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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)

)
)
)
)
)
)

Docket Nos. 50-445
50-446

NRC STAFF'S BRIEF IN SUPPORT OF
ITS EXCEPTIONS TO ATOMIC SAFETY AND
LICENSING BOARD'S ORDER DENYING RECONSIDERATION
OF SEPTEMBER 30, 1982

STATEMENT OF THE CASE

Introduction

This case arises as an appeal by the NRC Staff ("Staff") from the "Order Denying Reconsideration" ("Order" or "ODR") issued by the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding on September 30, 1982. In its Order, the Licensing Board ruled that the 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 Investigation 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.; emphasis added).

On October 8, 1982, the Staff timely filed its exceptions to the Licensing Board's Order,^{2/} and on October 12, 1982, the Staff timely sought a stay of the effectiveness of that Order.^{3/} As set forth in the Staff's Exceptions, the Licensing Board's Order (a) rests upon an improper interpretation of applicable decisional precedent governing the disclosure of confidential information, (b) is unsupported by a proper determination that the ordered disclosure is necessary to a decision in this proceeding or by a proper balancing of the benefit of disclosure against the harm which might result therefrom, and (c) ignores pertinent facts and applicable case law in threatening to impose sanctions against the Staff and/or Staff Counsel. For these reasons, as more fully set forth below, the Staff appeals from the Licensing Board's Order and urges that the Order be reversed. In the alternative, if the Appeal Board

^{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, in the Staff's response to the Licensing Board's "Order to Show Cause" issued on August 4, 1982. See discussion infra, at 9.

^{2/} "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.

^{3/} "NRC Staff's Application for a Stay of the Effectiveness of the Atomic Safety and Licensing Board's Order Denying Reconsideration" ("Stay Application"), filed on October 12, 1982. The Staff's Stay Application was denied by the Appeal Board by "Order" of November 4, 1982, on the grounds that the Licensing Board's Order Denying Reconsideration appeared to have provided a stay.

determines that an appeal as of right is premature at this time, the Staff requests that the issues raised herein be decided by the Appeal Board pursuant to directed certification as more fully set forth in the Staff's Motion for Directed Certification filed simultaneously herewith.

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.^{4/} 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.^{5/}

^{4/} Contention 5 as admitted by the Licensing Board asserts as follows:

Contention 5. The Applicant's failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. 50.57(a) necessary for issuance of an operating license for Comanche Peak.

^{5/} See "Memorandum and Order", issued by the Licensing Board on September 22, 1982, at 3 and 4-5.

On July 16, 1982, Intervenor Citizens Association for Sound Energy ("CASE") pre-filed the written testimony of Charles A. Atchison,^{6/} along with the written testimony of other individuals CASE anticipated calling as witnesses at the July 1982 hearing sessions; on July 19, 1982, CASE filed supplemental written testimony of Mr. Atchison.^{7/} Mr. Atchison has identified himself as a former QC inspector employed by Brown & Root, Inc. (B&R), the constructor at the Comanche Peak Steam Electric Station (CPSSES); his written testimony sets out a number of allegations concerning QA/QC practices at the CPSSES site.

Having learned in advance of the anticipated appearance by Mr. Atchison at the July hearing sessions,^{8/} on July 19, 1982, the Staff pre-filed the written testimony of Robert G. Taylor (an NRC Senior Resident Inspector at the CPSSES site) and Donald D. Driskill (an Investigator working at the NRC's Region IV Office) concerning the QA/QC allegations which had been made by Mr. Atchison to the NRC.^{9/} The

^{6/} "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).

^{7/} "Supplementary Testimony of Charles A. Atchison, Witness for Intervenor CASE (Citizens Association for Sound Energy)," filed on July 19, 1982, and admitted into evidence as CASE Exhibit 656 (Tr. 3468).

^{8/} See, e.g., "CASE (Citizens Association for Sound Energy) Proposed Witness List," filed June 23, 1982. Even prior to CASE's filing of its witness list, CASE indicated at the June hearings that Mr. Atchison would appear as a witness (Tr. 727-28). Further, Mr. Atchison made several statements to the press, in which he repeated the allegations he had made to the NRC's investigative Staff. See Tr. at 2497, 3058-60.

