UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

METROPOLITAN EDISON COMPANY,	)	
	)	Docket No. 50-289
(Three Mile Island Nuclear Station, Unit No. 1)	)	(Restart)
	)	

COMMONWEALTH OF PENNSYLVANIA'S MOTION TO DISQUALIFY
THE LAW FIRM OF SHAW, PITTMAN, POTTS & TROWBRIDGE

The Commonwealth of Pennsylvania ("Commonwealth") hereby moves that the law firm of Shaw, Pittman, Potts, & Trowbridge ("Shaw, Pittman") be disqualified from representing Mr. Charles Husted in this proceeding. The Commonwealth makes this motion because Shaw, Pittman has a conflict of interest arising out of its concurrent dual representation in this proceeding of two parties with substantially related and adverse interests. Shaw, Pittman's conduct in this regard is in direct conflict with the standards set forth in both the Rules of Practice for Domestic Licensing Proceedings before the Nuclear Regulatory Commission (10 C.F.R. §2.713(c)) and Disciplinary Rules 4-401 and 5-105 and Ethical Considerations 5-14, 5-15, 5-16, 9-1, 9-2 and 9-6 of the American Bar Association's Code of Professional Responsibility.

A. Facts

In its February 25, 1985 Order in the above-captioned matter, the Commission provided to Mr. Charles Husted, an employee of GPU Nuclear

Corporation ("GPU") and formerly an operator and training supervisor at TMI-1, an opportunity to request a hearing concerning whether he should be prohibited from holding a supervisory position in the training of non-licensed operators at TMI-1. CLI-85-2 (February 25, 1985), Slip Opinion at 54. The issue specifically identified for hearing in CLI-85-2 was "whether the Appeal Board's condition barring [Mr. Husted] from supervisory responsibilities insofar as the training of non-licensed personnel is concerned should be vacated." Id. In a letter dated March 25, 1985, Ms. Deborah B. Bauser, attorney for Shaw, Pittman, and identified as counsel for Mr. Husted, formally requested such a hearing.

The Appeal Board's condition expanded upon a Stipulation dated July 6, 1983 ("Stipulation"), which was entered by GPU and the Commonwealth in order to remove various issues concerning operator training and competency from the appeals process. In particular, GPU and the Commonwealth agreed that Mr. Husted would not be utilized to operate TMI-1 or to train TMI-1 operating license holders or trainees. Throughout the negotiation of the Stipulation, GPU was represented by the law firm of Shaw, Pittman. It is clear that at the time of the execution of the Stipulation, Shaw, Pittman did not represent Mr. Husted. Furthermore, GPU was not supportive of Mr. Husted and voluntarily agreed to the provisions of the Stipulation.

The Appeal Board and the Commission have not altered any of the terms of the Stipulation. By its March 25, 1985, letter and its May 14, 1985, reply to the Commission's staff's response to that notice Shaw, Pittman, as counsel for Mr. Husted, sought not only the hearing afforded by the Commission, but also to expand its scope to vacate certain terms of the Stipulation which it nego-

tiated on behalf of GPU. Shaw, Pittman continues to represent GPU in this proceeding before the Commission; in fact, the same attorney -- Ms. Bauser -- has represented both GPU and Mr. Husted in this proceeding. Shaw, Pittman's representation of Mr. Husted in the forthcoming hearing represents a continuing conflict of interest in that Shaw, Pittman cannot both support the Stipulation and attack the facts which form the basis of the Stipulation. Such a role violates the Commission's Rules of Practice and the Code of Professional Responsibility. The Commonwealth requests the Commission to disqualify Shaw, Pittman from representing Mr. Husted in the hearing requested on his behalf.

