

H/T/C - C in



March 4, 1983

SECY-83-89

ADJUDICATORY ISSUE
(Affirmation)

To: The Commissioners

From: Herzel H. E. Plaine
General Counsel

Subject: STAFF REQUEST FOR STAY OF ALAB-714 (IN
THE MATTER OF TEXAS UTILITIES GENERATING
COMPANY)

Facility: Comanche Peak, Units 1 and 2

Purpose: To inform the Commission of a staff
application for a stay of ALAB-714
pending appeal; in our
opinion, E.V.

Petition for
Review: None 1/

Background: In the course of attempting to introduce
an IE inspection report in response to
an intervenor's QA/QC allegation, the
staff refused, under the informers'
privilege, to identify the 10
individuals it had interviewed in
conducting the investigation. An
applicant's witness, however,
subsequently identified all 10
individuals. Due to this third party

1/ In its application for a stay the staff also has
Indicated its intent to petition the Commission for review.

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 92-436

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identification and the absence of an express pledge of confidentiality at the time of the investigation, the Licensing Board then ordered the staff to independently identify the interviewees and produce their signed statements. The staff again declined to identify the interviewees. On August 4, 1982, the Licensing Board issued an Order to Show Cause why sanctions should not be imposed against the staff for its refusal to identify the interviewees. The staff requested the Licensing Board to reconsider its disclosure order and, in the alternative, argued that sanctions were inappropriate. On September 30, 1982, the Licensing Board re-affirmed its disclosure order, modified the order's scope to exclude two individuals who had subsequently requested confidentiality, and ordered the staff to either comply with its new order or appeal. The staff appealed.

In ALAB-714, the Appeal Board (Dr. Johnson dissenting) dismissed the staff's appeal as moot in light of the third party identification of all 10 interviewees. That decision is now before the Commission under 10 CFR 2.786(a). In ALAB-716 (March 1, 1983), the Appeal Board (Dr. Johnson dissenting) denied the staff's application for a stay of ALAB-714 pending appeal (Enclosure 1). The staff has renewed before the Commission its application for a stay (Enclosure 2).

Discussion:

While the staff argues that all four factors set out in 10 CFR 2.788(e) justify the grant of a stay in this case, it relies most heavily upon its likelihood of prevailing on the merits and the irreparable injury that will occur should its application for a stay be denied. |

EX 3

]

F

Herzel H. E. Plaine
Herzel H. E. Plaine
General Counsel

- IN BP

Attachments: As stated

Commissioners' comments or consent should be provided directly to the Office of the Secretary ASAP.

This paper is tentatively scheduled for affirmation at a Closed Meeting on Friday, March 4, 1983.

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ENCLOSURE 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. W. Reed Johnson
Thomas S. Moore

In the Matter of)	
)	
TEXAS UTILITIES GENERATING COMPANY,)	Docket Nos. 50-445
<u>ET AL.</u>)	50-446
)	
(Comanche Peak Steam Electric Station,)	
Units 1 and 2))	

Guy H. Cunningham, III, and Sherwin E. Turk
for the Nuclear Regulatory Commission
staff.

MEMORANDUM AND ORDER

March 1, 1983

(ALAB-716)

On February 25, 1983, the NRC staff filed a motion for a stay of the effectiveness of ALAB-714, 17 NRC _____ (February 24, 1983), pending the filing and disposition of a petition for Commission review of that decision. See 10 CFR 2.788. For the following reasons, the motion is summarily denied.

1. In ALAB-714, a majority of this Board concluded that there was no occasion to decide whether the Licensing Board had erroneously directed the staff to disclose the names of eight of the ten interviewees identified only by letters and job titles in its investigative report No. 82-10/82-05 (Staff Exhibit 199). The basis for this

conclusion was that the identity of all ten of the interviewees already "had become public knowledge through the unequivocal testimony of a highly reliable applicants' witness [Ronald G. Tolson]." 17 NRC at ____ (slip opinion, p. 17). In this connection, we noted that the Tolson identifications had been corroborated through one or another of several independent sources, which included not only the original informant [Charles A. Atchison] but also staff witnesses Robert G. Taylor and Donald D. Driskill. Id. at ____ (slip opinion, pp. 17-18).