^{9/} "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). The Staff's reasons for filing this testimony are described generally at Tr. 2432-33 and 3058-60.

allegations discussed by Messrs. Taylor and Driskill in their written testimony (and which are referred to in Mr. Atchison's testimony) were as follows:

- (1) that B&R's Quality Assurance Department was failing to ensure that corrective action was being taken with respect to documented non-conformances (Staff Ex. 197, at 2);
- (2) that discrepancies in vendor-manufactured components were being waived by direction of a Texas Utilities Generating Company (TUGCO) QA auditor, in order that equipment could be shipped to the plant site (id.);
- (3) that non-conformance reports (NCRs) were being disapproved and the numbers assigned to those NCR's were being reused (id.);
- (4) that Mr. Atchison had submitted an NCR to the TUGCO NCR coordinator in January 1982, which NCR was never assigned an NCR number and was never processed and dispositioned (id., at 9); and
- (5) that Mr. Atchison was terminated as a QC inspector as a result of his submitting several NCRs in March and April, 1982 (id.).

In addition to the written testimony of Messrs. Taylor and Driskill, 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).^{10/}

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.

^{10/} See Tr. 2336, 2461. The Staff also moved into evidence numerous other Inspection and Investigation Reports which do not relate to Mr. Atchison's allegations.

Cross-examination of Messrs. Taylor and Driskill by CASE commenced on July 27, 1982. While CASE never asked the Staff witnesses to identify the letter-designated individuals by name (see Tr. 2463-68, 2478, 2494),^{11/} in the midst of its cross-examination, the Licensing Board Chairman demanded their names:

I'd like to get their names. . . . I'm asking that these A, B, C's and D's be gotten down into life blood people so we know who we're talking about, who you talked to and who made the allegations and who said they could support them. . . . I don't think there's any necessity now for secrecy. I don't think it has anything to do with the investigation.

(Tr. 2479). In support of his order, the Licensing Board Chairman asserted that "matters of credibility" were involved, and that he was "not content to have the record rest on hearsay or what some unknown X, Y, Z said to so and so." (Tr. 2481, 2484).^{12/} The Chairman stated that "if there was something unusual for any particular person," the Staff should so indicate, "and we'll take that up as a separate matter; if we had somebody that was hooded or whatever" (Tr. 2480).

^{11/} CASE had never before requested that those identities be disclosed, and did not even express an opinion on the subject of disclosure until after the Licensing Board Chairman had ordered disclosure and then solicited CASE's views -- and even then, CASE's representative vacillated until a course was illuminated for her by the Licensing Board Chairman (Tr. 2501-04). At no time did CASE or any other party object to the admissibility of Staff Exhibits 123, 178 or 199 on the ground that the documents were incomplete or irrelevant, or on any other grounds; indeed, CASE sought to introduce the same documents into evidence (see generally, Tr. at 2327, 3026).

^{12/} Subsequently, the Licensing Board Chairman further justified his order to disclose on the grounds that the "reliability" of evidence presented in the Staff's testimony was in question (Tr. 2488, 2492-93); that he wanted "full disclosure" (Tr. 2499); and that he needed the names in order to decide whether Mr. Atchison had been terminated by his employer for writing NCRs and whether the Staff's investigation had been adequate (Tr. 3046).

In response to the Chairman, Staff witness Driskill stated that he "can't specifically recall any individuals, aside from Mr. Atchison, who requested confidentiality. However, we were directed to write the reports identifying all individuals with an alphabetic identifier rather than names" (Tr. 2480); this practice was dismissed as irrelevant by the Chairman (id.). Staff counsel advised the Licensing Board Chairman that an "investigative privilege" was in question (Tr. 2482), but the Chairman directed the Staff to "waive it" or the Staff's testimony would be stricken (Tr. 2482-83). Following a brief recess taken at Staff counsel's request, Staff counsel advised the Chairman that, "on the request of Mr. Driskill and his supervisors," the Staff was asserting the informer's privilege and "is not at this time going to disclose the names of the individuals designated by letter" (Tr. 2484).

