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November 14, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Docket Nos. 50-445-2 and 50-446-2
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

CASE MEMORANDUM IN OPPOSITION TO LIPINSKY PRIVILEGE

Mr. Lipinsky claims the attorney-client privilege with respect to certain notes he made during meetings with counsel for Applicants. A pre-requisite for the claim of the privilege is the existence of an attorney-client relationship. The available facts indicate that no such relationship ever existed between Mr. Lipinsky and counsel for Applicants.

The alleged attorney-client privilege is claimed to have arisen on November 29, 1983 and to relate solely to Mr. Lipinsky's meeting with representatives of the NRC, which meeting eventually occurred on January 4, 1984 and was attended by MacNeill Watkins, an attorney for CPSES in these proceedings. Gallo Letter, November 14, 1984. First, far from accepting Applicants' attorneys as his attorneys, Mr. Lipinsky viewed his relationship with them to be adversarial. Second, there was every reason for Mr. Lipinsky to treat the relationship as adversarial since his interests and those of CPSES were and had

been opposed to each other. Third, Applicants' counsel could not have ethically had any attorney-client relationship with Mr. Lipinsky and it is contrary to public policy to assume now such a relation existed then. Finally, if Applicants' counsel established an attorney-client relationship it was with the corporation, O.B. Cannon, whose in erests were also adversarial with Mr. Lipinsky's.

1. Lipinsky Believed He And CPSES Were Adversaries.

As late as November 23, 1983 Lipinsky was dealing with Applicants' counsel as adversaries. In notes of a meeting held that day with NSR (Nick Reynolds) Lipinsky writes:

> Attorney position (who side are they representing?) -- Is OBC getting all info. (indications are no)
>
> * * *
>
> 50% shot to shut down if position reversed.
>
> * * *
>
> HOW? NOT IN OBC BEST INTEREST TO VOL. INFO. (DON'T MEAN TO BLIND SIDE UTLIITY BUT ATTORNEY WORKS FOR UTILITY NOT US)
>
> * * *
>
> OBC wants a hold harmless? OBC to cooperate but want two way street w/ TUGCO & TUSI.

In other notes made the same day, Lipinsky indicates his interest in showing Applicants' attorneys he is not out to get CPSES:

> RBR TO CALL NSR TO ASSURE THAT JJL HAS NO AXE TO GRIND AND IS WILLING TO PREFORM AN OBJECTIVE AUDIT

Lipinsky also noted on November 23 that he was upset because apparently Applicants' attorney was misreading O.B. Cannon views and misleading them about meetings:

JJL POINTED OUT TO JJN & RAT THAT INFO. IN INTERVIEWS WAS INACCURATE IN SOME AREAS AND/OR MISLEADING.

* * *

RBR ALSO SAID THAT OBC WAS SAND BAGGED AT LEAST TWICE

Five days later, on November 28th when Mr. Lipinsky is contacted by Frank Hawkins of NRC (Region III) for an interview he called Mr. Reynolds at the suggestion of RAT (Ralph Trallo) (Lipinsky Notes, 11/28/83) and the next day tells Hawkins that "NSR (TUGCO ATTORNEY) & F. HAWKINS (NRC = 1550 HRS. EXPLAINED TO F. HAWKINS THAT NSR REPRESENTS JJL ON THIS ITEM" (Lipinsky Notes, 11/29/83).

Finally, in his affidavit attached to the November 5, 1984 filing by O.B. Cannon, Lipinsky describes his relationship with Applicants' counsel as follows (¶3):

> I considered Messrs. Reynolds and Watkins as my attorneys in dealing with the NRC deposition matter.

These words are significant because they do not say that Lipinsky "retained" these lawyers and clearly he did not.

Having already established in his own mind the conflict between these lawyers and himself there is no rational possibility that Lipinsky freely and openly sought these attorneys and their advice. Rather he was led by Ralph Trallo to them and they in turn took over Lipinsky in order to control the NRC interview. At best Lipinsky became their witness, not their client. In the meeting with NRC on January 4 Watkins does not claim that he is Lipinsky's counsel and the NRC assumes he is not and asks Lipinsky if he will be inhibited by having Watkins present. Deposition, 4. As previously briefed, an attorney's

suggestions to a witness on how to testify are not privileged attorney-work product, particularly where it is the very conversation which may demonstrate improper pressure on a witness to alter his opinion.

That Lipinsky could not have overcome the adversarial relationship to become a client is buttressed by the selective use of the claim. How can Lipinsky be a client to talk to F. Hawkins of the NRC and a witness to talk to this Board? 1/ What is happening is that Lipinsky, without any free will of his own is being treated as client or witness or adversary whatever suits counsel for O.B. Cannon and/or Applicants. 2/

2. Lipinsky And CPSES Are Adversaries.

From the first moment the Lipinsky memo became public CPSES and Lipinsky have been at odds. Lipinsky's notes reflect the tension between them. Lipinsky Notes prior to November 10th meeting.

