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Certified By

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
TEXAS UTILITIES GENERATING COMPANY ) Docket Nos. 50-446  
  )                       50-447  
(Comanche Peak Steam Electric      )  
Station, Units 1 and 2            )

NRC STAFF'S RESPONSE TO ORDER TO SHOW CAUSE  
AND MOTION FOR RECONSIDERATION

On August 4, 1982, the Licensing Board issued an "Order to Show Cause" ("Order") in which it directed the NRC Staff ("Staff") to show cause "why sanctions should not be imposed for its refusal to obey the Board's orders" to identify by name ten (10) individuals who were designated by letter in NRC Inspection Report 82-10/82-05 (Staff Exhibit 199), and to produce unexpurgated signed witness statements taken by the Staff during that investigation (Order, at 2 and 10).

The Staff hereby submits its response to the Licensing Board's Order. For the reasons set forth below and in the attached Affidavits,<sup>1/</sup> the Staff submits (1) that it acted fully in accordance with established legal principles in declining to reveal the identity of the informants in question, (2) that disclosure by the Staff of the names of the letter-

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1/ Attached hereto and incorporated by reference herein are (1) "Affidavit of John T. Collins" ("Collins Affidavit"), dated August 24, 1982, and (2) "Affidavit of Donald D. Driskill and Richard K. Herr" ("Driskill/Herr Affidavit"), dated August 24, 1982. Mr. Driskill participated in drafting the Driskill/Herr Affidavit but was unavailable to sign it; a copy of that Affidavit bearing Mr. Driskill's signature will be submitted shortly.

designated individuals was neither necessary nor appropriate and could cause irreparable harm to the Commission's ability to investigate future allegations of applicant and licensee misconduct, and (3) that sanctions should not be imposed upon the Staff for declining to comply with the Licensing Board's orders. Finally, for the reasons set forth herein, the Staff respectfully requests that the Licensing Board reconsider and vacate its orders directing the Staff to disclose the names of its informants.

#### I. BACKGROUND

On June 16, 1980, the Licensing Board admitted Contention 5 for litigation in this proceeding. That contention generally asserts that the Applicants' quality assurance/quality control (QA/QC) program during construction was deficient in numerous respects and that an operating license accordingly should not be issued.<sup>2/</sup> Hearing sessions on Contention 5 were held on June 7-11 and July 26-30, 1982; further hearings on Contention 5 will be held during the hearing sessions scheduled to commence on September 13, 1982.

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2/ Contention 5 as admitted by the Licensing Board asserts as follows:

Contention 5. The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 CFR Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 CFR 50.57(a) necessary for issuance of an operating license for Comanche Peak.

On July 16, 1982, CASE pre-filed the written testimony of Charles A. Atchison,<sup>3/</sup> along with the written testimony of other individuals CASE anticipated calling as witnesses at the July 1982 hearing sessions; on July 19, 1982, CASE filed supplemental written testimony of Mr. Atchison.<sup>4/</sup> Mr. Atchison has identified himself as a former QA inspector employed by Brown & Root, Inc. (B&R) at the Comanche Peak Steam Electric Station (CPSES); his written testimony sets out a number of allegations concerning QA/QC practices at the CPSES site.

Having learned in advance of the anticipated appearance by Mr. Atchison at the July hearing sessions,<sup>5/</sup> on July 19, 1982, the Staff pre-filed the written testimony of Robert G. Taylor (an NRC Senior Resident Inspector at the CPSES site) and Donald D. Driskill (an Investigator working at the NRC's Region IV Office) concerning the QA/QC allegations which had been made by Mr. Atchison to the NRC.<sup>6/</sup> The allegations

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- 3/ "Testimony of Charles A. Atchison, Witness for Intervenor CASE," filed on July 16, 1982 and admitted into evidence as CASE Exhibit 650 and 650A through 650X (Tr. 3468).
  - 4/ "Supplementary Testimony of Charles A. Atchison, Witness for Intervenor CASE (Citizens Association for Sound Energy)," filed on July 19, 1982 and admitted into evidence as CASE Exhibit 656 (Tr. 3468).
  - 5/ See, e.g., "CASE (Citizens Association for Sound Energy) Proposed Witness List," filed June 23, 1982. Even prior to CASE's filing of its witness list, CASE indicated at the June hearings that Mr. Atchison would appear as a witness (Tr. 727-28). Further, Mr. Atchison made several statements to the press, in which he repeated the allegations he had made to the NRC's investigative Staff. See Tr. at 2497, 3058-60.
  - 6/ "Testimony of NRC Staff Members Robert G. Taylor and Donald D. Driskill Regarding NRC Staff Investigation and Inspection Findings on Allegations By Charles Atchison," filed July 19, 1982 and admitted into evidence as Staff Exhibit 197 (Tr. 2461). The Staff's reasons for filing this testimony are described generally at Tr. 2432-33 and 3058-60.

