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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

81 NOV -4 P2:03

COMMISSIONERS:

Nunzio J. Palladino, Chairman  
Victor Gilinsky  
Peter A. Bradford  
John F. Ahearne  
Thomas M. Roberts

OFFICE OF SECRETARY *emp*  
DOCKETING & SERVICE  
BRANCH

In the Matter of )  
HOUSTON LIGHTING & POWER )  
COMPANY, et. al. )

Docket Nos. STN 50-498 OL  
STN 50-499 OL

South Texas Project, )  
Units 1 and 2 )

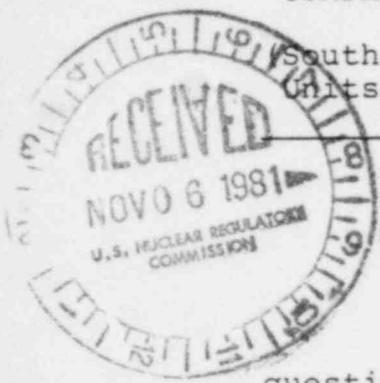
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CLI-81 -28

ORDER

The Commission voted 2-2 on June 30, 1981, on the question of whether to take review sua sponte of the Atomic Safety and Licensing Appeal Board decision in ALAB-639, 13 NRC 469 (1981), regarding the release during discovery of the identity of certain confidential sources of information.\*/ The result of this vote was to allow the time for review to expire pursuant to 10 CFR §2.276. Shortly thereafter, a request was made by one Commissioner to reconsider that vote sua sponte. The Commission has voted 3-2 not to reconsider.

\*/ The Commissioners participating in that vote were Chairman Hendrie and Commissioners Gilinsky, Bradford and Ahearne.



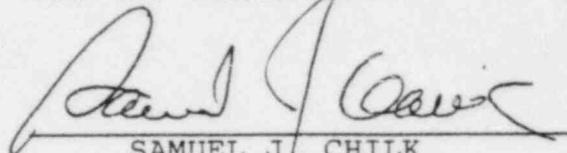
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Separate views of Commissioners Gilinsky, Bradford  
and Ahearne are attached.

It is so ORDERED.

For the Commission



SAMUEL J. CHILK  
Secretary of the Commission

Dated at Washington, D.C.

this 4<sup>th</sup> day of November, 1981

## SEPARATE VIEWS OF COMMISSIONER GILINSKY

By refusing to review the Appeal Board's decision in this case, the Commission has again lost an opportunity to provide much needed guidance to the agency's adjudicatory boards and staff. NRC's inspections of licensed facilities play a crucial role in assuring the safe construction and operation of such facilities. The success of these inspections sometimes depends upon information provided by the employees of the licensees and their contractors, and in those cases, these employees are often willing to provide information to NRC's inspectors only in confidence. This case makes it clear that a coherent policy is needed which strikes a reasonable balance between protecting sources of information and the public's right of access to safety information. The Commission should itself decide that policy rather than allow it to develop haphazardly.

## SEPARATE VIEWS OF COMMISSIONER BRADFORD

What is at issue in this decision is not the desirability of extending confidentiality or other protections to those who discuss safety matters with the NRC. The Commission can and should extend such protection when circumstances so warrant. However, there are degrees of confidentiality, and, while the Commission may choose to err on the side of caution, it may not blind itself to other considerations such as the integrity of its licensing process. To strike a fair balance in any given case, some part of the NRC must review the matter in some detail, which neither the Commission nor its Appeal Board did in this case.

Instead, two Commissioners blocked Commission review of the split Appeal Board decision to withhold all names of persons interviewed in the investigation of the quality assurance program at the South Texas facility, and a majority has now, months later, been assembled to support this result. In reversing a unanimous Licensing Board decision requiring release under a protective order, the Appeal Board majority claimed to have balanced the interests of the agency in receiving safety information, the interests of parties in an adjudicatory hearing and the interests of individuals assisting an NRC investigation. However, it did not take the minimum steps necessary to assure that this balance was fairly done.

