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October 12, 1989

HAND DELIVERED

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Re: Nevada Power Company v. Monsanto, GE & Westinghouse
Case CV-S-89-555-LDG LRL

Dear Mr. Jones:

We have a discovery dispute. Please consider this letter, in addition to the several calls and conferences we have had, as an effort to resolve our discovery dispute pursuant to Local Rule of Practice, Rule 190-1(f)(2).

As you know, Westinghouse propounded a set of Interrogatories and Request for Production of Documents on August 4, 1989. These discovery responses were initially due on September 5, 1989. Your office requested, and you were granted an extension of time to Tuesday, September 26, 1989, in which to respond to these discovery requests. Late in the afternoon on September 26, in a telephone call initiated by John L. Thorndal of this office to discuss the upcoming status hearing before the court, your office again requested an additional extension of time. This issue was discussed the following morning in a conference call before court, and again before the Judge during the hearing.

With respect to the pending discovery requests, you represented to the court you did not have any specific objections to any of the questions, but that you wished to reserve your right to assert privilege objections once you had reviewed the documents themselves.¹ In fact, you told the court you had

1. Transcript of proceeding, page 7, lines 11-18; page 19,

EXHIBIT E

J. Randall Jones, Esq.
Re: Nevada Power v. GE, Westinghouse
& Monsanto
October 12, 1989
Page 2

looked at each individual question propounded.² You represented to the court that you would be willing to indicate within 24 hours of receipt of the documents whether you had any specific objection on the basis of privilege. In fact, when Jeff Klein clarified this question with the court he articulated the issue as follows:

Your Honor, I guess what we thought we proposed in the conversations yesterday, was that -- and I thought we understood Mr. Jones to say that he had no objections to the written discovery requests, save for objections as to privilege. And based on that, maybe what we could propose is that he would serve written discovery requests indicating that he will produce the documents requested subject to reservation of privilege and work product; and I think that is really what we are asking for. (Transcript of Proceeding, page 20, lines 15-23)

Your response was "I think that is what I have said, your Honor." You went on to agree in open court that you would put in writing any specific objections you had as to which documents you wished to assert any objection on the basis of privilege by describing the document, and if necessary submitting it for an in camera review. (Transcript of Proceeding, page 21, line 22, through page 22, line 3)

I spoke with you concerning your response to the defendants' discovery requests Thursday morning, October 5, 1989. During this telephone conversation I inquired of you whether you had an indication of how voluminous the documents were that you intended to produce, and attempted to make arrangements for review of the documents on Monday morning. As I indicated, I had several out-of-state counsel who were preparing to come to Las Vegas to review documents on Monday morning. At that time you indicated to me that you did not believe the documents were very voluminous, that the bulk of the documents had previously been produced prior to filing the Complaint, that there were not materials similar to

lines 11-14.

2. Transcript of proceedings, page 19, line 24 through page 20, line 1.

J. Randall Jones, Esq.
Re: Nevada Power v. GE, Westinghouse
& Monsanto
October 12, 1989
Page 3

those produced in the Chatanooga case, and that you would serve the defendants with a hard copy of all documents responsive to our discovery requests the following day.

As a result of your representation that we would be served with a hard copy of the documents on Friday, October 6, 1989, I contacted out-of-state counsel, who then cancelled their travel arrangements to come to Las Vegas to review the documents.

At approximately 3:00 p.m. on Friday afternoon, October 6, I called your office to determine the status of the document production and discovery responses, indicating I wished to make arrangements with an overnight copy service to have the documents copied so they could be Federal Expressed on Saturday to out-of-state counsel. I was referred to Nik Skrinjarc who advised me of several disturbing matters. First, he indicated to me that there were probably tens of thousands of documents which were responsive to the defendants' discovery requests, and that he did not know where all of those documents were located. He was unable to tell me when the documents could be produced. He was unable to tell me when the defendants could make arrangements to go to Nevada Power to review the voluminous documents which were not going to be produced that day as promised. He indicated that both he and Mr. McCrea had spent the last two days at Nevada Power trying to go through the documents and he had not been told until the day before (10/5/89) that Nevada Power did not have a convenient document retrieval system which would permit the document production to go more smoothly. He inquired whether defendants were "really interested" in the breakdown of equipment that is involved in this lawsuit, indicating "that stuff is all over the place." When I tried to ask for more details concerning where the documents were located, how many there were, and what the categories of documents consisted of, Mr. Skrinjarc responded that he could not tell me what was there because he had not seen most of the documents. Because he indicated he had no authority to make arrangements for our review of the documents still at Nevada Power, I asked that he have you contact our office.

