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July 9, 1993

VIA TELEFAX

Peggy A. Leen
Thorndal, Backus, Maupin & Armstrong
1100 East Bridger Avenue
Las Vegas, Nevada 89101

Re: Nevada Power Company v. Monsanto Company, et al.
USDC, District of Nevada Case CV-S-89-555-LDG (LRL)

Dear Peggy:

I look forward to working with you to resolve as many deposition issues as we can before the telephone hearing at 4:00 p.m. on Wednesday, July 14, 1993. This letter is limited to providing you with authority pertaining to our contention that work-product immunity and attorney-client privilege have been waived by Westinghouse regarding all forms of discovery, including interrogatories, production, and deposition questions, which could serve as trial evidence or lead to admissible evidence regarding the question of whether or not Westinghouse destroyed documents pursuant to its 1986 sweep for PCB documents or the Bair/Bickerstaff memo. This includes evidence which could be used for impeachment of testimony provided by Bair, Bickerstaff, and others. You and I have already discussed Nevada Power's need to take stock of all documents listed in the Bair/Bickerstaff memo and all PCB documents gathered in the 1986 corporate-wide sweep.

The cases we have found unanimously support our contention that privilege and immunity do not apply regarding the destruction of documents issue. If you find any contrary authority, please let me know before Wednesday if you can. Here is what we found:

1. Voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject. Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed. Weil v. Investment/Indicators, 647 F.2d 18, 24 (9th Cir. 1981) (quoting from 8 J. Wigmore,

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Evidence § 2327 at 636 (McNaughton rev. 1961) and Duplan v. Milliken, Inc., 397 F.Supp 1146, 1161,62 (D. S.C. 1975)) Duplan contains a wonderful discussion of the rationale for waiver of the subject matter of a disclosure. Beginning at page 1161, it states:

When a client voluntarily waives the privilege as to some documents that the client considers not damaging and asserts the privilege as to other documents that the client considers damaging, the rule compelling production of all documents becomes applicable. The reason behind the rule is one of basic fairness. The rationale of the rule was aptly stated in 8 Wigmore, Evidence, § 2327 (McNaughton rev. 1961): "He [the client] cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final." A waiver of the privilege as to all communications ordinarily follows from the voluntary waiver even if made with limitations of one or more similar communications. Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived.

Other case supporting this proposition are: Chubb Integrated Systems Limited v. National Bank of Washington, 103 F.R.D. 52, 63 (D.C. 1984); In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982); Westinghouse v. Republic of the Philippines, 951 F.2d 1414, 1424 (3rd Cir. 1991); In re Subpoenas Duces Tecum to Fulbright & Jaworski, 99 F.R.D. 582, 585 (D.C. Cir. 1983); Fox v. California Sierra Financial Services, 120 F.R.D. 520, 527 (N.D. Cal. 1988). Where party injects document into the case as a relative matter, opposing counsel is entitled to probe into the circumstances surrounding issuance of the document. Garfinkle v. Arcata National Corp., 64 F.R.D. 688, 689 (S.D. N.Y. 1974).

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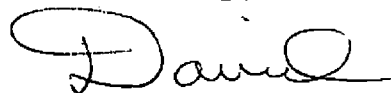
2. Waiver of or exception to work product protection subsumes attorney-client privilege which is also therefore waived. In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982).

3. If document is not privileged in the hands of the client, it does not become privileged merely because it is given to an attorney. Duplan v. Milliken, Inc., 397 F.Supp 1146, 1168 (D. S.C. 1975).

4. Work prepared in furtherance of a crime or fraud is not protected under work-product privilege. In re Sealed Case, 676 F.2d 793, 812 (D.C. ct. app. 1982).

We intend to supply these and possibly other authorities we might come across over the weekend to the court on Monday.

Sincerely,

A handwritten signature in cursive script, appearing to read "David", followed by a horizontal line.

DAVID E. SCHALK

DES:bms

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MESSAGE FROM XEROX 7024: (702) 386-1655

DATE: July 9, 1993

TO: Peggy A. Leen, Esq.

FAX #: (702) 388-0327

PHONE #: (702) 366-0622

FROM: David E. Schalk, Esq.

CLIENT/MATTER: Nevada Power v. Monsanto, et al.

CLIENT/MATTER NO.: 11927.2

DOCUMENT(S) DESCRIPTION: Letter re: deposition issues and Wednesday, July 14 telephonic conference

NUMBER OF PAGES (including cover page): Four (4)

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