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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' MOTION TO VACATE
NOVEMBER 16, 1984 MEMORANDUM

Applicants move to vacate this Board's November 16, 1984 Memorandum (Lipinsky Privileges) on the grounds that the Memorandum is in error and should not be made part of this record. While the findings in that Memorandum regarding the conduct of Applicants' counsel are in and of themselves disturbing and unwarranted, they may also reflect adversely on Applicants in the context of this proceeding and are equally unwarranted in that regard.

In that Memorandum, the Board held that Mr. Joseph J. Lipinsky could not invoke an attorney-client privilege to protect from disclosure documents containing advice given him by his chosen counsel. As predicate for this holding, the Board took the unusual step of treating as void an acknowledged attorney-client relationship between Mr. Lipinsky and counsel, declaring that it was ethically impermissible for counsel to represent

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simultaneously Mr. Lipinsky and Applicants and that therefore the relationship could be ignored. It premised this conclusion on two erroneous factual assertions: (1) counsel solicited Mr. Lipinsky's representation; and (2) counsel could not represent Mr. Lipinsky, while at the same time being engaged by Applicants, because of a claimed conflict between the two regarding the latter's coatings program.^{1/}

The record contradicts both of these findings. It shows that Mr. Lipinsky contacted counsel and asked that they represent him in connection with his deposition before NRC. It also shows that before agreeing to represent him, counsel explored Mr. Lipinsky's views and reasonably concluded that no conflict existed arising out of his representation.

Granted, the need for an order compelling production no longer exists because Mr. Lipinsky has voluntarily agreed to release those documents as to which he was claiming attorney-client privilege; nevertheless, the issues raised by the Board's Memorandum regarding the propriety of Applicants' conduct as well as the conduct of their counsel which are now contradicted by the record remain. The Board has an interest in assuring not only an

^{1/} In vitiating the attorney-client privilege on the basis of alleged improper conduct by counsel, the Board overlooked that the privilege is personal and that it was denying Mr. Lipinsky his reasonable expectation of confidentiality arising from the relationship. More important, in so holding the Board ignored that it thereby denied Mr. Lipinsky his right to counsel, a fundamental requisite of which is free and unfettered communication between attorney and client without the fear of a subsequently compelled disclosure. See E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D. Tex. 1967).

adequate but also an accurate record as to matters which are of "serious concern" (Memorandum at 5) to it. On this basis, Applicants believe that the Memorandum should be vacated.

In addition to the testimony now received, the challenged findings are contradicted by Mr. Lipinsky's diary, which has now been entered into evidence (Tr. 20,088). The relevant diary entries are, as the Board appears to have recognized, particularly significant (Memorandum at 12). First, Mr. Lipinsky began the diary at the suggestion of the NRC Staff (Lipinsky Diary ("LD"), 11/14/84) as an accurate record of events should he find the need to commence an action under Section 210 of the Energy Reorganization Act, 42 U.S.C. 1851. Second, no one knew that Mr. Lipinsky maintained such a diary and Mr. Lipinsky himself had no knowledge of the other uses (if any) to which it ultimately might be put. Third, the Board itself has viewed the diary as a contemporaneous writing of how Mr. Lipinsky felt. The Board has characterized the diary as "the best evidence of what Mr. Lipinsky's state of mind was, his knowledge was, at particular points of time" (Tr. 20,088) and as "crucial to a full understanding of the truth" (Memorandum at 12).

Resort to these diary entries shows incontrovertibly that there was no conflict apparent in the interests of Mr. Lipinsky and Applicants on the November 29, 1983 date when he retained counsel and, further, that Mr. Lipinsky retained counsel only after having been fully briefed as to the potential for a future conflict.

A. Counsel Did Not Solicit Mr. Lipinsky's Representation; He Sought Out Counsel.

The Board drew support for its finding that no attorney-client relation existed from the unwarranted inference that counsel solicited their representation of Mr. Lipinsky:

We find it noteworthy that before Mr. Lipinsky allegedly engaged [counsel] . . . , the contacts between Mr. Lipinsky and Applicants' firm were initiated at the attorneys' behest. Generally, the steps one takes to retain an attorney are initiated by the potential client, and not by an attorney. [Memorandum at 11.]