discussed by Messrs. Taylor and Driskill in their written testimony (and which are referred to in Mr. Atchison's testimony) were as follows:

- (1) that B&R's Quality Assurance Department was failing to ensure that corrective action was being taken with respect to documented non-conformances (Staff Ex. 197, at 2);
- (2) that discrepancies in vendor-manufactured components were being waived by direction of a Texas Utilities Generating Company (TUGCO) QA auditor, in order that equipment could be shipped to the plant site (id.);
- (3) that non-conformance reports (NCRs) were being disapproved and the numbers assigned to those NCRs were being reused (id.);
- (4) that Mr. Atchison had submitted an NCR to the TUGCO NCR coordinator in January 1982, which NCR was never assigned an NCR number and was never processed and dispositioned (id., at 9); and
- (5) that Mr. Atchison was terminated as a QC inspector as a result of his submitting several NCRs in March and April, 1982 (id.).

In addition to the written testimony of Messrs. Taylor and Driskill, the Staff submitted two NRC Investigation Reports which related to Mr. Atchison's allegations - Investigation Reports 80-22 and 82-10/82-05 (admitted into evidence as Staff Exhibits 123 and 199, respectively).<sup>7/</sup>

In both of those reports, the Staff reported the findings of its investigations concerning the allegations made by an individual designated only as "A" and reported upon related information provided by other persons identified only by letter designation and job title.

After Messrs. Taylor and Driskill's testimony was admitted into evidence at the hearing session held on July 27, 1982 -- and upon the

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7/ See Tr. 2336, 2461. The Staff also moved into evidence numerous other Inspection and Investigation Reports, most of which do not relate to Mr. Atchison's allegations.

Licensing Board's own initiative<sup>8/</sup> -- the Licensing Board Chairman directed Mr. Driskill to disclose the identities of all the individuals designated by letter and title in Staff Exhibits 123 and 199 (Tr. 2479, 2735).<sup>9/</sup> Inasmuch as no party to the proceeding had ever requested that those identities be disclosed, the Staff was required to determine "on the spot" whether it could lawfully and properly comply with the Licensing Board's orders, without violating the Commission's policy or case law (Tr. 2482-83, 3048-49). Following repeated long-distance telephone conferences between Staff counsel and members of the Staff (including, inter alia, the Executive Director for Operations, the Executive Legal Director, the Director of the Office of Inspection and Enforcement,

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8/ Even the Intervenors had no interest initially in compelling the disclosure of the letter-designated individuals' identities (Tr. 2494). Mrs. Ellis, CASE's representative, stated "we have no problem whatsoever with their remaining confidential, if that is their desire, because many times we realize that these people may jeopardize their jobs" (Tr. at 2501); only upon the urging of the Licensing Board Chairman did the Intervenors announce that they, too, would like to have the identities disclosed (Tr. 2501-03).

At no time did the Intervenor or any other party object to the admissibility of Staff Exhibits 123, 178 or 199 on the ground that the documents were incomplete or irrelevant, or on any other grounds. Indeed, CASE sought to introduce the same documents into evidence (see generally Tr. 2327, 3026).

9/ The Licensing Board Chairman also ordered the Staff to disclose the names of individuals identified by letter in Investigation Report 81-12, admitted into evidence as Staff Exhibit 178 (Tr. 2336), concerning the unrelated allegations made by another individual which are reported therein (Tr. 3558). Although the Licensing Board's Order to Show Cause concerns only Staff Exhibit 199, the facts and arguments set forth herein apply also to the Licensing Board's orders compelling disclosure of the identities of individuals referred to in Staff Exhibits 123 and 178.

