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Certified By

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August 27, 1982

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U.S. Nuclear Regulatory Commission
Washington, DC 20555

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U.S. Nuclear Regulatory Commission
Washington, DC 20555

In the Matter of
Texas Utilities Generating Company, et al.
(Comanche Peak Steam Electric Station,
Units 1 and 2)
Docket Nos. 50-445 and 50-446

Dear Administrative Judges:

Pursuant to the Licensing Board's Order, on August 24, 1982 the NRC Staff ("Staff") filed its "Response to Order to Show Cause and Motion for Reconsideration" ("Staff Response"). Therein, we discuss the fact that the Staff had provided to Mr. Fortman, the Department of Labor (DOL) investigator, the unexpurgated signed statements of four persons interviewed during the Staff's investigation of one of Mr. Atchison's allegations referred to in Staff Exhibit 199 (Staff Response, at 11 n.14). We further state our belief that no waiver of the informer's privilege was occasioned thereby (*id.*, at 11-12). In this regard, I wish to advise the Licensing Board of the following facts.

At approximately 4:30 P.M. on August 24, 1982, I received a telephone call from Mr. Reynolds, counsel for the Applicants. Mr. Reynolds informed me that Mr. Fortman had produced the four written statements which he had received from the Staff to Mr. Atchison's attorney (pursuant to subpoena) and that the written statements had been proffered and admitted into evidence in the DOL proceeding at the hearing held during the week of August 16, 1982. I was unable to independently verify the accuracy of these statements before serving the Staff's Response. However, on August 25, 1982, I placed several telephone calls to DOL and was able to verify the accuracy of these statements.

In the Staff's view, the disclosure by DOL is regrettable. I am informed that Mr. Driskill had understood that the statements would be treated

confidentially by DOL,*/ and had believed that DOL operates under the same principles as the Staff with respect to the confidentiality of investigations (indeed, DOL's regulations, at 29 C.F.R. § 24.4, do provide for confidential treatment of such information). In addition, the Staff requested in writing that DOL preserve the confidentiality of the signed statements obtained during the Staff's investigation; unfortunately, the documents had been released by DOL without the Staff's knowledge even before the Staff's written request was transmitted.

Nonetheless, in our view, these facts do not alter the positions expressed in the Staff's Response, for the following reasons:

1. A valid informer's privilege does exist even where information is obtained in the absence of an explicit pledge of confidentiality (Staff's Response, at 7-11);
2. The Licensing Board did not and does not need the Staff to disclose or confirm the identities of the individuals referred to in Staff Exhibits 123, 178 or 199 (id., at 14-17);
3. Disclosure or confirmation of those identities by the Staff, prior to DOL's disclosure, could have resulted in harm to the Commission's investigative abilities (id., at 17-21), and even now, such disclosure or confirmation could only compound the harm which may result;
4. At the July hearing sessions, the Staff did not reasonably anticipate that DOL would make public the Staff's investigative documents, and inasmuch as the Staff acted lawfully and with the Commission's best interests in mind, sanctions are not appropriate (id., at 11-12, 21-23); and
5. In any event, the Staff's positions with respect to Staff Exhibits 123 and 178 are not affected, in that the DOL investigator received no information or statements concerning those matters -- and even as to Staff Exhibit 199, he received only four written statements, relating to only one of Mr. Atchison's allegations (id., at 11).

*/ I am further informed that before the four written statements were provided to Mr. Fortman, Mr. Fortman had stated that they would be used for internal purposes only, that they would not be made publicly available, and that it was unusual for public hearings to take place in which such documents might be produced. I am further informed that after the four statements were provided to Mr. Fortman, one individual requested a copy of his own statement from DOL under the Privacy Act, at which time Mr. Fortman inquired as to whether Mr. Driskill objected to its release; Mr. Driskill responded that he had no objection to its release under the Privacy Act but that release under the Freedom of Information Act would be improper.

For these reasons and the reasons set forth more fully in the Staff's Response, we continue to believe that the Licensing Board should reconsider and vacate its orders compelling the Staff to disclose the identities of its informants, and that sanctions against the Staff should not be imposed.

Sincerely,

Sherwin E. Turk
Counsel for NRC Staff

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