Although disagreeing with the determination to refrain from addressing the merits of the issues presented by the staff's appeal, the dissenting opinion that accompanied ALAB-714 did not challenge this analysis of the evidentiary record before us. Similarly, the stay motion does not endeavor to demonstrate the analysis was erroneous. To the contrary, the staff refers to "the Appeal Board's own determination that the names [of the interviewees] are known" in support of its insistence that "no harm can result at this time" from a grant of the sought stay. Motion for Stay at 8.

In these circumstances, we are at a loss to understand how the staff can assert that it would be irreparably injured if ALAB-714 were allowed to go into effect. ^{1/} On that score, the staff's principal claim is that, if it is now required to divulge "the identities of the eight individuals who 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." Id. at 5. This, we are told, "could seriously jeopardize the Commission's ability to gather information from confidential sources in future investigations of applicant and licensee misconduct." Ibid. That line of argument -- earlier pressed upon us on the appeal itself -- might have been worthy of our consideration had Mr. Tolson's identification (and the confirmation obtained from other sources) involved only the eight

1/ It is long settled that, of the four factors to be considered in passing upon a stay application (see 10 CFR 2.788(e)), the most crucial is whether the movant will be irreparably injured unless a stay is granted. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977), Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-507, 8 NRC 551, 556 (1978); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978). Accordingly, we have looked first to the showing attempted by the staff on that factor. It should be noted, however, that we also have examined the staff's claims on the other factors and found that they likewise are unpersuasive.

interviewees covered by the Licensing Board's September 30, 1982 order. Given, however, the fact that the identity of the other two interviewees equally were revealed by Mr. Tolson (and confirmed by at least Mr. Atchison), the thesis is frivolous.

No more substantial is the staff's further insistence that compliance with the Licensing Board's disclosure order will leave the public with the clear, even if erroneous, impression that individuals "who provide information to Commission investigators cannot rely on this agency to protect their confidentiality." Id. at 6-7. In this regard, the staff appended to its stay motion a news article on ALAB-714 that appeared in the February 25, 1983 edition of the Fort Worth (Texas) Star-Telegram. That article correctly indicates, however, that (1) staff disclosure is being required only of the identities of those interviewees who did not object to such disclosure; and (2) the names of the interviewees had already been publicly disclosed by the applicant -- the very basis of our action in ALAB-714. If, notwithstanding the accuracy of the newspaper account, the staff perceives a remaining danger that the roots of its compliance with the disclosure order would be misapprehended in some quarters, the staff need look only to itself in search of the cause. Once the controversy over the application of the informer's privilege here became academic last July, the staff could have complied with the Licensing

Board's disclosure order without jeopardizing its legitimate interest in avoiding harm to its investigative ability. By choosing instead to pursue the controversy as a matter of abstract principle, the staff invited the kind of publicity it now decries.

2. The stay motion also alludes to the recent creation of an Advisory Committee for Review of Office of Investigation Policy on Rights of Licensee Employees under Investigation. The staff reports that it has been informed by the NRC Office of the General Counsel that the committee will be asked "to address, inter alia, the issue of confidentiality for persons interviewed in the course of an investigation." Motion for Stay at 4 fn. 8.

As we see it, this development has no relevance here. Obviously, the staff's compliance with the Licensing Board's disclosure order will not interfere to any extent with the advisory committee's deliberations or the implementation of any recommendations that it might make with regard to the procedures to be followed by the Office of Investigations in conducting future investigations. Further, the staff has overlooked that, no matter what procedures the Commission might choose to decree for future investigations, it has asserted an evidentiary privilege in this proceeding. If the issue of preserving confidentiality on the strength of that privilege had not vanished by virtue of intervening events, it would have had to be resolved in the context of

those procedures actually employed in this investigation -- rather than another set of procedures which, when utilized, might bring about a different result on the applicability of the privilege. ^{2/} In sum, the generic study upon which the stay motion relies simply could not affect the outcome of this dispute, even were it a live one.