B. Discussion

The Commission has had the opportunity to rule on a motion to disqualify a law firm for dual representation of clients with substantially related and adverse interests on a prior occasion. The case of In re: The Toledo Edison Company and the Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Units 1, 2, and 3) (Docket Nos. 50-346-A, 50-500-A, 50-501-A); the Cleveland-Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2) (Docket Nos. 50-440-A, 50-441-A) LBP-76-11, 3 NRC 223 (1976); remanded to special board, ALAB-332, 3 NRC 785 (1966); on remand, LBP-76-40, 4 NRC 561 (1976) ("Toledo Edison") involved a motion in an NRC licensing proceeding by the intervenor City of Cleveland ("City") to suspend and disqualify for conflict of interest a law firm which represented both the license applicant Cleveland-Electric Illuminating Company ("CEI") and the City, its competitor in providing electric power to northern Ohio. The law firm represented CEI subsequent to its acting as bond counsel for the City of

Cleveland. The City alleged that this dual representation gave an unfair advantage to CEI in the licensing proceeding, in that the firm was in a position to transmit--and did in fact transmit--to CEI information obtained in its earlier lawyer/client relationship with the City regarding the City's operations, capabilities, and condition. In addition to alleged violations of the Code of Professional Responsibility, the City alleged the violation of the Commission Rule of Practice set forth at 10 C.F.R. §2.713.[1]

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[1]At the time of the Toledo Edison proceeding the rule stated:

* * * * *

> (b) Standards of conduct. An attorney shall conform to the standards of conduct required in the courts of the United States.
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> (c) Suspension of attorneys. A presiding officer may, by order, suspend or bar any person from participation as an attorney in a proceeding if the presiding officer finds that such person:
>
> * * * * *
>
> (2) Has failed to conform to the standards of conduct required in the courts of the United States;
>
> * * * * *

Effective October 22, 1980 (45 Fed. Reg. 69877), §2.713 of the Rules of Practice was amended to read as follows:

> §2.713. Appearance and Practice before the Commission in Adjudicatory Proceedings
>
> * * * * *
>
> (c) Reprimand, Censure or Suspension from the Proceeding. "A presiding officer, an atomic safety and licensing appeal board, or the commission may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct."

In remanding to a special board convened to hear the charges against the firm, the Appeal Board stated the basic test for disqualification of a law firm for conflict of interest before the Commission. Citing §2.713(c)(2), the Appeal Board ruled, inter alia, that the special board has jurisdiction to disqualify a law firm for unprofessional conduct, and that disqualification is the appropriate remedy, provided "the former client must show that there is a 'substantial relationship' between the issues in the present case and the subject matter of the former representation." Toledo Edison, ALAB-332, 3 NRC 785, 799 (1976).

Upon remand, however, the special board gave collateral estoppel effect to a federal district court decision which upheld the firm's right to represent CEI in an action brought by the City alleging antitrust violations. The City was also held to have knowingly and intelligently waived its right to object to dual representation. LBP-76-40, 4 NRC 561 (1976), citing City of Cleveland v. Cleveland Electric Illuminating Co., 440 F.Supp. 193 (N.D. Ohio 1976), aff'd. 573 F.2d 1310 (6th Cir. 1977), cert. denied 435 U.S. 996. The District Court, in so holding, found no "substantial relationship" between the firm's representing CEI in a litigatory capacity in the pending antitrust action and the firm's special services to the City as bond counsel, particularly in view of the non-litigious nature of the bond consultations.

This is, of course, in sharp contrast to Shaw, Pittman's representation of both GPU and Mr. Husted during the same proceeding. In this regard the Commission has held:

> [w]e do not wish to be misquoted as finding that there are no conflict of interest cases that would justify a presiding officer's invocation of the suspension provisions of

§2.713(c)(2). Certainly for example, if an attorney has actively represented an intervenor throughout half an evidentiary proceeding (preparing witnesses, reviewing testimony and strategy) and then he suddenly appears at the hearing as the new trial counsel for the applicant (the intervenor's de facto adversary), the case would cry out for barring such attorney from further participation." 3 NRC 223, 263.

The conduct by Shaw, Pittman so clearly violates the guidelines of the Code of Professional Conduct concerning the representation of parties with substantially related and adverse interests, that it surely is the type of conduct to which either the former or present version of §2.713 is directed.

One of the reasons prohibiting dual representation is the need to preserve confidences and secrets of a client. DR 4-101 states:

DR 4-401. Preservation of Confidences and Secrets of a client

* * * * *

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly (1) Reveal a confidence or secret of his client, including his identity. (2) Use a confidence or secret of his client to the disadvantage of the client. (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them."