On July 28, 1982, the Licensing Board Chairman announced that he "had deferred ruling" until then (Tr. 2729; see Tr. 2569), but that he now rejected the Staff's assertion of the informer's privilege and directed the Staff to disclose the identities of all individuals designated by letter in Staff Exhibits 123 and 109 (Tr. 2735).^{13/} Following repeated long-distance telephone conferences between Staff counsel and members of the Staff (including, inter alia, the Executive Director for

^{13/} 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 (Tr. 3558). However, at the hearing sessions held in September 1982, the Chairman effectively rescinded his order compelling the disclosure of those identities, on the grounds that confidentiality appeared to have been requested by and granted to all of those individuals (Tr. 4064, 4068).

Operations, the Executive Legal Director, the Director of the Office of Inspection and Enforcement, and the Regional Administrator of NRC Region IV), the Staff advised that compliance with the Licensing Board's directive would effect a waiver of the informer's privilege and could cause substantial harm to the Commission's ability to protect the public health and safety (Tr. 3047-49, 3051-54, 3060). Accordingly, the Staff respectfully declined to comply with the Licensing Board's order -- although Staff counsel produced expurgated copies of signed witness statements and voluntarily produced the investigators' notes, from which names and other identifying information had been deleted. (Tr. 2965, 3041, 3159; see Tr. 2750, 3042).^{14/} 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, just three business days after the conclusion of the hearing sessions and before the Staff had had an opportunity to seek appellate review of the Licensing Board's order as it indicated it would do (Tr. 3072-73; see also Tr. 3559-60, 3466-67), the Licensing Board

^{14/} After the Staff declined to identify its informants, the Licensing Board permitted Mr. Tolson, an employee of Applicants, to testify as to his understanding of the identities of the Staff's informants in Staff Exhibits 123 and 199 -- in most cases with an asserted 100% certainty (Tr. 2506, 2508-13). Mr. Tolson's identifications were later substantially confirmed by Mr. Atchison (Tr. 3442-56), and the Licensing Board admitted into evidence over Staff's objection a copy of Mr. Atchison's unexpurgated signed witness statement (Tr. 3466-68); that witness statement (CASE Exhibit 663) identifies by name many of the persons named by Mr. Atchison to the Staff's investigators. Further identification of three informants in Staff Exhibit 199 was inadvertently made by Staff witnesses during sustained cross-examination and Board questioning (Tr. 2573, 2593, 2698).

issued an "Order to Show Cause" ("OSC"), 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 orders to disclose the identities of the ten individuals designated by letter in Staff Exhibit 199, and to produce unexpurgated signed witness statements taken by the Staff during that investigation (OSC, at 2 and 10).

On August 24, 1982, the Staff timely filed its response to the Order to Show Cause,^{15/} and included therein a motion for reconsideration based, in part, upon significant new information which was gathered by the Staff after the close of the July hearing sessions.^{16/} Specifically, the Staff informed the Licensing Board that since returning from the hearing, the Staff had had an opportunity to contact the individuals identified by letter in Staff Exhibits 123 and 199; the Staff further advised that two individuals designated by letter in Staff Exhibit 199 and one individual designated by letter in Staff Exhibit 123 sought to remain anonymous.^{17/}

On September 30, 1982, the Licensing Board issued its Order Denying Reconsideration, in which it ruled that the Staff had not shown good

^{15/} "NRC Staff's Response to Order to Show Cause and Motion for Reconsideration" ("Staff's Response"), filed on August 24, 1982.

^{16/} Attached to and incorporated by reference in the Staff's Response were the "Affidavit of John T. Collins" ("Collins Affidavit"), and the "Affidavit of Donald D. Driskill and Richard K. Herr" ("Driskill/Herr Affidavit"), which set out the new information referred to in the Staff's Response.

^{17/} Staff's Response, at 23. In addition, the Staff advised that it had been able to contact six of the individuals designated by letter in Staff Exhibit 178, and each of those persons sought to remain anonymous (id.).

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 (ODR, at 14). On October 8, 1982, the Staff timely filed its Exceptions to the Licensing Board's Order, and on October 12, 1982, the Staff timely filed its Stay Application before the Appeal Board.

REFERENCE TO RULINGS

The decision from which this appeal arises is the "Order Denying Reconsideration" issued by the Licensing Board in this proceeding on September 30, 1982. Closely related to the Order Denying Reconsideration is the "Order to Show Cause" issued by the Licensing Board on August 4, 1982. The Licensing Board's oral rulings directing the Staff to disclose the identities of the individuals designated by letter in Staff Exhibits 123 and 199 and to produce unexpurgated signed witness statements may be found at Tr. 2479, 2735 and 2750.