To the contrary, as the record shows, it was Mr. Lipinsky who sought out Applicants' counsel to represent him in connection with his deposition before NRC (LD, 11/29/83). It was only because Counsel knew from a November 22, 1983 meeting with Mr. Lipinsky that his position was, by that time, consistent with that of Applicants (See, LD, 11/22/83) that counsel consented to advise and represent him in the matter. In addition, counsel did so only after they made Mr. Lipinsky aware that should a conflict of interest later arise, such would require counsel to withdraw (LD 12/1/83).

As Mr. Lipinsky's diary shows, he was contacted by NRC's Mr. Hawkins on November 28 (LD, 11/28/83).

T. Conn. w/ F. Hawkins (NRC) wanted to set up with JJL (preferably after work or on weekend) to discuss areas into which F. Hawkins could pursue. JJL pointed out O.B. Cannon position and offered to cooperate. [Id.]

He then discussed the call with his colleagues, Messrs. Norris and Trallo. It was Mr. Trallo who "suggested that JJL contact N. Reynolds" for advice on the NRC interview. Id. Mr. Lipinsky called counsel early the following morning but because counsel was out he "left [a] message." LD, 11/29/83.

Counsel subsequently returned the call during which Mr. Lipinsky asked counsel to represent him during the NRC interview. Id.^{2/}

Acting under that retainer, counsel set up a conference call with Messrs. Lipinsky and Hawkins, in which Mr. Lipinsky:

[e]xplained to F. Hawkins that NSR represents JJL on this item -- also explain to F. Hawkins that JJL based memo w/o TUGCO's side of the story and that if TUGCO is doing all they (TUGCO) says then JJL's concern would be mitigated. (JJL cannot prove one way or the other) -- agreed to meet in Chicago on 12/8/83 (NSB [sic] to arrive 400 p.m. in Chicago) [LD, 11/29/83].

On November 30, Mr. Lipinsky again spoke with counsel.

His diary indicates:

T. conn. w/ N.S.R. (Attorney) went over T. Conn. w/ F. H. - NSR to call - F. H. to make sure there are no problems re: conflict of interest [LD, 11/30/83].

As Mr. Lipinsky wrote in his diary, "at this mtg. NSR represents only JJL interests." Id. (emphasis added).

^{2/} The first meeting between Mr. Lipinsky and counsel was on November 22, 1983, at which counsel represented only Applicants. Even at that time there was no conflict between Mr. Lipinsky and Applicants. See Part B, infra.

Finally, on December 1, 1983 Mr. Lipinsky had another telephone conversation with counsel. He was informed that counsel had resolved with Mr. Hawkins the conflict issue and that Mr. Lipinsky and counsel would have an attorney-client relationship at the meeting. More importantly, Lipinsky wrote in his diary that he was advised by counsel that "NSR would excuse himself if a conflict came up" [LD, 12/1/83].

The Board treats as a threat counsel's necessary admonition that they would be required to withdraw in the event a potential for a conflict should ripen into an actual one (Memorandum at 12). But such a caution is precisely what the Model Rules would require and counsel was bound to inform his client of that fact. Moreover, any such necessary withdrawal would have in no way prejudiced Mr. Lipinsky. There is nothing which even remotely suggests that the interview could not have been recessed or terminated as Mr. Lipinsky might choose.

In sum the record is plain and not subject to any other reasonable interpretation but that Mr. Lipinsky knowingly and willingly requested counsel on November 29 to represent him at

the NRC interview that subsequently took place on January 4, 1984.^{3/} There is no evidence of solicitation to further some supposed ulterior motive.

B. There Was No Conflict Between the Interests of Mr. Lipinsky and Applicants When Counsel Undertook to Represent Both of Them.

The Licensing Board held that counsel could not adequately represent Mr. Lipinsky.

We are unconvinced that [counsel] could represent Mr. Lipinsky adequately in light of the firm's relationship to Applicants. The firm could not fully pursue with him the option of continuing to support his story. [Memorandum at 7.]

On this basis, reasoned the Board, there was necessarily a conflict between Applicants' counsel and Mr. Lipinsky.

Memorandum at 6 - 7.

But when counsel undertook to represent Mr. Lipinsky on November 29, 1984, Mr. Lipinsky already believed that if Applicants had in place the program they described to him, then the concerns expressed in his August, 1983 trip report would be mitigated (See, LD, 11/18/83). On November 10, Mr. Lipinsky and others from O.B. Cannon met with site management, including

^{3/} Contrary to the Board's statement that Mr. Lipinsky's representation took place "solely on January 4, 1984" (Memorandum at 10), advice and representation by the firm commenced on November 29, 1983 and continued through January 4, 1984 when the interview took place (LD, 11/29/83). Statements regarding what one firm lawyer did by way of appearing for Mr. Lipinsky must be distinguished from what other lawyers did in advising Mr. Lipinsky about the scheduled appearance and acting as counsel during telephone contacts.

