676

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	)	Docket Nos. 50-498 50-499
	)	
(South Texas Project, Units 1 & 2)	)	

STAFF STATEMENT REGARDING THE PERMISSIBILITY OF CALLING ATTORNEYS AS WITNESSES

I. INTRODUCTION

On June 13, 1985, CCANP filed with the Board a list of prospective witnesses to be called during the July 11-19 and July 29-August 9 hearings. This list included a number of attorneys, including NRC attorneys Ed Reis, Jay Guiterrez, and James Liberman, and several attorneys for Applicants. By Memorandum and Order of June 24, 1985, the Board has requested the Applicants and the Staff to address the permissibility and need (if any) for calling these attorneys as witnesses, prior to CCANP setting out the exceptional circumstances for calling NRC employees and the relevance of the testimony it seeks to solicit from NRC witnesses. 1/

1/ The Memorandum and Order of June 24, 1985 recited: "By July 3, 1985, CCANP shall file its statement of exceptional circumstances for calling named NRC personnel. This statement must include the particular unique information which the NRC employee is said to posses, why it cannot be obtained from already designated NRC witnesses, and its relevance to the points which CCANP is seeking to establish (i.e., to CCANP's direct case)." Memo at 5.

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Staff herewith responds. It is emphasized that this memorandum does not fully deal with whether the burden of showing exceptional circumstances to compel the testimony of NRC witnesses can be met by CCANP herein (see 10 C.F.R. § 2.720(h)(2)) or whether there may be other privileges preventing the testimony of names NRC employees who are sought as witnesses (see 10 C.F.R. §§ 2.790(b)(1), 2.744). Until CCANP furnishes a statement (to be supplied on July 3, 1985) about what these witnesses' testimony will reveal and the exceptional circumstances requiring their testimony, Staff has insufficient information to fully respond to the Board's request. However, in keeping with the Board's request in an unrecorded telephone conference call of June 21, 1985, the Staff is furnishing the following outline of legal standards applicable to compelling the testimony of attorneys and the attorney-client privilege, and a preliminary discussion of factors which show that CCANP cannot have the NRC attorneys, listed in its June 13, 1985, "CCANP Identification of Witnesses", called to testify in this proceeding.

II. Requiring Testimony and the Attorney-Client Privilege

Generally attorneys should not be called as witnesses unless their testimony is both absolutely necessary and unavailable from other sources. U.S. v. Schwartzbaum, 527 F. 2d 249, 253 (2d Cir. 1975), cert.denied, 965 S. Ct. 1410; Cajewski v. U.S., 321 F. 2d 261, 268-269 (8th Cir. 1963); U.S. v. Newman, 476 F. 2d 733, 738 (3d Cir. 1973); U.S.

v. Tamura, 694 F. 2d 591, 601 (9th Cir. 1982). [2/] In Schwartzbaum , supra, and Tamura, supra, the test set out is whether there was a "compelling need" for an attorney to testify.

The rationale for preventing attorneys from testifying, set out by the ABA Code of Professional Responsbility (EC-59 (1958)), is that:

> The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts of objectively.

See: U.S. v. Johnston, 664 F. 2d. 152, 153 (1981). See also: U.S. v. Schwatzbaum 527 F. 2d at 253 where the court speaks of confusing the distinction between "advocate and witness, argument and testimony."

Even in cases where there would seem to be an absolute need for an attorney to testify, much of the attorney's testimony will be protected by the attorney-client privilege and an attorney will be excused from being called as a witness where it appears that all matters in his knowledge were communications to him by his client for the purpose of obtaining advise. See Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-83-53, 18 NRC 282, 285 (1985), where a subpeona to depose an attorney on privileged matters was quashed.

The basis for the attorney-client privilege is to encourage frank communication between client and attorney so that the attorney's advice can be based upon a complete array of facts instead of scattered bits of

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2/ Cases involving the calling as a witness of a party's attorney by an adverse party have mainly involved criminal matters where defendants subpoened prosecuting attorneys. However, as a practical matter, much of the rationale for not calling prosecuting attorneys in criminal cases would also apply to adverse attorneys in civil cases.

information that a client, fearful of revelation, might grudgingly impart. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Consumers Power Co. (Midland Plant, Units 1 & 2), LBP 83-70, 18 NRC 1094, 1099-1103 (1983); Long Island Lighting Co. (Shoreham Unit 1), LBP 82-62, 16 NRC 1144, 1157-58 (1982). See also Wigmore, Evidence (McNaughton rev. 1961) § 2290 (hereinafter cited as "Wigmore"). The classic statement of the attorney-client privilege made by Judge Wyzanski in United States v. United Shoe Machinery Corp, 89 F. Supp 357, 358-359 (D. Mass. 1950), outlines the requisites for the privilege:

> ...(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 the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication related 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 purposes of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In establishing the existence of the privilege, the following principles apply:

Legal advice as opposed to business or personal matters

The privilege applies to the communications made for the purpose of receiving legal advice or services, as contrasted to communications made for business or social purposes. Consumers Power Co., at 18 NRC 1103 and 18 NRC at 282; Long Island Lighting Co., 16 NRC at 1158; U.S. v. United Shoe Machinery Corp., 89 F. Supp at 359; Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N. D. Cal. 1971); Garrison v. General Motors, 213 F. Supp. 515, 520 (S. D. Col. 1963).