Commission inaction leaves in place a decision which will not withstand court review and which may weaken our own final record and the safety of the plant. This indecision invites delay, uncertainty and further safety concerns in the licensing of the troubled South Texas reactors. This refusal even to examine the issue is also a serious Commission retreat from its adjudicatory responsibility.

The primary defect in the Appeal Board's decision is its failure to examine the particular factual circumstances of the I&E investigation and the persons interviewed. The Appeal Board's scrutiny was so superficial that it did not even ascertain whether or not the interviewees had any objections to having their names released. Without such examination, it is not possible to determine either the interests of the persons interviewed or the extent to which the agency's ability to gather information might be hampered by revelation of the interviewees' names. Indeed, to state the worst case, we may be "protecting" 60 people who are perfectly prepared to be identified. Hence, a proper balance has not been struck, and the abstract propositions about confidentiality that adorn other opinions are devoid of factual support in the case at hand.

Another essential line of inquiry missing from the Appeal Board analysis is the exact nature of the pledge of confidentiality and what might reasonably be inferred from this pledge. A pledge which stated that confidentiality would not be maintained for

agency hearings might be treated differently in the balancing process from a pledge which gave assurance that the interviewee's name would not be disclosed to anyone other than the investigator. This appears particularly serious in light of an indication in a subsequent I&E investigation of the licensee's quality assurance/quality control program that I&E only "assured confidentiality, barring any court or legal hearing process...." (April 30, 1981 letter to Houston Lighting and Power Company from J.E. Gagliardo, I&E, page 4) (emphasis added)

In addition to the above omissions, other areas of the decision need Commission review. The Appeal Board asserts that the intervenors have not shown that the staff came forward with less than the information necessary for a fair hearing. However, the I&E report itself suggests that not all the information relevant to safety concerns has been gathered.<sup>1/</sup> Furthermore, the Commission itself has significant information on this subject in a report on the South Texas I&E investigation by its Office of Inspector and Auditor. The conclusions of this report strongly

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<sup>1/</sup> The following are but a few of the many excerpts from the disclosed summaries of the I&E interviews which suggest the possible safety concerns not corrected by remedial actions to date: A43 "stated that there are many in-house problems between managers, claiming A35 and A40 are the biggest problems in QA/QC. A43 did not specify or detail the problems...." (Statement of A43); A construction worker "told me that he would be waiting for me in the parking lot with a .357 magnum. I became worried that he was serious about it and about a month later I finally told my supervisor, A35. We discussed it and I decided not to pursue it any further...." (Statement of A30); A41 "stated that he has not been threatened, but routinely gets a lot of static from construction." (Statement of A41)

indicate that further NRC investigations at South Texas would uncover additional relevant information and that not all potential witnesses had been interviewed. The Commission has not released the OIA report.<sup>2/</sup> In short, the Commission has declined to review the Appeal Board decision even though it has information, which it has not shared with the Board or the parties, which strongly indicates that a principal underpinning of the Appeal Board decision is wrong.

If the Commission took review, it might ultimately agree with the result reached by the Appeal Board. Whether it did or not, its action would provide definitive guidance in this troublesome area. However, such an order should be issued only after considering whether interviewees objected to disclosure of their identities, whether their identities had already been revealed unintentionally and whether they had been given a pledge of confidentiality which extended to agency proceedings. Additionally, any NRC order must take into consideration the conclusions in the OIA report and whether the adjudicatory proceeding ordered by the Commission can take place on the basis of secondhand information if the names are not disclosed.

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<sup>2/</sup> Intervenors have requested the identities of confidential sources relied upon by the Office of Inspector and Auditor in its review. The Licensing Board denied this request "on the ground that the inspection undertaken by OIA was performed directly for the Commission," implying that the Board felt itself to be without jurisdiction over OIA. Lic. Bd. M.&O. Slip op. at note 2, p.7, citing the transcript of the proceedings at pp. 707-713. The intervenors' appeal of this issue was dismissed as interlocutory by the Appeal Board.

