

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

TEXAS UTILITIES GENERATING COMPANY,
ET AL.

(Comanche Peak Steam Electric Station,
Units 1 and 2)

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Docket Nos. 50-445
50-446

NRC STAFF'S APPLICATION FOR A STAY OF
THE EFFECTIVENESS OF THE ATOMIC SAFETY AND
LICENSING BOARD'S ORDER DENYING RECONSIDERATION

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October 12, 1982

DESIGNATED ORIGINAL

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On September 30, 1982, the Atomic Safety and Licensing Board ("Licensing Board") issued its "Order Denying Reconsideration" ("Order" or "ODR"), in which it ruled that the NRC Staff ("Staff") had not shown good cause for failing to comply with the Licensing Board's oral rulings compelling the Staff to disclose the identities of ten 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 (ODR, at 1-2). The Licensing Board indicated that "sanctions will be imposed unless the orders are obeyed forthwith" (id., at 2), and directed the Staff to make eight of the ten disclosures which the Licensing Board had previously ordered (id., at 14.)^{1/} The Licensing Board warned that "if the Staff fails either to obey this order promptly or to seek appellate review, the Licensing Board will use its authority pursuant to 10 C.F.R. § 2.713(c) to impose sanctions upon Staff counsel" (id.).

^{1/} Exempted from the Licensing Board's order of September 30, 1982, were the identities of "two individuals who asked for confidentiality" (ODR, at 14). This ruling was premised solely upon new information provided by the Staff on August 24, 1982. See discussion infra, at 5.

In accordance with the provisions set forth in 10 C.F.R. § 2.788, the Staff hereby applies for a stay of the effectiveness of the Licensing Board's Order Denying Reconsideration, pending the filing of and a decision on the Staff's appeal from that order.^{2/}

INTRODUCTION AND 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. Hearing sessions on Contention 5 were held on June 7-11, July 26-30, and September 13-16, 1982; it has not yet been determined whether further hearing sessions on Contention 5 will be held.

On July 16, 1982, Intervenor CASE pre-filed the written testimony of Charles A. Atchison,^{3/} a former QA inspector employed by Brown & Root, Inc. at the the Comanche Peak site; his written testimony sets out a number allegations concerning QA/QC practices at the site. 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

^{2/} The Staff timely filed its exceptions to the Licensing Board's Order on October 8, 1982. See "NRC Staff's Exceptions to the Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982" ("Exceptions"), filed on October 8, 1982. In the letter of transmittal which was filed along with the Staff's Exceptions, the Staff indicated that it intended to seek a stay of the effectiveness of the Licensing Board's Order. See Letter from Sherwin E. Turk, Esq., to Ms. C. Jean Shoemaker, dated October 8, 1982.

^{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).

the NRC's Region IV Office) concerning the QA/QC allegations which had been made by Mr. Atchison to the NRC.^{4/} In addition, 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).^{5/} 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 Licensing Board's own initiative (See Tr. at 2463-2504) -- 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).^{6/} 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

^{4/} "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).

^{5/} See Tr. 2336, 2461.

^{6/} 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, concerning the unrelated allegations made by another individual which are reported therein (Tr. 3558). At the subsequent hearing sessions held in September 1982, the Licensing Board effectively rescinded its order compelling the disclosure of identities of persons referred to in Staff Exhibit 178 (Tr. 4068).

(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, 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, before the Staff had had an opportunity to file a motion seeking appellate review of the Licensing Board's order as it indicated it would do (Tr. 3072-73; see also Tr. 3559, 3467), the Licensing Board issued an "Order to Show Cause", in which it directed the Staff to show cause why sanctions should not be imposed against the Staff for declining to comply with the Licensing Board's order to disclose the identities of Staff informants. The Staff filed its response to that order on August 24, 1982, as directed by the Licensing Board,^{7/} and included therein a motion for reconsideration based, in

^{7/} "NRC Staff's Response to Order to Show Cause and Motion for Reconsideration" ("Staff's Response"), filed August 24, 1982.

part, upon significant new information which was gathered by the Staff after returning from the July hearing sessions.^{8/}