and the Regional Administrator of NRC Region IV) (See Tr. 3051, 3053-54), the Staff determined that compliance with the Licensing Board's directive would effect a waiver of the "informer's privilege" which is of fundamental importance to the Staff's investigative capability, could cause substantial harm to the Commission's ability to protect the public health and safety, and was unnecessary for the development of a factual record in the instant proceeding (Tr. 2484-87, 3047-48). Accordingly, the Staff respectfully declined to comply with the Licensing Board's order. One day later, on July 29, 1982, the Staff requested that the Licensing Board stay its order so that prompt review by the Appeal Board could be obtained; the Licensing Board Chairman, however, denied the Staff's request as untimely -- although he stated that he would have granted the request had it been made one day sooner (Tr. 3072-73). On August 4, 1982, just five days after the conclusion of the hearing sessions and before the Staff had had an opportunity to file a motion seeking interlocutory appellate review of the Licensing Board's order as it indicated it would do (id.; see also Tr. 3559, 3467), the instant "Order to Show Cause" was issued by the Licensing Board.

## II. DISCUSSION

### A. The Staff Acted Properly and in Accordance with Established Legal Principles Governing the Informer's Privilege

It is well established that an "informer's privilege" may exist where individuals confidentially provide information to the Staff in the course of an investigation of alleged licensee or applicant violations of law. As recognized by the Appeal Board in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981),

important policy considerations underlie the informer's privilege:

The Supreme Court has recognized "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Roviaro v. United States, 353 U.S. 53, 59 (1957) (citations omitted).

Further, the Appeal Board observed that the informer's privilege derives from "an ancient doctrine... founded upon the proposition that an informer may well suffer adverse effects from the disclosure of his identity," and that "the most effective protection from retaliation" is obtained by "withholding the identity of the informer"; thereby, "the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice." South Texas, supra, 13 NRC at 474, quoting In re United States, 565 F.2d 19, 22 (2d Cir. 1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1968). See also, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-81-28, 14 NRC 933, 938 (1981) (denying reconsideration of ALAB-639) (Commissioner Ahearne, concurring).

While the Licensing Board recognizes that an informer's privilege may be claimed in NRC adjudicatory proceedings, it attempts to limit the privilege to instances in which "express promises and pledges of anonymity" have been made (Tr. 2730-31; Order, at 8). In doing so, the Licensing Board ignores the clear precedent established by the Appeal Board and the Commission in Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390 (1970). There, in the most

unequivocal terms, the Appeal Board overturned a Licensing Board's order compelling the Staff to disclose its informants' names:

We think it sound policy that when information is given in confidence, the names of the persons giving it may properly be withheld from disclosure....

We further believe that a showing that there was an explicit understanding that information was being given in confidence is not an absolute prerequisite for this nondisclosure consideration to apply. For example, the surrounding circumstances, when viewed in the light of an historical pattern of non-disclosure, may support a determination that it was entirely reasonable for the party giving the information to assume that it was being given in confidence. In this connection, consideration here should be given to the possible adverse effect any such disclosure might have on the ability of AEC inspectors to obtain full and candid expression of the views of individuals they interview during the course of an inspection.

4 AEC at 395 (emphasis added). The Appeal Board then remanded the case to the Licensing Board for a determination, inter alia, of (1) the circumstances surrounding the Staff's receipt of the information, (2) the relevance of the names sought, and (3) the expected benefit to be obtained from disclosure of those names. *Id.*, at 395.<sup>10/</sup>

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10/ In addition, the Appeal Board stated that certain types of rulings should thereafter be referred to it by the Licensing Boards (4 AEC at 399):

[I]n light of the arguable ambiguity as between 10 C.F.R. Part 2 and 10 C.F.R. Part 9 and of the nature of the matters involved, a Licensing Board should, prior to compelling disclosure, refer the following types of rulings to us for our review:

- (1) A ruling that an item is not privileged when the Director of Regulation claims that it is privileged.
- (2) A ruling that the proponents of disclosure have demonstrated a need for items of information which are properly privileged.

The Licensing Board's orders in the instant proceeding, and its denial of the Staff's request for a stay, altogether ignore this directive.

On appeal following remand of the Monticello decision,<sup>11/</sup> the Appeal Board reaffirmed that "an explicit understanding that information was being given in confidence is not an absolute prerequisite" and that "the surrounding circumstances, when viewed in the light of an historical pattern of nondisclosure" may support a finding of privilege. 4 AEC at 436. Having so concluded, the Appeal Board ruled as follows (id.):

Applying these principles to the present record, we have determined that nondisclosure of names is appropriate only as respects those persons (other than public officials) who made statements to compliance inspectors outside of general meetings (emphasis added).

