

ORIGINAL

UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 50-445-OL2
50-446-OL2

TEXAS UTILITIES GENERATING COMPANY, et al.

(Comanche Peak Steam Electric Station,
Units 1 and 2)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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TEXAS UTILITIES GENERATING COMPANY, : Docket Numbers
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50-445-OL2
(Comanche Peak Steam Electric : 50-446-OL2
Station, Units 1 and 2) :
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Nuclear Regulatory Commission
4350 East/West Highway
Room 550
Bethesda, Maryland

Friday, November 16, 1984

The telephone prehearing conference in the above-entitled
matter convened at 10:00 a.m.

BEFORE:

PETER BLOCH, Chairman
Atomic Safety and Licensing Board

HERBERT GROSSMAN, Member
Atomic Safety and Licensing Board

APPEARANCES:

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6 ALSO PRESENT:

7 JOSEPH GALLO, ESQ.
8 Isham, Lincoln & Beale
9 1120 Connecticut Avenue, N.W.
10 Washington, D. C.

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PROCEEDINGS

2 JUDGE BLOCH: Good morning, this is operating
3 licensing proceeding for the Comanche Peak nuclear power
4 plant. In today's prehearing conference we're dealing with
5 questions that have arisen in the incrimination and
6 harrassment portion of the proceeding, which is indicated by
7 the docket number, plus the dash 02 designation.

8 We have several matters for discussion in today's
9 conference call but before we get to the matters on the
10 agenda, the board will announce that it has reached a
11 determination on the privileges that are claimed for the
12 Lipinsky documents, both the attorney-client privilege and
13 the work-product privilege.

14 We will issue an order this afternoon which will
15 discuss these matters extensively and we will notify the
16 parties when the order is available. Our order will state
17 that documents 12, 13, and 14 listed in Texas Utilities
18 Electric Company's letter to the board of October 18, 1984,
19 are privileged and need not be disclosed.

20 In all other respects, privileges asserted by
21 O. B. Canon and by applicants with respect to any
22 O. B. Canon or Lipinsky documents is denied. Those
23 documents must be filed and delivered forthwith.

24 We found that the relationship between counsel
25 and Mr. Lipinsky should not be considered to be a legitimate

2 OMTpp

1 attorney-client privilege. We discussed extensively the
2 canons of ethics related to that and the necessary
3 components of the relationship between an attorney and a
4 client.

5 In addition, on the work-product privilege we
6 have several things that we discussed but we rely on the
7 importance of the information in this proceeding and discuss
8 somewhat extensively the context in which these privileges
9 are asserted before reaching the conclusion that the
10 balancing test requires that the documents that were claimed
11 to be privileged be subject to discovery.

12 To the matters from this morning's docket --

13 MR. GALLO: Judge Bloch, this is Joe Gallo.

14 JUDGE BLOCH: Yes, Mr. Gallo.

15 MR. GALLO: With respect to your ruling affecting
16 the attorney-client relationship between Mr. Lipinsky and
17 Mssrs. Reynolds and Watkins --

18 JUDGE BLOCH: Yes, that's the correct firm; yes.

19 MR. GALLO: I would move at this time that the
20 order for the production of documents forthwith be stayed,
21 pending interlocutory appeal to the Appeal Board to review
22 the order of the licensing board.

23 JUDGE BLOCH: What is the nature of the
24 irreparable injury you're claiming?

25 MR. GALLO: That if the documents are disclosed

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1 forthwith, any appeal on the issue would be compromised and
2 would be mooted by the disclosure of the document.

3 JUDGE BLOCH: That's clearly the case. But in
4 the case, for example, of proprietary documents there could
5 be a large loss that's never recoverable. Could you tell me
6 more about what the nature of the loss is in this instance?

7 MR. GALLO: No. Mr. Lipinsky's interest is to
8 maintain the confidentiality of the advice and discussions
9 that he had with Counsel. I can think of no greater
10 interest, no greater matter of importance than to maintain
11 the integrity of the lawyer-client relationship, in this
12 case, on behalf of Mr. Lipinsky. That relationship would be
13 jeopardized and, indeed, rendered a nullity by the
14 delivering up of the documents forthwith.

15 JUDGE BLOCH: Okay, we have a new agenda item
16 which is Mr. Gallo's motion. Would the other parties
17 respond in order? Mr. Roisman, would you like to address
18 the motion for stay?

19 MR. ROISMAN: Yes, I will, Mr. Chairman.

20 JUDGE BLOCH: Could you speak up, please,
21 Mr. Roisman?

22 MR. ROISMAN: Yes. I'm speaking fairly loudly
23 now; are you still having trouble?

24 JUDGE BLOCH: No, that's very good.

25 MR. ROISMAN: Okay. It seems to me that the

1 OMTpp

1 argument that Mr. Gallo makes would apply to every single
2 request involving documents with respect to which the
3 privilege of attorney-client is claimed. That is, that the
4 only argument that he makes is that every time there's a
5 claim of attorney-client privilege it must always be stayed
6 until the highest legal authority, I assume in this case the
7 United States Supreme Court, has ruled one way or another.

8 Clearly, that is not the rule of law and absent
9 Mr. Gallo presenting something specifically describing
10 something about what's contained in those notes that would
11 lead us to believe that there is some special harm that
12 would be suffered by Mr. Lipinsky. It seems to me that it
13 is a groundless request for a stay because it presents no
14 ground that's any different than could be made in any other
15 proceeding.

16 So, I don't think he's given us a reason for
17 granting a stay in this case, much less taking the
18 interlocutory appeal.

19 MISS GARDE: This is Miss Garde. Let me
20 supplement, please, Mr. Roisman's comment.

21 JUDGE BLOCH: This is a little extraordinary.
22 why --

23 MR. GALLO: I'm going to object to that
24 procedure, Mr. Chairman. This is Joe Gallo.

25 As I understand the parties to this proceeding --

1 OMTpp

1 it's Applicants, Mr. Roisman, and the Staff. And in all
2 proceedings that I've been involved with in this case,
3 Mr. Roisman has represented the Intervenors in this matter.

4 JUDGE BLOCH: Miss Garde, is there some special
5 reason to make reason to make an exemption from the rule
6 that there's one Counsel for each party?

7 MR. ROISMAN: Mr. Chairman, let me state as to
8 that reason. I'm in Houston; Miss Garde is in Washington.
9 The legal research has been done by Miss Garde. And the
10 only way for us to participate effectively the argument is
11 for her to provide legal citations or references to
12 particular legal authority.

13 JUDGE BLOCH: Okay. She has done legal research
14 on stay criteria?

15 MR. ROISMAN: She's done legal research on the
16 issues of privilege. And, I assume, that she has some
17 information on that.

18 JUDGE BLOCH: Have you done legal research on the
19 stay criteria, Miss Garde?

20 MISS GARDE: Yes, I have, Judge. And, also, on
21 the canon of ethics and the bar cases regarding the matters
22 that I'm sure you will discuss in you order this afternoon.

23 The only comment that I wanted to make was that
24 one of the --

25 MR. GALLO: Mr. Chairman, is she going to be

1 OMTpp 1 permitted to speak now under the guise of answering your
2 question?

3 JUDGE BLOCH: I think if she has citations to
4 standards of law, the Board is interested in hearing them.

5 MR. GALLO: She only has a comment; she doesn't
6 have citations to --

7 JUDGE BLOCH: What we want is citations to
8 standards of law, Miss Garde.

9 MISS GARDE: Yes, sir.

10 MR. ROISMAN: This is Mr. Roisman. Mr. Gallo's
11 tone is insulting. He, perhaps, is not aware that Miss
12 Garde is also an attorney in this proceeding for purposes of
13 the proceeding. She is not only a law clerk. She also
14 conducts cross-examination and may well cross-examine some
15 of Mr. Gallo's punitive clients.

16 JUDGE BLOCH: Okay. I did not find --

17 MISS GARDE: Please treat her as an attorney and
18 not in the tone in which he's dealing with her. I find it
19 offensive.

20 JUDGE BLOCH: Mr. Roisman, I did not find
21 Mr. Gallo's comments particularly offensive, although, I see
22 in looking at my fellow Judge that there's some disagreement
23 even among us. I do think we should keep in mind, this
24 morning, that the matters being discussed are matters of
25 great tension, and great importance to everybody, and we

1 OMTpp 1 should avoid all comments addressed to other lawyers that
2 might be considered insulting and we should be very careful
3 to maintain an appropriate tone for this proceeding.

4 MR. GALLO: Mr. Chairman, can I address that --
5 Mr. Roisman's comments. This is Gallo.

6 JUDGE BLOCH: Well, this is only to the extent
7 that he's mentioned your tone of voice?

8 MR. GALLO: Well, yes, that's -- and I will
9 limit myself to that. The necessity of leaping and barking
10 as I did was as a result of the fact that the point I was
11 trying to make would have been lost because the comment was
12 about to come forward. And in my exuberance to make sure
13 that I wasn't compromised on my objections, that accounted
14 for my tone of voice. Not because Miss Garde is anything
15 other than a proper person in terms of her general,
16 all-around conduct.

17 JUDGE BLOCH: Thank you, Mr. Gallo. The Chairman
18 did feel that way about it and there is some agreement on
19 the Board about that at this point.

20 Now, Miss Garde, legal citations related to the
21 standard on a stay?

22 MISS GARDE: Well, sir, in referring to the
23 standard of the stay under 10CFR, one of the criteria is, of
24 course, whether or not the party will prevail on the
25 merits. And in response to that, I draw your attention to

1 OMTpp 1 the case of Valley Title v. Superior Court of Santa Clara
2 County 177 California Reporter 643.

3 JUDGE BLOCH: Is it a California State Case?

4 MISS GARDE: Yes, sir.

5 And Tarone v. Smith, the 9th Circuit Case.

6 JUDGE BLOCH: Tarone v. Smith?

7 MISS GARDE: Yes, sir. 621 Fed. 2nd, 994.

8 JUDGE BLOCH: And what does this last case stand
9 for; and what's the year?

10 MISS GARDE: 1981.

11 JUDGE BLOCH: And what does this latter case
12 stand for?

13 MISS GARDE: Both of the cases, sir, deal
14 extensively with a question of attorney-client privilege
15 between former clients and current clients where their
16 interests are in conflict. I cite the cases, as I said,
17 because I don't think, after reviewing these cases in
18 detail, that Mr. Gallo's stay will prevail on the merits of
19 legal authority.

20 JUDGE BLOCH: Okay. These actually are cases
21 that do not deal with a criteria. They deal with the merits
22 of a matter you previously filed on?

23 MISS GARDE: Yes, sir.

24 JUDGE BLOCH: Okay. Okay. Just a moment.

25 (Pause.)

1 OMTpp

1 JUDGE BLOCH: Okay. Now, the Staff, please?

2 Let's have -- sorry, Applicants first.

3 MR. WATKINS: Judge Bloch, this is Mr. Watkins.

4 We'd support a stay at least for as long as it

5 takes to take this matter to the Appeal Board which, I

6 think, can be probably resolved today.

7 JUDGE BLOCH: Okay. The problem with that is that

8 we won't have the order ready for you to pick up until about

9 1 o'clock. Just one moment.

10 (Pause.)

11 JUDGE BLOCH: Mr. Gallo, do you agree that a stay

12 until 5 o'clock this afternoon would be adequate?

13 MR. GALLO: No. I need more time than that to

14 prepare the necessary papers to go to the Appeal Board. I

15 see no need for an abbreviated time to consider this matter.

16 The documents involved are not lengthy in nature. The

17 licensee board knows what the documents are by

18 identification.

19 Secondly, if the documents are disclosed and if

20 it's necessary to recall the witnesses, so be it. That's

21 the nature of the proceeding. I see no reason --

22 JUDGE BLOCH: Okay. All I asked you was whether

23 this afternoon was enough. I wasn't inviting reargument.

24 MR. GALLO: All right. I would like to address,

25 at some point, the argument -- the question of likelihood to

1 OMTpp

1 succeed on the merits.

2 JUDGE BLOCH: Okay.

3 MR. GALLO: I won't advance --

4 JUDGE BLOCH: I don't know how you can do that
5 before you see the Board's order.6 MR. GALLO: Well, that's the observation I was
7 going to make, your Honor. Now, I no longer need to comment
8 on that point.

9 JUDGE BLOCH: Mr. Watkins?

10 MR. WATKINS: Yes, sir.

11 JUDGE BLOCH: Would you like to continue?

12 MR. WATKINS: I believe Mr. Gallo has shown at
13 least a colorable claim of harm and weighing things in the
14 balance, again, I see no harm in a stay at least until he
15 can take the matter to the Appeal Board again. I don't
16 think that will be that time consuming.17 JUDGE BLOCH: Well, on the other hand, Mr. Gallo
18 does, and I don't see how I can accept your representation
19 on that. I suppose we could rule that he should be able to
20 file by 5 o'clock this afternoon.21 MR. WATKINS: We would support your Honor's
22 suggestion that a stay be issued until 5 then.

23 MR. ROISMAN: Mr. Chairman, this is Mr. Roisman.

24 JUDGE BLOCH: Yes, sir.

25 MR. ROISMAN: At some time if the Board is into

1 OMTpp

1 that issue I would like an opportunity to address the
2 question of if a stay is granted, how long it will be
3 granted for and when arguments will be made before the
4 Appeal Board.

5 JUDGE BLOCH: Okay. There's a somewhat novel
6 question here. Is the same standard applicable to a stay
7 until this afternoon, Mr. Roisman, as would be applicable to
8 a somewhat longer stay?

9 MR. ROISMAN: It doesn't seem to me that the
10 standard should be any different. I wasn't going to address
11 that. I was going to address if you're going to give a
12 stay, my position on how long the stay should be.

13 JUDGE BLOCH: Okay. Mr. Watkins, have you
14 concluded your discussion?

15 MR. ROISMAN: -- unrelated to whether there
16 should be a stay?

17 JUDGE BLOCH: I'm sorry, your last comment was
18 cut off, Mr. Roisman.

19 MR. ROISMAN: I want to address the question not
20 whether there should be a stay -- I've already said -- and
21 Miss Garde has already said all we want to say on that. But
22 if you decide there should be a stay, there's still a
23 separate issue dealing with the procedural rights of the
24 parties as to how long the stay remains in effect. Or, to
25 put it differently, when the parties have the opportunity to

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1 deal with the Appeal Board. The 5 o'clock stay raises
2 certain problems which at an appropriate time I will
3 address.

