposal area. Kerr-McGee evaded answering all these interrogatories.

In its Response Kerr-McGee does not really address the reasons we have given why the interrogatory answers are evasive. Instead it argues generally that it does not know what will happen after closure--how maintenance and monitoring will be accomplished and access restricted; the costs of all such measures; and what uses, if any, the closed site can be put to. Kerr-McGee's "experts" are still considering these matters (KM Response 9, 12, 13)[2] and, in any event, the NRC will make all necessary decisions.

Kerr-McGee's professed ignorance about future maintenance, monitoring, and security needs at the site cannot pass for a good faith answer to these interrogatories. What Kerr-McGee is saying here is: we want to bury this waste in West Chicago, so you, NRC, work out the details for us. That is patently unacceptable. Furthermore, as the People pointed out in their motion, if Kerr-McGee does not know what long-term maintenance, monitoring, and restrictive measures will be appropriate after closure, it has no business applying for permission to bury five million cubic feet of contaminated waste in a residential neighborhood and over a major aquifer. Finally, it is not credible, fully six years after the Stabilization Plan was presented, that Kerr-McGee's "experts" still have not figured out how to prevent cap damage or monitor contaminant movement after closure. One can only conclude that Kerr-McGee possesses at least a

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[2]Again, the unidentified "experts" to the rescue!

substantial part of the information sought and simply does not want to part with it.[3]

INTERROGATORY 62.

This interrogatory asks whether Kerr-McGee has conducted any studies or inquiries, whether formal or informal, about property values in the site vicinity, and if so, the nature and findings of such studies or inquiries. Kerr-McGee has answered by claiming yet again that outside "experts" who are "not designated to testify at hearing" have conducted "studies" (KM Response 13) and that such "studies" are privileged under R. 26(b)(4). In this regard, Kerr-McGee asserts (without verification) that "studies" have not been performed by in-house employees (id., n.1).

With regard to the alleged nonwitness "experts," the People have argued that good cause exists to require disclosure and that the People will pay reasonable costs. As for Kerr-McGee employees, Kerr-McGee's statement that they have not performed "studies" does not speak to the interrogatory, which asks not only whether Kerr-McGee has conducted "studies" but also whether it has conducted "inquiries of any kind, whether formal or informal". The first item of Exhibit B to the People's motion suggests that inquiries relating to property values have indeed been

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[3]Kerr-McGee indicates that the People take issue with the substance of the interrogatory answers (KM Response 9-10). That is incorrect. We contend that Kerr-McGee's profession of ignorance is belied by other answers given (see People's motion 10-11) as well as by common sense, and that a good faith response has not yet been made to the interrogatories in dispute here.

made by company employees.[4] Moreover, Kerr-McGee's initial answer to the interrogatory, in addition to invoking R. 26(b)(4), states that "Kerr-McGee objects to Interrogatory No. 62 to the extent it calls for information protected by the attorney-client or work-product privileges." This answer clearly suggests that in-house staff have taken action in some manner that is responsive to the interrogatory (otherwise, why would Kerr-McGee invoke those privileges?). Hence, Kerr-McGee's present response to Interrogatory 62 is legally insufficient and should be supplemented to provide the information sought or to demonstrate that the information is protected by the attorney-client or work-product privileges.

INTERROGATORY 75.

This interrogatory asks Kerr-McGee to identify the person(s) who answered each interrogatory--in other words, to state who has knowledge of each of the issues raised. Kerr-McGee argues in response that several employees contributed to each answer. That may be true, but it has no legal significance: so long as the interrogatories address relevant issues, the People have a right to know who at the company possesses knowledge about them. We also reiterate that there is nothing unusual about this interrogatory, given that Kerr-McGee asked the People for

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[4]The second item of Exhibit B appears to relate to property values as well, and the fact that the properties involved are owned by Kerr-McGee does not seem relevant.

precisely the same information with respect to both of Kerr-McGee's sets of interrogatories (and the People provided the information).

Respectfully submitted,

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PROOF OF SERVICE

I, DOREEN REDEAUX, having been sworn and under oath do state that I have this 23rd day of August, 1985 served copies of the foregoing People's Reply To Kerr-McGee Response To Motion To Compel upon the persons listed on the attached Service List by placing same in envelopes addressed to said persons, by first class mail, postage prepaid, and depositing same with the United States Postal Service located at 160 North LaSalle Street, Chicago, Illinois 60601.

Doreen Redeaux

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 23RD DAY
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