The Appeal Board's rulings in this regard were explicitly affirmed by the Commission as "appropriate and reasonable." 4 AEC at 440.<sup>12/</sup>

The Staff believes that when these principles are applied to the "surrounding circumstances" present in the instant proceeding, it becomes clear that the Licensing Board incorrectly ruled that persons who supplied information to the Staff were not protected by the informer's privilege unless they had received an explicit pledge of confidentiality. Thus, as suggested by the Appeal Board in Monticello, the Staff has indeed followed "an historical pattern of non-disclosure." At the hearing,

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11/ Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-16, 4 AEC 435, aff'd by the Commission, 4 AEC 440 (1970).

12/ Both of the Monticello decisions (ALAB-10 and ALAB-16) are cited by the Appeal Board in its South Texas decision, relied upon extensively by the Licensing Board. See South Texas, supra, 13 NRC at nn. 13 and 20.

Staff witness Driskill cited this historical practice. While the Licensing Board disregarded the significance of this historical practice, the Appeal Board has clearly recognized that such a pattern of conduct may support a finding of privilege in the absence of any express pledge of confidentiality. Monticello, supra, ALAB-16, 4 AEC at 395.

In addition, the general conditions surrounding the Staff's conduct of its investigations may very well lead a person reasonably to believe that he will be afforded confidential treatment. For example, NRC inspectors and investigators refrain from fraternizing with licensee and applicant personnel. In addition, investigations are kept secret while in progress; informants are generally interviewed in private; and informants' names are generally deleted from the Staff's investigation reports (Tr. at 2480, 2495, 2532-33, 2605-09). These practices have been followed historically, as they were in the instant case, and may well create an aura and perception of confidentiality.

Further, the Licensing Board merely assumed that Mr. Driskill's inability to recall which individuals had requested anonymity (e.g., Tr. at 2479-80, 2540, 2731) could only mean that Mr. Atchison was the sole person who desired confidentiality, concluding that "[a]pparently none of these alphabetical witnesses either sought or even wanted such secrecy" (Order, at 7). On the contrary, since returning from the hearing, the Staff has now had an opportunity to contact many of the individuals in question -- and three of them have expressly stated

that they wish to preserve their anonymity.<sup>13/</sup> The Licensing Board's unfounded assumption that none of these persons desired anonymity was simply wrong, and the propriety of the Staff's action in withholding their identities has been borne out.

Finally, the Licensing Board is incorrect in its conclusion that the informer's privilege was preempted or waived by virtue of the fact that a Department of Labor (DOL) investigator was present during portions of the Staff's investigation of one allegation and received copies of certain signed statements (Order, at 5; Tr. 2559-60, 2562-63).<sup>14/</sup> The DOL investigator was performing an official function in the investigation of one of Mr. Atchison's allegations, which was being investigated concurrently by the Staff -- and was limited to the one allegation which involved both agencies (Tr. 2574). The DOL's investigation, conducted pursuant to Section 210(a) of the Energy Reorganization Act of 1974 (Tr. 2555), shares a common purpose with the Staff's investigation, as when any two governmental agencies investigate conduct which comes simultaneously within their respective jurisdictions. While DOL seeks to protect the employee, the Commission seeks to protect the public health

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13/ See Driskill/Herr Affidavit, at 2. In addition, six persons designated by letter in Staff Exhibit 178 have requested that their identities be withheld. Id.

14/ The DOL investigator (Mr. Fortman) was present during three of the Staff's interviews (these involved individuals E, D and F in Staff Exhibit 199); in addition, Mr. Fortman was given the signed witness statements made by each person who provided information concerning that allegation (individuals B, E, F and G in Staff Exhibit 199) (see Tr. at 2551-52, 2559, 2562, 2571-72, 2574, 2606).

and safety-- but the same instance of conduct may give rise to both agencies' invocation of their investigative powers (See Tr. at 2577-78). Inasmuch as the privilege belongs to the Government, an investigation conducted jointly by two government agencies cannot preclude or waive the informer's privilege. For these reasons, in the instant proceeding, DOL's access to aspects of the Staff's investigation did not preempt or waive the informer's privilege.<sup>15/</sup>

B. Absent Compelling Need, the Identities of the Staff's Informants Should be Protected

As set forth above, even in the absence of an express pledge of confidentiality, a valid informer's privilege exists with respect to the names of those individuals who provide information to the Staff in its investigations. It is well established that the identities of such

