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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. 50-445
(Comanche Peak Steam Electric	)	50-446
Station, Units 1 and 2)	)	

NRC STAFF'S REPLY TO CASE'S  
ANSWER CONCERNING SANCTIONS

On August 4, 1982, the Licensing Board issued its "Order to Show Cause" ("Order") in which it directed the NRC Staff ("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;<sup>1/</sup> Intervenor CASE filed its answer to the Staff's Response on September 3, 1982.<sup>2/</sup>

Pursuant to the Licensing Board's Order (at 2), the Staff hereby files its reply to CASE's Answer. As set forth in greater detail below, CASE's Answer demonstrates that it does not seriously support the imposition of sanctions against the Staff. Rather, CASE seeks, in essence, to

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<sup>1/</sup> "NRC Staff's Response to Order to Show Cause and Motion for Reconsideration" ("Staff's Response"), filed August 24, 1982.

<sup>2/</sup> "CASE's Answer to NRC Staff's Response to Order to Show Cause and Motion for Reconsideration and CASE's Motions" ("CASE's Answer"), filed September 3, 1982. No answer to the Staff's Response has been filed by the Applicants.

force the Staff to defend the methods and adequacy of its investigations -- "not only in these proceedings but in all future licensing proceedings of this type" (CASE's Answer, at 9; id., at 7, 10). For these reasons, as more fully set forth below, and for the reasons set forth in the Staff's Response, the Staff submits that sanctions against the Staff are unwarranted and should not be imposed.

#### DISCUSSION

A. The Facts and Arguments Set Forth in the Staff's Response Require that Sanctions Not Be Imposed

In the Staff's Response, the Staff set forth the bases for its belief that it acted in accordance with established legal principles in declining to reveal the identities of its informants, that such a disclosure was neither necessary nor appropriate, and that disclosure could cause irreparable harm to the Commission's ability to investigate future allegations of applicant and licensee misconduct.<sup>3/</sup> In support thereof, the Staff cited controlling legal precedent and submitted the sworn affidavits executed by three Commission employees.<sup>4/</sup>

Nowhere in its Answer does CASE attempt to refute the legal precedents cited by the Staff, nor does it cite a single decision in support of its arguments. Rather, CASE asserts that it is "not thoroughly familiar with

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<sup>3/</sup> Staff's Response, at 6-21.

<sup>4/</sup> See "Affidavit of John T. Collins" and "Affidavit of Donald D. Driskill and Richard K. Herr," attached to and incorporated by reference in the Staff's Response.

the particular cases cited by the Board" (although it relies upon the purported "intent" of those cases), and in essence states simply that it "agrees completely with the Board's assessment" (CASE's Answer, at 1). Notwithstanding these assertions, the Staff submits that the cases relied upon by the Staff are controlling, and that they fully support the views set forth in the Staff's Response.

Similarly, CASE provides no evidence to rebut the sworn affidavits submitted by the Staff,<sup>5/</sup> and relies only upon the personal feelings of Mrs. Ellis in asserting that disclosure of the informants' identities would not harm the Commission's investigative ability (id., at 7). In this regard, the Staff submits that Mrs. Ellis simply lacks any experience which would enable her to make such a judgment, and that her personal opinions should be given little weight -- particularly when balanced against the professional opinion of Commission employees who are actively engaged in performing the Commission's investigative function.<sup>6/</sup>

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<sup>5/</sup> The Staff rejects CASE's unfounded assumption that the letter-designated individuals referred to in the Staff's affidavits were contacted "apparently because the Staff was not certain whether or not those individuals desired confidentiality or considered that they had confidentiality" (CASE's Answer, at 3). On the contrary, those affidavits indicate that the individuals were contacted simply "to determine whether any of them object to the Staff's disclosure or confirmation of their identities. "Affidavit of Donald D. Driskill and Richard K. Herr," at 2; "Affidavit of John T. Collins," at 1. If none of those persons had objected to such disclosure, or if disclosure of some names would not compromise the identities of other individuals, the Staff might then have been able to comply with the Licensing Board's orders compelling disclosure. See Staff's Response, at 20-21. That is not the case here, however, as set forth in the Staff's affidavits.