4 JUDGE BLOCH: Okay. One moment.

5 (Pause.)

6 Staff, please?

7 MR. TREBY: Yes, Staff supports the motion for
8 stay. We would refer the Board to 10CFR 2.788 E, which
9 contains the criteria for granting a stay. These four
10 criteria come out of the Virginia Jawbers case.

11 We have briefly discussed the first criteria,
12 which is whether the moving party has made a strong showing
13 that is likely to prevail on the merits. That is something
14 that cannot be addressed at this time until we do see the
15 licensing board's decision.

16 The second criteria is whether the party will be
17 irreparably injured unless the stay is granted. Staff
18 agrees with Gallo that disclosure of these documents may
19 cause irreparable injury to Mr. Lipinsky. It should not be
20 done forthwith until there has been a determination made
21 that these documents are necessary to be turned over.

22 Third criteria is whether the grant of a stay
23 would harm the other parties. As has been pointed out here,
24 a list of the withheld documents are available to all
25 parties. There is a very brief description on that list of

3 OMTpp

1 what is contained in those documents. The Staff recognizes
2 that we are about to go to hearing on Monday on these
3 matters and that this might harm the parties in not having
4 the documents.

5 On the other hand, we do have the prefiled
6 testimony, do have extensive documents which have already
7 been provided on discovery and on balance the Staff does not
8 believe that the need of the parties for these documents on
9 Monday outweighs the potential harm to Mr. Lipinsky.

10 In saying this the Staff is aware that should new
11 information be available, that could always be a reason for
12 holding for the hearing.

13 And finally, where the public interest lies, the
14 Staff would say that the public interest at this point
15 anyway, lies in preserving Mr. Lipinsky's documents and
16 their confidentiality as far as he is concerned.

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JUDGE BLOCH: May I ask from any of the parties whether there is a precedent of any stay having been granted with respect to an order for the disclosure of documents alleged to be privileged under attorney-client privilege, have we any case that we can go to?

6 This was not a matter that was unable to be anticipated by the parties.

8 (No response.)

9 JUDGE BLOCH: I do not hear an answer so my conclusion is that none of the parties have such a citation at this time.

12 It is the Board's decision that we will modify the order that we are about to issue in light of this discussion, but that a stay is not appropriate. The order will be modified to require that the documents be delivered at noon tomorrow.

17 Mr. Roisman, where would you like the documents delivered to?

19 MR. ROISMAN: You should ask that of Ms. Garde. They certainly could not reasonably be delivered here.

21 JUDGE BLOCH: Ms. Garde.

22 MS. GARDE: To my home.

23 JUDGE BLOCH: Would you like to give the address?

24 MS. GARDE: Yes.

25 JUDGE BLOCH: Do applicants know the address?

1 OMT/bc

1 MS. GARDE: I don't think so, sir.

2 JUDGE BLOCH: Would you prefer to let them know
3 later or let them know on the record?

4 MS. GARDE: I'll let them know later.

5 MR. GALLO: Now, Judge Bloch, if it's Culpepper,
6 Virginia, I've got a problem with that.7 JUDGE BLOCH: It's in Washington, isn't it,
8 Ms. Garde? The Washington area?

9 MS. GARDE: Yes, sir.

10 JUDGE BLOCH: Okay. And my address for home
11 delivery to me is 3270 Aberfoyle Place, N. W., Washington,
12 D. C. 20015.13 I believe Dr. Jordan's address is known to the
14 parties. I assume that the mailing to him will be by
15 express mail. And Mr. Grossman's address is 1404 Arborview
16 Road, Silver Spring, Maryland. The copies to my house, one
17 of them for Ms. Ginsburg.18 Staff, do you want to arrange for where the
19 service would be on you?20 MR. TREBY: We will contact Mr. Gallo after this
21 conference call and give him an address.22 JUDGE BLOCH: And, Mr. Watkins, I assume you can
23 arrange with Mr. Gallo?24 MR. WATKINS: Judge Bloch, a point of
25 clarification. I believe this order extends only to the

1 OMT/bc 1 attorney-client documents.

2 JUDGE BLOCH: No, it does not. It extends to the
3 work product privilege claim.

4 MR. WATKINS: Fine.

5 JUDGE BLOCH: Except for the three name documents
6 that I read off.

7 MR. WATKINS: Understood.

8 We have a separate problem to raise whenever we're
9 through with this.

10 JUDGE BLOCH: You mean the stay order that we've
11 just issued? The denial of the stay applies only to that,
12 although the deadline for filing of all the documents will
13 be noon tomorrow.

14 MR. WATKINS: Understood. That clarifies my
15 question.

16 JUDGE BLOCH: Okay.

17 MR. WATKINS: But we do have one further matter
18 when we're through with this.

19 JUDGE BLOCH: At least one. Mr. Watkins, you have
20 one that has priority on the docket?

21 MR. WATKINS: It involves the production of
22 documents, your Honor.

23 JUDGE BLOCH: Please.

24 MR. WATKINS: Do you want it now?

25 JUDGE BLOCH: Yes.

2 OMT/bc 1

MR. WATKINS: Okay. As we observed in our filing on November 7, even if the board orders production of documents there is a caution -- and this is included in Section 2.740B-2 -- in ordering discovery of such materials when the required showing has been made, my reading of the board's order is it finds that the showing has been made.

The presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, legal theories of an attorney or other representative of the party concerning the proceeding.

Some of the material in those trial preparation documents reflects exactly that, the theories and opinions of counsel.

JUDGE BLOCH: You already argued that, too. Until you see our order, I think you won't know the grounds for our denial, but...

MR. WATKINS: Well, is the board just ordering wholesale production without such production? That is our concern, because we would like to delete those parts of the memoranda, letters and other documents.

JUDGE BLOCH: Okay. Now there was some memoranda that we excluded from our order.

MR. WATKINS: That's correct but those were strictly attorney work product.

JUDGE BLOCH: That's correct.

1 OMT/bc 1

MR. WATKINS: This is a different matter. This is
2 a different concept.

3 JUDGE BLOCH: Or the impression of only part of
4 the work product claim.

5 MR. WATKINS: That's correct. What I'm saying is
6 some of the documents, for examples, notes of a phone
7 conversation, Mr. Lipinski might have noted that Mr. Watkins
8 offered his opinion regarding strategy or something else,
9 that is the opinion of the attorney; that's not attorney
10 work product. But it does cover the mental impressions and
11 opinions of counsel. And that is...

12 JUDGE BLOCH: Yes, but Mr. Watkins, those, in this
13 context, the reason for overriding the privilege is that it
14 relates to the question at issue, which is the way in which
15 Mr. Lipinsky may have modified what he was saying from the
16 time immediately before he became a client of the firm to
17 the time that he spoke to the NRC and subsequently filed
18 testimony that was favorable to Tug Gulch.

19 MR. WATKINS: Your Honor, we understand perfectly
20 and we accept the board's ruling as to our claim of an
21 absolute privilege for work product. I mean, for materials
22 prepared in connection with litigation. This is a separate
23 question. It's a two-part process.

24 First, have intervenors made the showing necessary
25 for production of these documents? Now the Board has ruled

1 OMT/bc

1 that they have.

2 The second step, in the last sentence of the
3 regulation that I cited, is that in ordering the production
4 of the documents, the Presiding Officer shall take care that
5 the production does not include the mental impressions, the
6 conclusions or the opinions of counsel.

7 JUDGE BLOCH: Okay. To the extent that you have a
8 separate claim of that kind and wish to deliver documents
9 to us this afternoon by 3 o'clock, we'll examine the
10 documents to see if that is the case.

11 MR. WATKINS: But we suggested that perhaps we can
12 explore an alternative, which was moving for a special
13 master. The reason for that is that the caution, the
14 limited privilege included in that sentence, does us
15 absolutely no good if we go ahead and disclose to the Board
16 our mental impressions and conclusions.

17 JUDGE BLOCH: Our problem with appointing a
18 Special Master is the difficulty of, first of all, getting
19 agreement of the parties to whom the Special Master is; and,
20 second, the cumbersomeness of having him informed of the
21 entire factual situation involved; and the delay it would
22 necessarily entail. So we are not inclined to appoint a
23 special master, but we will permit you to give us documents
24 by 3 o'clock with a claim that they are mental impressions;
25 that is, particularly if they are mental impressions that

1 OMT/bc

1 are not related to the question of how the testimony was
2 changed.

3 MR. WATKINS: Understood. Why don't we do
4 it...well, we will deliver to you all documents? Or, just
5 those --

6 JUDGE BLOCH: Just those that you'd like us to
7 rule on as the result of an in camera examination.

8 MR. WATKINS: In some of these cases, it will
9 involve just bracketing sentences or perhaps paragraphs of
10 documents. We'll have that for you by 3.

11 JUDGE BLOCH: Good.

12 MR. ROISMAN: Mr. Chairman, this is Mr. Roisman.

13 JUDGE BLOCH: Yes, Mr. Roisman.

14 MR. ROISMAN: May I say something just in response
15 to the underlying premise of the request that's been made by
16 Mr. Watkins?

17 JUDGE BLOCH: Please.

18 MR. ROISMAN: As I understand the provision of the
19 regulation, a prerequisite to the reduction is that it be
20 determined in the first instance that we are dealing with
21 trial preparation material or attorney work product. So
22 that when the Board does its examination, it must decide
23 whether what its looking at represents that. It is
24 certainly possible on the stated facts as we know now the
25 conversation between the utilities counsel and Mr. Lipinsky

2 OMT/bc

1 were not trial preparation materials in conjunction with the
2 preparation of a witness, but rather were the efforts of the
3 company to examine a potentially hostile witness and, thus,
4 they would not be entitled to any protection if they should
5 have known to that potentially hostile witness what were
6 their mental impressions, anymore than if they'd made it
7 known to me or to the staff counsel, or to one of our
8 experts or their experts.

9 JUDGE BLOCH: Okay. And, Mr. Watkins, would you
10 like to give us some advice prior to our examining the
11 documents?

12 MR. WATKINS: I don't necessarily disagree with
13 what Mr. Roisman says. I think it will be clear when you
14 get the documents that they related to the preparation of
15 materials for trial. And the only thing as to which we will
16 claim it's limited privilege is the opinions, mental
17 impressions and conclusions of counsel.

18 So examine them, sure, to see whether they are in
19 fact trial preparation materials. Our position is they are.

20 JUDGE BLOCH: Okay, we will do that.

21 MR. TREBY: Well, the staff would just like to
22 draw the Board's attention to two cases. One is In Re:
23 Murphy at 560 Fed 2d 326 of the 8th Circuit. It's a 1977
24 case. And the Supreme Court case of Upjohn Company versus
25 the United States at 101 Sureme Court 677, 1981. Both

1 OMT/bc 1 those --

2 JUDGE BLOCH: What was the page cite there?

3 MR. TREBY: 677.

4 JUDGE BLOCH: Yes.

5 MR. TREBY: The 1981 Supreme Court decision.

6 JUDGE BLOCH: We rely on In Re: Murphy but we do
7 not rely on Upjohn. So tell us about Upjohn in particular.

8 MR. TREBY: All right. In Upjohn, the Supreme
9 Court expressly declined to decide the question of whether
10 the protection afforded to opinion work product is
11 absolute. This is at 688. The Court made clear, however,
12 a far stronger showing of necessity and unavailability by
13 other means than is required for the disclosure of factual
14 work product would be necessary.

15 JUDGE BLOCH: Okay. And what is it you think In
16 Re: Murphy stands for?

17 MR. TREBY: In our view, we think that In Re:
18 Murphy stands for the holding that opinion work product
19 enjoys a fairly absolute immunity and can be discovered only
20 in very rare and extraordinary circumstances.

21 That's the language of the Court at page 336.

22 JUDGE BLOCH: Yes, we're familiar with that
23 language and I think we actually quote it in discussing our
24 Order. Yes, we do in fact quote that specific language
25 you've just read.

1 OMT/bc 1

2 Now there are three motions pending and prior to
3 the consideration of Mr. Watkins' motion, which logically
4 still seems to the Board to be first, despite Mr. Gallo's
5 telephone call this morning, we think we ought to hear
6 Mr. Roisman's presentation of the grounds for
7 incompatibility of interest between Mr. Norris and
8 Mr. Lipinsky and the grounds for incompatibility of interest
9 between O.B. Cannon and Mr. Lipinsky. And then that will
10 set the stage for being able to decide whether it is or is
11 not appropriate to defer action along the lines that
12 Mr. Watkins had suggested.

13 Mr. Gallo, do you have an objection to that way of
14 proceeding?

15 MR. GALLO: That was the approach that I would
16 have suggested, your Honor. I have no objection.

17 JUDGE BLOCH: Thank you.

18 Any other objections?

19 (No response.)

20 There being none, Mr. Roisman...

21 MR. ROISMAN: Mr. Chairman, so that we don't run
22 into this problem again, I would like the argument to be
23 divided between my laying out of the generic issue and
24 discussing the --

25 JUDGE BLOCH: You stepped back from the phone
again.

1 OMI/bc 1

MR. ROISMAN: I'm sorry.

2

My laying out of the generic issue and the setting out of the facts of concern, Ms. Garde has done the legal research. And I would like her to finish by identifying to the Board in discussing those cases.

3

4

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JUDGE BLOCH: Okay, let's proceed in that fashion.

7

MR. WATKINS: Your Honor, Mr. Watkins here.

8

JUDGE BLOCH: Yes, sir.

9

MR. WATKINS: As I understood it, you've just asked Mr. Roisman to lay out the factual basis for the conflict, not the legal basis?

10

11

12

JUDGE BLOCH: No, I would like to have both, Mr. Watkins. Would you like him to keep the law a secret?

13

14

MR. WATKINS: We're essentially arguing his motion now? Is that...?

15

16

JUDGE BLOCH: He's got to present his motion. We'll be arguing it only if we decide to go ahead to answer. But he's got to lay out the grounds for his motion.

17

18

Would you prefer that he keep part of the grounds secret, Mr. Watkins?

19

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MR. WATKINS: No, I misunderstood your instructions. I thought you had wanted him to lay out the facts.