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15/ Similarly, the Licensing Board erred in finding that the Applicant had waived the informer's privilege (Tr. 3060-61). That might be true for privileges which belong to the employer and exist for its protection. The Licensing Board's conclusion, however, flies in the face of the fact that one of the central underpinnings of the privilege is the recognition that employees require protection from their employers' retaliation, which might result absent confidential treatment of their identities. South Texas, supra, 13 NRC at 474-75 and 478 n.27. By permitting the employer to waive this privilege, the employer learns the employee's identity, and the underlying purpose for the privilege is destroyed. Thus, the Appeal Board recognized in South Texas that "the informer's privilege inures only to law enforcement officials." ALAB-639, supra, 13 NRC at 478 n.26.

individuals should not be disclosed unless "under the circumstances, there is a necessity for production of the data" -- and even in such an instance, "the Licensing Board must weigh the detrimental effects of disclosure against the demonstrated need for production." Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 398 (1970). As the Appeal Board further observed in Monticello, a determination of the need for disclosure must take into consideration the availability of the information elsewhere (id., at 399):

[T]he necessity for disclosure is sharply reduced where available alternatives for obtaining information are present. In the face of a proper privilege claim, the proponent for disclosure should demonstrate convincingly that information already furnished or otherwise available is not adequate under the circumstances.

Similarly, in South Texas, supra, 13 NRC at 475, the Appeal Board held as follows:

To overcome the acknowledged importance of the need for confidential treatment of informants, the burden was on the intervenors to demonstrate the need for their disclosure.

Perhaps in recognition of this mandate, the Licensing Board asserts that "[t]he identities of the unnamed individuals are necessary so that their credibility and that of Mr. Driskill may be weighed" (Order, at 7), and appears to imply that the information is "essential to a fair determination of [the] cause" (id., at 8, 9). Nowhere does the Licensing Board balance the asserted need against the potential detriment arising from disclosure; rather, it simply concludes -- altogether without evidentiary or legal support -- that the informants either never had a

privilege or had waived their privilege (Order, at 7, 8), and therefore no harm could result from the disclosure of their identities.<sup>16/</sup> The Staff believes that the Licensing Board erred in reaching these conclusions, for the following reasons.

1. Disclosure of the Informants' Identities is Unnecessary

Both Mr. Atchison and Mr. Driskill appeared as witnesses at the July hearings. There can be no question that the credibility of these two persons was completely open for the Licensing Board to examine. While the Licensing Board suggests that it requires the identities of individuals B-K to test the credibility of Staff witness Mr. Driskill (Order at 6, 7), it is altogether unclear how the disclosure by the Staff of their identities will have any bearing whatsoever upon Mr. Driskill's credibility; indeed, at the hearing, the Licensing Board Chairman stated "we've had Mr. Driskill. We know what his appearance and demeanor is" (Tr. 3065).

The Licensing Board here already had the information which was provided by the letter-designated individuals, both in the Staff's reports and in the statements signed by those individuals. The Licensing Board's insistence on obtaining the names of those persons

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16/ During the course of the hearing, the Licensing Board further concluded -- without evidentiary or legal basis -- that no harm could result since the investigation was probably concluded anyway and half the persons were already identified before the Licensing Board (Tr. 2496). This conclusion is patently wrong, as set forth in the attached Affidavits. See discussion infra, at 20.

ignores the clear holding by the Appeal Board in South Texas (13 NRC at 477):

Not the individuals but their information is of significance to the proceeding. Had [the intervenors] demonstrated that their own informants tell a significantly different story than the one reported by the Staff, we might have a different situation. But that is not the case here.<sup>17/</sup>

In essence, the Licensing Board appears to suggest that Mr. Driskill's write-up of his investigation report is inaccurate -- but there is absolutely no factual basis for such an assertion. In similar circumstances, the Appeal Board has rejected the unfounded "surmise" put forth by intervenors as to possible inaccuracies in the Staff's investigative reports. South Texas, supra, 13 NRC at 475 n.21 and 477.

As to the credibility of any of the ten individuals designated by the letters B-K in Staff Exhibit 199, the Staff does not perceive that the disclosure of its informers' identities would have any bearing on the issue of credibility. The Staff has already provided its investigation reports, as well as its signed witness statements (from which only names and identifying information were deleted). Moreover, both Mr. Atchison and Mr. Tolson (an employee of the Applicant) testified to their understanding of who the informants were in Staff Exhibits 123 and 199, in most cases allegedly with 100% certainty (Tr. 2508-13, 3442-56), and even the

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<sup>17/</sup> Similarly, that is not the case with respect to Staff Exhibits 199 and 123 in this proceeding; it remains to be seen whether such an issue will arise with respect to Exhibit 178 (See, e.g., Tr. 3559-60). The alleger in Exhibit 178 has identified himself as Henry Stiner (Tr. 2720, 2722), an individual who will appear as a witness at the September hearing sessions (Tr. 2737).

