UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

MOTION FOR A STAY
PENDING APPEAL

On November 16, 1984, the Atomic Safety and Licensing Board ("Licensing Board") issued a Memorandum denying the assertions of privilege with respect to certain documents that fell within the ambit of subpoenas duces tecum issued by the Licensing Board on October 4, 1984. The nonproduction of the privileged documents was based on two very different bases of privilege. Privilege was claimed by the Applicants, Texas Utilities Electric Company, et al., with respect to approximately 15 documents based on work product privilege. Privilege was also asserted by counsel for Joseph J. Lipinsky with respect to three days of calendar diary notes and one memorandum based on an attorney-client relationship. This motion relates only to the matter of privilege being advanced by Mr. Lipinsky.

BACKGROUND

As a result of a site visit to Comanche Peak, Mr. Lipinsky wrote a trip report, dated August 8, 1983, that was

critical of the program being employed at the plant to paint safety-related areas with protective coatings. The trip report, although intended as an internal document, surfaced among employees at the Comanche Peak plant and a copy was ultimately conveyed to NRC's Office of Inspection and Enforcement ("I&E"). Thereafter, I&E inspectors sought to take Mr. Lipinsky's deposition to inquire into the technical aspects of his criticisms. It was in this connection that the representation of Mr. Lipinsky by Mr. Nicholas Reynolds and his firm began on November 29, 1983.[1/] Several telephone conversations between Mr. Lipinsky and Mr. Reynolds occurred in the subsequent days of November and December 1983, culminating on January 4, 1984 when Mr. Lipinsky's deposition was taken by I&E inspectors. Mr. Watkins of the Reynolds firm represented Mr. Lipinsky at the deposition.

Mr. Lipinsky summarized his telephone conversations with Mr. Reynolds in his calendar diary notes and he summarized his discussions with Mr. Watkins and the event of his testimony on January 4 in a memorandum to files written by Mr. Lipinsky on January 9, 1984. Mr. Lipinsky is asserting privilege with respect to diary notes written on November 30, December 1 and December 8, 1983.[2/]

SUMMARY OF LICENSING BOARD ORDER

The Licensing Board in its November 16 Order denied the attorney-client privilege claimed by Mr. Lipinsky based

on its finding that (i) any representation by the Reynolds firm of Mr. Lipinsky transgressed the Code of Ethics, and (ii) no attorney-client relationship was created between Messrs. Reynolds and Watkins and Mr. Lipinsky, notwithstanding Mr. Lipinsky's affidavit to the contrary. The documents in question were ordered to be produced by noon November 17, 1984. The Atomic Safety and Licensing Appeal Board ("Appeal Board") granted Mr. Lipinsky's motion for a stay to maintain the status quo pending the filing of this motion seeking a stay of the production order pending appeal. 3/

GROUNDS FOR A STAY PENDING APPEAL

This Motion is brought pursuant to 10 C.F.R. § 2.788. That section sets forth four criteria for determining whether or not a stay should be granted. These criteria are discussed seriatim.

1. LIKELIHOOD OF SUCCESS ON THE MERITS

As discussed in our brief before the Atomic Safety and Licensing Board, the prerequisites for a valid assertion of the attorney-client privilege are (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of a bar of a court and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which

the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of commiting a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. In re LTV Securities Litigation, 89 F.R.D. 595, 600 (N.D. Texas, 1981); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). See 8 J. Wigmore, Evidence, § 2292 (McNaughton rev. 1961).

The element of this test disputed by the Board is whether Mr. Lipinsky was a client of Mr. Reynolds and his firm. Discussions of possible unethical conduct on the part of the attorneys are not germane to this question. The presence of a conflict or a potential conflict may give rise to a motion to disqualify, but in no way attenuates the existence of the attorney-client relationship that has already been established. See E.F. Hutton & Company v. Brown, 305 F. Supp. 371 (S.D. Texas 1969). There is no basis in law or fact to reason that because a conflict could have arisen from an attorney's representation of a client, then that representation never took place. Accordingly, the discussion by the Licensing Board relating to the Code of Ethics and the conclusion that "representation by Applicants' attorneys (is) impermissible" (Board Memorandum at 5-7), although relevant to a motion to disqualify, has no bearing on the question of whether an attorney-client relationship existed between Lipinsky and

Reynolds.