3. Finally, the staff's motion does not come to grips with the fact that, if a stay were granted, the progress of this operating license proceeding might well be impeded. There is, however, a manifest need to avoid unnecessary delay in the completion of the proceeding. See the February 4, 1983 memorandum from the Director of the Office of Nuclear Reactor Regulation to the Executive Director for Operations, entitled "NRR Monthly Report," at 1-2. ^{3/} By

^{2/} For example, what the new procedures called for in terms of promises of confidentiality to interviewees might be highly relevant. See ALAB-714, 17 NRC at _____ (slip opinion, p. 13). In this instance, the staff investigator was unable to recall whether, at the time of the interviews, there was even a request for confidentiality on the part of any of the individuals. Id. at fn. 13.


^{3/} It appears from that memorandum that the Comanche Peak facility may be completed as early as September 1, 1983. And there is at least the possibility that, so long as the staff successfully persists in its endeavor to defer compliance with the Licensing Board's disclosure order, for its part that Board will hold open the quality control issues remaining before it pending the eventual outcome of that endeavor.

any definition of "unnecessary", delay grounded in a staff desire to perpetuate a now academic disagreement with the Licensing Board would come within it.

The staff's motion for a stay of the effectiveness of ALAB-714 is denied.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

Dr. Johnson, dissenting:

I would grant the stay for which the staff applies. As I see it, requiring the staff to comply with the Licensing Board's disclosure order will indeed send forth the message to potential informants that the NRC cannot be relied upon to protect their confidentiality (p. 4, supra). The particular circumstances of our case most likely will not accompany this message nor will it matter who is to blame for the disclosure here (pp. 4-5, supra). Harm will be done, however, to the agency's ability to conduct investigations. In these circumstances I believe it would be best for us to grant a stay and thus give the staff an opportunity to seek Commission review of a matter that may have a serious and lasting influence on the agency's effectiveness.

ENCLOSURE 2

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
TEXAS UTILITIES GENERATING COMPANY,)	Docket Nos. 50-445
<u>ET AL.</u>)	50-446
)	
(Comanche Peak Steam Electric)	
Station, Units 1 and 2))	

NRC STAFF'S APPLICATION FOR A STAY OF THE
EFFECTIVENESS OF ALAB-714 (FEBRUARY 24, 1983)

Guy H. Cunningham, III
Executive Legal Director

Sherwin E. Turk
Counsel for NRC Staff

March 1, 1983

03/01/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
TEXAS UTILITIES GENERATING COMPANY,)	Docket Nos. 50-445
<u>ET AL.</u>)	50-446
(Comanche Peak Steam Electric Station,)	
Units 1 and 2))	

NRC STAFF'S APPLICATION FOR A STAY OF THE
EFFECTIVENESS OF ALAB-714 (FEBRUARY 24, 1983)

INTRODUCTION

The NRC Staff ("Staff") hereby applies for a stay of the effectiveness of the Decision (ALAB-714) issued by the Atomic Safety and Licensing Appeal Board ("Appeal Board") on February 24, 1983, until such time as the Staff has filed^{1/} and the Commission has ruled upon the Staff's petition for Commission review of the Decision.^{2/} Unless a stay is granted

1/ 10 C.F.R. § 2.786(b) excludes the filing of a petition for review of "a decision or action on a referral or certification under §§ 2.718(i) or 2.730(f)." Inasmuch as the Appeal Board did not resolve the issue of whether the Staff's appeal was properly before it as an appeal of right under 10 C.F.R. § 2.762 or upon certification under 10 C.F.R. § 2.718(i), the Staff intends promptly to file a petition for Commission review of ALAB-714 pursuant to 10 C.F.R. § 2.786 and, in the alternative, a request for Commission certification.

2/ Pursuant to 10 C.F.R. § 2.788(b)(3), the Staff wishes to advise the Commission that a stay was initially requested from the Appeal Board on February 25, 1983. That application was denied in a "Memorandum and Order" (ALAB-716), issued on March 1, 1983, joined in by Chairman Rosenthal and Administrative Judge Moore; a dissent from that decision was filed by Administrative Judge Johnson. Upon being advised by telephone of that decision by the Appeal Board's secretary, the Staff called the Licensing Board Chairman to inform him that the instant stay application would be promptly filed.