22

23

24

JUDGE BLOCH: Okay. Mr. Roisman.

25

MR. ROISMAN: The motion is the existence of a

2 OMT/bc

1 conflict. It is not the potential existence of a conflict.
2 We don't have any question. We don't think any party could
3 legitimately argue and, in fact, I would design to stand on
4 what's already been said on this. The parties in effect
5 cede that there's a potential conflict and everybody's
6 agreed to withdraw and stand aside if that should happen.

7 Our concern is that there is a conflict and that
8 the ethical consideration, particularly No. 15, which we
9 have identified to the parties before under the general
10 canon 5, prohibits the establishment of an attorney-client
11 relationship where there's a conflict.

12 So the question then is what is it that makes it a
13 conflict?

14 First of all, there are two. Number one, the
15 nature of what it means to represent a client. As counsel
16 for a client, you must have the client's cooperation. That
17 means that the client must tell you secrets, the things the
18 client has not told anyone else. Share with you the
19 confidence.

20 Now what that means in the context of Mr. Lipinsky
21 is that to whatever extent Mr. Lipinsky has confidential
22 views or facts regarding the conduct of O.B. Cannon, of
23 Mr. Norris, of Mr. Roth, who appeared to be the chief
24 executive officer for the company, regarding these matter,
25 facts that are not previously known, events that they may

1 OMT/bc

1 not even know that he knows about, contractual
2 relationships, telephone calls, whatever, he must disclose
3 that to his counsel.

4 And his counsel would be expected to get that
5 information.

6 Conversely, the O.B. Cannon people must disclose
7 and Mr. Norris must disclose their confidence, cognizances
8 that relate to whatever Mr. Lipinsky may have done, things
9 that he may have said that no one else knows about, that he
10 doesn't realize that they know about. Conversations that he
11 had, memos that he wrote or notes that he took which are not
12 produced but which are actually in existence that they know
13 about and he doesn't know that they know about.

14 But there is inherently a full opening up. Now
15 that creates the conflict because of the nature of the issue
16 that's presented here. The issue that's presented here is
17 whether or not Mr. Lipinsky has actually found problems at
18 the Comanche Peak site, which he was pressured into
19 recanting, pressured both by Comanche Peak and/or by
20 O.B. Cannon. And, thus, there is set up a conflicting goal
21 of the two entities -- Mr. Lipinsky on the one hand, and
22 O.B. Cannon and Mr. Norris on the other.

23 For instance, in the notes that we already have,
24 Mr. Lipinsky consulted with the Nuclear Regulatory
25 Commission people on the issue of whether he would be fired

1 OMT/bc

1 by his employer if he were to discuss the matters that
2 related to his trip report. And they, in turn, recommended
3 that he take notes and advised him of his rights or, at
4 least in general of his rights, under the Whistle Blower's
5 Act.

6 At another time in his notes, he spreads his
7 concern that his chief executive officer, Mr. Roth, would
8 require him to commit perjury and went so far as to either
9 prepare or get ready to prepare a memo that Mr. Roth would
10 sign, directing Mr. Lipinsky to sign a changed trip report
11 in order to adequately protect himself from what he
12 perceived to be Mr. Roth's conduct.

13 But, even after Mr. Lipinsky said, "I don't want
14 to commit perjury," and even after Mr. Roth said, "I don't
15 want you to commit perjury," Mr. Lipinsky's notes filled
16 that Roth on several occasions pressured him to do it,
17 pressured him to sign it.

18 With respect specifically to Mr. Norris, he has
19 testified in this hearing regarding his views and opinions
20 of Mr. Lipinsky's attitude, of what was going on when he was
21 there on the site. Mr. Lipinsky's notes have indicated a
22 contrary view of Mr. Norris' competence, his ability to
23 comment on a number of the subjects on which he's already
24 under oath attempted to comment. And Mr. Lipinsky raised
25 serious questions about whether Mr. Norris is capable of

1 OMT/bc

1 doing that.

2 So that we have a situation in which we have
3 Mr. Norris and Mr. Lipinsky almost as conflicting experts.
4 Mr. Norris goes to the site and reaches one set of
5 conclusions. Mr. Lipinsky reaches a different set of
6 conclusions and they each disagree with the other on the
7 merits and on the relative competence of each other to have
8 the opinion.

9 Finally, Mr. Lipinsky reflects throughout his
10 memorandum a feeling of subjugation to Mr. Roth, though he
11 talked to Mr. Roth before he -- even before he goes to
12 see -- to change the transcript of the deposition or the
13 meeting that takes place between Mr. Hawkins, Mr. Watkins
14 and Mr. Lipinsky, even before he returns the transcribed
15 changes. He feels compelled, as his notes disclose, to go
16 back and make sure that it's all right with Mr. Roth that he
17 send those back.

18 Mr. Lipinsky does not feel himself to be a free
19 agent vis-a-vis Roth and the O.B. Cannon Company. Thus, we
20 submit that there is already a conflict between those
21 different people and that Mr. Lipinsky either has to
22 withhold information from his counsel, both because his
23 counsel would be obligated if he learned something that
24 would be of use to O.B. Cannon to tell it to O.B. Cannon, or
25 he would violate the confidences with O.B. Cannon; or he

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1 would have to get Mr. Lipinsky to not tell us those
2 confidences, which would mean that Mr. Lipinsky couldn't be
3 properly represented.

4 That's the basic factual...

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That's the basic factual predicate.

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Miss Garde will now, with the Board's permission,
3 go into the cases where this issue has risen.

4

JUDGE BLOCH: One second. Before Miss Garde
5 begins, someone is mumbling with their hand over the
6 telephone, and it can be heard.

7

Miss Garde, please continue.

8

MISS GARDE: Yes, sir. The cases that I have
9 cited before and the cases cited within them, again, let me
10 restate them. Tarons v. Smith, which is 621 Fed 2nd 994,
11 and I may have said 1981 previously. It's a 1980 case.

12

JUDGE BLOCH: You say 1981?

13

MISS GARDE: Yes.

14

JUDGE BLOCH: Continue.

15

MISS GARDE: I think that this particular case
16 deals specifically with the question in front of the Board
17 now. And in this case, what comes up is that it is
18 confidentiality between a lawyer and his client. That is
19 the most important facet of the professional relationship
20 which is served by the rule of disqualification which we
21 have argued. The possibility of the breach of confidence
22 and not the fact of the breach triggers the
23 disqualification.

24

JUDGE BLOCH: Is this a civil case?

25

MISS GARDE: Pardon?

2 LIVEbw 1

JUDGE BLOCH: Is Tarons v. Smith a civil --

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MISS GARDE: Yes, it is, sir.

3

JUDGE BLOCH: Continue.

4

MISS GARDE: Okay. The second point made in

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Tarons v. Smith is that "The lawyer is expected to use every

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skill, expend every energy and tap every legitimate

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resource," and I'm quoting, "in the exercise of independent

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professional judgment on behalf of the client in an

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undertaking representation on the client's behalf."

10

That is not possible, as is pointed out in this

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case. There is the conflict that exists in which, even

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though informed consent has been obtained, the dual

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representation of conflict in interests results in the fact

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that representation, in conjunction with the trial, presents

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an actual present existing conflict. And the discharge of

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duty to one client conflicts with the duty of the other.

17

And I think, as Mr. Roisman has argued, the cases

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where actual disqualification trials have been held, and

19

that is what I look at in the research, come down on the

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side of where a conflict -- not where a conflict already has

21

existed, but where, in the normal carrying out of the duties

22

to both clients, the lawyer has to, in effect, not disclose

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to each client information that those clients give to him.

24

That puts a lawyer in an untenable position, and it is for

25

that reason, and there's a particular cite which would be

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1 proper to give us this point, that it's not the dishonest
2 practitioner that is solely protected by this particular
3 rule, but it's the honest practitioner being prevented from
4 finding himself or herself in a position where, in order to
5 render proper services, someone has to be left by the side.

6 And it is that fact, that, in fact, Mr. Lipinsky
7 or O. B. Cannon, not could end up in conflicting positions
8 but, in fact, are in conflicting positions, that is strongly
9 supported by the law.

10 And let me again cite the California case which
11 was particularly on point, although I concede it is a
12 California Appeals case. And that's Valley Title v. Board
13 of Santa Clara County, 177 California Reporter 643.

14 JUDGE BLOCH: Is that a criminal case?

15 MISS GARDE: No, sir. It's a civil case.

16 JUDGE BLOCH: Can you actually deliver that case
17 to us this afternoon?

18 MISS GARDE: Yes, sir.

19 JUDGE BLOCH: Okay. We can get it. No problem.

20 All right. Mr. Gallo, do you want to defer
21 responding, or do you feel competent to respond at this
22 time?

23 MR. GALLO: I want to make a very clear
24 distinction on what my response will be at this time.

25 Before I make that distinction, I want to

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1 indicate that my argument from this point forward should not
2 be construed by either the Board or any party as waiving
3 what my preliminary judgment is, and that is that the
4 Nuclear Regulatory Commission does not have jurisdiction to
5 consider this matter.

6 It is my preliminary judgment that the NRC, as a
7 whole, has no jurisdiction to consider this matter. That if
8 the matter -- if it's relevant at all to be referred to the
9 applicable Attorney Conduct Review Board for the bar
10 association concerned.

11 JUDGE BLOCH: Mr. Gallo, your initial remark
12 actually astounds me. We're not talking about disciplining
13 you. We are talking about regulating the practice before
14 this Court.

15 MR. GALLO: Well, I can flesh out, if the Board
16 desires, my preliminary basis for that preliminary
17 judgment.

18 JUDGE BLOCH: Of course, there is already
19 precedent within the Commission on Appeal Board decisions
20 concerning whether or not lawyers have acted improperly
21 before Licensing Boards; is that right?

22 MR. GALLO: Well, there is -- the controlling case
23 that was -- is Cleveland Illuminating v. -- the Manning
24 Trust case. It's found in 3 NRC 785. And in that case, the
25 question of a law firm disqualification was taken up and

1 LIVEbw 1 heard by the Licensing Board and the Appeal Board.

2 JUDGE BLOCH: I'm sorry. 3 NRC what, Joe --
3 Mr. Gallo?

4 MR. GALLO: I've closed the book. I have to
5 reopen it to get the page. 785.

6 JUDGE BLOCH: Thank you.

7 MR. GALLO: Now, the basis for my preliminary
8 judgement is, is that the applicable regulation controlling
9 this subject is 2.713 of the Commission's regulations. The
10 shape and substance of 2.713 was markedly changed after the
11 Appeal Board decision was handed down that I just referred,
12 changed in direction, which leads me to believe that the
13 Board's jurisdiction, indeed, the NRC's jurisdiction is
14 limited solely to dealing with questions of attorney
15 conduct. That is, contentious conduct that requires action
16 by the Board to maintain an orderly proceeding.

17 JUDGE BLOCH: Mr. Gallo, I think you're looking in
18 the wrong section, because that section deals with
19 disciplinary-type questions. But isn't there a section in
20 the "Powers of the Presiding Officer" that also deals with
21 this?

22 MR. GALLO: It is my belief that 2.713, based on a
23 review of the statements of consideration that was issued at
24 the time the rule was amended, makes it quite clear that the
25 Commission intended that when it came to the question of

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1 attorney conduct to limit its powers to just go there is
2 contained in 2.713 and not to rely on the general powers
3 under 2.718.

4 JUDGE BLOCH: But 2.718 E is not applicable, in
5 your opinion, to our deciding that a person is not properly
6 represented before us?

7 MR. GALLO: That is my preliminary judgment; yes.

8 JUDGE BLOCH: What does the Statement of
9 Considerations have to say about that?

10 MR. GALLO: Well, it -- the -- at the time
11 comments were received on the Proposed Rule, and at the
12 time, it was suggested that the Proposed Rule, that is, the
13 reformulation of 2.713 was unnecessary because the authority
14 in power was already resided in the Section of 2.17 -- I'm
15 sorry, 2.718 that you cite.

16 The Commission, in disposing of that comment,
17 indicated that it -- although such authority might be
18 implied in 2.718, the Commission thought it more appropriate
19 to address the subject matter in 2.713.

20 That leaves me to -- I don't consider that -- that
21 statement, in and of itself --

22 JUDGE BLOCH: Where is this Statement of
23 Consideration found?

24 MR. GALLO: Well, Judge Bloch, I sense by your
25 questioning that you -- that we are dealing with a

1 LIVEbw 1 jurisdictional question on the merits.

2 I'm simply reserving, by advancing other
3 arguments, that I'm not waiving that particular argument.
4 I'm not prepared to argue completely that that
5 jurisdictional question, as I stated it, is correct. That's
6 why I say it's my preliminary view.

7 I have not had opportunity and time to complete
8 research the issue.

9 JUDGE BLOCH: Let's proceed from that then.

10 You've got this preliminary view, now what else --

11 MR. GALLO: Right. That's how I've characterized
12 it.

13 All right. Now Mr. Roisman has articulated what
14 he believes to be the factual basis for a conflict of
15 interest.

16 The purpose of my response is not to respond on
17 the merits to whether or not a conflict, in fact, exists, or
18 whether he's made a case, but to test initially whether or
19 not he's made a sufficient showing that a sufficient factual
20 basis, and, indeed, a legal basis, at this point, to what
21 the Licensing Board's further inquiry, even assuming it has
22 jurisdiction to do so. And the authority for that is found
23 in the Cleveland Illuminating case that I cite, where the
24 Appeal Board makes it clear that in the first instance, the
25 Licensing Board ought to determine whether or not a

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1 showing has been made to conduct such an inquiry.

2 JUDGE BLOCH: At what page is the standard set
3 forth?

4 MR. GALLO: I have to hasten to add that what they
5 were dealing with there in that case was a special board
6 that was required by the earlier formulation of 2.713. I'm
7 looking specifically -- let's see, 793. There's page 793,
8 where there's a -- and it's specific where the reference is
9 made to Rule 12(b)(6) of the Federal Rules of Civil
10 Procedure.

11 JUDGE BLOCH: If it decides that the allegations
12 did state a claim for disqualification, I should merely
13 refer the motion to a special board without comment --
14 there's no need for a special board under the current rule;
15 is that correct?

16 MR. GALLO: That is correct.

17 JUDGE BLOCH: And without commenting on the merits
18 of the claim or on the probity of any documents or
19 affidavits which may have accompanied the motion papers?