STATEMENT OF ISSUES

1. Whether the Licensing Board erred (a) in holding that the informer's privilege is available only with respect to those persons who have expressly requested or received pledges of confidentiality, and only if those persons fall within a narrowly restricted class of individuals, and (b) in failing to conduct an appropriate examination of the circumstances surrounding the Staff's communications with the ten individuals designated by letter in Staff Exhibit 199.

2. Whether the Licensing Board erred in determining that the disclosure of the ten individuals' identities was necessary to a proper

decision in this proceeding and would not result in harm to the Commission's ability to investigate future allegations of matters affecting the public health and safety and that the benefits of disclosure outweighed any potential harm.

3. Whether the Licensing Board erred in ordering the disclosure of certain individuals' identities where such disclosure could compromise the confidentiality of other individuals who had requested that their identities not be disclosed.

4. Whether the Licensing Board erred in holding that the Staff had not shown good cause for its refusal to comply with the Licensing Board's orders and that sanctions against the Staff and/or Staff Counsel are appropriate, thereby ignoring (a) the Staff's good faith and proper purpose in declining to disclose the identities of the ten individuals, and (b) the right of a party and its attorney to assert privileges which are reasonably perceived to exist.

ARGUMENT

I. THE LICENSING BOARD ERRED IN HOLDING THAT THE INFORMER'S PRIVILEGE IS UNAVAILABLE WITH RESPECT TO THE INDIVIDUALS DESIGNATED BY THE LETTERS "B-K" IN STAFF EXHIBIT 199.

In its Order, the Licensing Board concluded that the informer's privilege is available only with respect to those individuals who expressly requested or received pledges of confidentiality, thus reaffirming the standard it had defined in its Order to Show Cause (ODR, at 3, 4; OSC, at 7-8). In addition, the Licensing Board held that the informer's privilege is available only with respect to Mr. Atchison, the original informant who "confidentially volunteer[ed]" information to the

Staff, and not with respect to any other persons interviewed during the course of the Staff's investigation; and, in particular, the Licensing Board held that the privilege is unavailable with respect to the Applicants' "supervisory personnel" (ODR, at 4; OSC, at 8).

The Licensing Board's conclusions are erroneous, and may result in a substantial adverse impact upon the Staff's ability to obtain confidential information in future investigations of matters affecting the public health and safety.

A. The Informer's Privilege Is Applicable Where Confidentiality May Be Implied From the Circumstances Surrounding the Staff's Investigation.

It is well established that an informer's privilege may exist where individuals confidentially provide information to the Staff in the course of an investigation of alleged licensee or applicant violations of law. As recognized by the Appeal Board in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981), important policy considerations underlie the informer's privilege:

The Supreme Court has recognized "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Roviaro v. United States, 353 U.S. 53, 59 (1957) (citations omitted).

Further, the Appeal Board observed that the informer's privilege derives from "an ancient doctrine... founded upon the proposition that an

informer may well suffer adverse effects from the disclosure of his identity," and that "the most effective protection from retaliation" is obtained by "withholding the identity of the informer"; thereby, "the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice." South Texas, supra, 13 NRC at 474, quoting In re United States, 565 F.2d 19, 22 (2d Cir. 1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978). See also, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-81-28, 14 NRC 933, 938 (1981) (denying review of ALAB-639) (Commissioner Ahearne, concurring).

While the Licensing Board here recognized that an informer's privilege may be claimed in NRC adjudicatory proceedings, it attempted to limit the privilege to factual situations resembling those present in the South Texas proceeding, where "express promises and pledges of anonymity" had been made (OSC, at 8; ODR, at 3; Tr. 2729-31). In doing so, the Licensing Board ignored the clear precedent established by the Appeal Board and the Commission in Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390 (1970), where the Appeal Board overturned an order compelling the Staff to disclose its informants' names, notwithstanding the absence of an explicit grant of confidentiality:

We think it sound policy that when information is given in confidence, the names of the persons giving it may properly be withheld from disclosure....

