UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of:	X	
	X	
APPLICATION OF TEXAS UTILITIES	X	
GENERATING COMPANY, ET AL., FOR	X	Docket Nos. 50-445
AN OPERATING LICENSE FOR	X	and 50-446
COMANCHE PEAK STEAM ELECTRIC	X	
STATION UNITS #1 AND #2 (CPSES)	X	

CASE RESPONSE TO APPEALS BOARD QUESTION
DIRECTED TO NRC STAFF ON JANUARY 19, 1983

Intervenor CASE submits the following memorandum in response to two questions the Atomic Safety and Licensing Appeals Board ("Appeals Board") directed to the Staff of the Nuclear Regulatory Commission ("NRC" or "Commission") at oral argument on January 19, 1983.

Specifically, this memorandum outlines authority for the principle that without disclosing the identity of its informer or source, the government may introduce into evidence the informer's evidence or may call the informer himself or herself to testify.

I. BACKGROUND

The NRC has explicitly upheld the informer's privilege in its proceedings. In the seminal South Texas case the Appeals Board stated:

> The need to protect confidential informants is not an academic concern to the NRC. That this is so finds confirmation not only in the Commission's

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> regulations...but in Congressional enactments designed specifically to safeguard from retaliation those who assist the NRC in carrying out its safety responsibilities.[1/]

Houston Lighting and Power Co. (South Texas Project, Units 1 & 2), ALAB-639, 13 NRC 469 (1981).

The NRC Staff and Licensing Boards have been given the authority to maintain as confidential the identity of workers who bring safety violations to their attention because frequently these workers suffer harassment and reprisals after raising these concerns. However, as in all cases in which the informer's privilege is upheld, the Licensing Boards must balance the public interest in protecting the flow of information to the Commission against an individual's or party's right to prepare his case. See Roviaro v. United States, 353 U.S. 53, 62 (1957). Moreover, once the government asserts the privilege, the party desiring disclosure of the informer's identity has the burden of demonstrating entitlement to and need for the information. In re United States, 565 F.2d 19, 23 (2nd Cir. 1977), cert. denied, 436 U.S. 962 (1978); United States v. Hansen, 569 F.2d 406 (5th Cir. 1978).

A Licensing Board, just as a court, must look at all the circumstances to make its determination of whether disclosure of an informer's identity is necessary. Among the factors a Licensing Board must consider are:

(1) the position of the informer and his susceptibility to harassment or reprisals;

[1/] See Energy Reorganization Act of 1974, as amended, § 210, 42 U.S.C. § 5851 (1980).

(2) any history of harassment or retaliation at the site;

(3) whether or not the individual requested or demanded confidentiality as a condition of giving information to the NRC; and

(4) whether the identity of the informer has already been disclosed and become known to any person outside the NRC Staff. See generally, Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F.2d 762 (D.C.Cir. 1965); Black v. Sheraton Corp., 564 F.2d 550 (D.C.Cir. 1977); In re United States, supra.

For example, a Licensing Board would have much less reason to protect the identity of a director or top-level manager of a utility or constructor building a nuclear plant than to protect middle-management, tradespersons, construction workers or quality assurance personnel, since it is clear that top management, by their place in the hierarchy, are much less likely to suffer retaliation or harassment for reporting of safety violations. In fact, such top managers are obliged under 10 CFR Part 21 to notify the NRC of any facility, activity or basic component supplied to a plant which fails to comply with the Atomic Energy Act or NRC regulations. Although the NRC may give such individuals confidentiality, the fact these individuals have a legal obligation to report such deficiencies is more likely to undercut any basis for retaliation against them by their superiors.

In this case, the Licensing Board correctly and carefully balanced opposing interests in reaching its decision requiring disclosure of names of NRC sources. Licensing Boards in the future must subject each of their cases to this same close examination of

all circumstances and the same careful balancing of conflicting interests. To aid them in such balancing, the courts may use in camera hearings to determine the usefulness to a party of identifying a particular witness or the potential harm to a particular witness of publicly disclosing his or her identity. United States v. Jackson, 384 F.2d 825 (3rd Cir. 1967); Levine, The Use of In Camera Hearings in Ruling on the Informer Privilege, 8 U.Mich.J.L.Ref. 151 (1974). In addition, courts may employ protective orders so that litigants can obtain information useful for cross-examination of a particular confidential witness without jeopardizing that witness' physical safety or job security.