In the case's present posture, four of the six agency judges who have reviewed the matter would reach a different result than will occur. Nevertheless, the Commission declines even to consider the situation. No coherent policy guidance has issued. The Commission has taken no position at all. This is just about what the post-TMI investigations had in mind when they remarked disapprovingly on the Commission's posturing as the agency's 'Supreme Court while declining to do the adjudicatory work that that title requires.<sup>3/</sup>

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<sup>3/</sup> "The NRC Commissioners have largely isolated themselves from the licensing process." Report of the President's Commission on the Accident at Three Mile Island, (Kemeny Commission), Finding G.4, pt. 51-52.

"At the same time that the Commission holds itself out as the 'Supreme Court of the Agency,' (it) hardly ever grants certiorari to review a case. It isolates its members from detailed consideration of case-related safety issues...." Three Mile Island Report, NRC Special Inquiry Group; volume 1, pp. 140-141.

SEPARATE VIEWS OF COMMISSIONER AHEARNE

I agree with the Appeal Board majority opinion. The NRC's primary mission is to protect the public health and safety. Often this requires the cooperation of individuals with knowledge of particular circumstances in order to detect or confirm problems. If these people believe they will be subject to retaliation, we should expect they will not be as likely to cooperate. Therefore the Nuclear Regulatory Commission has a strong interest in protecting the identity of confidential informants. As the Appeal Board said, "The need to protect confidential information is not an academic concern to the NRC." 1/ This is particularly true since apparently we can offer little assistance to individuals other than to protect their names. 2/

More detailed guidance on the role of this interest in adjudicatory hearings might be useful, and I would support the Commission developing such a policy. Theoretically, Commission review of this case could result in such guidance. Realistically, Commission review of adjudications is a blunt instrument not suited to developing comprehensive policy. In this case, a majority of the Commission did not agree with Commissioner Bradford that there were major flaws in the approach taken by the Appeal Board.

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1/ Houston Lighting and Power Co., et. al (South Texas Project, Units 1 & 2), ALAB-639, 13 NRC 469, 474 (1981).

Footnotes continued

2/ A case that I became aware of soon after I came to the Commission starkly illustrates the difficulty an individual faces. See Union Electric Company. (Callaway plant, Units 1 & 2), ALAB-527, 9 NRC 126 (1979). "The Commission [had] licensed Union Electric Company to construct the Callaway nuclear-powered electric generating facility. Union Electric engaged Daniel Construction Company to build part of the plant; William Smart was among the ironworkers Daniel hired for the Callaway project. A number of times while working there, Mr. Smart reported to NRC inspectors what he considered safety-related deficiencies in Daniel's work. On March 21, 1978, Daniel fired him." Id. at 128 (footnotes omitted). "The final matter before [the Appeal Board] concerns the Commission's remedial powers in the event Mr. Smart's discharge was in fact in retaliation for his giving information to NRC safety inspectors adverse to his employer. The Licensing Board construed the issue to be outside its jurisdiction and refused to address it; Mr. Smart appeals. In the interim, however, the grievance proceedings terminated in his favor and Mr. Smart has been restored to employment with back pay. There thus remains no further relief which this Commission could afford him; in other words, his complaint is moot. . . . Were we to reach the question, however, we would be inclined to concur in the Licensing Board's judgment that the better view is [the issue was outside the scope of the proceeding]." Id. at 143-144 (footnotes omitted). Although the Appeal Board decision is not determinative, my preliminary inquiries in Callaway led to the conclusion that providing assistance to individuals such as Mr. Smart is at best very difficult.

Subsequently, Congress amended the Energy Reorganization Act of 1974 to provide an additional remedy. Id. at 131-132. This provides the Department of Labor with jurisdiction to investigate and order appropriate redress. However, because of resource constraints and questions of implementation (we still have not completed the Memorandum of Understanding with DOL concerning this authority), I still believe the primary protection we can offer to individuals is confidentiality.