Licensing Board now concedes that it has little, if any, need for the Staff to disclose the informers' identities (Order, at 6):

Most of the uncertainty as to the identities of the individuals interviewed was eliminated when Ronald G. Tolson, a high-ranking employee of the Applicants, testified to the identity of these alphabetical individuals. Mr. Tolson's identification of A through K was corroborated by the testimony of Mr. Atchison. These identifications are undenied on the present record.<sup>18/</sup>

At no time during the hearing did the Licensing Board require the attendance of the persons named by Messrs. Atchison and Tolson. Instead, the Licensing Board merely suggested that the Applicant might wish to call them as witnesses (Tr. 2586-87, 2705-06), deferred ruling on CASE's request for such a directive (Tr. 3068-69), and never once indicated that their presence was required for a "fair determination of the cause."<sup>19/</sup> Moreover, the Licensing Board is already in a position to assess the credibility of many of these persons, in that seven of the persons designated by letter in Staff Exhibit 199 as identified by Messrs. Tolson and Atchison have appeared or will appear as witnesses in

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18/ Even during the course of the hearing, the Licensing Board indicated that it was satisfied that it knew the identities of the persons in question (Tr. 2494, 2513, 3042-43, 3045, 3062).

19/ The Licensing Board could have used its in camera powers to obtain the information it sought had that information not been available elsewhere, pursuant to 10 CFR §§ 2.744(c) and 2.790(b), although the Licensing Board declined to do so when that procedure was suggested (Tr. 2498-99).

In light of the circumstances present in this proceeding, the Staff believes that in camera proceedings were not necessary, since (1) the information was available elsewhere, (2) the Licensing Board did not need the Staff to confirm that information, and (3) potential harm could be caused thereby to the Commission's investigative powers. Accord, South Texas, supra, 13 NRC at 477.

this proceeding.<sup>20/</sup> In light of these facts, the Staff believes that no useful or necessary purpose is served by the Licensing Board's continuing to require the Staff to disclose or confirm the identities of the individuals referred to in Staff Exhibit 199.<sup>21/</sup>

2. The Potential Detriment Arising From Disclosure Outweighs the Need for Such Disclosure

As set forth above, the Staff believes that there is no genuine need for the disclosure of the identities of individuals B-K. Furthermore, the Staff believes that a balancing of "the detrimental effects of disclosure against the demonstrated need for production" -- as required by the Appeal Board in Monticello, ALAB-10, supra, 4 AEC at 398--- leads to a conclusion that (1) the disclosure may cause great detriment to the Commission's future ability to obtain safety-related information from persons who would otherwise communicate that information in confidence to the Commission's investigative Staff, and (2) that this potential detriment outweighs the need for disclosure.

The Commission's need to obtain information concerning the safety of nuclear power plants is of great importance; "the need to protect

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20/ The seven individuals are Messrs. Atchison, Boren, Brandt, Chapman, Purdy, Smith and Tolson.

21/ The Staff recognizes that the Licensing Board is the Commission's primary finder of fact in an adjudicatory proceeding, and great deference is ordinarily given to its determination that certain information is required for it to be able to assess a witness' credibility or reach a fair determination of the issues. However, this principle is not absolute, and an appropriate balancing must be conducted where the Commission's primary goal of protecting the public health and safety may be compromised by the public disclosure of confidential information. See, e.g., South Texas, supra, 13 NRC at 478.

confidential informants is not an academic concern to the NRC."

South Texas, supra, 13 NRC at 474. Indeed, the Commission's safety inspectors "must depend" upon the information provided by construction employees and others who come forward with "information about apparent safety discrepancies." Id. at 475, quoting Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 134 (1979). In rejecting the suggestion even that such information could safely be disclosed subject to a protective order, the Appeal Board stated as follows (id., at 477-78):

Clairvoyance is not needed to appreciate that word of the breach of confidentiality would spread and the likelihood of informants coming forward with safety-related information in future cases be diminished.