<sup>6/</sup> Similarly, no factual basis has been provided to support Mrs. Ellis' personal opinion that a "potential difference" exists in the mind of unnamed "potential employers", depending upon whether an informant makes allegations to the NRC "while still employed at the site" or "after he had been fired" (CASE's Answer, at 3).

B. The Licensing Board Should Reject the "Sanctions" Proposed by CASE

In its Answer, CASE does not appear seriously to support the imposition of sanctions against the Staff -- notwithstanding the fact that CASE, like the Licensing Board, would prefer that the informants' identities be disclosed.<sup>7/</sup> While CASE opposes each aspect of the Staff's Response and asserts that "sanctions should be imposed" (CASE's Answer, at 2), it admits that the question of sanctions is "somewhat of a dilemma for CASE," and asserts that it is uncertain "just what options are open to the Board" (*id.*, at 10). Indeed, CASE candidly opposes the very sanctions which the Licensing Board may now be considering. Thus, CASE asserts that the goal of "bring[ing] out the truth" would not be furthered "by not allowing the Staff to cross-examine or to

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<sup>7/</sup> Mrs. Ellis now contends that at the hearing, she unequivocally sought disclosure of the informants' identities and that the Licensing Board Chairman had only been "making certain that he had accurately assessed CASE'S direction and intention," and she accuses the Staff of misrepresenting her position in the Staff's Response (*see* CASE's Answer, at 4-6). In this regard, the hearing transcript is manifestly clear that the Licensing Board -- not CASE -- initiated the request for disclosure (Tr. at 2478 *et seq.*), and that Mrs. Ellis until then had conducted lengthy cross-examination in which she was content to use letter designations alone and never once asked the Staff witnesses to identify by name the letter-designated individuals (*see* Tr. at 2463-78, 2503). Further, the record is clear that Mrs. Ellis did not even express an opinion on the subject of disclosure until quite some time later, when her views were first solicited by the Licensing Board Chairman --- and even then, she vacillated until a course was illuminated for her by the Licensing Board (Tr. at 2501-04).

Finally, whatever may have been Mrs. Ellis' unspoken "intent" (CASE's Answer at 5), the Staff was painstakingly scrupulous in researching and verifying the statements and record citations contained in the Staff's Response; the Staff's Response is fully accurate, and the Staff rejects Mrs. Ellis' assertion of "misrepresentation."

file motions" (id.), and CASE urges that "[t]he Board not strike the testimony of the Staff's witnesses...but rather that the Board carefully consider all the testimony...and let the facts determined go to the weight of the Staff's testimony" (id., at 11; emphasis in original).

A careful reading of CASE's Answer reveals that it suggests the imposition of only the following "sanctions" -- which are, in fact, not sanctions at all:

- (1) that the Licensing Board should recall Staff witnesses Driskill and Taylor to testify concerning Staff Exhibit 178 (CASE's Answer, at 11);
- (2) that the Licensing Board should again order the Staff to disclose its informants' identities (id.);
- (3) that if the Staff raises the informer's privilege, "an independent outside NRC representative" should be appointed to determine the grounds upon which the Staff's assertion of privilege rests, and that the Licensing Board should then determine whether the informant's testimony is needed (id., at 11-12);
- (4) that the Staff should be ordered to produce "the names and back-up unexpurgated notes regarding all other such individuals" (id., at 12);
- (5) that the Licensing Board should "call all the individuals (with the above referenced exceptions) to testify" (id.); and
- (6) that the Licensing Board should "consider reopening the investigation of previous allegations" (id.).

The Staff opposes each of the alternatives suggested by CASE, for the following reasons. Staff Exhibit 178 has been received into evidence and at this time stands unrefuted; even if a witness (for example, Mr. Stiner) appears and provides testimony which contradicts the information set forth in that exhibit, the Licensing Board will be unable properly to determine whether further testimony is required until it and



the parties have had an opportunity to cross-examine any such witnesses.<sup>8/</sup> Further, even following such cross-examination, the Licensing Board could not properly order the Staff to disclose its informants' identities absent a finding that such information is necessary and unavailable elsewhere, and that the harm which might result from such disclosure does not outweigh the benefit to be obtained thereby.<sup>9/</sup> Such a finding cannot properly be made at this time, given the current state of the record.