20 MR. GALLO: Yes. Now, taking Mr. Roisman's
21 factual statement, I was looking for some factual basis upon
22 which Mr. Roisman perceives an actual conflict of interest
23 in the representation of Mr. Lapinsky vis-a-vis O. B. Cannon
24 and vis-a-vis Mr. Norris. And all I heard from Mr. Roisman
25 was theoretical supposition.

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JUDGE BLOCH: No, I heard --

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MR. GALLO: No facts whatsoever.

3

JUDGE BLOCH: I heard facts. I don't understand what you're saying. I mean, he was saying to the --

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MR. GALLO: Well, let's review what he said. He said that -- his first point was that one must keep in mind the nature of what it means to represent a client. That there must be complete cooperation and complete ability to exercise confidentiality between attorney and client.

10

That, of course, is true. The implication is, however, that in his malleable --

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JUDGE BLOCH: No, those weren't the facts. That was the discussion of --

14

MR. GALLO: All right. Now he -- and I would agree with that. Continuing on what he said, he referred to -- again in that same context that perhaps Mr. Lipinsky may have produced notes which were not produced pursuant to the subpoena. Again, that's nothing more than supposition. And, in fact, that situation does not exist.

20

JUDGE BLOCH: That early part of his discussion was still hypothetical, but he mentioned specific facts.

22

MR. GALLO: Now, the only facts that I heard, I heard none between O. B. Cannon and Mr. Lapinsky. Mr. Roisman cited to the diary notes, where Mr. Lapinsky records some of his discussion with Mr. Roth, the

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1 LIVEbw 1 president of O. B. Cannon. He cites to the fact that
2 Mr. Lapinsky said that he would not commit perjury, and then
3 of course Mr. Roth is cited in those same notes as saying,
4 well, don't commit perjury.

5 There's -- why we may have a relationship between
6 Mr. Roth, as president of the company, and Mr. Lapinski as a
7 subordinate manager, there's no indication there of a
8 conflicting interest between Mr. Roth, on the one hand, and
9 Mr. Lapinski.

10 They simply had a disagreement about whether or
11 not the revised trip report should be signed by
12 Mr. Lapinsky. This matter is --

13 JUDGE BLOCH: How could it possibly have been the
14 case that he should have signed a revised trip report which
15 would have purported to have been issued at a backdated
16 time?

17 MR. GALLO: Well, that has nothing -- that
18 question has nothing to do with the conflict issue.

19 JUDGE BLOCH: Doesn't it? The fact that his boss
20 was asking him to make up a document and pretend that it
21 existed when it didn't exist?

22 MR. GALLO: Well, that question assumes a premise
23 that I don't agree with. I do not --

24 JUDGE BLOCH: What premise do you disagree with?

25 MR. GALLO: -- whatsoever. The important point --

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JUDGE BLOCH: Which part of the premise do you disagree with?

3 MR. GALLO: All of it.

4 There is nothing to -- but your own supposition
5 with respect to reading the diary that you assume that's
6 what he intended.

7 The point is that this whole question about the
8 diary and the various versions -- I'm sorry, not the diary,
9 but the trip report and the various versions of the trip
10 report and the controversy over the change, all of that as
11 discussed and was in the document production, and it's
12 discussed in detail in the testimony of Mr. Lapinsky that
13 was prefiled, as well as the testimony of Mr. Roth, the role
14 played by each. And the outcome of that controversy was
15 that the draft in question was never signed by
16 Mr. Lapinsky.

17 That is a matter that is really not in conflict
18 between those two. The facts are what they are. Mr. Roth
19 does not conflict and argue with Mr. Lapinsky's view of
20 those fact and vice versa.

21 It's history. There is no conflict there.

22 Well, let's go to the Norris situation, which I
23 guess is the only real factual matter that I heard.

24 Mr. Roisman suggests that Mr. Norris during the
25 course of his testimony on October 1 and 2 has indicated

1 LIVEbw 1 disagreement with the Lapinsky views in the trip report, had
2 considered that Mr. Lapinsky may not have had, as I recall
3 from reading that testimony, had a good day.

4 That, indeed, is Mr. Norris' viewpoint, and it's
5 the viewpoint that's reflected in his prefiled testimony.

6 Mr. Lapinsky does not agree with that viewpoint.

7 Now they do agree on one thing. That is, each is
8 entitled to his own view on whether or not Mr. Lapinsky had
9 a valid basis on August 8 to write what he wrote in his trip
10 report.

11 The point is that the nature of this proceeding is
12 not to decide who's right on that issue. That is not before
13 us. What is before this Board is whether or not
14 Mr. Lapinsky was intimidated in some way to change his
15 view. Whether or not the view was properly based on August
16 8 is irrelevant to this Board's consideration, in terms of
17 deciding whether or not, who is right on that point.

18 The only relevance of what happened on August 8 or
19 the views, is simply to fill in the factual basis.

20 JUDGE BLOCH: Well, first, Mr. Gallo, when you met
21 with Mr. Lapinsky, did you meet with him separately from the
22 other parties?

23 MR. GALLO: I did. I met with each one of the
24 principals separately.

25 JUDGE BLOCH: The problem I have is anticipating

1 LIVEbw

1 how it would have been possible for you to go over with
2 Mr. Lapinsky, in detail, each of the technical things that
3 were in the original report and his final position, and to
4 challenge him as to whether he really believed the final
5 position.

6 Did you feel free to do that, in light of the
7 position of O. B. Cannon?

8 MR. GALLO: I certainly did. There were no
9 restraints whatsoever by Mr. Roth. And I think the record,
10 based on those diary notes alone, is quite clear that
11 Mr. Roth runs an operation where -- the cornerstone of which
12 is to encourage dissent and differing viewpoints.

13 JUDGE BLOCH: And did you assure Mr. Lapinsky that
14 no matter what he told you about his technical views and his
15 final position that he would not have to share that with
16 Mr. Roth?

17 MR. GALLO: That is true.

18 JUDGE BLOCH: That you were trying to keep
19 separate conferences from the three clients?

20 MR. GALLO: No. No. I told him that, if at any
21 time he felt there was something that he believed to be
22 confidential and should not be shared with others, that is,
23 Mr. Norris or Mr. Roth, he, indeed, should make that known
24 to me.

25 In fact, Mr. Lapinsky's views with respect to his

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1 position on the affidavit, and I assume you're referring to
2 the affidavit that was executed on September 28, 1984,
3 Mr. Lapinsky had no reservation with respect to making those
4 views known to the other parties and to the other clients.

5 Indeed, the prefilled testimony filed by
6 Mr. Lapinsky makes that quite clear, where he identifies the
7 variances that he had with respect to what he said on the
8 28th of September and what his present position is.

9 So while it is possible to imagine and conjure up
10 scenarios where conflicts actually might exist, that is
11 nothing more than the fertile imagination of whoever
12 indulges in that exercise and not based on facts alone.

13 JUDGE BLOCH: And I take it you have examined the
14 diary notes that we have all ordered that we will receive,
15 and those diary notes do not indicate that there is a
16 conflict of interest between O. B. Cannon and Mr. Lapinsky?

17 MR. GALLO: I would want to look at them again,
18 but I believe the answer to that is definitely, yes, subject
19 to that one qualification.

20 And I -- if the Board would like a short recess --
21 would like a definitive answer from me on that point, I
22 would request a short recess to simply refresh my memory
23 with respect --

24 JUDGE BLOCH: I think that could be helpful,
25 because if there really is an indication in those notes of a

2 LIVEbw 1 conflict of interest, whether or not the Board ever sees
2 it, it seems to me that you should consider disqualifying
3 yourself.

4 MR. GALLO: All right.

5 Well, would the Board like to order a recess, so
6 I can quickly refresh myself?

7 JUDGE BLOCH: How much time do you need?

8 MR. GALLO: Oh, two or three minutes.

9 I've got them right here, and we're just talking
10 about --

11 JUDGE BLOCH: Take a five minute recess until
12 11:15. I have 11:09.

13 (Recess.)

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OMTbur 1 JUDGE BLOCH: I believe that Mr. Gallo is
2 disconnected.

3 Are you back, sir?

4 We are waiting for the reconnection of Mr. Gallo.
5 Hello, is anyone else there?

6 THE REPORTER: This is the Reporter.

7 MR. ROISMAN: I am here.

8 MR. WATKINS: Applicants are here.

9 MR. TREBY: Staff is here.

10 JUDGE BLOCH: Okay. Mr. Gallo has to be
11 reconnected.

12 Mr. Maggio, are you there?

13 THE REPORTER: Yes, sir.

14 JUDGE BLOCH: Good.

15 MR. GALLO: Mr. Bloch, this is Joe Gallo.

16 JUDGE BLOCH: Good. Are you prepared to proceed?

17 MR. GALLO: Yes. I apologize for inadvertently
18 disconnecting the conference line. I was just reinstated
19 just a moment ago by the NRC operator.

20 JUDGE BLOCH: Okay.

21 MR. GALLO: I have during the recess looked
22 carefully at the three days of diary notes that were not
23 produced as well as the one memorandum that was not
24 produced, and I can unequivocally state that there is nothing in
25 those documents that in my judgment raises any conflict

OMTbur 1 with respect to the interest of Mr. Lipinsky vis-a-vis
2 O. B. Cannon or Mr. Norris.

3 I can't underscore the fact that these witnesses
4 who are Board witnesses, after all, are coming to provide
5 their information and the facts as they know them in
6 unison. There is no disagreement that they should tell the
7 story as it developed and as they explained it.

8 The prefiled testimony, I believe, goes into
9 significant detail on the various steps that is, first of
10 all, started with the job itself, midstream with the August
11 8 trip report, then the steps thereafter in terms of how the
12 trip report potentially would have been revised; secondly,
13 the November 10-11 meeting and the subsequent steps that led
14 to a change in Mr. Lipinsky's position.

15 The witnesses are uniform, including Mr. Lipinsky,
16 who is the strongest on this point, that there was no undue
17 pressure.

18 JUDGE GROSSMAN: Okay, Mr. Gallo, this is Judge
19 Grossman. I have a question on that.

20 Apparently, your position, or it appears to me
21 that your position is that while there may have been some
22 disagreements in the past the parties -- that is, the
23 O. B. Cannon personnel -- have no disagreement now as to
24 even what happened in the past. They are all in unison.

25 Is that basically your position?

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MR. GALLO: Well, that is a correct
2 characterization of my position, Judge Grossman, but it is
3 coupled with the fact that where the areas of disagreement
4 occurred -- this is actually in the case of the
5 Norris-Lipinsky disagreement over whether or not there was
6 adequate basis for Lipinsky to have made the comments he
7 made on August 8.

8 That is not material to the question of whether or
9 not he subsequently, right or wrong, improperly changed the
10 opinion because he was coerced in some fashion.

11 JUDGE GROSSMAN: Okay, let me take another example
12 of where the parties disagreed, and if you can tell me they
13 are all agreed on this now, I will accept that.

14 MR. GALLO: All right.

15 JUDGE GROSSMAN: One point was, I thought, from
16 the diaries that Mr. Lipinsky thought that the changed trip
17 report was tantamount to perjury and that he was being
18 pressured into signing that and he was withstanding the
19 pressure.

20 Now, do all those people -- that is, Mr. Ross,
21 Mr. Norris, and Mr. Lipinsky -- now agree that that was the
22 case, that Mr. Lipinsky thought it was perjury and was being
23 pressured into signing that?

24 MR. GALLO: They -- Mr. Ross and Mr. Norris agree
25 that based on those diary notes that was Mr. Lipinsky's

OMTbur 1 state of mind. Mr. Ross does not believe that his actions
2 constitute either perjury or constitute undue pressure on
3 Mr. Lipinsky.

4 The point is that --

5 JUDGE GROSSMAN: Get him to sign a back-dated
6 document?

7 MR. GALLO: Well, I think, Judge Bloch, you have
8 referred to that a second time. Let's be clear here, at the
9 time that this exercise went on about revising the document,
10 we are talking the October-November 1983 timeframe. The
11 original version of the Lipinsky trip report was already a
12 public document because it was the original version that was
13 surreptitiously taken from the briefcase, as I understand
14 it, and furnished, among other people, the NRC.

15 JUDGE GROSSMAN: Well, Mr. Gallo --

16 MR. GALLO: Mr. Ross knew this at the time that he
17 was requesting Mr. Lipinsky to sign the second version.

18 JUDGE GROSSMAN: What was the second version
19 supposed to be?

20 MR. GALLO: The second version simply aims at Mr.
21 Ross' request, and his testimony spells this out, the very
22 last paragraph in the trip report, and in Mr. Ross' judgment
23 the last paragraph was a proper statement as long as it was
24 an internal document. But as soon as it became a public
25 document and he was requested officially by Mr. Meredith of

OMTbur 1 TU for a copy of the so-called Lipinsky trip report. He
2 didn't believe it was appropriate that the last paragraph
3 should convey a notion that the Lipinsky comments were
4 drafted for the purpose of O. B. Cannon seeking business
5 from TU.

6 That he determined to be a proprietary matter in
7 terms of a management decision that was specifically his
8 prerogative and not that of the Quality Assurance Manager,
9 and that was the nature of the change that was at stake, and
10 all of this is explained, as I say, in the testimony.

11 JUDGE GROSSMAN: Mr. Gallo, getting back to my
12 question --

13 MR. GALLO: Yes.

14 JUDGE GROSSMAN: -- I accept the fact that
15 everybody is agreed on Mr. Lipinsky's state of mind as he
16 expressed it in the diary. I don't see how anyone could
17 disagree with that, but my question is whether all those
18 people are agreed now that Mr. Lipinsky was being unduly
19 pressured to sign something that he didn't want to sign.

20 Do all these personnel agree with that, that he
21 believed something was perjury and was being coerced into
22 signing it?

23 MR. GALLO: I can't agree with that formulation of
24 the question. What he believed was perjury was that
25 subsequently, if he had signed the document without

0:1Tbur 1 changing the date, subsequently he would be called upon to
2 testify or explain in some fashion with respect to the
3 document, and that was the point in time that he thought he
4 was committing perjury, not at the time of signing the
5 document.

6 JUDGE GROSSMAN: Well, the question is: do they
7 all agree that he was being pressured at that time, as the
8 diary notes reflect, and that he was attempting to withstand
9 the pressure?