It is very easy when focusing on the immediate concerns of the case at bar to take the short view and err on the side of disclosing confidential sources of information. But this is neither the sole reactor under construction nor the only one in which informers may play an important role in bringing potentially dangerous situations to the Commission's attention. The informer's privilege, as it has been developed and refined by the courts over the years, is an attempt to balance the government's recognized need for information over the long range with the necessities of a fair hearing and a full record in a particular case.<sup>22/</sup>

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22/ For these reasons, the Appeal Board found that the speculative need for disclosure in the South Texas proceeding was outweighed by the Commission's long-term need for confidential treatment of informers:

Intervention in one Commission proceeding does not entitle [the intervenors] to privileged information that, if disclosed, might jeopardize the NRC's likelihood of receiving similar reports in future cases involving other plants. It is the NRC's continuing need for confidential informants that made the Licensing Board's failure to recognize the importance of the privilege both shortsighted and arbitrary.

South Texas, supra, 13 NRC at 478 n.26.

The Staff believes that these principles require a finding in the instant proceeding that disclosure should not be required. While the Licensing Board has a unique perspective as a finder of fact, which may have led it to give primary consideration to its own desire to have a full record upon which to make a decision, the determination as to whether the informer's privilege should be waived is not within the province of the Licensing Board alone. Rather, the Appeal Board has held long ago that the views of the Commission's investigative Staff should be given "great weight" in this area:<sup>23/</sup>

The Director of Regulation is the official most aware of the adverse impact disclosure of privileged information might have on the Commission's regulatory program. It follows, therefore, that a Licensing Board should give great weight to the position of the Director of Regulation.

Monticello, supra, ALAB-10, 4 AEC at 399.<sup>24/</sup> In the instant proceeding, the Commission's investigative Staff determined that disclosure by the Staff of its informers' identities may cause great detriment to the Commission's ongoing safety function and, for this reason, the Staff

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23/ The Monticello decision was issued at a time when 10 CFR § 2.744 required "great weight" to be afforded to the Staff's determination as to the need for confidentiality in producing materials during discovery. While that regulation has since been revised, the general principles continue to be applicable today.

24/ Following the reorganization of the AEC in 1974, the investigative function previously performed by the AEC's Director of Regulation was vested in the NRC's Director of the Office of Inspection and Enforcement. Just one month ago, the Office of Investigation was newly created, and the Commission's investigative function with regard to these type of matters was transferred to that office.

declined to comply with the Licensing Board's order compelling such disclosure (Tr. 2484-87). Rather than giving that determination "great weight," the Licensing Board simply swept it aside, giving it little or no consideration. In this respect, the Licensing Board acted arbitrarily and in disregard of established precedent.<sup>25/</sup>

As discussed supra at 10-11, since returning from the July 1982 hearing sessions, the Staff has had an opportunity to contact the individuals designated by letter in Staff Exhibits 123 and 199, and six of the individuals designated by letter in Staff Exhibit 178. Nine of those persons have requested that their names not be disclosed or confirmed by the NRC Staff, while the other persons contacted have stated they do not object to the Staff's disclosure (Driskill/Herr Affidavit, at 2). While, in some instances, the disclosure or confirmation of the names of those persons who waive confidentiality would not inadvertently compromise the identity of those persons who seek to maintain their anonymity,<sup>26/</sup> in the present circumstances, the Staff has

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25/ The Licensing Board's patent desire to obtain the immediate disclosure of the requested information precluded the Staff -- as well as the Licensing Board itself -- from being able fully to research applicable legal principles and to reflect dispassionately upon the need for disclosure when weighed against the potential harm which might arise therefrom. As set forth herein, now that the hearing has recessed, the Staff has been able to obtain additional information which, had it been available during the hearing, may well have led the Licensing Board to follow a different course of action.

26/ For instance, where an investigation report identifies by letter a single craft employee and many supervisory personnel, and all of the supervisory personnel waive confidentiality, the disclosure of their names, in appropriate circumstances, may not result in an inadvertent disclosure of the identify of the single craft employee. That is not the case here.

determined that such a disclosure might indeed compromise the confidentiality of the persons who seek to remain anonymous (Collins Affidavit, at 2-3). Such an effect could result in harm to the Commission's ability to obtain confidential information in the future, both in this and in other proceedings (*id.*, at 3); accordingly, the Staff has determined that it cannot properly identify any of these persons. The appropriateness of this course of action has been upheld by the courts under the "jigsaw puzzle" doctrine applicable to Freedom of Information Act requests, whereby disclosure of pieces of information may inadvertently result in the disclosure of other information. See, e.g., Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980); Hayden v. National Security Agency/Central Security Service, 608 F.2d 1381, 1390 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980).