II. COURTS HAVE ADMITTED INFORMERS' TESTIMONY AT TRIAL WITHOUT DISCLOSURE OF THEIR IDENTITIES.

Courts have admitted into evidence at trial testimony of an informer while barring a party's inquiry into that informer's identity. In United States ex rel. Abbott v. Twomey, 460 F.2d 400 (7th Cir. 1972), on an appeal of a conviction for sale of heroin, the court held that a defendant was not denied his constitutional right to confront his accusers by the trial court's refusal to allow questions about an informer-witness' identity and place of business. See also, United States v. Rangel, 534 F.2d 147, 148 (9th Cir. 1976); United States v. Cosby, 500 F.2d 405, 407 (9th Cir. 1974); United States v. Ellis, 468 F.2d 638 (9th Cir. 1972).

Also upheld has been a court's right to bar questions at trial about an informer-witness' address when the information solicited by such questions is not likely to bear on the witness'

credibility. United States v. Daddano, 432 F.2d 1119 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971); United States v. Lawler, 413 F.2d 622 (7th Cir. 1969); United States v. Teller, 412 F.2d 374 (7th Cir. 1969), cert. denied, 402 U.S. 949 (1971).

Similarly, courts have been upheld in rulings that government witnesses may testify at trial about the substance of what informers told them without identifying the informers. In United States v. Brooks, 477 F.2d 453 (5th Cir. 1973), the defendant defended against charges of possession with intent to distribute and distribution of heroin by claiming he was entrapped by the police. On the appeal of his conviction on these charges it was held that the trial court had not erred in admitting into evidence testimony of a government witness that several unnamed informants had told him defendant had been involved in other drug transactions. See also, United States v. Bell, 506 F.2d 207 (D.C.Cir. 1974), in which the informer's privilege was upheld when a government witness testified at trial that an informer had told him the defendant participated in other drug transactions in rebuttal to a self-serving statement of defendant that he was unfamiliar with drugs; Mitrovich v. United States, 15 F.2d 163 (9th Cir. 1926) (held, on review of conviction for violation of National Prohibition Act, that where government witness testified that the premises at which intoxicating liquor was found were pointed out to him by informer, it was not error for trial court to sustain an objection to a question asking for identification of witness); McInes v. United States, 62 F.2d 180 (9th Cir.), cert. denied, 288 U.S. 616 (1932).

420 U.S. 910 (1975); Davis v. Beto, 423 F.2d 633 (5th Cir. 1970).[2/]

Similarly, courts, in determining whether there exists probable cause for an arrest or search, routinely consider informers' information, either in the form of an affidavit or hearsay statements communicated to the court through the testimony of police witnesses. See generally, United States v. Freund, 532 F.2d 501 (5th Cir.), cert. denied, 426 U.S. 923 (1976); United States v. Moreno-Duelna, 524 F.2d 1129 (9th Cir.), cert. denied, 423 U.S. 1035 (1975); United States v. Hart, 526 F.2d 345 (5th Cir. 1976); Riley v. United States, 411 F.2d 1146 (9th Cir. 1969), cert. denied, 397 U.S. 906 (1970); Lane v. United States, 321 F.2d 573 (5th Cir. 1963); Buford v. United States, 308 F.2d 804 (5th Cir. 1962).

Both the preliminary hearing stage and the hearing on a motion to suppress are critical stages in a criminal proceeding at which all of a defendant's due process rights adhere. Therefore, if a court has the authority to uphold the informer's privilege in making its determination regarding probable cause for an arrest or a search, or probable cause to charge a defendant with a criminal act, it certainly has the authority in a civil proceeding to uphold the privilege when its balancing of opposing interests dictate.

In Summary, CASE believes the authorities cited above demonstrate the Licensing Board's authority to consider evidence

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[2/] An exception to this rule of nondisclosure is enforced if the informer's information is the essence or core information supporting probable cause and is not corroborated by any independent evidence. United States v. Manley, supra; United States v. Commissiong, 429 F.2d 834, 838-39 (2nd Cir. 1970).

or testimony of an informer without public disclosure of the informer's identity.

Respectfully submitted,

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Dated: January 26, 1983

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NUCLEAR REGULATORY COMMISSION

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Docket Nos. 50-445 and 50-446

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of the foregoing CASE RESPONSE TO APPEALS BOARD QUESTION DIRECTED TO NRC STAFF ON JANUARY 19, 1983, have been sent to the names listed below this 26th day of January, 1983 by: Express Mail where indicated by * and First Class Mail elsewhere.

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