10 If there is no disagreement on that and Mr. Norris
11 and Mr. Ross both agree with Lipinsky that he was being
12 pressured at the time, that is the extent of my question.

13 MR. GALLO: Well, I can't acknowledge that. Ross
14 does not agree that he pressured Lipinsky to sign the
15 report. I mean, he believes that at some point after
16 Lipinsky said no he gave up on it, and he considered the
17 interaction to be the normal interaction you would have with
18 employer-employee relationships.

19 The point here is that this matter is also not
20 central to the issue that we are dealing with, which was:
21 what was the basis and the ground rules for Mr. Lipinsky in
22 changing his views with respect to the tactical merits of
23 his comments that were provided on August 8th, and as I see
24 the disagreement over the signing of the trip report, it is
25 simply a side issue that is not material to the position

OMTbur 1 taken with respect to the merits of the comments made by
2 Mr. Lipinsky on the 8th.

3 Indeed, if you look at the August 28th -- I am
4 sorry -- the September 28th affidavit of 1984, if you look
5 at the transcript of the November 10-11 meeting, the whole
6 question of whether or not rework was feasible or difficult
7 or otherwise or the whole question of whether O. B. Cannon
8 should do more work was not addressed in any of those
9 meetings or the affidavit itself.

10 That was not a material point, and I believe it is
11 not a material point as to what is before this Board, which
12 is simply an issue as to whether or not, right or wrong, on
13 August 8 was Lipinsky subsequently coerced into changing his
14 position.

15 JUDGE BLOCH: Would you like to continue?

16 MR. GALLO: Yes, I would like to address just
17 briefly on just one statement on the wall.

18 It seems to me the controlling Code of Judicial
19 Conduct that would be applicable is Rule 1.7 of the Model
20 Rules of Professional Conduct and Code of Judicial Conduct
21 issued by the American Bar Association in August 1983.

22 JUDGE BLOCH: Well, we are pleased to hear you say
23 that. That is the one we cite in our order.

24 MR. GALLO: It says -- in significant part, Rule
25 1.7 says: "A lawyer shall not represent a client if the

OMTbur 1 representation of that client will be directly adverse to
2 another client unless the lawyer reasonably believes the
3 representation will not adversely affect the relationship
4 with the other client and each client consents after
5 consultation."

6 That is the extent of what I believe to be the
7 relevant portion of that rule.

8 JUDGE BLOCH: Hold on a second.

9 (Pause.)

10 1.7(B)(1), that is important?

11 MR. GALLO: I am looking at --

12 JUDGE BLOCH: .7(B) says: "A lawyer shall not
13 represent a client if the representation of that client may
14 be materially limited by the lawyer's responsibilities to
15 another client or to a third person or by the lawyer's own
16 interest unless the lawyer reasonably believes the
17 representation will not be adversely affected."

18 MR. GALLO: Yes, well, I read you (A), but I would
19 submit that I guess the whole rule applies, but certainly
20 the (B)(1) and (2) essentially says the same thing: "...the
21 lawyer reasonably believes the representation will not be
22 adversely affected and the client consents after
23 consultation."

24 And I assume that means all the clients.

25 Now, my letter of November 15 indicates quite

OMTbur 1 clearly that I do not believe that a conflict exists with
2 respect to representing the interest of these clients and
3 that I have gone to excruciating pain to explain the
4 situation to Messrs. Ross, Lipinsky, and Norris; indeed, did
5 that on November 14 after I learned of -- actually on
6 November 15 after I learned of Mr. Roisman's intention to
7 file some sort of -- this motion.

8 And they understand fully the situation. I
9 believe that I have explained it as completely as is
10 possible, and they do not see a conflict in their interest,
11 and they consent to the representation on that basis, and I
12 believe that based on the item that I have just read and
13 plus the representations that I make in the letter -- which,
14 by the way, if necessary, I can have confirmed by
15 affidavit -- is dispositive of this thing, when you compare
16 that the only allegations made by Mr. Roisman of a factual
17 basis are really on the basis of either a scenario which he
18 has developed based on supposition or on what he perceives
19 to be conflicts, which really are not material to the issue
20 before this Board.

21 And for all of those reasons, I don't believe that
22 Mr. Roisman in his motion has set forth an adequate basis
23 upon which the Board should entertain it further, and you
24 ought to dismiss it out of hand as not setting forth a
25 sufficient basis upon which relief can be granted -- to

OMTbur 1 quote the rule that was cited by the Appeal Board.

2 I would like to make one final observation. What
3 we are dealing with here is a company and three witnesses.
4 They are Board witnesses. They have no vested interest in
5 this proceeding.

6 It is TU that wants the operating license for
7 Comanche Peak. These people are in the business of putting
8 paint on -- protective coatings on various commercial
9 enterprises.

10 This proceeding is distracting that enterprise
11 significantly. Mr. Ross as President of the company,
12 Mr. Trallo as Vice President -- and of course he is our
13 witness, at my request, so I will exclude him -- Mr. Norris
14 as Production Manager for the Southwest, Mr. Lipinsky as the
15 Chief QA Manager, their attentions are being significantly
16 diverted by this proceeding away from the normal course of
17 business, a proceeding in which they really have no interest
18 in.

19 Secondly, they are incurring legal expenses and
20 other costs as a result of being called as a Board witness.
21 It seems to me to be unreasonable, given the tangential
22 nature of this issue to this case, that they be required to
23 even get further counsel with respect to this matter.

24 I think the Board should keep that perspective in
25 mind in considering this matter.

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That concludes my remarks.

2

JUDGE BLOCH: Thank you, Mr. Gallo.

3

Mr. Watkins?

4

MR. WATKINS: Sure.

5

JUDGE BLOCH: Have you remarks at this time?

6

MR. WATKINS: On the merits, no, sir.

7

JUDGE BLOCH: Staff?

8

MR. TREBY: Yes, Judge Block.

9

JUDGE BLOCH: This is Mr. Treby?

10

MR. TREBY: That is correct.

11

The Staff's comments at this point is that we

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think that the facts which are before the Board are that

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there may well have been some differences of views amongst

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these various persons involved with O. B. Cannon during the

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period in question.

16

However, we have had a representation here by

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Mr. Gallo that nothing in his discussions with these various

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persons, nothing in discovery, including material which we

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the parties have not seen, indicates to him that there is

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any conflict of interest between any of his clients.

21

Both in his letter of November 15th and earlier

22

this morning, he has stated that he has discussed the matter

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in detail with Mr. Lipinsky, and he does not believe that

24

such a conflict exists, and also that he has explained to

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Mr. Lipinsky that in the event a conflict were to arise in

OMTbur 1 the future what steps could be taken at that time.

2 It seems to the Staff that the facts here are that
3 there are no conflicts of interest, at least perceived by
4 the clients, and it is usually the client who would be
5 raising the concern of conflict of interest.

6 The cases -- the civil cases that I have seen,
7 usually the question of conflict of interest arises where
8 there has been a biased representation of an attorney -- or
9 let me restate that -- that usually arise in the instance of
10 an attorney representing interests adverse to that of a
11 former client. That, in fact, seems to have been the facts
12 in this Prawn v. Smith case, which was cited by Ms. Garde.

13 There seems to be little law that I have found
14 with regard to where you have an attorney representing a
15 corporation and parties within the corporation or
16 individuals within the corporation all on the same side, and
17 the few references that I have seen to that have indicated
18 that there is no problem with his attorney representing
19 those kinds of interests.

20 We believe that in view of the representations by
21 Mr. Gallo -- and also we would expect that should we go
22 forward, as we currently plan to go forward, that the Board
23 would advise the witnesses of this question of potential
24 conflict of interest, ensure itself that the witnesses are
25 aware of their options, and then proceed with the hearing.

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1 If, during the course of the hearing, it appears that a
2 conflict of interest problem arises, deal with it then.

3 But it seems to me at this point, based on the
4 facts that we now have, none of the O. B. Cannon people, at
5 least, perceive any conflict of interest questions.

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1 MR. TREBY: This concludes the Staff's comments.

2 JUDGE GROSSMAN: Mr. Treby, this is Judge

3 Grossman. Could you refresh my recollection on something.

4 I do recollect that Mr. Norris indicated at the hearing that

5 the believes now and believed in the past that Mr. Roth

6 should have fired Mr. Lipinsky. Is that your recollection,

7 too?

8 MR. TREBY: My recollection was that Mr. Norris

9 believes that Mr. Lipinsky performed an act which he didn't

10 think was an appropriate act and that he would have taken

11 stringent disciplinary action. I'm not sure whether he

12 actually came out and stated he would have fired

13 Mr. Lipinsky or not.

14 JUDGE GROSSMAN: Mr. Gallo, you've read that

15 transcript. Was that essentially what --

16 MR. GALLO: I don't -- I'd have to -- yes, I've

17 read the transcript but I'd have to go back and refresh

18 my memory on that point. I just couldn't -- I wouldn't want

19 to hazard a guess on that point. I guess I will go so far

20 as to say that my recollection is somewhat along the lines

21 of Mr. Treby was that -- not that I suggest that he be

22 fired, but that he disagreed strongly with the -- what was

23 said in the August 8 trip report and I guess I just don't

24 recall exactly just he'd characterize it at that point in

25 time on the witness stand.

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1 JUDGE GROSSMAN: I take it, Mr. Gallo, that is he
2 said that he believes Mr. Roth should have fired
3 Mr. Lipinsky that you would take that into account in
4 determining the compatibility of the interests of Norris and
5 Lipinsky?

6 MR. GALLO: I would take that into account, but
7 let me quickly say that I would view that statement somewhat
8 similarly to the statement that I do recall he made which
9 was he thought that Mr. Lipinsky had a bad day.
10 Mr. Lipinsky does not believe today that back in July of 26,
11 27, 28, when he was at the T.U. site that he had a bad day.

12 The point is -- and they both agree -- that
13 they're each entitled to their own point of view and that
14 would be the case even if Mr. Norris had gone so far as to
15 suggest that he thought Roth should have fired Lipinsky.
16 It is just one man's opinion. It's not an issue before this
17 Board. In fact, Mr. Lipinsky is still with O.B. Canon in
18 his original capacity. So, I don't see it, really, as being
19 a germane issue on the conflicts question.

20 One of the first things I inquired about before I
21 undertook this multiple representation was whether or not it
22 would be possible for each witness to give his point of
23 view unfettered by the interest of the other. And that's
24 exactly -- and the answer I got to that was, yes. That's
25 exactly what is displayed in the prefilled testimony. And

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1 it's that strong conviction that we've accomplished that
2 objective and that is the instruction that I've been given
3 and that has been carried out so strongly that there's no
4 conflice in this situation.

5 JUDGE BLOCH: Mr. Treby, this is Judge Bloch.
6 Would you think that what we ought to do on this question at
7 this point is to just await the facts in the ordinary course
8 of the trial, or would it be more appropriate to start with
9 a voir dire of Mr. Lipinsky?

10 MR. TREBY: A voir dire of Mr. Lepinsky to assure
11 ourselves that he's aware of this advice and is aware of his
12 options if he perceives a conflict of interest; is that the
13 question?

14 JUDGE GROSSMAN: Yes, and to assure ourselves
15 that there is no conflict of interest?

16 MR. TREBY: My recommendation was that, you know,
17 we do advise the parties of their options, even though I'm
18 sure Mr. Gallo has but, just to reinforce that information.

19 I guess I would see no difficulty in further
20 assuring ourselves via some voir dire of Mr. Lipinsky.

21 JUDGE BLOCH: Mr. Roisman, would it serve your
22 purposes if we began with a voir dire of Mr. Lipinsky?

23 MR. ROISMAN: No, Mr. Chairman. And I think
24 there's been some substantial statements by Mr. Gallo which
25 confirm our view which, if the view of wrong as a matter of

OMTpp 1 law, t n so be it. If that's the Board's determination to
2 make.

3 JUDGE BLOCH: Okay. What we're going to do is to
4 allow you some additional remarks now and then we'll allow
5 Mr. Gallo rebuttal.

6 MR. ROISMAN: All right. Thank you,
7 Mr. Chairman.

8 I think the absence --

9 JUDGE BLOCH: Okay. Speak up into the phones.

10 MR. ROISMAN: All right. Can you hear me now?

11 JUDGE BLOCH: Yes.

12 MR. ROISMAN: All right. I think the essence of
13 the issue is is Mr. Lipinsky freely stating all the views
14 and opinions that he has on the issue of why he now has
15 recanted what he previously said regarding the CPSES paint
16 codings program. And that's the underlying issue.

17 Now, the issue that arises here is, is
18 Mr. Lipinsky free to tell all to his Counsel whether he
19 then, under proper advise from Counsel, has to tell it all
20 to us is a different issue. That's a question that's not at
21 fault here.

22 JUDGE BLOCH: Well, how do you feel about the
23 fact that if he just told Counsel that he couldn't discuss
24 it with Counsel, that he could then get another attorney?

25 MR. ROISMAN: The problem that I have is that

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1 everything that he says Mr. Gallo said that he has an
2 obligation -- and I wasn't clear but it doesn't matter which
3 side of the line he falls on. In either case, the conflict
4 is there.

5 He either has an obligation to tell Mr. Roth what
6 Mr. Lipinsky tells him or, he has an obligation to protect
7 everything that Mr. Lipinsky tells him from Mr. Roth. But
8 as a lawyer to both clients he has the obligation to hear
9 everything they have to say and to tell them everything that
10 he knows. He can't keep a confidence.

11 JUDGE BLOCH: I think what he said though was
12 that if there was some problem about keeping it confident,
13 he'd resign.

14 MR. ROISMAN: But he would also have to tell
15 Mr. Roth that that's what Mr. Lipinsky believes.

16 JUDGE BLOCH: Now, Mr. Gallo, do you agree with
17 that? If Mr. Lipinsky were to have told you something that
18 gave rise to a conflict -- something that was in conflict
19 with Mr. Roth -- would you have had the obligation to tell
20 Mr. Roth that?

21 MR. GALLO: If he had told me something that was
22 in conflict with Mr. Roth on the intimidation question --
23 let me think about that.

24 JUDGE BLOCH: At that point, you wouldn't --

25 MR. GALLO: Well, I -- at that point, then the

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1 conflict -- I mean, it seems to me the question you're
2 asking is similar to the potential conflict that I was
3 seeing. Let me answer your question by way of example.