Messrs. Tolson and Merritt (Tr. 19,715). The purpose of the meeting was to describe how Comanche Peak satisfied the specifications and regulatory requirements that led to the concerns raised by Mr. Lipinsky in his trip report (Id.). Mr. Lipinsky concluded at that time that if the activities described to him were being implemented properly, his concerns would no longer be valid (Id.). He further concluded that if the audits described to him were of sufficient scope and depth, his confidence in the coatings program would increase considerably (Tr. 19,716). The only reservations he expressed were to the effect that he did not claim independent knowledge of the adequacy of the implementation of the coatings program; he depended on Applicants doing what he had been told they were doing (LD, 11/18/83). Following the meeting, representatives from O.B. Cannon met to discuss what they learned at the meeting. They all agreed that if site management was doing what was described, they would have no concerns (Id.).

Mr. Lipinsky's November 18 diary entry confirms that he, in fact, reached this conclusion before he retained counsel on November 29. There, Mr. Lipinsky reported

RBR asked what JJJ would say under cross-examination about how TUGCO explained away concerns -- JJJ said if utility doing what they claim and JJJ could not prove one way or the other then concerns would be mitigated" [LD, 11/18/83].

Similarly, at the hearings he explained:

Essentially I had concerns as a result of my August 8 trip report. We had a meeting on-site on November 10.

Taking that at face value, my concerns went away. [Tr. 20,031, See also Tr. 20,049-53.]

As Mr. Lipinsky's diary indicates, he and other O.B. Cannon personnel were interviewed regarding potential testimony by Applicants' counsel on November 22 -- a date approximately a week before both the request by the NRC's Mr. Hawkins to question him, and Mr. Trallo's suggestion that he obtain counsel to advise him in that connection. At that November 22 meeting, Mr. Lipinsky disclosed his position and was asked by counsel if he would become a witness for TUGCO, an offer which clearly would not have been made if Mr. Lipinsky had views in direct conflict with Applicants.

Nor was Mr. Lipinsky in danger of being pressured to change his mind, as the Board suggests in positing that representation was necessary "solely to prevent his being forced into making fraudulent statements (potentially actionable against him) favorable to Applicants' coatings program" (Memorandum at 5). Once Mr. Lipinsky concluded that if Applicants had implemented the coatings program they described to him his concerns would be mitigated, this concern presumably no longer existed. Indeed,

subsequent to the November 16, 1984 Memorandum, Mr. Lipinsky testified that he was not "railroaded" at the November 10, 1983 meeting with Applicants (Tr. 19,928).

In any event, the facts regarding Mr. Lipinsky's expressed state of mind establish that it was reasonable for counsel to conclude on November 29, when asked by Mr. Lipinsky, that they could properly represent him in connection with his NRC interview.^{4/} The record is plain that before such representation commenced, Mr. Lipinsky had already concluded on his own that if Applicants were implementing a coatings program as described to him, then his concerns were mitigated. Once Mr. Lipinsky reached this conclusion there was no conflict apparent between him and Applicants.

C. The November 16 Memorandum Should be Vacated In Light of Additional Errors.

There are additional errors in the November 16 Memorandum which support its being vacated. First, the Board is under the mistaken impression that counsel advanced that there was an attorney-client relationship with O.B. Cannon, Applicants' consultant (Memorandum at 8). In support of this observation,

^{4/} It must be borne in mind that whether and under what circumstances Mr. Lipinsky in fact concluded that his concerns regarding the coatings program at Comanche Peak were mitigated is a separate question from whether counsel improperly undertook to represent him. The standard to be used in making that determination is whether counsel reasonably believed no conflict existed such that proper representation could be had. Memorandum at 5, citing Rule 1.7(b)(1) of the American Bar Association Model Rules of Professional Conduct.

the Board cites Tr. 18,721; 18,725-27; and 18,734-37. But in that portion of the transcript the focus of discussion is on the production of documents. Counsel, after having reserved the right to object to a request by the Board to produce certain materials, was challenged by the Board to establish its standing to do so. In response, counsel stated that O.B. Cannon was a consultant for Applicants, a fact which would be relevant should Applicants have elected to object to the production of certain O.B. Cannon documents either on the grounds that they were work product or trial preparation materials. But counsel never claimed to have represented O.B. Cannon. Tr. 18,724, 18,735.

