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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges

Marshall E. Miller, Chairman
Dr. Kenneth A. McCollom
Dr. Richard F. Cole

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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

(Application for
Operating License)

September 30, 1982

ORDER DENYING RECONSIDERATION

On August 4, 1982, the Licensing Board issued an Order To Show Cause requiring the Staff show cause why sanctions should not be imposed for its failure and refusal to obey the Board's orders to identify individuals interviewed in connection with an investigation of an informer's QC allegations, and to produce unexpurgated copies of signed witness statements taken from persons identified by the informer. The inspection report and testimony affirmatively put into evidence by the Staff concerned allegations by a former QC inspector that he was wrongfully fired because of his reporting of construction defects. The circumstances surrounding those orders to produce were described in the

Order To Show Cause, and will not be repeated except as necessary to amplify our discussion herein.^{1/}

On August 24, 1982, the Staff submitted its response to the Order to Show Cause. The Staff asked that the Licensing Board reconsider its orders and argued that sanctions against the Staff are inappropriate.^{2/} The Intervenor CASE filed an answer to the Staff's response on September 3, challenging many of the arguments it contained. The Staff filed a reply to CASE's answer on September 10, 1982.

Subsequently beginning September 13, another week of hearings was held in this case. At that time the Board stated that it would not reconsider its orders to the Staff to produce the information, and that this written order would follow (Tr. 3578). For the reasons discussed infra, the Staff has not shown good cause and sanctions will be imposed unless the orders are obeyed forthwith.

^{1/} Since the Order to Show Cause was entered, the Department of Labor has made an additional finding (now under appeal) that Charles Atchison, the individual who approached the NRC with the allegations covered by the investigation reports in question, was improperly fired from a subsequent job at the Waterford nuclear plant. The Department of Labor determined that Mr. Atchison's firing was a result of his having testified in the Comanche Peak proceeding, and was related to personnel connections and relationships between his former employers at Comanche Peak and Waterford. See CASE Exh. 684A.

^{2/} By a letter dated August 27, 1982, the Staff informed the Board that four of the unexpurgated witness statements sought by the Board had been admitted into evidence in a Department of Labor hearing on appeal from its first finding, held the week of August 16, 1982. However, the Staff indicated that these further disclosures did not alter its position.

The Staff relies upon an "informer's privilege" to justify its obdurate refusal to produce the information as ordered. The Staff argues that in the current situation, express pledges of or requests for confidentiality are not required for an informer's privilege to apply. Having contacted the unidentified individuals in question, the Staff avers that two of the ten individuals now desire confidentiality. However, the Staff refuses to disclose the identities or produce the statements of the other eight individuals, claiming that if it did so someone might be able to deduce the identities of those who wish confidentiality.

The Staff's ostensible position is internally inconsistent. On the one hand, the Staff argues that the Board does not need information on the identities because other witnesses have testified as to their understanding of the identities of those interviewed. On the other hand, the Staff argues that if the individuals who have not sought confidentiality are disclosed, this might confirm the tentative identifications made by Mr. Atchison and the Applicants and lead to conclusions about those not identified. The Staff both relies upon and then illogically deprecates the information available to the Board. In any event, the Staff cannot justify its continued defiance of the Board's orders to produce unaltered witness statements by claiming that the names are now known. This knowledge resulted only from the Board's insistence that underlying documents bearing upon the credibility of a Staff investigation be disclosed after its conclusions were affirmatively proffered by testimony at a public hearing. It constitutes no defense to the Staff's intransigence to show that others

have attempted to obey the Board's request for full information after the Staff put on censored testimony.

The Staff also overstates the scope of the informer's privilege. The Staff apparently would apply the privilege so broadly that it could apply to virtually everyone with whom an NRC investigator talks. However, the courts have held that informer's privilege applies only to those who confidentially volunteer information to government officials charged with enforcing a law, not to everyone interviewed during the course of an ensuing investigation. It has been judicially stated:

Generally speaking, therefore, an informer is an undisclosed person who confidentially volunteers material information of violations of the law to officers charged with enforcement of that law. As we understand the term, persons who supply information only after being interviewed by police officers, or who give information as witnesses during the course of an investigation, are not informers.^{3/}

Thus, only Mr. Atchison qualified for the informer's privilege, not the Applicants' supervisory personnel whom he identified. Mr. Atchison's role in the investigations has been established through his own testimony after unauthorized disclosure by the Staff. See, e.g., Staff Ex. 197 at 3 (Tr. 2518-19).

