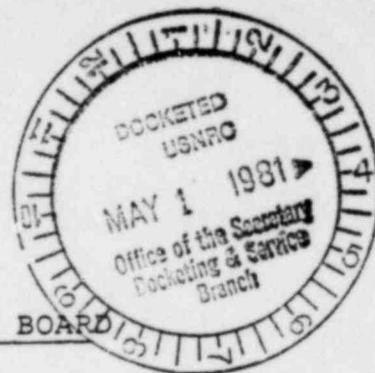




UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING & POWER	)	
COMPANY, <u>ET AL.</u>	)	Docket Nos. 50-498 OL
	)	50-499 OL
(South Texas Project,	)	
Units 1 and 2)	)	May 1, 1981

APPLICANTS' BRIEF IN SUPPORT  
OF NRC STAFF APPEAL

I. Background

On April 3, 1981, the NRC Staff filed a "Notice of Appeal and List of Exceptions" and a "Motion For Direct Certification Pursuant to 10 C.F.R. § 2.785(d)" seeking appellate review of the ASLB's ruling requiring the Staff to disclose the identity of informants who provided information to the Office of Inspection and Enforcement (OIE) during an investigation of construction practices at the South Texas Project site. On April 15, the Applicants filed a Response in support of the Staff's appeal.<sup>\*/</sup>

The Appeal Board, by Order dated April 24, 1981, requested the parties to furnish it with any additional argument on the merits of the Staff's appeal that were not covered in

\*/ Applicants' Response to the NRC Staff's "Notice of Appeal and List of Exceptions" and "Motion for Direct Certification Pursuant to 10 C.F.R. § 2.785(d)".

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their previous filings. In response to the Appeal Board's Order the Applicants hereby set forth argument supplementing our earlier Response.<sup>\*/</sup>

II. CCANP Has Not Met Its Burden Of Showing That Disclosure of Informants' Identities Is Warranted.

In its December 8, 1980, "Additional Response to CCANP 'Requests for Information'" (Staff Response), the Staff objected to producing the requested information on grounds that such disclosure is exempted under 10 C.F.R. § 2.790. (Staff Response at 2). No one appears to dispute the Staff's assertion that the informants whose identities CCANP seeks are "confidential sources" whose "privacy" the Staff may protect, within the meaning of § 2.790(a)(7).<sup>\*\*/</sup> The question

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<sup>\*/</sup> CCANP has now filed a cross-appeal asserting that the ASLB erred in not requiring disclosure of individuals interviewed by the Office of Inspector and Auditor, the names of all other OIE informants, and the sworn statements of all persons providing information to OIE. Applicants agree with the Staff that this appeal should be rejected as untimely. The Staff's filing of its notice of appeal did not automatically extend the time permitted for CCANP to file exceptions pursuant to 10 C.F.R. § 2.762.

Applicants also agree with the Staff that CCANP's appeal is an unsupported request for interlocutory review of a discovery order. None of the important public policy questions which underlie the Staff's appeal are applicable to CCANP's request for appellate review.

Finally, as the Staff states, CCANP's request for the identities of all informants during OIE's investigation, was not raised below and is therefore improper.

<sup>\*\*/</sup> See, Memorandum and Order, March 24, 1981, at 5; CCANP Motion to Compel NRC Staff to Provide Information, March 16, 1981, at 3-5.

before the Appeal Board is therefore whether CCANP has met its burden under 10 C.F.R. § 2.744(d) of showing that disclosure is nevertheless required because the information it seeks is "necessary to a proper decision, and . . . not reasonably obtainable from another source . . .".<sup>\*/</sup>

The above-cited regulations codify for NRC practice the established rule that the identities of persons providing information to a federal agency during a civil or criminal investigation are conditionally protected from disclosure under an informant's privilege. Roviaro v. United States, 353 U.S. 53 (1957); Wirtz v. Continental Finance & Loan Co., 326 F.2d 561 (5th Cir. 1964).

This long recognized privilege is supported by important public policy considerations. Those considerations are set forth in detail by the Staff in its December 8, 1980, Response, (Staff Response at 3-4) and Applicants agree with the Staff's formulation. Specifically, the Staff stated its concern that future OIE investigations might be compromised if individuals possessing important information are afraid to bring that information to the Staff under a guarantee of confidentiality.

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<sup>\*/</sup> The ASLB also considered 10 C.F.R. § 2.720(h) relating to interrogatory requests to the Staff. However, the standards for disclosure in that provision are the same as § 2.744(d).

In light of the important policy considerations underlying the informant's privilege, the law places a burden on the party seeking disclosure of an informant's identity, to show that its need for information outweighs the government's interest in protecting confidential sources. In Re United States, 565 F.2d 19, 23 (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978); United States v. Prueitt, 540 F.2d 995, 1004 (9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977). Consistent with the above, the Commission's regulations require the party seeking disclosure to demonstrate not only the relevance of the information sought, but also that disclosure is necessary to a proper decision in the proceeding, and that the information cannot be obtained from another source. (10 C.F.R. § 2.744(d)).

Before the ASLB, CCANP relied primarily on CLI-80-32<sup>\*/</sup> to support its request for the informants' identities.<sup>\*\*/</sup> In that decision the Commission rejected CCANP's assertion that its right to obtain information in support of its contentions in this OL proceeding would be abridged if the Commission did not grant it a hearing on OIE's Order to Show Cause. (12 NRC at 289). The ASLB properly held that, in so ruling,

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\*/ Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281 (1980).