Facts learned from sources other than the client

It is only communications between an attorney and a client that are privileged. Thus, facts disclosed to the attorney by persons outside the clients organization (e.g.: facts learned from a third party witness) are not privileged. Hickman v. Taylor, 329 U.S. 495, 508 (1947); U.S. v. Goldfarb, 328 F.2d 280 (6th Cir.), cert. denied, 377 U.S. 976 (1964). Nor are facts privileged which are within the knowledge of the attorney and are not communicated or confided to him by his client. Boston Edison Co. (Pilgrim Unit 2) LBP-75-30, 1 NRC 579, 585 (1975), citing Hickman v. Taylor, supra.

Documents which are originally not privileged do not become so when transmitted to an attorney. Such documents would include those prepared as a matter of the client's routine or policy, or for any reason other than the communication with his attorney. Grant v. U.S., 227 U.S. 74, 79 (1912); Coltin v. U.S., 306 F.2d 633, 639 (8th Cir. 1963); U.S. v. Judson, 322 F.2d 460, 463 (9th Cir. 1963).

Waiver of the Privilege

To qualify for the privilege the communication cannot be made in the presence of a third part or later conveyed to outsiders. U.S. v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958) cert denied, 358 U.S. 281 (1958); Fratto v. New Amsterdam Fire Insurance Co., 359 F.2d 842 (3d Cir. 1966). But see: U.S. v. Bigus, 459 F.2d 639, 643 (1st Cir. 1972), cert. denied, 409 U.S. 899.

This principle has been applied in NRC cases. In Kerr-McGee Chemical Corp (West Chicago Rare Earth Facility), LBP-85-1, 21 NRC 11, 12-21 (1985), the privilege was waived when documents were seen by third

parties. However, in Consumers Power Co. (Midland Plant, Units 1 & 2), LBP 83-70, 18 NRC 1094, 1100-1103 (1983), there was no waiver when only a broad recitation of the general subject of the communication was conveyed to third parties.

Communication must be made to an attorney or his agent

In order to be protected, the communication must have been made to an attorney for the purpose of securing advice from the attorney. Attorney and clients may both employ agents in their communciations without jeopardizing the privilege. Wigmore, § 2301 at 583 and § 2317 at 618. U.S. v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961); U.S. v. Jordan, 316 F.2d 460, 462 (9th Cir. 1963).

Communications with employees of a client

It has been consistently held that corporate clients benefit from the privilege, but there has been some controversy about whether communications from all employees of a corporation to the corporation's attorney are subject to a claim of privilege. Many of the earlier decisions followed City of Philadelphia v. Westinghouse Co., 210 F. Supp. 483, 484-486 (E. D. Pa. 1962), [3/] which applied what is referred to as the "control group" test. Under that test, the privilege was only allowed if the employee was a member of a so-called control group who made, or took a substantial part in, decisions about the advice of the attorney. The other earlier main line of cases followed the broader

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3/ See Natta v. Hogan, 392 F.2d 686, 692 (10 Cir. 1968); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D 117, 120 (M. D. Pa. 1970); Garrison v. General Motors Corp., 213 F. Supp 515, 520 (S. D. Cal. 1963)

rule found in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), aff'd, 400 U.S. 348 (1971), which also allowed the privilege to be claimed when a lower-level employee made the communication at the direction of his supervisor about a matter within the ambit of his employment. 4/

In 1981 the Supreme Court in Upjohn v. U.S., 449 U.S. 383 (1981), rejected the control group test and adopted portions of the test in Harper & Roe. Factors emphasized by the court in Upjohn allowing the privilege included: (1) the communications were made to lower ranking employees at the direction of corporate supervisors, (2) the information was necessary to supply a basis for legal advise, (3) the communications concerned matter within the scope of the employees' corporate duties, and (4) the employees were aware they were being questioned so that the corporation could obtain legal advice. 5/

III. The NRC Attorneys CCANP Lists as Witnesses should not be Called to Testify

CCANP has failed to show the permissibility and necessity of calling any of the listed NRC attorneys as witnesses.

Edwin J. Reis. CCANP states, at p. 4 of "CCANP Identification of Witnesses" of June 13, 1985, that it wishes to call Mr. Reis to testify as to his communications with Don Sells, the NRC project manager, and

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4/ See Lifland, "Corporate Clients and the Attorney Client Privilege - Who is the Corporate Client", 41 A.B.A.J. 557 (1973).