The Licensing Board, recognizing the important and sometimes sensitive nature of NRC investigations, has not sought to learn the identity of any individual who has requested confidentiality. Thus, in regard to another investigation, the Board refused to order that individuals interviewed in connection with Investigation Report 81-12 (Staff Ex.

^{3/} Gordon v. United States, 438 F.2d 858, 875 (5th Cir.), cert. denied 404 U.S. 828 (1971); accord, United States v. Oliver, 570 F.2d 397, 401 (1st Cir. 1978).

178) be identified, because it was apparent to the Board that the individuals involved desired confidentiality and that the investigation had been conducted in such a way as to achieve it (Tr. 4055-68). However, this does not mean that it is reasonable to withhold all information because one or two individuals out of ten or eleven desire confidentiality. A single request for confidentiality cannot be used to shield an entire investigation from scrutiny in an adjudicatory setting.^{4/}

The Staff recognizes that the informer's privilege, even if it applies, is not absolute. However, the Staff argues that the Board does not need this information. The Board acting in an adjudicatory capacity should be the sole judge of its informational needs, subject only to appellate review (Tr. 2478-83). It is not required to justify its orders to Staff counsel, nor to engage in interminable debate with the Staff which, in effect, rules upon its own objections and finds them good. The Board reviews the conduct and actions of the Staff, not vice versa. It is the responsibility of the Board to balance the need for full information after an issue is partially opened up with the Staff's desire to conceal the underlying bases of its investigator's conclusions. The Board conducting an adversarial evidentiary proceeding is not required to act merely as an umpire calling balls and strikes.

^{4/} The cases cited by the Staff for the proposition that all of the identities may be withheld to protect a single identity are easily distinguishable. They refer not to a common law privilege, but to specific statutory exemptions from disclosure. Moreover, those exemptions relate to national security materials, and courts have historically been reluctant to become involved in questions of this nature.

Its function as the arbiter of important safety and environmental questions "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it..."^{5/} It has the right and duty to develop a full record for decision making in the public interest. Accordingly, it is immaterial whether the Board or the Intervenor first requested the information. However, as CASE points out, the Staff does not fairly quote the entire transcript reference at Tr. 2501-04, wherein CASE indicated its desire for the information (CASE's Answer, pp. 5-6).

It is improper for the Staff to attempt to dictate to the Board what matters it may or may not consider. Certain powers and duties are given to licensing boards by statute and regulation. The Staff may not interfere with the licensing board in the performance of its adjudicatory duties any more than the licensing board may properly interfere with Staff duties. As the Appeal Board has stated:

"In making this argument, the applicants overlook that the staff is but one of the parties to this licensing proceeding, and that the positions which it may take are in no way binding upon us. The boards have independent responsibilities to fulfill, and the actions of the staff cannot compel a board to adopt a particular position."^{6/}

^{5/} Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2nd Cir. 1965). See also Greene County Planning Board v. FPC, 455 F.2d 412, 419 (2nd Cir. 1972); Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971); Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204, 226 (D.C. Cir. 1960); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752 (1977).

^{6/} Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NRC 383, 399 (1975).

The role of the Staff has been described:

"In the first place, contrary to the petitioners' apparent view, the staff does not occupy a favored position at hearings. We have taken pains to point out that, when a board comes to decide contested issues, it must evaluate the staff's evidence and arguments in the light of the same principles which apply to the presentations of the other parties. In short, the staff's views 'are in no way binding upon' the boards; they cannot be accepted without passing the same scrutiny as those of the other parties...the applicant's (or any other party's) remedy is the same. If it disagrees with the staff's assessment, it can and should raise the issue in the hearing process and thus put before the licensing board the relative merits of its and the staff's positions. The final decision lies with the boards, not with the staff." (Footnotes omitted)

The Board has determined that in the circumstances of the present case, the information is sufficiently significant that any privilege which may exist should be overridden.^{8/} The Board's reasons for

^{7/} Consolidated Edison Co. (Indian Point, Units 1, 2 and 3), ALAB-304, 3 NRC 1, 6 (1976). See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976).