The controlling factor in determining if the asserted holder of the privilege is or sought to become a client is the client's reasonable understanding of his relationship with the attorney. E.F. Hutton, 305 F. Supp. at 389; United States v. Ostrer, 422 F. Supp. 93, 97 (S.D. N.Y. 1976). As explained in the background section of this motion, the evidence clearly indicates that as of November 29, 1983, it was Mr. Lipinsky's belief that he was being represented by Mr. Reynolds and his firm.

The Board's bases for concluding that no attorney-client relationship existed consist of inferences drawn from evidence that is clearly not probative:

(a) The Board relies on statements made by Mr. Norris and Mr. Watkins at the October 1, 1984 hearing. The statements by Mr. Norris on their face indicate that Mr. Norris simply was not aware of whether or not an attorney-client relationship existed between Mr. Lipinsky and Messrs. Reynolds and Watkins. (Memorandum at 8, 10.) The statement of Mr. Watkins is misinterpreted by the Board. When asked whether he had acted as Mr. Lipinsky's counsel, Mr. Watkins replied that he had done so on January 4, 1984 (Tr. 18725). The Board incorrectly asserts that Mr. Watkins stated that "his firm's representation of Mr. Lipinsky took place solely on January 4, 1984." (Memorandum at 10). As Mr. Lipinsky's diary notes indicate, the advice provided to him prior to this date was provided by Mr. Reynolds, not Mr. Watkins, and

Mr. Watkins' statement is not inconsistent with that fact.

(b) The Board relies on the absence of any document establishing an attorney-client relationship between the Applicants' law firm and O.B. Cannon, and the fact that Mr. Lipinsky apparently never intended to pay for counsel. The relationship of attorney and client is not dependent upon the payment of a fee, nor upon the execution of a formal contract. E.F. Hutton, 305 F. Supp. at 388; United States v. Costanzo, 625 F. 2d 465, 468 (3rd Cir. 1980). Further, it is not uncommon for corporate counsel to represent an individual corporate officer when he is sued as a result of actions he has taken within the ambit of his official duties. Accordingly, when this occurs, corporate counsel becomes counsel for the individual officer as well, even if the corporation pays his entire fee. E.F. Hutton, 305 F. Supp at 388. See In re Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368 (E.D. Wisc. 1979). Thus, the basis for the Licensing Board's conclusion is clearly inappropriate.

(c) The Board infers that the certain conferences which took place between Mr. Lipinsky and Mr. Reynolds before the initiation of the attorney-client relationship may have hampered Mr. Lipinsky's subsequent ability to communicate fully and freely with his attorney. (Memorandum, p. 11.) This is no basis for denial of the attorney-client privilege. The privilege is recognized by courts to further the public policy of encouraging full and free disclosure to the attorney by his

client. The existence of the privilege in a given case, however, does not depend on a court's subsequent determination of whether the communications between the attorney and his client were in fact free and unconstrained.

(d) The Board states that "the assertion of privilege with respect to Mr. Lipinsky's diary notes from November 29 to January 3 is especially troubling," and concludes that the attorney-client privilege does not extend to these documents. (Memorandum, p. 12.) This conclusion is plainly wrong. The attorney-client privilege attaches to a written communication just as it would to an oral communication. Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1981); 2 J. Weinstein, Evidence, par. 503(b)(03) at 503-38 (1977). The privilege also encompasses summaries of meetings, where the substance of the meetings would be covered by the attorney-client privilege. Natta v. Zletz, 418 F. 2d 633, 638 (7th Cir. 1969); Upjohn & Co. v. United States, 449 U.S. 383 (1981). The Board also concludes that the diary cannot be privileged because Mr. Lipinsky may have intended to divulge its contents at some future time if his employment status were threatened. Obviously, the existence of the privilege does not depend on the client's intention to maintain the secrecy of the communications at all future times. The Board, however, draws from Mr. Lipinsky's apparent intention the conclusion that the contents of the diary are unlikely to have been "truly confidential." The existence of the privilege does not depend on the Board's speculations about

the degree of confidentiality the client may have attached to particular privileged communications.