by the Commission, Staff will be compelled to disclose the identities of eight informants interviewed during the course of an investigation of safety-related QA/QC allegations, which disclosure may result in the identification of two other informants who expressly requested confidentiality. Such disclosure could result in harm to the Commission's investigative ability and would be contrary to the Commission's long-standing policy favoring informant confidentiality. In addition, unless corrected by Commission action, the Appeal Board's Decision will have a totally unacceptable precedential effect in that it authorizes the Licensing Boards to disregard Staff assertions of privilege and obtain tentative identification of Staff informants by other means, and thereafter to compel the Staff to identify publicly its confidential sources. Finally, such disclosure could prove to be especially unfortunate should it turn out to be inconsistent with the results of the Commission's current generic review of informant confidentiality issues. For these reasons, as more fully set forth herein and as will be further explained in the Staff's petition for Commission review, the Staff urges that the Commission grant the instant stay application.

BACKGROUND

The events leading up to the Appeal Board's issuance of ALAB-714 are not in dispute, and the Staff hereby adopts and incorporates by reference herein the Appeal Board's recitation of those events (Decision, at 3-10).^{3/}

^{3/} In one critically material respect, the Staff disagrees with the Appeal Board's view of those events. While the Appeal Board concludes that after the Staff asserted the informers' privilege, "the identity of the interviewees had become public knowledge" (Decision, at 17), the Staff does not consider those identities to have been conclusively demonstrated. See discussion infra, at 4.

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;
- (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.^{4/}

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

The Appeal Board's Decision, if unreviewed by the Commission, requires the Staff to disclose the names of eight of its informants -- notwithstanding the Appeal Board's pivotal determination that those names are known already. Compliance with this directive could result, as the Staff asserted on appeal, in the identification of two individuals who have expressly requested confidentiality, thereby causing

^{4/} 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).

harm to the Commission's investigative ability. The Staff does not agree with the Appeal Board's characterization of this matter as being "moot" or "merely academic" (Decision, at 15, 19). On the contrary, the Staff believes that until it discloses or confirms the identities of its informants, at the very least there exists a certain measure of uncertainty as to their identities. Were this not the case, the question must be asked as to what basis there can be for the Licensing Board's issuance of its disclosure orders and the Appeal Board's action in upholding those orders, and for the Licensing Board's order of September 30, 1982 exempting the names of the two individuals from direct disclosure by the Staff. In addition, we note that the two individuals who requested confidentiality did so even after they were advised that their names "may have been disclosed at the July hearings" (App. Tr. 34); from the perspective of these two individuals, certainly, there was some valid interest to be protected by continued confidential treatment -- although their request for confidentiality has been accorded no weight by the Appeal Board.

Further, if allowed to stand, the Appeal Board's Decision will have a totally unacceptable precedential effect. Here, the Staff had determined that the informers' privilege precluded the public identification of its informants. The Appeal Board, itself, recognizes that this privilege is "well-established" in NRC adjudicatory proceedings, and that its function "in the fulfillment of this agency's health and safety responsibilities is an extremely important one" (Decision, at 11). Nonetheless, the Appeal Board has allowed to stand various orders compelling disclosure, where the Licensing Board (1) refused to receive the names in camera (Tr. 2498-99), (2) permitted other witnesses to provide their own identification of the informants, and (3) with that information in hand,

insisted upon confirmatory identification to be made by the Staff. The Appeal Board's action in upholding the disclosure orders, on the grounds that the information had been obtained already from other witnesses, will serve to emasculate the Staff's ability effectively to invoke the informers' privilege in this and all future proceedings. The Appeal Board's Decision clearly instructs that the Licensing Boards may disregard this agency's need for informant confidentiality -- as protected in an adjudicatory proceeding by the Staff's assertion of the informers' privilege -- simply by obtaining tentative identification from other sources and by then demanding confirmation or disclosure by the Staff. This result is abhorrent to the Commission's undisputed need to maintain the confidentiality of its informants in order to encourage individuals to provide the Commission's investigators with information important for the protection of the public health and safety. These issues demand review by the Commission before the Staff is compelled to make the required disclosures in this proceeding.

Finally, the Commission is now engaged in a review, on a generic basis, of the issue of informant confidentiality. This review is being conducted both within the Commission^{5/} and by the recently created "Advisory Committee for Review of Office of Investigation Policy on Rights of Licensee Employees under Investigation."^{6/} In seeking Commission review of the instant Decision, the Staff will propose that the Commission adopt the following procedures: (1) accept review of ALAB-714, (2) toll the requirement for briefing until there has been a

^{5/} See App. Tr. 36; Appeal Brief, at 17 n.21.