You called our office shortly thereafter and participated in a conference call with John Thorndal and me. John was very frank in expressing his disappointment with Nevada Power and your firm in the representations which had been made in the face of what Mr. Skrinjarc had just told us. During our conversation you indicated that it was your understanding the documents were in two principal locations: (1) the library, and (2) in Mr. Fabbi's office. You indicated that you had not copied all of these reference materials which Nevada Power had received over the years

J. Randall Jones, Esq.
Re: Nevada Power v. GE, Westinghouse
& Monsanto
October 12, 1989
Page 4

on the subject of PCB because those materials were incredibly voluminous. You indicated, however, that we were to receive on Friday all internal memos on the subject of PCBs and other in house documents. We requested access to the remaining documents at Nevada Power at 8:00 a.m. on Monday morning, October 9. After checking with Nevada Power you determined the offices were closed on Monday and indicated we would not be able to review documents on Monday, but would be able to review documents on 8:00 a.m. on Tuesday, October 10. John Thorndal requested that Nevada Power house counsel meet us Tuesday morning so that any problems related to Nevada Power's willingness or ability to provide access to the documents could be immediately addressed and resolved by someone with authority on behalf of Nevada Power.

Following our telephone conversation of Friday afternoon, we received after 5:00 p.m. your response to the defendants' discovery requests and approximately 1,000 pages of documents consisting of two exhibits. Contrary to your representation to the court and to counsel, you asserted objections to six of the seven interrogatories propounded by Westinghouse. These six interrogatories are designed to determine the pieces of PCB equipment which you contend are involved in this lawsuit. How you can object that these interrogatories are beyond the scope of the limited discovery ordered by the court is inconceivable.

We discussed this matter on Tuesday morning at Nevada Power's offices while waiting for all counsel to assemble for the document review. At that time you indicated that you had spent all day Monday conferring with Thomas Kotoske and that your office was in the process of supplementing your discovery responses. However, you did not answer the question directly concerning whether or not you will provide the defendants with a comprehensive list of each item of PCB equipment which you contend was manufactured or sold to Nevada Power by the defendants which you claim is involved in this lawsuit. This matter needs immediate resolution. I posed this question again to Nik Skrinjarc in a telephone conversation last night and he indicated to me that your office would not be in the position to identify the pieces of equipment involved in this litigation until you had seen the documents. Nik indicated that once the documents had been pulled a review would be conducted by your office and he anticipated we could have a list of the equipment you claim is involved in this lawsuit by Tuesday, October 17, 1989. He indicated that your office had been handicapped by the fact that you had not previously seen these documents before the end of last week in preparation for a response to our discovery requests which incidently you have now had for over two months. He also

J. Randall Jones, Esq.
Re: Nevada Power v. GE, Westinghouse
& Monsanto
October 12, 1989
Page 5

indicated to me that the damage summaries previously provided to the defendants prior to the initiation of this lawsuit were incomplete in that Nevada Power keeps finding new pieces of PCB equipment "everytime they pull one and test it." From discussing this matter with Nik, it is my understanding that Nevada Power has very poor records with respect to documentation of the original dates of purchase, although the records are fairly good with respect to documentation of when pieces of equipment were tested, determined to be PCB equipment and removed.

You have indicated to John and I on several occasions that you are at a disadvantage in this lawsuit because we are effectively getting the documents to review before your office has seen them. While we appreciate the efforts you have made between Friday and Tuesday morning to expedite the document review and production process, it goes without saying that this was necessary as a result of your client's failure to timely respond to these document requests, and counsel's failure to adequately supervise the document production and discovery responses.

As you know, the Order required you to serve full and complete responses on Friday, October 6, 1989, and to propound whatever written discovery you deemed appropriate on the defendants. The Order also calls for taking substantive depositions beginning the week of October 16, 1989. Your failure to produce the documents as promised, and failure to answer interrogatories has made it impossible to take meaningful, substantive depositions the week of October 16, 1989. It is now 3:00 p.m. on Thursday afternoon and we still have not received hard copies of the first installment of documents which were supposed to be delivered to us yesterday morning. It is my understanding the second installment of documents in the possession of Mr. Fabbi were sent over yesterday to Kinko's Copy Service to be copied, and that you anticipated we would receive all of the documents by mid-afternoon today. I have had an attorney from Pittsburg in my office since 8:30 this morning prepared to review documents which have not yet arrived as promised.

As a result of the difficulties encountered in obtaining timely responses to discovery requests from Nevada Power in this action, the defendants have noticed the deposition of the person or persons most knowledgeable from Nevada Power on the subject matter set forth in the notice, pursuant to Rule 30(b)(6). This Notice of Deposition was served on Nevada Power because of the manner in which you have elected to produce documents in this case, and as a result of the discovery responses which have been made.

J. Randall Jones, Esq.
Re: Nevada Power v. GE, Westinghouse
& Monsanto
October 12, 1989
Page 6

We have a status check before Magistrate Leavitt tomorrow afternoon at 4:00 p.m. We intend to raise with the Magistrate the adequacy of your responses to the Request for Production of Documents, the manner in which the documents have been produced to date, and more importantly your objections to interrogatories in the face of your representation to the court and to the parties that no such objections would be interposed.