^{8/} Licensing Boards are charged with conducting hearings and making findings on contentions which concern matters affecting the health and safety of the public. Labor practices such as the firing of employees who report construction deficiencies can have serious safety implications. See Union Elec. Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 126-39 (1979). To, in effect, allow the Staff to make this determination rather than to allow it to be adjudicated as part of the hearing on the contention to which it indisputably relates would contravene the hearing rights conferred by Section 189a of the Atomic Energy Act, as amended, 42 U.S.C. 2239(a). Cf. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ___, slip op. at 11 (August 19, 1982) (to deny petitioners opportunity to file contentions on necessary documents not available before special prehearing conference would contravene hearing rights).

finding the information necessary have been explained both in the transcript and in the Order To Show Cause. The Staff may appeal from the Board's ruling, but it is not the Staff's role to debate with the Board the bases for its actions. The independence and integrity of licensing boards is fundamental to due process.

As the Supreme Court has stated, nuclear energy "may someday be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role.... Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment."^{9/}

Congress by statute has established the authority of the Commission to provide for hearings upon the request of any person whose interest may be affected by the licensing proceeding.^{10/} The Commission has also been authorized to establish licensing boards to conduct such hearings, each "comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided...."^{11/}

^{9/} Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 557-58 (1978).

^{10/} Atomic Energy Act of 1954, §189; 42 U.S.C. §2239.

^{11/} Id., §191; 42 U.S.C. §2241.

The Commission has used its powers to make regulations necessary to carry out the purposes of the Act by formulating Part 2 of 10 CFR, which sets out its Rules of Practice to govern the conduct of adjudicatory hearings. This is the method by which procedural as well as substantive due process of law is accorded to all parties, an indispensable element of administrative hearings.

Under our Rules of Practice, Licensing Boards "function in a quasijudicial capacity. Accordingly, parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity and decorum as they should before a court of law."^{12/} In the instant proceeding, Staff counsel have steadfastly refused to obey a lawful Board order from its entry on July 27, 1982,^{13/} and its reaffirmance in the Order To Show Cause entered August 4, 1982. Oral denial of the Staff's motion for reconsideration of the Order was announced on September 13, 1982 (Tr. 3578). The Staff stated on July 29 that it intended to appeal this order,^{14/} but it has not done so up to the present date. Its response to the show cause order merely amounts to a continuing argument with the Board, but it does not constitute either compliance with our Orders or a reasonable

^{12/} 10 CFR §2.713(a).

^{13/} Tr. 2484, 2497, 2559-66, 3041-42, 3050-51, 3056, 3559.

^{14/} Tr. 3072-73, 3559.

appeal therefrom. If this were a court of law, such conduct would probably be deemed to be contumacious,^{15/} and a likely contempt of court (18 U.S.C. §401(3)).

Our Rules of Practice further provide that a Board "may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct."^{16/}

The Staff in its Response to the Order To Show Cause argues that the Licensing Board ignored a direction that, prior to compelling disclosure of the identities of those who have given information to NRC investigators, the Licensing Board should refer its rulings to the Appeal Board. Staff Response at 8 n.10. The direction to which the Staff refers was given in light of an arguable ambiguity between 10 CFR Part 2 and 10 CFR Part 9. See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 399 (1970). In this case, however, the Staff does not rely on 10 CFR Part 9 for its claim of privilege. Therefore, the reason for the required referral does not exist and the Appeal Board direction is not applicable.

^{15/} In an unprecedented action, Staff counsel on one occasion actually attempted to direct a witness on the stand (Mr. Driskill) not to answer questions propounded to him by the Board (Tr. 2635). Such unwarranted conduct by any lawyer is obviously in derogation of the authority of the tribunal, as well as the express power of the presiding officer (Board) to "examine witnesses" (§2.718(g)) and to "regulate the course of the hearing and the conduct of the participants" (Id. at (e)). The notion that any lawyer can direct a witness not to answer Board questions has a hang time of less than one second, in case anyone is tempted to emulate Staff counsel in this regard.

^{16/} 10 CFR §2.713(c).

The Staff has orally mentioned 10 CFR Part 21 as authority for its position (Tr. 2486), although curiously it does not mention or rely upon it in its Response. It may be that the Staff has now recognized that 10 CFR §21.2 prevents the identification "of anyone so reporting" known or suspected defects only "as authorized by law." Only Mr. Atchison "so reported" suspected defects. The other witnesses were chiefly supervisory personnel who were questioned after their identification by this informer. Inasmuch as the law on informer's privilege does not authorize the withholding of these particular identities, then 10 CFR §21.2 does not expand the privilege beyond its common law limits. See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 483n.6 (Judge Kohl, dissenting).