^{6/} 48 Fed. Reg. 5827 (Feb. 8, 1983). The Staff has been informed by the Office of the General Counsel that the advisory committee will be asked to address, *inter alia*, the issue of confidentiality for persons interviewed in the course of an investigation.

generic resolution of the informant confidentiality issues, and (3) apply the generic outcome to the facts of the instant case after receiving whatever briefs from the parties that the Commission considers necessary.

In our view, Commission review of this Decision is both warranted and appropriate.^{7/} Accordingly, this factor weighs in favor of granting the Staff's motion for a stay.

B. Irreparable Injury

In two significant respects, the Appeal Board's Decision may result in irreparable injury to the Staff unless a stay is granted. First, as stated above, if the Staff divulges the identities of the eight individuals who 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. That result could seriously jeopardize the Commission's ability to gather information from confidential sources in future investigations of applicant and licensee misconduct.^{8/}

Secondly, compliance with the Licensing Board's orders at this time may well have the very effect postulated by Chairman Rosenthal at oral

^{7/} In Dr. Johnson's dissenting opinion (Decision, at 32-33), he concludes that the Appeal Board should have resolved the issues raised by the Staff's appeal or advised the Staff "to seek policy guidance from the Commission". The Staff's petition for Commission review will seek the "policy guidance" which Dr. Johnson recommends. The instant stay application seeks to defer disclosure in this proceeding until that guidance can be obtained.

^{8/} Affidavit of John T. Collins (Aug. 24, 1982), at 2-4. As noted by Dr. Johnson in his dissent from ALAB-716, a stay pending Commission review is necessary to avoid "sending forth the message to potential informants that the NRC cannot be relied upon to protect their confidentiality," thereby potentially causing "a serious and lasting influence on the agency's effectiveness" (ALAB-716 (dissent by Dr. Johnson), at 7).

argument, wherein he observed that the following argument might be made:

[E]ven if all ten individuals here had wanted their names disclosed or at least had no objection to it, ... the fact that their names had been disclosed without their objection might be carried on the grapevine only in part; ... workers similarly situated might have heard that the names of these interviewees were disclosed but might not have also heard that they were disclosed without objection.

App. Tr. 47. The Staff has recognized that such a scenario could result^{9/} -- and, indeed, an article in the Fort Worth Star-Telegram (Feb. 25, 1983), reporting on the issuance of the Appeal Board's Decision, demonstrated the prescience of the Chairman's statement.^{10/} The article, boldly captioned "NRC Told It Must Name Names," stated that the Staff has been directed to reveal the names of eight individuals who "have since been identified through several sources"; nowhere is any reference made to the fact that the eight individuals had no objection to the Staff's disclosure of their identities.^{11/} Moreover, while the article recites the Staff's assertion that "revealing the names of the individuals would hurt two other employees who had expressly requested confidentiality," it fails to indicate how that concern has been addressed by the Appeal Board's Decision. In sum, the public is left with the clear impression -- as noted by Dr. Johnson in his dissent from ALAB-716, and which the Staff's appeal struggled so vigorously to avert -- that individuals who

^{9/} App. Tr. 47; "NRC Staff's Brief in Response to the Questions Raised by the Atomic Safety and Licensing Appeal Board at the Oral Argument of January 19, 1982," filed on January 26, 1983, at 2.

^{10/} A copy of the referenced article is attached hereto.

^{11/} In ALAB-716, the Appeal Board states that this article "correctly indicates ... that (1) Staff disclosure is being required only of the identities of those interviewees who did not object to such disclosure" (id., at 4). The Staff finds no such indication in the referenced article.

provide information to Commission investigators cannot rely on this agency to protect their confidentiality.^{12/}

The Staff expects that compliance with the Licensing Board's disclosure orders will receive similar treatment by the media, and that such disclosure, as reported in the media, will make it increasingly difficult for the Commission's investigators to obtain critical safety information from nuclear power plant workers and other members of the public. The natural consequences of a public perception that identities of persons who provide information on safety problems to the NRC will be disclosed, will be either (1) that persons with such concerns will remain silent, or (2) that there will be an increase in the already disturbingly large number of instances in which such concerns are presented in confidence to others (such as intervenors, public interest groups, and congressional staffers) who make the substance of the concerns known to the NRC but refuse to provide access to the informant. Either of these results could cause irreparable harm to the Commission's ability to protect the public health and safety.