On September 30, 1982, the Licensing Board issued its Order Denying Reconsideration, in which it ruled that the Staff had not shown good cause, and indicated that failure to comply with its order or to seek appellate review would result in the imposition of sanctions upon Staff counsel (*id.* at 14).^{9/} On October 8, 1982, the Staff timely filed its exceptions to the Licensing Board's Order Denying Reconsideration.^{10/}

DISCUSSION

Pursuant to 10 C.F.R. § 2.788(e), any determination as to whether an application for a stay should be granted must be based upon a consideration of the following factors:

- (1) whether the moving party has made a strong showing that it is likely to prevail on the merits;

^{8/} *Id.*, at 23-24. Attached to and incorporated by reference in the Staff's Response were the "Affidavit of John T. Collins," and the "Affidavit of Donald D. Driskill and Richard K. Herr," which set out the significant new information referred to in the Staff's Response.

^{9/} In the Staff's Response, the Staff had requested 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" (Staff's Response, at 24). The Licensing Board's Order Denying Reconsideration does not address the Staff's request for a stay, nor has the Licensing Board ever ruled on that request.

^{10/} The Staff's exceptions were filed pursuant to 10 C.F.R. § 2.762(a), as an appeal from a final decision and/or collateral order. The Staff recognizes that the Licensing Board's order may be perceived to constitute an interlocutory order (from which an appeal as of right does not lie), however, the Staff believes that even if the Licensing Board's order is interlocutory in nature, directed certification is necessary and appropriate. Upon filing the brief in support of the Staff's Exceptions, the Staff intends to seek, in the alternative, that directed certification be granted.

- (2) whether the party will be irreparably injured unless a stay is granted;
- (3) whether the granting of a stay would harm other parties; and
- (4) where the public interest lies.^{11/}

In the discussion which follows, the Staff addresses each of these factors seriatim. For the reasons set forth herein, the Staff submits that each of these factors supports the granting of the Staff's application for a stay.

A. Likelihood of Prevailing on the Merits

In compelling the Staff to disclose the identities of its informants, the Licensing Board appears to have erred in numerous respects, as set forth in detail in the Staff's Exceptions.^{12/} The Staff's brief in support of its exceptions to the Licensing Board's Order will explain in detail the reasons why the Staff believes it should prevail on the merits of its appeal. While we do not believe that a detailed discussion of those reasons is necessary or appropriate herein,^{13/} we wish to note that the Licensing Board's orders compelling disclosure failed to take any cognizance whatsoever of the Appeal Board's decisions upholding assertions of implied confidentiality, set forth in Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1),

^{11/} Of these factors, the Commission has stated that "the weightiest is the need to maintain the status quo -- whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted." Westinghouse Electric Corp. (Exports to the Phillipines), CLI-80-14, 11 NRC 631, 662 (1980).

^{12/} See Staff's Exceptions, at 3-5.

^{13/} A more complete discussion of these reasons may be found in the Staff's Response filed before the Licensing Board on August 24, 1982.

ALAB-10, 4 AEC 390 (1970),^{14/} and improperly restricted the class of persons as to whom the privilege may be asserted. Further, the Licensing Board's orders were issued without a proper finding of need or a proper balancing of the benefit of disclosure against the harm which might result therefrom,^{15/} contrary to the guidance set forth in Monticello^{16/} and in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 12 NRC 469 (1981).^{17/} Finally, the Licensing Board's unprecedented threat of sanctions against the Staff and/or Staff counsel altogether ignores the Appeal Board's recent recognition in its Midland decision of an attorney's right and, indeed, duty to assert his client's privileges, where, as here, such privileges are reasonably perceived to exist,^{18/} and also ignores the Staff's good faith and proper purpose in declining to comply with the Board's orders, pursuant to the Commission's longstanding policy favoring the protection of informants' identities as set forth in the Monticello and South Texas decisions.

For all of these reasons, the Staff submits that there is a great likelihood that the Staff will succeed on the merits of its appeal.

^{14/} Id., at 6-12.

^{15/} Id., at 12-21.

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

^{17/} See also Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-81-28, 14 NRC 933 (1981) (denying reconsideration of decision not to undertake sua sponte review of ALAB-639).

^{18/} Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC _____ (September 9, 1982), slip opinion at 33.