A second example of such error is the Memorandum's confusion of the chronology of events that led up to Mr. Lipinsky's concluding that if Applicants were doing everything they said they were doing, his concerns would be mitigated. Said the Board:

Subsequent to this "leak" [of the August 8, 1983 trip memorandum], Mr. Lipinsky met with Applicants' personnel and lawyers. For a substantial portion of this time, Mr. Lipinsky appears to have continued to assert the validity of his conclusions. However, when he appeared for a sworn statement before an [NRC] investigator, he was represented personally by a lawyer who also represents Applicants. In that interview and subsequently, Mr. Lipinsky testified that his preliminary conclusions were hastily drawn and do not raise serious problems. [Memorandum at 2 (emphasis added).]

The record will not support this assertion. Mr. Lipinsky never met with Applicants' counsel at any time between August 8, 1983 (the date of the trip report) and November 18, 1983 (the date on which Mr. Lipinsky advised Mr. Roth of his changed view). Mr. Lipinsky did not meet with counsel until November 22, 1983, nearly two weeks after he concluded his concerns would be met if the program were as described to him in the November 10, 1983 meeting.

Similarly, the Board erroneously relied upon Mr. Norris' October 1, 1984 testimony as evidence that no attorney-client relationship existed between Mr. Lipinsky and counsel (Memorandum at 10).

Q. Was he [Mr. Watkins] giving you legal advice?

A. Negative.

Q. What did he say?

A. Well, they were asking Joe the details about the memo, as I remember it. I was an observer there. It's Joe's memo; you know, it's Joe's to defend, if he has to defend it, and prove it if he has to prove it.

Q. Were they giving Joe legal advice?

A. No, not to my knowledge. I think Joe as I remember it, mentioned just in passing that he felt he was going to retain his own attorney. And to the best of my knowledge, I never discussed it with Joe, I think he probably retained somebody locally to give him legal advice. [Tr. 19,882-83.]

Mr. Norris did not even claim to be in a position to know the answer, and in any event, his impressions are irrelevant. The controlling factor in determining if Mr. Lipinsky in fact had an attorney-client relationship with counsel is Mr. Lipinsky's reasonable understanding. United States v. Ostrer, 422 F. Supp. 93, 97 (S.D.N.Y. 1976). That is reflect in Mr. Lipinsky's diary entries for November 29 and 30 and December 1, 1983 (which were before the Board though not yet in evidence), and also in a sworn statement by Mr. Lipinsky to the effect that counsel represented him as of November 29, 1983 in connection with his deposition before NRC. November 5, 1984, Affidavit of Joseph J. Lipinsky.

The Board erred in not according any weight to Mr. Lipinsky's sworn statement and relying instead on the testimony of a witness who conceded that he had no personal knowledge as to who was representing Mr. Lipinsky. Now that there is corroboration from the contemporaneous diary entries in evidence, there is even more reason for the Board to rectify its error.

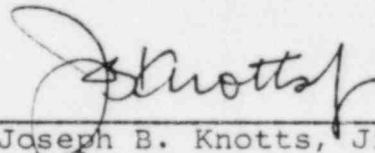
CONCLUSION

The case law makes plain that before a tribunal assesses the propriety of a representation or the conduct of counsel, a full and complete record must be made.^{5/} The November 16 Memorandum

^{5/} See, U.S. v. Csapo, 533 F.2d 7, 11 (D.C. Cir. 1976) (before SEC may exclude attorney from its proceedings on the grounds of impermissible multiple representation it must come forth with "concrete evidence" that his presence would obstruct and impede its investigation.)

demonstrates the error that can otherwise result. In view of the gravity of the charges erroneously made against counsel and their client, as well as the interest of the Board in assuring not only an adequate record but one that is both accurate and fair, Applicants believe that the Memorandum must be vacated.

Respectfully submitted,



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November 26, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
TEXAS UTILITIES GENERATING)	Docket Nos. 50-445-2
COMPANY, <u>et al.</u>)	50-446-2
)	
(Comanche Peak Steam Electric)	(Application for
Station, Units 1 and 2))	Operating Licenses)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion to Vacate November 16, 1984 Memorandum" in the above-captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid, on the 26th day of November, 1984:

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