The Staff plays a numbers game concerning the number of witnesses it reinterviewed who requested confidentiality. It concedes that the Order To Show Cause concerns only Staff Exhibit 199.^{17/} Excluding Mr. Atchison whom the Staff identified as Individual A in Exhibit 199, there were individuals B through K, a total of ten (Id., p. 15). According to the Driskill/Herr affidavit, page 2, contacts were made with these Individuals B-K, and only "two individuals requested confidentiality." It is immaterial that there were different results on different reports (one individual on Staff Ex. 123, six as to Ex. 178). Nevertheless, the Staff refers in its Response variously to three individuals (p. 10), 6 (p. 11, N.13, and pp. 20 and 23), and 9 (pp. 20, 23) and then concludes that these various numbers somehow show

^{17/} NRC Staff's Response, p. 5, n. 9.

that "it was fully justified in declining to comply with the Licensing Board's orders," and that the "propriety of the Staff's actions in this regard has been proven correct, as set forth in the attached Affidavits" (Id., p. 22). The total number of Ex. 199 Individuals now requesting confidentiality remains only two. Adding this number to others whose disclosure is not here involved (the six involved in Ex. 178 have been expressly excluded by the Board, Tr. 4055-68) to arrive at nine and then to talk about "this newly obtained information" (Id., at 23) is somewhat disingenuous. And this startling information involving only two out of 10 or 11 witnesses remains a bit underwhelming as a defense to defiance of orders.

The Staff is not relieved of its duty to obey an order because the Staff believes the order invalid. Cf. United States v. United Mine Workers, 330 U.S. 258, 291-94 (1947), which held that one who violates an order of a court with jurisdiction to enter it may be held in contempt although the order is subsequently set aside on appeal. Not only has the Staff here not obeyed the Board's orders, but it has not sought appellate review despite its avowed intention to do so (Tr. 3559) and the passage of more than two months time. Although the Staff is a party to NRC proceedings, it is not a super-party entitled to flout orders with impunity.

The Staff argues that "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...."^{18/} This interesting theory of the professional duty of lawyers being limited to avoiding unethical conduct^{19/} is too coarse a standard for NRC proceedings. It is similar to a politician proclaiming that he is not a crook. Such protestations are merely the beginning of the inquiry into permissible conduct, not the end requiring automatic exculpation.

The Staff's asserted standard was not approved in Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193 (9th Cir. 1979). In that case, a lawyer refused to comply with a pretrial order of the district court, asserting that the order was confusing and invalid for unconstitutionality. The Court of Appeals stated:

"Mrs. Halvonik argues she was privileged to disobey the court's order because it was invalid. An attorney who believes a court order is erroneous is not relieved of the duty to obey it. The proper course of action, unless and until the order is invalidated by an appellate court, is to comply and cite the order as reversible error should an adverse judgment result." (Id. at 197)

This attorney's failure to obey the court order was also deemed to be contrary to the Code of Ethics. The Court held:

"Attorneys, as officers of the court, have a duty to cooperate with the court to preserve and promote the efficient operation of our system of justice.

The Code of Professional Responsibility, Disciplinary Rule 7-106(A) provides:

^{18/} NRC Staff's Response To Order To Show Cause, p. 23, n. 27.

^{19/} Presumably as described in the American Bar Association's Code of Professional Responsibility, comprised of nine Canons of Ethics, each accompanied by Ethical Considerations and Disciplinary Rules.

'A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.'

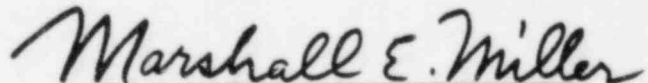
The Code further exhorts the lawyer that:

'Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them' Ethical Code 7-15." (Id.)

The Staff is once again directed forthwith to identify those individuals identified by letters B through K in Inspection Reports 82-10/82-05 (Staff Exh. 199), except those two individuals who asked for confidentiality. Unexpurgated copies of signed statements taken from those identified individuals are also to be produced. 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 CFR §2.713(c) to impose sanctions upon Staff counsel.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

September 30, 1982