CASE's other suggestions similarly lack merit. The suggestion that some "independent outside NRC representative" be appointed, reflects CASE's failure, after years of litigation, to understand the organizational structure of the Commission, and its suggestion is altogether without merit. CASE's suggestion that the Licensing Board again order

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<sup>8/</sup> While CASE's Answer focuses primarily upon Mr. Stiner's allegations and Staff Exhibit 178, those matters have nothing to do with Mr. Atchison's allegations and Staff Exhibit 199 -- which serve as the sole basis for the Licensing Board's assertion that disclosure is necessary in order for it to assess the credibility of Messrs. Atchison, Driskill and other persons on the subject of Mr. Atchison's allegations. Indeed, neither Staff Exhibit 178 nor Mr. Stiner are even mentioned in the Licensing Board's Order to Show Cause. Further, the mere appearance of differences between Mr. Stiner's allegations and any Staff document would not, standing alone, warrant Licensing Board attention absent a finding that such differences are material or important to the Licensing Board's decision.

<sup>9/</sup> See Staff's Response, at 12-21. The Staff notes that with respect to Staff Exhibit 178, each of the six persons the Staff has been able to contact has specifically requested that he remain anonymous. In light of this fact, the Staff submits that any order compelling the disclosure of the identities of letter-designated individuals in Staff Exhibit 178 could very well result in harm to the Commission's investigative abilities. See *id.*, at 17-21.

disclosure and the production of documents does not constitute a "sanction" and would not serve any purpose. The suggestion that additional witnesses should be required to appear is unsupported by any real demonstration of need and the requisite balancing of potential detriment. Further, the Licensing Board has already had the opportunity to require such attendance but, instead, has merely suggested that their appearance be considered by the Applicants. Staff's Response, at 16.

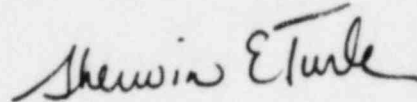
As to CASE's suggestion that the Licensing Board should consider reopening the Staff's investigations, the Staff submits that such a reopening is not warranted and that in any event, the Licensing Board lacks the authority to direct the Staff in the performance of its independent responsibilities. Cf. New England Power Co. (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279-80 (1978). Similarly, CASE's assertion that the Staff should be required to disclose how its investigations were conducted and "what approach was taken by the investigators" (CASE's Answer, at 7), lacks any basis whatsoever, and should be rejected on the grounds that such a disclosure could very well result in significant harm to the Commission's ability effectively to conduct any future investigations of misconduct by these Applicants as well as other applicants or licensees. Moreover, CASE's request that the Licensing Board conduct an examination not just of the investigations referred to in Staff Exhibits 123, 178 and 199, but of all Staff investigations (CASE's Answer, at 9), constitutes an impermissible subject for this proceeding.

For all of these reasons, the Staff opposes each of the alternatives suggested by CASE and urges the Licensing Board to reject them.

CONCLUSION

For the reasons set forth above and more fully in the Staff's Response, the Staff respectfully submits that sanctions should not be imposed, and that the Licensing Board should reconsider and vacate its orders compelling the Staff to disclose its informants' identities.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sherwin E. Turk". The signature is written in dark ink and is positioned above the typed name and title.

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 10th day of September, 1982



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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TEXAS UTILITIES GENERATING	)	Docket Nos. 50-445
COMPANY, <u>et al.</u>	)	50-446
(Comanche Peak Steam Electric	)	
Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO CASE'S ANSWER CONCERNING SANCTIONS," in the above captioned proceeding have been served on the following by deposit in the United States mail, first class, or by Overnight Delivery or Express Mail (\*\*\*), or by hand delivery (\*\*), or through deposit in the Nuclear Regulatory Commission's internal mail system (\*), this 10th day of September, 1982.

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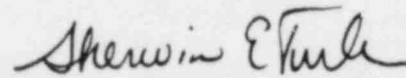
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