2. IRREPARABLE HARM

Unless a stay pending appeal is granted, Mr. Lipinsky's privilege will be compromised and lost because disclosure to the Licensing Board and all parties will be required by the Board's November 16 Order. Not only will the confidentiality of his relationship with counsel be lost, but his right to appeal the Licensing Board's November 16, 1984 Order will be mooted as well. Thus, Mr. Lipinsky would be forced to sacrifice his right of privilege without prior recourse to the agency's appellate process. No greater consideration of irreparable harm to Mr. Lipinsky's interest is imaginable.

3. HARM TO OTHER PARTIES BY THE GRANT OF A STAY

Counsel cannot conceive of any harm to any party by the grant of this motion. The only delay to the proceeding before the Licensing Board might result from a need to recall Mr. Lipinsky because disclosure (assuming an adverse result on appeal) of the privileged documents provides good cause for such action. Counsel believes that witness recall would involve less than a day's additional hearing time, an eventuality that surely can be accommodated within the time of the expected completion of the NRC Staff's review of the Comanche Peak

application, January 1985. See "NRC Staff Report to the Licensing Board on Status and Schedule For Addressing Hearing Issues," dated October 19, 1984.

4. THE PUBLIC INTEREST

The public interest clearly lies in favor of Mr. Lipinsky. Policy considerations of maintaining attorney-client relationships are paramount. No possible competing interest exists. The interest of producing the concerned documents is protected by the process. Their production would simply be delayed pending the outcome of the appeal.

CONCLUSION

A consideration of all of the factors discussed above favors the grant of the stay pending appeal; and therefore, the motion should be granted.

Respectfully submitted,

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DATED: November 17, 1984

FOOTNOTES

1. The fact of Mr. Lipinsky's representation by Messrs. Reynolds and Watkins is evidenced by Mr. Lipinsky's affidavit of November 5, 1984, counsel's letter of November 14, 1984, and the contemporary diary notes written by Mr. Lipinsky. All of said documents are attached as Attachments A, B and C, respectively.

2. While preparing this brief, counsel reviewed the privileged materials by comparing the expurgated and unexpurgated versions of the diary notes and the January 9, 1984 memorandum. The deletion of the notes for the entire days of November 30 and December 1 was inappropriately overbroad. Only a portion of those days' notes concern conversations with Mr. Reynolds. With respect to the memorandum, it was written to the Company's quality assurance files with copies to Company officials, Messrs. Roth, Trallo and Norris. Since the representation by Messrs. Reynolds and Watkins did not extend to Oliver B. Cannon & Son, an assumption made on October 18, 1983, counsel now believes the attorney-client privilege, although valid in the first instance, was waived when it was distributed within the Company. Revised expurgated diary notes for November 30 and December 1 and the January 9 memorandum are enclosed for the information of the Appeal Board and the parties as Attachment D.

3. Pursuant to its authority under 10 CFR §§ 2.718(i) and 2.785(b)(i), the Appeal Board has certified interlocutory review of similar discovery rulings (i.e. which admitted discovery over claimed privilege) on at least two occasions: Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 472-73 (1981); Kansas Gas & Electric Co. (Wolf Creek Station, Unit 1), ALAB 327, 3 NRC 408, 413 (1976). Those cases and the present situation should be distinguished from those instances where the Appeal Board declined review of rulings which denied discovery. ALAB-639, supra, 13 NRC at 479; The Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758-59. 1975.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Motion For A Stay Pending Appeal" were (i) served upon the following persons by hand-delivery prior to 2:00 p.m., November 17, 1984*; (ii) served upon the following persons by hand-delivery prior to 10:00 a.m., November 19, 1984**; or (iii) by deposit in the United States mail, first class, postage prepaid, this 19th day of November, 1984:

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