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

^{12/} See n.8, *supra*. The Appeal Board asserts that "the Staff need look only to itself in search of the cause" for any danger that the public may misapprehend "the roots of its compliance with the disclosure order" (ALAB-716, at 4), and contends that had the Staff complied with the Licensing Board's disclosure order "last July", there would be no controversy at this time (*id.*). This statement, however, ignores the fact that only by resisting the Licensing Board's disclosure orders was the Staff able to avoid direct disclosure of the names of the two individuals who requested confidentiality (*see* Appeal Brief, at 16 n.20), and that, in the Staff's view, even disclosure of the other eight names could result in harm to the Commission's investigative ability.

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. In this regard, we note that while the Applicants did not address the central issues raised by the Staff's appeal, they did argue that no prejudice has resulted from the Staff's non-disclosure.^{13/} In addition, we note that the Licensing Board asked the parties to brief the question of what additional information is necessary to close the record in this proceeding,^{14/} and not one of the parties included in their briefs any indication that they believe disclosure of the informants' identities is necessary.^{15/} Moreover, the Appeal Board's own determination that, in its view, the names are known already demonstrates that no harm can result at this time from a stay of the effectiveness of the Appeal Board's Decision.^{16/} For these reasons, the Staff submits that no harm to any other party is likely to result

^{13/} See "Applicants' Brief in Response to NRC Staff Exceptions to the Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982," filed on December 22, 1982.

^{14/} "Memorandum and Order," dated September 22, 1982.

^{15/} See "Applicants' Brief Regarding Status of Record," filed on October 8, 1982; "CASE's Response to Board's 9/22/82 Memorandum and Order For Briefs Re: Necessary Documents and Information," filed on October 9, 1982; "NRC Staff Response to Memorandum and Order of September 22, 1982," filed on October 11, 1982.

^{16/} In ALAB-716, the Appeal Board appears to believe that the Staff has now conceded that all ten identities are known (*id.*, at 2). The Staff does not so concede, nor could we do so in view of our continued assertion of the privilege. Any contrary interpretation of the statement cited by the Appeal Board is erroneous.

Further, while the Appeal Board cites the Applicants' projected construction completion date of September 1983 as grounds to deny the stay application and thereby to avoid "delay", (ALAB-716, at 6), it ignores the fact that none of the parties believes the informants' names are necessary to a decision in this proceeding.

from the granting of the instant application.

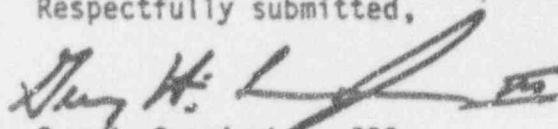
D. The Public Interest

The Staff believes that the public interest clearly favors the granting of a stay. As set forth supra, at 7-8, the public's perception of the Commission's willingness to protect informants could be significantly affected in the absence of a stay, and irreparable injury may be caused thereby to the Commission's ability to investigate future allegations of conduct potentially injurious to the health and safety of the public. Also, in view of the fact that the Commission is now engaged in a generic review of the issue of confidentiality, it would be most appropriate for disclosure in this proceeding to be deferred until the issues raised herein can be reviewed by the Commission. These factors demonstrate that the public interest favors the granting of the instant application.

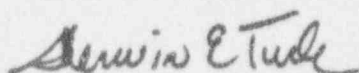
CONCLUSION

For all of the above reasons, the Staff submits that its application for a stay of the Appeal Board's Decision, pending the filing of and a decision on the Staff's petition for Commission review, should be granted.

Respectfully submitted,



Guy H. Cunningham, III
Executive Legal Director



Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of March, 1983

NRC is told it must name names

By CINDY BERZYCKI
Star-Telegram writer

WASHINGTON — The Atomic Safety and Licensing Appeal Board decided Thursday that the Nuclear Regulatory Commission must reveal the names of eight people involved with a staff investigation at the Comanche Peak nuclear power plant last summer.