With respect to Nevada Power's answers to Westinghouse Interrogatories, we intend to raise with the Magistrate your objection to six of the seven interrogatories that the information requested is beyond the scope of limited discovery ordered by the court. We are willing to concede that information pertaining to the calculation of the damages or expenses may be deferred until after the Motion for Summary Judgment is heard, assuming we still have a case at that point. However, with respect to the remaining interrogatories and their subparts, this information is absolutely relevant to statute of limitations issues and must be answered.

With respect to your response to Westinghouse Electric Corporation's First Request for Production of Documents, it is evident that very little thought or advance preparation went into the response. Forty-two separate requests for production of documents were made. You produced two exhibits consisting of approximately 1,000 pages of documents, the overwhelming majority of which are documents produced in prior non-related PCB litigation. The only documents which you produced from Nevada Power's files consist of a 1979 Nevada Power Company manual entitled "Polychlorinated Biphenols, PCB Control and Handling Procedures," and a 1985 Nevada Power manual entitled "Polychlorinated Biphenols, PCB Spill Prevention and Handling Procedures."

Your responses indicate that Exhibits 1 and 2 respond to document request nos. 1, 37, 38, 39, 40 and 41. With respect to the remaining Requests for Production of Documents you have answered uniformly that the documents are "numerous and consequently available for inspection." While this may be an accurate response with respect to certain categories of the Request for Production of Documents, it cannot possibly be an accurate description of the state of Nevada Power's documents with respect to many of the items requested in our Request for Production. For example:

J. Randall Jones, Esq.
Re: Nevada Power v. GE, Westinghouse
& Monsanto
October 12, 1989
Page 7

Request No. 8 which asks for communications with rate payers or customers concerning PCBs.

Request No. 11 - minutes of the Board of Directors or Shareholders of NPC referring or relating to PCBs.

Request No. 12 - reports submitted to the Board of Directors or Stockholders of NPC referring or relating to PCBs.

Request No. 16 - communications referring or relating to this lawsuit. You have objected on the basis of privilege, but have not identified the documents which you claim are privileged, or the nature of the privilege which you are asserting.

Request No. 17 - communications referring or relating to actual or potential claims concerning PCBs or PCB equipment. You have asserted attorney/client privilege and work product privilege but have not identified the documents you have withheld as you agreed to do.

Request No. 24 - documents establishing the job description of any employee of Nevada Power responsible for compliance with PCB regulations.

Request No. 25 - documents concerning any complaints, grievances or worker's compensation claims made for compliance with PCB regulations.

Request No. 26 - complaints by any customers of Nevada Power concerning PCBs or PCB equipment. Your response that the compliance plan is attached as Exhibit 2 is nonresponsive.

Request No. 27 - requesting documents concerning Nevada Power's activities in monitoring developments in PCB regulations.

J. Randall Jones, Esq.
Re: Nevada Power v. GE, Westinghouse
& Monsanto
October 12, 1989
Page 8

Request No. 28 - documents concerning Nevada Power's activities in monitoring compliance with PCB regulations.

Request No. 33 - technical and scientific papers or articles authored or co-authored by Nevada Power employees concerning PCBs or PCB equipment.

Request No. 42 - documents concerning plaintiff's consideration of any alternatives to compliance with PCB regulations.

While it is understandable that certain categories of documents requested may be voluminous, for example, purchase orders for equipment involved, it is inconceivable that Nevada Power cannot respond to a Request for Production of Documents which asks for such things as copies of technical or scientific articles authored by employees of Nevada Power; minutes of Board of Directors or Shareholders meetings of Nevada Power relating to PCBs and reports submitted to the Board of Directors or Shareholders of Nevada Power referring to PCBs. It is difficult, if not impossible, to believe that these documents are so voluminous that you are making them available for inspection and copying in lieu of producing them. Rather, it appears that Nevada Power did not review the Request for Production of Documents in sufficient detail or perform the necessary search for the information before these responses were given. It is the position of Westinghouse that we are entitled to more than a blanket response that the documents are voluminous and available for inspection and copying with respect to the document request numbers identified above.

I will be available this evening and all of tomorrow to discuss any of these matters and to determine whether we can come to a resolution of the specific matters. I am particularly interested in obtaining from you a representation concerning whether you intend to identify the pieces of PCB equipment which you claim are involved in this lawsuit, and if so, when that information will be provided. As I indicated, we are willing to compromise the responses with respect to the calculation of expenses and damages issues. However, identification of the equipment, the date of purchase, and the related information is absolutely relevant to statute of limitation issues and should be produced.

J. Randall Jones, Esq.
Re: Nevada Power v. GE, Westinghouse
& Monsanto
October 12, 1989
Page 9

I will await your response.

Respectfully,


Peggy Leen

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