1/ Counsel for O.B. Cannon has indicated that he represents Norris and Lipinsky personally as well as O.B. Cannon. The Lipinsky notes make clear that this triple representation is ethically impossible since Lipinsky and Norris are clearly finger-pointing and adversarial, Lipinsky and Roth have been at odds on these issues and O.B. Cannon as an institution seeks to save its future while Lipinsky and Norris want to avoid perjury.

2/ Note the nature of the advice being given to Lipinsky by Mr. Watkins as disclosed by Lipinsky notes on August 1, 6, 7 and 8 with regard to subsequent meetings with Ms. Tang [sic] of the NRC for which no attorney-client relationship is claimed to exist. There is no material difference in the nature of the relationship except one is allegedly attorney-client and the other is not. We submit there never was an attorney-client relationship and that Applicants' attorneys at all times acted in the inerest of their only client -- CPSES.

Even now it is apparent that he is not acting at his own free will when dealing with CPSES. His pre-filed testimony (11/15/84) discloses some important and substantive modifications in his previously filed affidavit -- an affidavit prepared with the "help" of CPSES attorneys. Lipinsky did not feel free to have these corrections made in the affidavit itself and only when he had some distance from CPSES did he make the corrections -- corrections which should have been obvious all along.

In addition this is a classic case of conflicting interests between Lipinsky and CPSES. Lipinsky has written two reports unconstrained by consultation with CPSES attorneys. (8/8/83 Trip Report and 10/31/83 Explanation of Trip Report and Answers to Chapman Questions) Both were highly critical of the CPSES paint coatings program. Obviously this is bad news for CPSES, particularly if it becomes an issue in the hearings. Actions by CPSES and its attorneys from that time on were directed at controlling the damage and produced anxiety and/or irrational actions by Lipinsky. The abrupt change in purpose of the November 9-11 O.B. Cannon site visit; Lipinsky's anxiety about the meeting; the frequently repeated O.B. Cannon and Lipinsky theme that only an audit would satisfy the Lipinsky concerns; and then the complete reversal of this view after meeting with CPSES lawyers as shown in Hawkins' meeting transcript and Lipinsky affidavit. Added to this were the financial pressures being applied by O.B. Cannon and CPSES. O.B. Cannon has to reduce its bill by one-half (Lipinsky Notes, 8/7/84); and then holds back the Lipinsky affidavit until they are paid their money (Lipinsky Notes, 5/25/84, 8/6/84, 8/8/84, 8/30/84).

The premise of this O.B. Cannon phase of the hearing is that CPSES may have unduly pressured Lipinsky and/or O.B. Cannon to change their opinion about CPSES paint coatings. To allow portions of relevant evidence to be excluded on the basis that O.B. Cannon and Lipinsky were so fully in agreement with CPSES that they used the same lawyer would severely corrupt the inquiry and defeat its purpose. The claimed privilege assumes the evidentiary conclusion the hearing is designed to explore. Without all the evidence the hearing record will be significantly deficient. The present record continues to strongly indicate that CPSES and its attorneys pressured Lipinsky to alter his position. Significant corroboration of that conclusion may be contained in the notes being withheld by O.B. Cannon as well as the notes being withheld by CPSES.

3. Applicants Attorneys Would Have Acted Unethically If They Represented Lipinsky

The Model Code of Professional Responsibility (ABA, 1979) unequivocally forbids an attorney from representing two clients with "differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant." EC 5-14. "A lawyer should never represent in litigation multiple clients with different interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests." EC 5-15. The interests of Lipinsky and CPSES were and are differing. CPSES wants an operating license as soon as possible. Opinions of experts that

paint coatings may be defective and may not be subject to correction without a complete re-work interfere with that goal.3/ Lipinsky has expressed those opinions and has indicated that only with a thorough audit could the doubts be removed. CPSES is and has been unalterably opposed to any such audit. Lipinsky's interest is truthfully reporting his opinion regardless of its impact on CPSES. At the time that Applicants' counsel is said to have begun to represent Lipinsky these differing interests were clearly present. See, e.g., November 28, 1983 Trallo memo to Roth.

Surely when Lipinsky shared confidences with Applicants' counsel if they were of legitimate interest to CPSES Applicant would be bound to share those confidences with CPSES.4/ To whom did counsel owe its loyalty?

Disciplinary Rule D.R. 5-105 relates to the full disclosure requirement prior to representation. This record is devoid of any evidence of such full disclosure either to Lipinsky or to CPSES. In fact Lipinsky didn't even know that O.B. Cannon had retained Applicants' counsel for him and was paying the fees until after the representation had ended.5/ Lipinsky Affidavit 11/5/84, Paragraph 4. But D.R. 5-105(c) only provides an

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3/ Applicant is of course free to ignore contrary opinion but once that opinion becomes public a conflict between the expert and the Applicant are obvious.

4/ Such disclosure would destroy the attorney-client privilege if it existed, particularly if the confidence was shared with CPSES employees below the corporate officer level.

5/ If the Lipinsky relationship with Applicants' counsel was attorney-client then Lipinsky's disclosure of his communications with those attorneys to Roth waived that privilege. See Lipinsky Notes from November 29, 1983 through January 5, 1984.

opportunity for multiple representation with full disclosure where there is a possibility of differing interests. Where the differing interests are real the dual representation is prohibited. EC 5-14 and 5-15.