* * * * *

The Appeal Board in Toledo Edison held that the former client need not show that special confidences would be breached or that the information imparted to the attorney cannot be obtained elsewhere, but only that it can "reasonably be said that in the course of the former representation the attorney might have

acquired information related to the subject of his subsequent representation", Toledo Edison, ALAB-332, 3 NRC 785, 798 (1976). In its present representation of GPU, Shaw, Pittman has acquired information from other parties in the proceeding that bears on Mr. Husted's request for a hearing.

Canon 5 also speaks clearly to the duty of a lawyer regarding the impropriety of representing differing interests:

> EC 5-14. "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant."
>
> EC 5-15. "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially different interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially ... (emphasis added)"

Shaw, Pittman, through seeking to dually represent in litigation GPU and Mr. Husted, has thus placed itself in a position where the professional judgment, loyalty, and zeal it owes to each client may reasonably be questioned. DR 5-105 states the general prohibitory rule regarding employment on behalf of one client potentially impairing a lawyer's independent professional judgment toward another client:

DR 5-105. Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.

(A) A lawyer shall decline proferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it obvious that he can adequately represent the interest of each and if each consent to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, associate or any other lawyer affiliated with him or his firm may accept or continue such employment."

Given the adverse relationship between GPU and Mr. Husted, as established in the terms and provisions of the Stipulation, it is far from obvious that Shaw, Pittman can adequately represent the interests of each client in the same proceeding. Thus, the first prong of the two-part test for permitting dual representation set forth in 5-105(C) is not met.

The second prong of the two-part test set forth in DR 5-105(C) involves the waiver of the right to object that an attorney represents conflicting interests. The Commonwealth recognizes the ability of a former client to consent to multiple representation in certain cases. However, it has

been held that in the absence of a full disclosure of the potential conflicts, mere knowledge that an attorney represented potential conflicting parties does not amount to waiver. Marketti v. Fitzsimmons, 373 F.Supp. 637 (W.D. Wisc. 1974). Ethical consideration 5-16 speaks to the need for informed consent prior to the undertaking of dual representation.

> "In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desire. Thus, before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent ..."

Shaw, Pittman has failed to evidence such informed consent by GPU.

It need only be shown that the matters embraced within the pending suit in which an attorney appears on behalf of the previous client's adversary are "substantially related" to the matters or cause of action wherein the attorney previously represented the former client. Toledo Edison, ALAB-332, 3 NRC 785, 799 (1976). GPU's negotiated stipulation and Mr. Husted's dispute as to its effects on him are obviously directly related. Moreover, if the question as to whether there is a substantial relationship between the subject matter of the former representation and the issues in the present case is a close one, it should be resolved in favor of the former client to avoid even the appearance of impropriety. Id. Regarding the avoidance of even the appearance of impropriety, the Code of Professional Responsibility states:

> EC 9-1. "A lawyer should promote public confidence in our system and in the legal profession."
>
> EC 9-2. "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer."

> EC 9-6. "Each lawyer owes a solemn duty ... to uphold the integrity and honor of his profession; to observe the code of professional responsibility; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public, and to strive to avoid not only professional impropriety but also the appearance of impropriety."

As the Commonwealth has stated throughout the TMI proceedings, the conduct of proceedings concerning the restart of TMI-1 is subject to intense public scrutiny and interest and require the highest standards of professional conduct. Shaw, Pittman has most certainly created at least an appearance of impropriety through its representation in a litigatory capacity of the adverse interests of GPU and Mr. Husted in related matters within the same proceeding. This is not even a close case of adverse interests--by executing the Stipulation, the interests of GPU and Mr. Husted are in actual conflict.

Conclusion

Accordingly, the Commonwealth of Pennsylvania moves that the law firm of Shaw, Pittman, Potts & Trowbridge be disqualified from representing Mr. Charles Husted in the forthcoming hearing.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Commonwealth of Pennsylvania's Motion to Disqualify the Law Firm of Shaw, Pittman, Potts & Trowbridge have been served on the persons listed on the attached Service List by First Class U.S. Mail this 28th day of May, 1985.

Maxine Woelfling

MAXINE WOELFLING
Assistant Counsel

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