C. Sanctions Against the Staff Are Inappropriate and Should Not Be Imposed

As set forth above, the Staff believes that it acted reasonably, lawfully and in the best interests of the Commission in declining to comply with the Licensing Board's orders to disclose the identities of its confidential informants. In addition, the need for such disclosure is lacking and, in any event, is outweighed by the potential harm which could result to the Commission's ability to protect the health and safety of the public. For all of these reasons, the Staff submits that the imposition of sanctions against the Staff would be inappropriate.

The determination as to whether sanctions should be imposed must turn upon a case-by-case analysis of the events which are asserted to

give rise to the need for such action, taking into consideration "all of the circumstances". See generally, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). The imposition of sanctions may result where a party acted in disregard of its legal obligations:

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations.

CLI-81-8, supra, 13 NRC at 454.

The Staff submits that in the instant proceeding, Staff's conduct was lawful and reasonable in light of the Commission's long-standing policy favoring the protection of informants' identities, as set forth in the Monticello and South Texas decisions. In addition, given the uncertain need for disclosure and potential detriment resulting therefrom, the Staff submits it was fully justified in declining to comply with the Licensing Board's orders. The propriety of the Staff's actions in this regard has been proven correct, as set forth in the attached Affidavits.

Further, the Staff indicated at the hearing that it intended promptly to seek interlocutory appellate review of the Licensing Board's orders and, as discussed supra at n.8, the Appeal Board has required that such an appellate review be conducted in these circumstances. The Staff submits that the Licensing Board should have stayed its hand until such a review had been obtained and, in any event, the imposition of

sanctions at this time would be improper. For all of these reasons, sanctions should not be imposed.<sup>27/</sup>

D. The Licensing Board Should Reconsider Its Orders and/or Issue a Stay

As set forth above and in the attached Affidavits, since returning from the July hearing sessions, the Staff has had an opportunity to contact the individuals identified by letter in Staff Exhibits 123 and 199, and six of the individuals identified by letter in Staff Exhibit 178, and has learned that nine of those persons seek to remain anonymous. In view of this newly obtained information and in view of the fact that the Staff's non-disclosure was motivated solely by its desire to preserve the Commission's effectiveness in protecting the public health and safety, as more fully set forth above, the Staff hereby requests that the Licensing Board reconsider and vacate its orders

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27/ As noted by the Appeal Board in Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, Slip Opinion (June 17, 1982), at 33-34, the Licensing Board is required "to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance." In this proceeding, the Staff submits that no harm has been caused by the Staff's having declined to disclose the names of its informers, since the Licensing Board had other means to obtain their names.

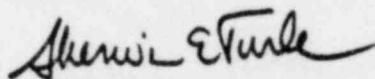
While the Licensing Board appears to be considering striking the Staff's written testimony (Tr. at 2482, 2495, 3069), that would serve no useful purpose and, indeed, would frustrate the Licensing Board's desire to develop a full and probative record upon which to base a decision in this proceeding (Tr. 2498). Similarly, sanctions against Staff counsel are inappropriate in view of the fact that counsel acted in accordance with the professional code of ethics in representing her client's position before the Licensing Board and acted with due respect for the Licensing Board members (see Tr. at 3050-51, 3053-54, 3056).

compelling the Staff to disclose the names of its informants. In the alternative, the Staff requests that the Licensing Board reconsider its denial of the Staff's prior request for a stay (Tr. 3073), and that the Licensing Board stay any further orders which it may issue concerning the disclosure of informants' identities.

III. CONCLUSION

For all of the above reasons, the Staff submits (1) that it acted fully in accordance with established legal principles in declining to reveal the identities of the informants in question, (2) that disclosure by the Staff of those persons' identities would be inappropriate and could cause irreparable harm to the Commission's future ability to investigate allegations of applicant and licensee misconduct, and (3) that sanctions should not be imposed upon the Staff for declining to comply with the Licensing Board's orders. Finally, the Staff respectfully requests that the Licensing Board reconsider and vacate its previous orders compelling the Staff to disclose its informants' identities, as set forth more fully above.

Respectfully submitted,



Sherwin E. Turk  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 24th day of August, 1982