B. Irreparable Injury

In three significant respects, the Licensing Board's Order may result in irreparable injury to the Staff unless a stay is granted. First, if the Staff complies with the orders compelling disclosure and divulges the identities of the eight individuals who have stated that they do not object to their names being disclosed, there is a great risk that the names of the two individuals who seek to remain confidential will be readily ascertainable.^{19/} That result could seriously jeopardize the Commission's ability to gather information from confidential sources in future investigations of applicant and licensee misconduct.^{20/} The Appeal Board, itself, has recognized that the disclosure of such information -- even subject to a protective order -- could have irreparable consequences. South Texas, supra, 13 NRC at 477-78.^{21/}

Secondly, and in the alternative, if the Staff does not comply with the Licensing Board's orders, the Licensing Board may again rule that the Staff stands in contempt (see ODR, at 9-10, 12). This position is unacceptable, not only to the Licensing Board, but to the Staff as well. Certainly, the public's perception of the Commission is not furthered by the Staff's standing in contempt of a Licensing Board order, and the harm to the Commission and the Commission's Staff resulting from such an unprecedented situation may well be irreparable.

^{19/} See Affidavit of John T. Collins, filed before the Licensing Board on August 24, 1982, at 2.

^{20/} Id., at 2-4.

^{21/} The appropriateness of withholding information that tends to disclose confidential information 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).

Finally, in the absence of a stay, the Licensing Board may well proceed to impose sanctions against Staff counsel.^{22/} That result could very well injure Staff counsel's reputation and standing before the Bar and cause irreparable injury to Staff counsel^{23/} -- notwithstanding the fact that Staff counsel acted with due respect for the Licensing Board members (see Tr. at 3051-56), and merely served as the spokesman for her client in accordance with the direction, inter alia, of the Executive Director for Operations and the Executive Legal Director (Tr. at 3051, 3053-54).

For all of these reasons, the Staff submits that irreparable injury may result to the Staff and/or Staff counsel, if the instant application for a stay is not granted.

C. Harm to Other Parties

The Staff submits that the granting of a stay will not result in harm to either Applicants or Intervenor CASE, the other parties to this proceeding. Rather, the matter raised by the Staff's appeal primarily concerns two arms of the Commission, i.e., the Staff and Licensing Board. In this regard, we note that the Applicant did not take the opportunity to answer the Staff's Response to the Order to Show Cause (although they had been invited to do so), and even CASE did not seriously support the imposition of sanctions against the Staff

^{22/} The Licensing Board's Order to Show Cause appeared to contemplate sanctions against the Staff as a party to the proceeding (OSC, at 2, 10), in line with the Licensing Board's indication at the hearing that it was considering the sanction of striking Staff testimony (Tr. at 2482, 2495, 3069). The Licensing Board has apparently decided that such a sanction is inappropriate, and it has now focused, instead, on Staff counsel.

^{23/} For example, an attorney who applies for membership in the Bar of another jurisdiction may be asked to state in his or her application whether he or she has ever been subjected to "sanctions" by a court or judicial panel.

in its answer to the Staff's Response.^{24/} For these reasons, the Staff submits that no harm to any other party is likely to result from the granting of the instant application.

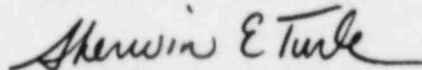
D. The Public Interest

The Staff believes that the public interest clearly favors the granting of a stay. As set forth supra, at 8, the public's perception of the Commission (and its Staff) could be significantly affected in the absence of a stay. Moreover, in the event that the Staff does comply on pain of sanctions with the Licensing Board's orders, irreparable injury may be caused to the Commission's ability to investigate future allegations of conduct potentially injurious to the health and safety of the public. These factors demonstrate that the public interest favors the granting of the instant application.

CONCLUSION

For all of the above reasons, the Staff submits that its application for a stay of the Licensing Board's Order Denying Reconsideration should be granted.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of October, 1982

^{24/} See "CASE's Answer to NRC Staff's Response to Order to Show Cause and Motion for Reconsideration and CASE's Motions", filed September 3, 1982; and "NRC Staff's Reply to CASE's Answer Concerning Sanctions," filed September 10, 1982, at 4-7.

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}

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S APPLICATION FOR A STAY OF THE EFFECTIVENESS OF THE ATOMIC SAFETY AND LICENSING BOARD'S ORDER DENYING RECONSIDERATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of October, 1982:

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