4 Mr. Lipinsky presently is of the view that he was
5 not coerced into changing his view. Let's hypothesize that
6 during the course of cross-examination he recants that
7 position and says, indeed, he was coerced. At that point it
8 seems to me that a conflict has arisen and what would be
9 necessary would be to recess and to sort out the
10 representation and permit whoever is going to get other
11 Counsel the time to do it.

12 If Lipinsky -- to get back to your question --
13 had told me something that he didn't want Roth to know about
14 and I thought it was material to the Roth interest in terms
15 of issue that's before the Board, I would have had to make
16 the draw right then and there and resign as to Lipinsky.

17 JUDGE BLOCH: Well, you told us you weren't sure
18 who you'd resign as to. So you now think you'd resign as to
19 --

20 MR. ROISMAN: That is it. Lipinsky gets out
21 without Counsel and Roth gets told the secret.

22 MR. GALLO: No, that's not right.

23 JUDGE BLOCH: Ross, when you get a chance, let's
24 let Mr. Gallo and me continue for a moment here.

25 MR. GALLO: If Lipinsky tells me a secret, to use

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1 Mr. Roisman's words, and then I have to sort out the
2 representation and if continued representation with Canon
3 means that I have to tell Mr. Roth the secret, then I can't
4 opt in that direction. I have to opt in the direction of
5 keeping my representation with Mr. Lipinsky alone or
6 withdrawing from the case entirely.

7 JUDGE BLOCH: Would the consequence of that have
8 been that he would no longer have an attorney provided for
9 him by his company?

10 MR. GALLO: I don't know the answer to that
11 question. That is not a question that I've asked.

12 JUDGE BLOCH: But he may have been afraid of
13 that, that he would had to pay a couple thousand dollars if
14 he squared with you?

15 MR. GALLO: No, I don't think that's it at all,
16 because we were very, very -- it's my personal belief that
17 he was not intimidated in any way or pressured in any way
18 into dealing with me by virtue of the fact that he was not
19 paying my legal fees. I think that he was as forthcoming
20 with me as he would have been with another lawyer who he was
21 paying a legal fee. And he did not feel -- it is my firm
22 belief -- threatened in anyway by the fact that I also
23 represented Mr. Norris or Mr. Roth.

24 I mean, we went through that at considerable
25 length. I explained to him how he would have to tell me all

OMTpp 1 the details that were involved with respect to his change in
2 position so that we could formulate testimony which is what,
3 in fact, we did. He showed no reticence in doing that.

4 I do not believe that the payment of fees was, in
5 any way, pertinent.

6 JUDGE BLOCH: Mr. Roisman?

7 MR. ROISMAN: Mr. Chairman, the question that you
8 had asked was with regard to his -- whether it would be
9 appropriate to voir dire him. And the answer is who's his
10 lawyer for purposes of the voir dire if the subject of the
11 voir dire is whether he was able to be candid with his
12 lawyer.

13 He doesn't have a lawyer for that because
14 Mr. Gallo does not know whether Mr. Lipinsky has been candid
15 with him because Mr. Lipinsky -- you've heard Mr. Gallo
16 stumble and fumble trying explain to you what in the world
17 he's going to do if Lipinsky tells him a secret about
18 saying, like, you know, I've known ever since Roth and I had
19 the fight over perjury, that I was either out the door or
20 was going to play ball.

21 And he doesn't have the freedom to say to
22 Mr. Gallo -- because Mr. Gallo today is for the first time
23 even thinking about that issue -- Mr. Lipinsky cannot be
24 free to do it. Mr. Lipinsky has never had an independent
25 lawyer. He had Mr. Watkins and Reynolds. And now he's got

OMTpp 1 Mr. Gallo, who represents his employer. And the issue is
2 whether or not his employer was making him feel
3 uncomfortable about having certain opinions.

4 And the record, the factual record, is that he
5 expressed those concerns. They were laid out on the
6 record. We can see them. And then dramatically
7 Mr. Lipinsky, like a newborn Christian gets religion. What
8 transpired between the date when he didn't have it and the
9 date that he did. Only one thing. He started meeting with
10 Mr. Reynolds and Mr. Watkins. That's the only event that
11 happened in November. From that point on we have a
12 different Mr. Lipinsky. This Board and we are legitimately
13 interested in answering the question: Mr. Lipinsky, why did
14 you change your mind?

15 I submit that there is nothing that has been
16 submitted in his statement to Mr. Hawkins, in his September
17 28th affidavit, his modification of the September 28th
18 affidavit, and in his prefiled testimony, that gives a
19 rational explanation for why he no longer thinks that he
20 must do a full audit to answer the question, or why he
21 changed his mind on so many different issues.

22 Now, we can't get at that truth as long as
23 Mr. Lipinsky's only confidant is employed for him by the
24 company whose conduct he's concerned about. And he said
25 he's concerned about it.

OMTpp

1 Now, he's got to have -- you were exactly where
2 we were with Mr. Norris. We're going to start that voir
3 dire and I'm going to stand up and say, the man needs a
4 lawyer. Because he's either going to commit perjury or he
5 doesn't understand what it means to commit perjury. He
6 doesn't have the advice of Counsel because he's afraid to
7 proceed, to talk to his Counsel openly.

8 And that's a fear that's inherent in the combined
9 representation of Mr. Roth, Trallo, Norris, O. B. Canon, and
10 Lipinsky. It's built into the system.

11 JUDGE BLOCH: Mr. Roisman, I think you're
12 overstating, but I'd like you to respond to my feelings
13 about that.

14 First, it's quite clear to me that the Board is
15 going to have to give a special instruction on the meaning
16 of truth as we begin the hearing. And then you're going to
17 have an opportunity to describe to Mr. Lipinsky what he's
18 entitled to in terms of being able to confide fully in an
19 attorney. And we may have to ask some questions, some
20 specifics, to help to determine whether there are actual
21 problems.

22 Wouldn't we be able to find out at that point
23 whether or not Mr. Lipinsky feels that he has a problem
24 because of a potential conflict?

25 MR. ROISMAN: Mr. Chairman, if Mr. Lipinsky

OMTpp 1 believes that answering that question creates a problem for
2 him then our asking him that question while he's under oath
3 in open court, is a danger to him.

4 JUDGE BLOCH: Can't hear you, Tony.

5 MR. ROISMAN: If he has to answer the question
6 that the Chairman just phrased, in open court, under oath,
7 when he believes that the answer to the question may be
8 damaging to him, then he is placed in an untenable position.

9 What I'm having trouble with -- and the essence
10 of the issue is -- we know that the nature of the issue --

11 JUDGE BLOCH: Well, let me ask you a different
12 question, Mr. Roisman. What if we were to do that in-camera
13 and off the record. We can discuss before, discuss with
14 Mr. Lipinsky, the problems that might cause him to think he
15 has a conflict. And it was clear that it would not be
16 released.

17 MR. ROISMAN: Isn't a better way to do that,
18 Mr. Chairman, to have a lawyer who is not paid for and also
19 retained by his employer do that? He shouldn't be required
20 to tell you the answer to that question, or me. He should
21 be entitled to tell a lawyer that and then be advised by the
22 lawyer. And we don't have is, we don't have a -- there's a
23 catch-22 built in here. If Mr. Lipinsky has the fear he
24 won't tell Mr. Gallo.

25 JUDGE BLOCH: Okay, wait. Mr. Roisman, what if

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1 we provided -- what if we advised that Mr. Gallo should ask
2 Mr. Lipinsky to consult with an independent lawyer solely on
3 the question of whether there's a im
4 conflict. Would it be adequate in that case -- would you
5 accept that -- if Mr. Lipinsky went to an independent lawyer
6 solely for advise on that and then came back to us and said
7 it's okay?

8 (Pause.)

9 MR. ROISMAN: I'm thinking Mr. Chairman.

10 Yes, if the questions were framed. In other
11 words, if what we did was, in effect, submit prefiled voir
12 dire which Mr. Lipinsky would not be required to answer
13 unless he felt comfortable answering and would take to an
14 independent lawyer and the independent lawyer would advise
15 him and then Mr. Lipinsky would come back and he could tell
16 us, I don't want to answer your voir dire or, I do and here
17 are my answers.

18 Yes, I would have no problem with that.

19 JUDGE BLOCH: Mr. Gallo, you have a chance to
20 respond.

21 MR. GALLO: Yes, I -- once again, I think
22 Mr. Roisman is mixing the question of whether or not there's
23 conflict with his version of the merit. He'll have ample
24 opportunity to cross-examine Mr. Lipinsky on the basis of
25 his direct testimony on the question of why he changed his

OMTpp

1 position and whether or not he was coerced to do it. And I
2 believe that in characterizing the fact as he sees it he's,
3 again, indulging in the supposition as to what he perceives
4 to be a conflict.

5 Addressing the Board's suggestion of voir dire, I
6 would object to that procedure. I see no basis -- the
7 Board, unless it's prepared to find -- and my
8 representations are unreliable. For the Board to indulge
9 in voir dire -- I assume it's the Board and not the parties
10 as well since these witnesses, after all, are the Board
11 witnesses -- and I see no basis unless, again, I repeat
12 the Board finds my representation to be unreliable in which
13 event I've already offered to have those representations
14 confirmed by affidavit.

15 I think the more appropriate approach is for the
16 Board to engage in the special instructions that you
17 mentioned about. Not only special instructions on what
18 truth means but on the conflict question as well if the
19 Board deems that it's necessary and appropriate.

20 But I think it's improper to engage in a voir
21 dire exercise on the basis of this record after the
22 representations I made. Now, if the Board believes that I'm
23 telling other than the factual situation and has some cause
24 for that position, that's another matter and we can address
25 it.

OMT/bc 1

JUDGE BLOCH: We'll take a brief decisional

2 recess.

3 (Recess.)

4 JUDGE BLOCH: Back on the record.

5 Before we start, I do want to poll the parties
6 because I heard something that sounded like a disconnect.

7 Mr. Gallo?

8 MR. GALLO: Yes.

9 JUDGE BLOCH: Staff?

10 MR. TREBY: Here.

11 JUDGE BLOCH: And, Mr. Roisman?

12 MR. ROISMAN: Yes.

13 JUDGE BLOCH: Ms. Garde?

14 MS. GARDE: Yes.

15 JUDGE BLOCH: Okay. Let's continue.

16 MR. WATKINS: Judge Bloch?

17 JUDGE BLOCH: Yes, Mr. Watkins, I hear you. Yes,
18 sir.

19 MR. WATKINS: Applicants are still here.

20 JUDGE BLOCH: Thank you.

21 THE REPORTER: The reporter is still here.

22 JUDGE BLOCH: Good. That was the most important
23 one. Thank you, Mr. Maggio.24 First, we have considered whether or not there was
25 a prima facie case of conflict of interest here. And,

OMT/bc 1 under the circumstances, we do think this is different from
2 the question of potential conflict of interest between
3 co-co-counsel and Mr. Lipinsky.

4 However, we still are troubled by the facts in
5 this case. We see a situation in which at an earlier time,
6 Mr. Lipinsky apparently was pressured by the President of
7 O.B. Cannon to create a document that would serve the
8 purposes of the company.

9 He also at an earlier time, as late as October,
10 1983, was defending in detail the conclusions he reached in
11 the Linpinsky memorandum that was leaked. Mr. Norris took
12 an opposing view to that.

13 There is some indication in Mr. Norris' testimony
14 that he may have felt pressured not to say as much as he
15 knew as he began his testimony.

16 Under the circumstances, we are not prepared at
17 this time to decide that the conflict prohibits Mr. Gallo
18 going forward as Mr. Lipinsky's counsel, but we do think
19 that there is enough for further inquiry.

20 Mr. Gallo's representations are not those of the
21 witness. We believe that the witness himself is the best
22 source of information for the record in this case.

23 Consequently, we will begin on Monday by advising
24 Mr. Lipinsky both of the nature of the obligation to tell
25 the truth. Incidentally, that portion of our advice will be

OMT/bc

1 for all of the witnesses; and also we will provide advice on
2 the nature of the conflict and the nature of the attorney-
3 client privilege.

4 To help Mr. Lipinsky to understand that, we would
5 hope that Mr. Gallo would make a copy of our decision that
6 we will issue this afternoon available to Mr. Lipinsky as
7 much in advance as possible, because in that decision we
8 discuss the nature of the attorney-client relationship.

9 We will permit voir dire by the parties. The
10 Board will conduct voir dire if necessary. Even though
11 these are Board witnesses, we think it's more appropriate
12 for the parties to carry the burden of the adversary conduct
13 rather than the Board where that's possible.

14 Now the last question before us for this hearing
15 is the sequestration question.

16 MR. GALLO: Judge Bloch, this is Joe Gallo. Point
17 of clarification.

18 JUDGE BLOCH: Surely, sir.

19 MR. GALLO: What is the purpose, as the Board
20 envisions based on its ruling for the party voir dire?

21 JUDGE BLOCH: The purpose for the party voir dire
22 will be to delve into the question of whether or not there
23 are actual conflicts of interest still existing which make
24 it difficult for Mr. Lipinsky to confide fully in the
25 attorney of record.

OMT/bc 1

2 MR. GALLO: I take it, in that exercise, he will
3 be represented by me?

4 JUDGE BLOCH: We're not disallowing representation
5 at this time, so, yes, you may remain as his counsel at this
6 time. If you consider what's going to happen at that time,
7 and decide that that's not appropriate, we, of course, would
8 expect you to advise us of that.

9 MR. GALLO: I thank you, Judge Bloch.

10 JUDGE BLOCH: Mr. Gallo, would you like to speak
11 briefly in support of your motion to lift the Board's rule
12 on sequestration of witnesses and to avoid our extending
13 that rule to Mr. Trallo?

14 MR. GALLO: Yes, Judge Bloch. I have to find my
15 copy of it here.

16 (Pause.)

17 I think, as I've cited in my motion, I've set
18 forth the grounds that I believe that justify lifting the--
19 modifying the order with respect to Roth and Lipinsky. And,
20 of course, the same grounds would also apply to Trallo.

21 And I guess I would stand on that writing unless
22 the Board has questions, and save my time for rebuttal.

23 JUDGE BLOCH: Okay, that will mean you will only
24 be able to respond to arguments made by others that you
25 cannot at this time reasonably anticipate?