\*\*/ CCANP Motion to Compel NRC Staff to Provide Information, March 16, 1981; Tr. 670-71.

the Commission had not intended to expand CCANP's discovery rights by granting it unfettered access to Staff investigatory records. (March 24 Order at 5).<sup>\*/</sup>

Before the ASLB, CCANP made only very general statements reflecting its need for the names of informants. In its March 16 Motion to Compel, CCANP alleged that the Staff's refusal to disclose "adversely affects" Intervenors' access to "clearly relevant" material and that this evidence is "invaluable" to it, such that withholding of the evidence will be "detrimental to Intervenors' interests." (Motion to Compel at 3). These same generalized concerns were expressed at the March 18 prehearing conference (Tr. 681-82). Before the Appeal Board, CCANP adds that it needs to interview the Staff informants to determine whether they possess relevant information in addition to that given to the Staff, and to obtain information that may lead to further relevant evidence.<sup>\*\*/</sup>

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<sup>\*/</sup> Clearly, the language cited by CCANP was intended by the Commission to mean that whatever rights to discovery CCANP would have had in a show-cause proceeding are no different than those available to it in this OL proceeding; and not that the Commission intended to override its normal limitations on discovery contained in the regulations. If the Commission had intended to override a provision as important as its regulation protecting confidential sources, in a case where its application was likely, it would have done so explicitly.

<sup>\*\*/</sup> Opposition to NRC's "Notice of Appeal And List of Exceptions" And Cross Appeal - March 24, 1981 (April 13, 1981) at 4. CCANP also argues in that same pleading that the ASLB required it to provide the identities of its informants to the Staff and Applicants under a (footnote continued)

These generalized statements fall far short of the showing required to overcome the Staff's need for confidentiality. At most CCANP has shown that the names of informants might lead to relevant evidence. However, even assuming CCANP's statements were sufficient to demonstrate relevance, the Commission's regulations are clear that a showing of relevance is but the first hurdle in overcoming the Staff's right to withhold. Intervenors are required to demonstrate further that the identities are "necessary" to litigate its case and the information sought not otherwise available. (10 C.F.R. § 2.744(d)). CCANP should have provided more than speculation that identification of the informants might be of assistance. In Re United States, supra, 565 F.2d at 23; United States v. Prueitt, supra, 540 F.2d at 1004. Nor is disclosure warranted to permit CCANP to engage in a "fishing expedition" in the hope that additional relevant information might come to the fore. In Re United States, supra; United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974); Waldron v. Cities Service Co., 361 F.2d 671, 673 (2d Cir. 1966),

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(footnote continued)

protective order and it merely seeks the same relief. However, CCANP failed to recognize that it does not enjoy the same right to preserve confidential sources as does the Staff. (10 C.F.R. § 2.790). The reason for the parties' different status is obvious. The NRC Staff is responsible under the law for assuring the public's health and safety. To carry out that responsibility the Staff must be assured access to relevant information, during investigations of alleged violations of the Atomic Energy Act and its implementing regulations.

affirmed sub nom., First National Bank v. Cities Service Co.,  
391 U.S. 253 (1968).

CCANP's obligation to make a particularized showing of need is especially strong in the instant case since the information which the informants have provided to the Staff has already been divulged. In addition, the Staff has stated that it will present as witnesses, its investigators who obtained information from the informants. (Tr. 668-70). CCANP has never indicated what additional necessary evidence disclosure of identities will provide them.<sup>\*/</sup>

Having failed to satisfy its burden to overcome the informant's privilege, CCANP's motion to compel should have been denied by the ASLB.

III. The ASLB Erred In Stating That It Will Require Identification Of Informants And That Informants Might Be Called As Witnesses.

In the March 24, Order, the ASLB stated that it will want the names of Staff informants and that it may call these individuals at the upcoming hearings. In Applicants' view, the grounds stated by the ASLB do not demonstrate a need for blanket

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<sup>\*/</sup> The ASLB provided its own ground for ruling that disclosure to CCANP is warranted. It stated that disclosure will permit it to determine whether the instances of harassment allegedly uncovered by CCANP are coextensive with those discussed in the OIE investigation. However, this information can be obtained from Staff and Intervenor witnesses at the upcoming hearings. As the testimony unfolds, the ASLB may then decide that it wants additional information. In any event, the ASLB's reason does not establish CCANP's need for information at this time.

disclosure, and its decision, therefore, reflects an inappropriate balancing of the considerations involved.

As stated above, testimony addressing alleged cases of harassment will be proffered at the upcoming hearings by Staff witnesses who interviewed the subject informants. (Tr. 680-81). The ASLB should not require that informants be identified unless, as the testimony unfolds, it becomes clear that identification of a specific individual is necessary to a sound decision and that the information which that individual possesses can only be obtained via disclosure of his identity. This need has simply not been shown at the present time.\*/

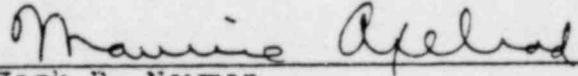
IV. Conclusion.

Applicants urge the Appeal Board to reverse the ASLB's March 24, 1981, Order requiring blanket disclosure of informants' identities to CCANP and ruling that these informants might be called as witnesses. As demonstrated above, CCANP has not shown that disclosure of confidential sources is warranted in this case, and the ASLB failed to properly weigh the competing considerations governing disclosure of such sources. In addition, there is no present need to disclose these individuals for purposes of calling them as witnesses.

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\*/ Even if the ASLB believed that it is important to obtain the names of informants now, it should have ordered in camera disclosure of their identities to determine the potential need for their direct testimony before requiring the Staff to reveal confidential sources to the intervenors. (10 C.F.R. § 2.744(c)).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicants' Brief In Support of NRC Staff Appeal has been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, or by hand delivery as indicated by an asterisk, on this 1st day of May, 1981.

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