While avoiding the thornier issue of whether the NRC staff was acting properly in protecting their identities, the appeals board did note that the individuals have since been identified through several sources.

"We have concluded that the staff's privilege assertion is, in actuality, moot in the present posture of this case," said the appeals board decision.

The decision upholds a Sept. 30 order issued by the Atomic Safety and Licensing Board, which is conducting hearings and permit hear-

ings at the plant near Glen Rose. The Licensing Board requested the names to verify allegations of faulty construction at the plant made by former quality control inspector Charles Atchison, who was later fired from his job.

The Licensing Board also was examining an NRC staff investigation into the firing which concluded that the dismissal by the plant's contractor, Brown & Root, could be "set-aside" if substantiated as defunct.

That finding was at odds with a concurrent Department of Labor investigation which held that Atchison was improperly dismissed. Atchison was later fired from two other jobs in the nuclear industry and is awaiting a final decision from the Labor Department on an appeal filed by Brown & Root in the case.

At issue is the protection by the NRC staff of the identities of eight staff-management and supervi-

sory employees of Texas Utility Generating Co. who were interviewed during the investigation of the Atchison firing.

Although the internal dispute involved determining which type of employee is a true "whistleblower," the appeals board, except for a dissent by one of its three members, left that question unanswered.

The appeals board said it could not directly grapple with the issue of who should be treated as a whistleblower because the dispute over the names had been settled by a third party — the plant operator that furnished the names to the board.

In its case before the licensing board and the appeals board, the staff had argued that revealing the names of the individuals would hurt too other employees who had expressly requested confidentiality and would damage the staff's ability

to conduct investigations in the future.

Appeals board member Dr. W. Reed Johnson disagreed with the board's argument that the disclosure of the whistleblowers' names is a very fundamental and generic way to the use of the informer's privilege as a valuable tool in NRC investigations.

Johnson predicted that questions of confidentiality to whistleblowers will arise again and, "in the next case, this sort of confusion may well be repeated, but with the added result of disclosure of information under circumstances that would endanger the well-being of individuals."

An NRC staff official, who declined to be identified, said there has been no decision whether to comply with the Licensing Board order or to file an appeal in the Nuclear Regulatory Commission for review.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

TEXAS UTILITIES GENERATING COMPANY,)
ET AL.)

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

Docket Nos. 50-445
50-446

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S APPLICATION FOR A STAY OF THE EFFECTIVENESS OF ALAB-714 (FEBRUARY 24, 1983)", 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 1st day of March, 1983.

Alan S. Rosenthal, Esq., Chairman*
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. W. Reed Johnson*
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Thomas S. Moore, Esq.*
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Marshall E. Miller, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Kenneth A. McCollom
Administrative Judge
Dean, Division of Engineering,
Architecture and Technology
Oklahoma State University
Stillwater, OK 74078

Dr. Walter H. Jordan
Administrative Judge
881 W. Outer Drive
Oak Ridge, TN 37830

Mrs. Juanita Ellis
President, CASE
1426 South Polk Street
Dallas, TX 75224

David J. Preister, Esq.
Assistant Attorney General
Environmental Protection Division
P.O. Box 12548, Capital Station
Austin, TX 78711

Nicholas S. Reynolds, Esq.
Debevoise & Liberman
1200 17th Street, N.W.
Washington, DC 20036

Mr. Robert G. Taylor
Resident Inspector/Comanche
Peak Steam Electric Station
c/o U.S. Nuclear Regulatory Commission
P.O. Box 38
Glen Rose, TX 76043

Lanny Alan Sinkin
838 East Magnolia Avenue
San Antonio, TX 78212

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

John T. Collins
Thomas F. Westerman
U.S. Nuclear Regulatory Commission
Regional Administrator, Region IV
611 Ryan Plaza Drive, Suite 1000
Arlington, TX 76011

Herzel H. E. Plaine
General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555*

Atomic Safety and Licensing
Appeal Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Lucinda Minton, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555*

Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555*

Sherwin E Turk

Sherwin E. Turk
Counsel for NRC Staff

ENCLOSURE 3