Inasmuch as counsel could not have ethically represented both interests, and no clear attorney-client relationship was ever established it would be inappropriate for this Board to assume that counsel for Applicant acted unethically but rather the Board should conclude that no attorney-client relationship ever was established and that attorneys from CPSES spoke to Lipinsky solely in their capacity as counsel for CPSES.

4. Alternatively, O.B. Cannon and Not Lipinsky Retained Applicants' Counsel

In his letter of November 14, 1984, Mr. Gallo discloses that it was originally decided that Lipinsky's legal fees would be paid by O.B. Cannon or TUGCO and in November, 1984 Lipinsky learned that O.B. Cannon had paid the fees. Was Lipinsky represented by these lawyers? We submit he was not as evidenced by the following:

1) Apparently the lawyers were prepared to take their fees from TUGCO or O.B. Cannon suggesting Lipinsky was not the client.

2) Lipinsky talked to Applicants' lawyers at Trallo's suggestion and did not independently seek them out. (Lipinsky Notes, 11/28/83)

3) Lipinsky and O.B. Cannon did not have an identical or even compatible interest. Cannon wanted to avoid placing itself in an adversarial relationship with its clients (see Roth to Reynolds, November 28, 1983) and Lipinsky wanted to defend his judgments (see October 31, 1983 memo to Roth on Chapman concerns) and avoid perjury which he felt Roth was pushing him to commit. (Lipinsky Notes, 11/15,18/83)

4) Lipinsky was clearly concerned he would lose his job as a result of the Trip Report (Lipinsky Notes, 11/14/83) and felt a real conflict with O.B. Cannon appearing to "cover up". (Lipinsky Notes, 11/17/83)

5) In a memo to Roth on February 24, 1984 Lipinsky indicates that "Unless directed to the contrary" he will forward a copy of comments/corrections to Watkins (hardly the attitude of a client toward his own attorney).

How could it be rationally concluded that Lipinsky was the client of these lawyers who obviously were joining O.B. Cannon and TUGCO as common clients to fight and reduce the damage caused by Lipinsky.6/ Throughout this process Lipinsky pictures himself as one who is afraid of TUGCO and reluctant to meet with them on November 10th, afraid of losing his job, afraid of having his boss force him to commit perjury, afraid that Applicants lawyers are misleading him and misrepresenting meetings he attends and generally afraid because of the furor created by the unintended disclosure of his August 8 Trip Report. Obviously he needed legal help. How could any rational person believe that he got that legal help from attorneys who had a duty to disclose every confidence to those whose reactions to his August 8 Trip Report were the sources of his anxieties? O.B. Cannon paid for Applicants' lawyers to help O.B. Cannon keep tabs on and control Lipinsky.

6/ In his November 14, 1984 letter Mr. Gallo indicated that Lipinsky was advised by Reynolds that a conflict would arise during the NRC deposition if Lipinsky's testimony was "detrimental to the interest of Texas Utilities". He was told that if that occurred Reynolds would "interupt the deposition and withdraw his representation". Either Lipinsky had to give answers which were acceptable to T.U. or be left without counsel. This does not ameliorate a conflict, it creates one.

Conclusion

For the reasons given there is no legitimate attorney-client privilege which Lipinsky is entitled to claim to prevent disclosure of the notes he took of the meetings with Applicants' counsel.

Respectfully submitted,

ANTHONY Z. ROISMAN
Trial Lawyers for Public Justice, PC
2000 P Street, N.W., Suite 611
Washington, D.C. 20036
(202) 463-8600

Counsel for CASE

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Memorandum in Opposition to Lipinsky Privilege have been sent to the names listed below this 14th day of November, 1984, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

Administrative Judge Peter B. Bloch
U.S. Nuclear Regulatory Commission
4350 East-West Highway, 4th Floor
Bethesda, Maryland 20814

Herbert Grossman
Alternate Chairman
ASLB Panel
U.S. Nuclear Regulatory Commission
4350 East-West Highway, 4th Floor
Bethesda, Maryland 20814

Dr. Kenneth A. McCollom, Dean
Division of Engineering, Architecture
and Technology
Oklahoma State University
Stillwater, Oklahoma 74074

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

Ms. Ellen Ginsberg, Law Clerk
U.S. Nuclear Regulatory Commission
4350 East/West Highway, 4th Floor
Bethesda, Maryland 20814

Nicholas S. Reynolds, Esquire
Bishop, Liberman, Cook,
Purcell & Reynolds
1200 17th Street, N.W.
Washington, D.C. 20036

Stuart Treby, Esquire
Geary S. Mizuno, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
7735 Old Georgetown Rd., 10th Floor
Bethesda, Maryland 20814

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Renea Hicks, Esquire
Assistant Attorney General
Environmental Protection Division
Supreme Court Building
Austin, Texas 78711

Mrs. Juanita Ellis
President, CASE
1426 S. Polk
Dallas, Texas 75224

Joseph Gallo, Esquire
Isham, Lincoln & Beale
1120 Connecticut Avenue, N.W.
Suite 840
Washington, D.C. 20036

ANTHONY Z. ROISMAN