5/ In Duke Power Co. (Catawba Units 1 & 2), CLI-83-31, 18 NRC 1303, 1304 (1985), the Commission in ruling on questions not here germane cited the Upjohn case as applicable to NRC proceedings.

HL&P or HL&P's counsel on turning over the Quadrex Report to the Licensing Board. Conversations between Mr. Reis and Mr. Sells in the course of and related to the hearings herein, fall within privilege and need not be revealed. Consumers Power Co., 18 NRC at 1103. Further, CCANP has not yet established the necessity of Mr. Reis testifying to his conversations with HL&P or its attorneys relative to turning over the Quadrex Report to the Licensing Board. The date HL&P received the Quadrex Report is known to the Board as is the date HL&P informed the Board of the Report. CCANP has not shown any need to call Mr. Reis.

Jay Guiterrez. CCANP states, at p. 5 of "CCANP Identification of Witnesses", that its wishes to call Mr. Guiterrez to inquire into his participation in an investigation pertaining to an allegation of a conspiracy to withhold the Quadrex Report from the NRC. To the extent Mr. Guiterrez received communications from NRC personnel in his capacity as a hearing counsel, those matters are privileged. See Consumers Power Co., supra. The inspection report, 82-02, is a matter of public record. Moreover, CCANP has not shown what unique information attorney Guiterrez has that may not be gathered from others. See U.S. v. Schwartbaum, supra; U.S. v. Tamura, supra; 10 C.F.R. § 2.720(h)(ii).

James Lieberman. CCANP states, at pp. 5-6 of "CCANP Identification of Witnesses", that it wishes to call Mr. Lieberman regarding NRC enforcement policies as they apply to HL&P's handling of the Quadrex Report and regarding his response to communications from CCANP concerning the potential for enforcement actions stemming from the Quadrex Report. To the extent CCANP may be seeking communications between Mr. Lieberman and NRC officers or employees concerning any enforcement actions stemming

from the handling of the Quadrex Report, such communications would be subject to protection not only by virtue of their being attorney-client communications, but also as intraagency communications and as investigatory records compiled for law enforcement purposes. See 10 C.F.R. §§ 2.790(a)(1)(i)(5) and (7); Warren Bank v. Camp, 396 F. 2d 52, 56-57 (6th Cir. 1968); Morgan v. United States, 313 U.S. 409 (1941); NLRB v. Sears, 421 U.S. 132, 150 (1975); cf. 10 C.F.R. §§ 2.740(f)(3), 2.744. 6/ To the extent CCANP seeks to have Mr. Lieberman testify to NRC enforcement practices and what was done in regard to the Quadrex Report, CCANP has failed to show that such testimony is necessary, that designated NRC witnesses cannot testify to those matters or that the matters sought to be enquired into are not a matter of public record. See U.S. v. Schwartzbaum, supra; 10 C.F.R. 2.720(h)(2)(ii). To the extent CCANP seeks communications between Mr. Lieberman and itself, it has those communications and can show no need of having Mr. Lieberman testify to those matters. Id.

Thus CCANP has failed to show any matter that is not either foreclosed from being revealed as the subject of attorney-client communications or otherwise protected as a matter of law. Moreover, CCANP has not sustained its burden of showing an overwhelming necessity

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6/ The nature and extent of these privileges is not set out herein as the Memorandum and Order of June 24, 1985, only asked the parties to address issues concerning the permissibility and need to call attorneys as witnesses. To the extent it is necessary the Staff will address these issues after it has received CCANP's statement of why "exceptional circumstances" exist to call witnesses pursuant to 10 C.F.R. § 2.720(h)(2)(ii). See Memorandum and Order of June 24, 1985, at 5.

to obtain the testimony of the attorneys it seeks to call as it has not shown either that their testimony would be relevant to the issues herein or that the substance of their testimony could not be obtained from others.

CONCLUSION

Pursuant to the Board's request, Staff has presented the above outline dealing with calling attorneys as witnesses in this proceeding. As the Board recognized in the telephonic conference of June 21 1985, a more complete discussion of whether CCANP may require a particular NRC employee to be produced and the application of any claim of privilege to the testimony of that employee must await CCANP's elucidation of the exceptional circumstances which would require the employee to be produced for testimony under the terms of 10 C.F.R. § 2.720(h)(2)(ii). The question of producing NRC Staff witnesses to testify, including NRC Staff attorneys, will be addressed at oral argument after CCANP has supplied its basis for asking for them to be produced. See Memorandum and Order, at 5-6.

Respectfully submitted,

Lee Scott Dewey

Lee Scott Dewey
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Dated at Bethesda, Maryland
this 3 of July, 1985