MR. GALLO: Yes.

OMT/bc

1 JUDGE BLOCH: Mr. Watkins?

2 MR. WATKINS: We agree with Mr. Gallo that the
3 Board did not give its reasons for the sequestration order
4 to begin with. It should have. We also agree with him that
5 Midland indicates that counsel is entitled to the aid,
6 assistance from his clients unless there is a serious reason
7 justifying denial of it.

8 JUDGE BLOCH: Did Midland deal with this kind of
9 situation, or with technical witnesses on matters that
10 counsel needs constant advice on?

11 MR. WATKINS: Midland deals principally with
12 technical issues. In this case, the technical issues are
13 somewhat intertwined with the other issues. "Codings" is a
14 fairly complex area.

15 JUDGE BLOCH: And, also in Midland, that was the
16 party that had to have someone present. Does it matter that
17 this is not a party?

18 MR. WATKINS: The operative language in Midland,
19 your Honor, is counsel is entitled to the aid. So we
20 believe it doesn't make any difference.

21 JUDGE BLOCH: Yes, but in Midland...

22 (Interruption by ringing telephone.)

23 JUDGE BLOCH: Can the parties hear me?

24 MR. TREBY: The staff can hear you.

25 JUDGE BLOCH: Okay. I thought everyone left.

OMT/bc

1 Mr. Watkins, are you there?

2 MR. WATKINS: I'm here, your Honor.

3 JUDGE BLOCH: Did you hear the loud bell also?

4 MR. WATKINS: Yes, it was my phone, and I
5 apologize.

6 JUDGE BLOCH: Okay. I thought we got
7 disconnected.

8 Well, the question on the party, Mr. Watkins, is
9 whether Mr. Gallo actually has a case here for which he
10 needs assistance. He had some individual witnesses who are
11 important to your case and to intervenor's case, and to the
12 staff's case, but he doesn't have a case in which he needs a
13 technical assistant; he just has individual witnesses who
14 have some importance to other parties' cases.

15 Can you comment on that, Mr. Watkins?

16 MR. WATKINS: Yes, sir.

17 Mr. Gallo is representing individual witnesses as
18 well as the company. If, for example, on cross-examination
19 of one of his clients, an issue were to develop that he has
20 little familiarity with and needed assistance on, it would
21 be critical for redirect, for example, that he have that
22 assistance.

23 JUDGE BLOCH: This is a little strange. If each
24 of these witnesses had separate counsel, I take it that the
25 counsel for the witness on the stand would have no one

OMT/bc 1 sitting with him.

2 Isn't that correct?

3 MR. WATKINS: That could be.

4 JUDGE BLOCH: So is it because of the joint
5 representation that there's some special need to have a
6 witness sitting next to counsel?

7 MR. WATKINS: It is a fact that he represents
8 O.B. Cannon and several individuals. So we're not talking
9 about a case in which O.B. Cannon and each witness were
10 separately represented.

11 JUDGE BLOCH: Isn't the only interest of each
12 witness here though that they tell the truth? There's no
13 need that it match the stories of the other witnesses, is
14 there?

15 MR. WATKINS: I don't think that's the point that
16 Mr. Gallo is making. The question goes not to the
17 truthfulness of the witnesses, but to the aid to which
18 counsel is entitled.

19 JUDGE BLOCH: Okay, have you completed your
20 discussion?

21 MR. WATKINS: Yes, sir.

22 JUDGE BLOCH: Mr. Roisman.

23 MR. ROISMAN: Mr. Chairman, as a preliminary
24 matter, as you know --

25 JUDGE BLOCH: Mr. Roisman, can't hear.

OMT/bc 1

MR. ROISMAN: I'm sorry. Now can you hear me?

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JUDGE BLOCH: Now we can.

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MR. ROISMAN: All right, I'm sorry.

4

As you know, it's a preliminary matter. There was a motion filed with regard to the issue of lateness of our filing and not filing in writing the motion on disqualification. And I believe that one of the proponents of the principle if not of the motion itself was Mr. Gallo.

9

I find it incomprehensible that we received, after I had left town, a motion to upset an order of the Board which has long been outstanding.

12

And I might add we fully support the proposition in sequestering. Had the Board not ordered it, we would have requested it.

15

MR. GALLO: Can't hear him, Judge Bloch. I'm sorry to interrupt.

17

JUDGE BLOCH: He said "Had the Board not ordered it, we would have requested it."

19

MR. ROISMAN: Can you hear now, Mr. Gallo?

20

MR. GALLO: Yes, thank you.

21

MR. ROISMAN: I'm sorry.

22

Our position is, as a preliminary matter, that this is too late, that Mr. Gallo slept on his rights, that we are prejudiced by having received this document and not have an opportunity to even research the authority cited;

25

OMT/bc 1 and that the complaints raised at this point in time should
2 not be considered at all.

3 So, preliminarily, we object to the motion on the
4 ground that it's out of time, and that the party whose
5 seeking it has essentially waived it.

6 Secondly, we think that if there had been any
7 question about the need for sequestering before, and I don't
8 think there was, that question was laid to rest by our
9 preceding discussion today over the issue of the conflict of
10 interest.

11 Now that conflict of interest matter, which,
12 incidentally, as the applicant's motion on the issue
13 properly notes, is raised with Mr. Gallo almost immediately
14 after we got the first set of Lipinsky notes. And, at his
15 request, postponed doing anything about it until we had read
16 the Lipinsky testimony.

17 The discussion today indicates that there are real
18 potentials for disagreements among these parties and that
19 they shouldn't be in the room at the time that the other is
20 testimony, nor should they have shared with them what it is
21 that the Board is asking; or that when the Board is through
22 with its questioning, whatever, the parties may ask of these
23 witnesses.

24 Number three, it seems to me clear that the issue
25 that is presented of the need or the value of having some

OMT/bc 1 technical person with Mr. Gallo, if he needs a technical
2 person, he can retain one. He's not prohibited. You
3 haven't barred him from having some technical advisor.

4 All you've done is tell him that he can't use
5 these witnesses as his technical advisors. And so if he
6 feels that the technical issues are going to be a problem
7 for him, there's an easy way to deal with that.

8 I certainly agree with the thrust of the questions
9 by Mr. Grossman to Mr. Watkins, which is that we are dealing
10 here with someone who -- and by the Chairman as well --
11 we're dealing here with someone who does not have a
12 position; that is, they are not trying to convince this
13 Board that Comanche Peak site has a good codings program, or
14 doesn't have a good codings program.

15 And so the real issue -- I mean, that issue will
16 come up, it doesn't even come up in our side of the hearing,
17 much less in this phase of our side of the hearing. The
18 issue is merely whether or not these witnesses are telling
19 the truth.

20 I would suggest that the only expert that
21 Mr. Gallo may need is a psychologist, but not a coding
22 specialist. And that, in that sense, there is no crying
23 need for him to have one of these people there in front of
24 him. I feel that the full question, the whole issue that's
25 in front of the Board, is one of whether or not everybody is

OMT/bc 1 telling it as it is, or whether they are feeling some
2 constraint. And that to the extent inconsistencies exist,
3 they need to be fully explored, and one witness should not
4 be able to hear how the other witness deals with the
5 previously unanswered stated question. That could destroy
6 value of the testimony that's being received.

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OMTbur 1 MR. ROISMAN: That is the end of my statement,
2 Mr. Chairman.

3 JUDGE BLOCH: Staff?

4 Thank you, Mr. Roisman.

5 MS. GARDE: May I interrupt? This is Billie
6 Garde.

7 I have a few cases, if you are interested in them,
8 which I could cite at this time.

9 JUDGE BLOCH: Yes.

10 MS. GARDE: In NLRB, Yale Manufacturing, 570 F2nd
11 705. This is an Eighth Circuit 1978 case. The holding was
12 that the ALJ had discretion to order sequestration and that
13 the discretion should generally be exercised in favor of
14 sequestration; unless an opponent can show particular facts
15 of case, that it is necessary for witnesses to remain in the
16 hearing room.

17 U.S. v Warren, 550 Fed 2nd 219, Fifth Circuit,
18 1977 case, regarding Rule 615, which is of the Federal
19 Rules, which is the sequestration rule, provides that at the
20 request of a party the Court shall order witnesses
21 excluded. That rule is mandatory in nature, according to
22 this case.

23 JUDGE BLOCH: Which case is that?

24 MS. GARDE: U.S. v Warren.

25 And Wood v. Southwestern Bell Telephone Company,

OMTbur 1 which was a sexual harassment case, in which the case, if I
2 remember this correctly, wanted the alleged harasser
3 excluded from the courtroom.

4 JUDGE BLOCH: So you haven't given cites for
5 U.S. v. Warren and Wood v. Southeast Bell?

6 MS. GARDE: Yes, I gave you the cite for
7 U.S. v. Warren. I will repeat it. It is 550 Fed 2nd 219,
8 Fifth Circuit. It is a 1977 case.

9 And Wood v. Southwestern Bell Telephone Company,
10 637 Fed 2nd 1181, an Eighth Circuit case -- oh, 1188 --
11 excuse me -- Eighth Circuit, 1981 case.

12 All of these cases deal in some way with the issue
13 of intimidation of the witness on the stand by the presence
14 of individuals in the courtroom which may color their
15 testimony.

16 JUDGE BLOCH: Now, does that require that there be
17 an advanced finding of the likelihood of intimidation?

18 MS. GARDE: I don't believe so.

19 JUDGE BLOCH: Okay, the Staff?

20 MR. TREBY: Yes, Judge Bloch. This is Mr. Treby.
21 The Staff opposes the motion to modify the order.

22 First, we believe the motion is untimely. The
23 Licensing Board's order establishing the sequestration is
24 dated October 4th. The motion was not filed until November
25 15th, almost six weeks after the order was filed, and if

OMTbur 1 reconsideration had been necessary it should have been filed
2 earlier, certainly at an earlier time when Mr. Gallo knew
3 that he was going to be involved in this proceeding.

4 While we agree that the Board did not articulate
5 the reasons for sequestering the witnesses, we believe that
6 in the very unique circumstances of this particular group of
7 witnesses -- but not an abuse of discretion for the Board to
8 have ordered it and free from error in doing it.

9 It is apparent that this is not an instance where
10 you have a panel of expert witnesses, each of whom have
11 contributed a part of the overall testimony so that you need
12 the whole group up there to explain their testimony.

13 What we have here is a group of persons who are
14 all employed by the same company and played some role in a
15 matter which the Board wishes to inquire about, and each --
16 and the role they played can be ascertained by asking them
17 separately. You don't need a panel up there to do it.

18 To get to the question then as to whether or not
19 they should be sequestered in the sense that they are not
20 able to read other people's testimony and therefore educate
21 them as to what has gone on before, I think to put to bed
22 all of the concerns, speculations, et cetera, that we have
23 heard here today the best approach would be to sequester the
24 witnesses, hear them separately.

25 That is the end of the Staff's view.

OMTbur 1

JUDGE BLOCH: Thank you, Mr. Treby.

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Your rebuttal, Mr. Gallo?

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MR. GALLO: Thank you.

4

On the question of the cases cited by Ms. Garde,

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two remarks with respect to those cases:

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I do not dispute that the Licensing Board has the

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discretion, can exercise the discretion to sequester

8

witnesses. Indeed, the thrust of my motion is that there is

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no basis upon which to exercise that discretion in this

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instance because the issue of credibility has only been

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properly raised with respect to Mr. Norris, and my motion

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doesn't go to him.

13

The Licensing Board, in its memorandum of October

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4, made quite clear that it expected the other witnesses

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and, presumptively, that the other witnesses would tell the

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truth. Hence, there is no basis for the sequestration

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order.

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The cases relied upon by Ms. Garde really rely in

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turn upon the particular rule -- the number escapes me -- of

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the Federal Rules of Civil Procedure. I think the Appeal

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Board made it quite clear in its series of Midland cases

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that the standard for applying sequestration is not

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mandatory, as required by -- as permitted by the Federal

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Rules or mandated by the Federal Rules; is, indeed, a

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matter of discretion.

OMTbur 1

So I believe the cases she cited; namely, Bell and Warren, are really inapposite for that reason.

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As I point out, the purpose of the motion was based on two prongs. Lawyer assistance was just one prong.

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The other prong was, of course, that there was no basis for the Board to exercise in the first instance its discretion to sequester Ross and to sequester Lipinsky and, now, if I understand the thrust of the argument as posed to me, your Honor, also to sequester Mr. Trallo, who is not subject at the moment to the sequestration order.

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JUDGE BLOCH: Timeliness.

7

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MR. GALLO: Let me see, the question of out of time.

9

Is that what you said, your Honor, timeliness?

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JUDGE BLOCH: Yes.

11

MR. GALLO: All right.

12

As your Honor may recall, now, we had a conversation on or about October 30 or 31, November 1, in that timeframe, where I posed to you the dilemma I saw with respect to Trallo not being subject to the sequestration order and the need that I saw for assistance.

13

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JUDGE BLOCH: That was October 30, and our order was the 10th?

15

MR. GALLO: That is right.

16

JUDGE BLOCH: I see.

OMTbur 1

2 MR. GALLO: And on that basis, during that
3 conversation you indicated that the matter -- that the Board
4 might take a different view of the matter and after we take
5 a look at your testimony, which was supposed to be filed on
6 November 5.d

7 JUDGE BLOCH: Okay, the matter we were talking
8 about then was solely whether to extend the motion to
9 Trallo. You are certainly not untimely on that one, but
10 that was all we were discussing, as to whether Trallo could
11 sit next to you?

12 MR. GALLO: My recollection is very clear when you
13 said that maybe a sequestration order may not be necessary
14 at all.

15 JUDGE BLOCH: That is correct, if there were a
16 full disclosure of everything and all the facts were gone
17 into. That is correct.

18 MR. GALLO: Now, based on that, I was -- the word
19 I was going to use was "lulled," but I am not going to use
20 that word -- I was convinced at least to let the matter go
21 until after our testimony was received by the Board and the
22 Board had an opportunity to read it.

23 I called -- I believe the 12th was a holiday, a
24 federal holiday, and I called on the 13th, and you were on
25 annual leave. We discussed the matter on the 14th, and you
said you better file a formal motion, and I filed one

OMTbur 1 yesterday on the 15th.

2 JUDGE BLOCH: Of course, that was in on the 11th.

3 MR. GALLO: Well, I must confess to you that I
4 gave the 11th for the purpose of providing the Board with an
5 opportunity to read the testimony.

6 JUDGE BLOCH: Sure.

7 Yes, I must apologize to the other parties for not
8 having informed them of the October 30th contact. That is,
9 in fact, what did happen, and that is part of why they are
10 filing this -- they are concerned about timeliness. That
11 had slipped my memory, and I did fail to notify the parties
12 of that. I apologize.

13 Mr. Gallo, have you further to complete on your
14 rebuttal?

15 MR. GALLO: Let me see.

16 Well, other than with respect to Mr. Treby, we are
17 not proposing that we call a panel, as I think he may have
18 suggested in one of his remarks. We merely wish the order
19 lifted with respect to Ross and Norris, and, as an
20 alternative request, I would remind the Board that if it
21 disagreed with respect to Ross and Norris, that it at least
22 permit Ross to sit at counsel table at the time Trallo takes
23 the stand and to, of course, not extend the order to Trallo
24 at all, in view of the fact -- and I would emphasize what
25 the Board said in its October 4 order -- presumption that

OMTbur 1 these witnesses indeed will tell the truth and will not take
2 into account their various pecuniary interests.

3 JUDGE BLOCH: What I don't understand is what the
4 need is.

5 I mean, suppose that, say, Lipinsky is testifying
6 and he says something. Why would it be relevant to you to
7 have Mr. Trallo turn to you and explain something about
8 that?

9 MR. GALLO: Well, let's follow that hypothetical.
10 Let's assume during the course of cross-examination -- and
11 we are focusing on the events that occurred on November 9th,
12 10th, and 11th, which were the days of those transcription
13 meetings down in Comanche Peak. Now, I will rearticulate
14 that more clearly.

15 The November 10-11 meeting in 1983 down at the
16 Comanche Peak site. Let's assume during the course of
17 cross-examination on that matter he refers to some
18 situation, some factual matter, some discussion either of a
19 technical nature or of a plainly factual nature that I don't
20 understand in response to the question. Mr. Trallo was
21 there. I could turn to Mr. Trallo and say -- and seek his
22 advice as to -- and seek clarification as to what the point
23 is.

24 I feel that my representation has been
25 sufficiently brief that, while I know the facts reasonably

OMTbur 1 well, I just feel the need to be able to consult with one of
2 the principals that are involved here; indeed, to adopt the
3 notion that Mr. Roisman suggests, which is to hire somebody,
4 would serve no purpose, given the example I just provided.

5 Other people within the company just are not
6 sufficiently involved with this matter to be of any
7 assistance either, and it is for that reason that I find the
8 assistance of one of the principals necessary, and in light
9 of the fact that the Board has not found or has no basis to
10 conclude with respect to Ross and Lipinsky any
11 untruthfulness and certainly as to Trallo, since he is the
12 witness that I volunteered without objection by the parties,
13 that it would be appropriate to provide at least the limited
14 relief that I request in the motion.

15 JUDGE BLOCH: I still am confused. You say Trallo
16 knows the facts, but Lipinsky and Trallo could have seen the
17 facts differently.

18 Why would you use what Trallo tells you about the
19 facts to challenge Lipinsky?

20 MR. GALLO: Well, I am not talking about
21 challenging. I might, to be candid, as I often do, sitting
22 at the counsel table, turn to my adviser and say, "What the
23 hell is he talking about? I don't understand it." And then
24 my adviser says some words and explains, and it may jog my
25 memory, that I slipped -- during the heat of the fray I

OMTbur 1 might have forgotten. It may be a matter that I really
2 hadn't focused on before and didn't fully understand. That
3 is the purpose that these advisers provide.

4 JUDGE BLOCH: Isn't redirect satisfactory to do
5 that?

6 MR. GALLO: Redirect? I would suggest that the
7 preliminary question I would ask my adviser in that answer
8 would be a condition precedent to conducting effective
9 redirect. If I don't understand the thrust of the point or
10 the comment, I cannot effectively conduct redirect unless my
11 redirect is: "Mr. Lipinsky, I don't understand what you are
12 talking about. Would you please repeat that?" And then
13 unravel on the public record a matter which maybe redirect
14 was inappropriate, but I am forced to do it because I have
15 no other recourse in order to find out just exactly what the
16 point was.

17 The purpose of the adviser is to avoid that
18 jeopardy.

19 JUDGE BLOCH: Have you concluded your rebuttal?

20 MR. GALLO: Yes, sir. Thank you.

21 JUDGE BLOCH: Thank you. We will take a brief
22 decisional recess.

23 (Recess.)

24 MR. GALLO: I think everybody is on the line.

25 Tony Roisman, can you hear me?

OMTbur 1

MR. ROISMAN: Yes, I can, Joe.

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MR. GALLO: Okay. I thought for a moment I had disconnected us again, and I was getting distraught.

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MR. ROISMAN: The line I am on has a calling feature.

5

6

Billie, are you there?

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MS. GARDE: Yes, I am.

8

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MR. ROISMAN: Okay. As soon as we are off, will you call me?

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MS. GARDE: Yes.

11

JUDGE BLOCH: The Board is prepared to decide.

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We have decided to extend the rule of

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sequestration to each and all of the witnesses, being a key question in this portion of the proceeding has to do with the credibility of each of the witnesses.

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The order that we are issuing this afternoon will set forth the context in which we believe these proceedings are taking place. It mentions the pressures that may have existed within the O. B. Cannon Company in the form of Mr. Lipinsky's concerns about perjury.

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We are also aware of the conflict that existed in the views of Mr. Norris and Mr. Lipinsky. We are aware of a change of viewpoint that occurred between October and January that we still don't fully understand.

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We think that the sequestration of the witnesses

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OMTbur 1 will help to clear the air, as the Staff has said, and we
2 note that there is a big difference in this portion of the
3 proceeding from other proceedings in which assistants of
4 experts is sought by counsel.

5 O. B. Cannon is not applying for a license for a
6 nuclear plant. If it were, it would have a very important
7 interest to defend and would have to assure the accuracy of
8 the technical information being presented. These issues are
9 not primarily technical. They are questions of credibility
10 and what occurred.

11 If a technical expert is desired by Mr. Gallo, he
12 may of course have him with him, providing it is not one of
13 these four witnesses.

14 One second.

15 (Pause.)

16 The role of witnesses on Monday will be that we
17 will explain the importance of truthfulness and conflicts of
18 interest questions to all of the witnesses, and at that time
19 we will exclude all the witnesses except Mr. Lipinsky and
20 begin with Mr. Lipinsky.

21 The order of the remaining witnesses will be
22 determined after we consider what we have learned from
23 Mr. Lipinsky.

24 We will also decide whether we will continue with
25 Mr. Lipinsky after the voir dire after we have had a chance

OMTbur 1 to consider what we learn during the voir dire.d

2 Are there any qualifying comments or questions at
3 this point?

4 MR. ROISMAN: Mr. Chairman, this is Mr. Roisman.

5 JUDGE BLOCH: Yes, sir.

6 MR. ROISMAN: I take it that the Board's order
7 regarding the release of documents, postponing it till 3:00
8 o'clock tomorrow afternoon, is designed to allow any party
9 who feels aggrieved to attempt whatever appellate review
10 they want.

11 I wonder if, while all the parties are on, the
12 Board could lay down some guidelines for how that is to be
13 done and how they will make contact with the other parties
14 if they are going to do that so that we are not in an ex
15 parte situation.

16 JUDGE BLOCH: Mr. Gallo, would you have any
17 suggestions on how the parties should be notified if you do
18 file an appeal this afternoon? Are you going to attempt for
19 a stay?

20 MR. GALLO: What is today -- Thursday?

21 JUDGE BLOCH: Today is Friday.

22 MR. ROISMAN: I believe today is Friday.

23 MR. GALLO: Yes, today is Friday. Well, so if I
24 have to apply for a stay, I have to do it between the time
25 that the Board's decision is available and 5:00 o'clock,

OMTbur 1 when the Appeal Board goes home.

2 JUDGE BLOCH: That could be as early as 1:30 that
3 it will be available. It will be available for all parties
4 up here.

5 MR. GALLO: Well, I am considering moving for a
6 stay on the grounds that the Board's order is unreasonable,
7 a stay with the Appeal Board on the grounds that the Board's
8 order is requiring the production of documents -- I believe
9 you said, by noon tomorrow, didn't you?

10 JUDGE BLOCH: That is correct.

11 MR. GALLO: -- is unreasonable, given the
12 circumstances of the availability of the Board order and
13 given the fact that tomorrow is Saturday, and the Appeal
14 Board doesn't sit.

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1 JUDGE BLOCH: So you plan to file that this
2 afternoon?

3 MR. GALLO: Yes, I planned it on that limited
4 basis at least as to that because he could state further for
5 the purpose of reviewing the Board's decision and preparing
6 a proper motion on the merits of the stay addressing the
7 four factors.

8 JUDGE BLOCH: Mr. Roisman, is that sufficient
9 clarification?

10 MR. ROISMAN: No, I want to know whether is
11 making a representation that we will be served with a copy
12 of the order before -- requested a stay order before he
13 serves it on the Appeal Board. He didn't make such a
14 representation.

15 MR. GALLO: Well, I haven't really thought
16 through how I will go about seeking the stay. I think
17 realistically, the only way to do it is to hastily prepare
18 some sort of writing and serve on the Appeal Board and, of
19 course, report in the alternative to attempt it by telephone
20 conference.

21 If I opt for the -- and that, of course, would be
22 up to the wishes and desires of the Appeal Board of how they
23 might want to deem it appropriate to proceed.

24 If I, of course, opt to file a writing, I would
25 serve it at Mr. Roisman's offices by messenger.

OMTpp

1 MR. ROISMAN: All right. Mr. Chairman, I think
2 I'm still not getting an answer from Mr. Gallo. What I wish
3 to avoid -- ex-party phone conversation of setting up a
4 conference call with the Appeal Board. I do not wish to
5 have any communication with the Appeal Board ex-party.

6 I want to be on record now as saying I want
7 either Miss Garde or myself to be on the line even if
8 Mr. Gallo is merely calling to learn of the availability of
9 the Appeal Board. I feel that it prejudices our interest
10 particularly since the call would not be on the record. We
11 have no way of knowing what Mr. Gallo would say in
12 characterizing even what the issue is.

13 JUDGE BLOCH: Mr. Watkins, do you know the
14 Chairman of the Appeal Board for this proceeding?

15 MR. WATKINS: Mr. Rosenthal.

16 JUDGE BLOCH: It is Mr. Rosenthal? For the OL2
17 part?

18 MR. WATKINS: I assumed it was. I called the
19 Appeal Board yesterday to ask for the Appeal Board panel.
20 And I was given the names of Rosenthal, Moore, and
21 Dr. Johnson.

22 JUDGE BLOCH: Okay, that's new to me because he
23 was not on the other side of the case.

24 MR. WATKINS: No, I would have to clarify that.
25 I want to make it clear that I find Mr. Roisman's request

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OMTpp

1 answer, Mr. Roisman, wouldn't you really like him to deliver
2 it up here somewhere and arrange to be able to pick it up so
3 that you could have Miss Garde work on it and answer, if
4 she's going to?

5 MR. ROISMAN: When you say "up here"?

6 JUDGE BLOCH: Meaning on the 4th floor as opposed
7 to the 5th floor. We're in the same building as the Appeal
8 Board.

9 MR. ROISMAN: That's right, I don't mean down
10 here in Houston. Yes, I'm talking about delivery to Miss
11 Garde.

12 JUDGE BLOCH: Okay. Why don't you arrange that
13 delivery should take place in this proceeding for the
14 purpose of this motion by leaving an extra copy with the
15 secretary of the Atomic Safety and Licensing Board Panel on
16 the 4th floor?

17 MR. ROISMAN: That may be terribly inconvenient
18 for Miss Garde. She doesn't have the access to a library
19 there, she does not live there.

20 JUDGE BLOCH: Well, I don't know how she's going
21 to answer unless she gets it in this building. But if you'd
22 rather have it -- you want to have it served on her at her
23 place?

24 MR. ROISMAN: Well, Billie?

25 MISS GARDE: Yes.

OMTpp 1

MR. ROISMAN: Where do you want it?

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MISS GARDE: Well, it seems to me in order to be able to answer this, I'm going to need both Judge Block's order and I'm going to need the motion for stay and I'm going to need a library. So it's acceptable to me to pick it up up there if I can have access to one of the law libraries.

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JUDGE BLOCH: You can have access to the Licensing Board Panel's library, which is not very complete.

MISS GARDE: Okay.

JUDGE BLOCH: It won't have your statement.

MISS GARDE: Okay.

MR. ROISMAN: All right, is that satisfactory, Billie?

MISS GARDE: That's fine. A stay is a very narrow issue.

MR. ROISMAN: Okay. That's fine, Mr. Chairman, that solves the problem.

JUDGE BLOCH: Mr. Gallo, if you could serve Miss Garde up here that would be appropriate for the purpose of this case?

MR. GALLO: All right. I'll do that.

Could you indicate for me your best projection as to when the opinion of the Board will be available for appeal?

OMTpp 1

JUDGE BLOCH: One moment.

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(Pause.)

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JUDGE BLOCH: From 1:30 to 2:00 is our best

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projection.

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MR. GALLO: It will be available from 1:30 to

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2:00 in Bethesda, in your office?

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JUDGE BLOCH: That's correct.

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So, I assume that there's no more business here

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so we can go work on that order?

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There being no further business, the hearing is

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adjourned.

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I want to thank all the parties and the reporter.

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(Conference Adjourned.)

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CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before the UNITED STATES NUCLEAR REGULATORY COMMISSION in the matter of:

NAME OF PROCEEDING: TEXAS UTILITIES GENERATING COMPANY, et al.
(Comanche Peak Steam Electric Station,
Units 1 and 2)

DOCKET NO.: 50-445-OL2
50-446-OL2

PLACE: BETHESDA, MARYLAND

DATE: FRIDAY, NOVEMBER 16, 1984

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

(sig) *Joe Maggio/sg*

(TYPED)

JOE MAGGIO

Official Reporter
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