We further believe that a showing that there was an explicit understanding that information was being given in confidence is not an absolute pre-

requisite for this nondisclosure consideration to apply. For example, the surrounding circumstances, when viewed in the light of an historical pattern of non-disclosure, may support a determination that it was entirely reasonable for the party giving the information to assume that it was being given in confidence. In this connection, consideration here should be given to the possible adverse effect any such disclosure might have on the ability of AEC inspectors to obtain full and candid expression of the views of individuals they interview during the course of an inspection.

4 AEC at 395 (emphasis added).

The Appeal Board in Monticello remanded the case to the Licensing Board for a determination, inter alia, of (1) the circumstances surrounding the Staff's receipt of the information, (2) the relevance of the names sought, and (3) the expected benefit to be obtained from disclosure of those names. Id., at 395. On appeal following remand,^{18/} the Appeal Board reaffirmed that "an explicit understanding that information was being given in confidence is not an absolute prerequisite" and that "the surrounding circumstances, when viewed in the light of an historical pattern of nondisclosure" may support a finding of privilege. 4 AEC at 436. Having so concluded, the Appeal Board ruled that "nondisclosure of names is appropriate ... as respects those persons (other than public officials) who made statements to compliance inspectors outside of general meetings" (id.; emphasis added). The Appeal Board's rulings in this regard

^{18/} Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-16, 4 AEC 435, aff'd by the Commission, 4 AEC 440 (1970).

were explicitly affirmed by the Commission as "appropriate and reasonable." 4 AEC at 440.^{19/}

When these principles are applied to the instant proceeding, the Licensing Board's errors are readily apparent. First, contrary to the Appeal Board's guidance in Monticello, the Licensing Board never conducted an examination of the "surrounding circumstances" or "historical patterns" to determine whether confidentiality should be applied, relying instead upon the Chairman's black-and-white standard of whether confidentiality had been expressly requested or conferred. This standard -- which underlies and colors all of the Licensing Board's subsequent rulings on confidentiality -- is simply inconsistent with decisional precedent.

Further, the Licensing Board never obtained a clear understanding even as to which individuals expressly requested confidentiality. Rather, the Licensing Board merely assumed that Mr. Driskill's inability to recall specifically which individuals had requested anonymity (Tr. 2480; see also Tr. at 2479, 2506-07, 2731), could only mean that Mr. Atchison was the sole person who desired confidentiality, concluding that "[a]pparently none of these alphabetical witnesses either sought or even wanted such secrecy" (OSC at 7; see Tr. 2496). On the contrary, after returning from the July hearing sessions, the

^{19/} Both of the Monticello decisions (ALAB-10 and ALAB-16) are cited by the Appeal Board in its South Texas decision, relied upon extensively by the Licensing Board in this proceeding. See South Texas, supra, 13 NRC at nn. 13 and 20. Nonetheless, neither of the Monticello decisions is referred to in this regard in the Licensing Board's Order or in its Order to Show Cause -- although the Staff highlighted these decisions in its response to the Order to Show Cause (Staff's Response, at 8-9).

Staff had an opportunity to contact many of the individuals in question -- and three of them (two individuals in Staff Exhibit 199 and one individual in Staff Exhibit 123) expressly stated that they wish to preserve their anonymity. The Licensing Board's unfounded assumption that none of these persons desired anonymity was simply wrong, and the propriety of the Staff's action in withholding their identities at the July hearing sessions has been borne out.^{20/}

If the Licensing Board had examined the circumstances surrounding the Staff's investigation, it properly should have upheld the Staff's assertion of the informer's privilege. As suggested by the Appeal Board in Monticello, the Region IV investigative Staff has indeed followed "an historical pattern of non-disclosure." At the hearing, Staff witness Driskill cited this historical practice, noting that "we were directed to write the reports identifying all individuals with an alphabetic identifier rather than names" (Tr. 2480); the Licensing Board, however, swept aside any consideration of the Staff's historical practices, responding simply, "I understand that's your practice. Now, however, we're in trial" (id.; emphasis added). Mr. Driskill further testified that investigations are kept secret from applicants and licensees and that informants are generally interviewed in private (Tr. 2532-33, 2605-08); but this testimony was similarly disregarded by the Licensing Board.

^{20/} The Licensing Board now seeks to minimize the significance of this information. Thus, it asserts that "this startling information involving only two out of 10 or 11 witnesses remains a bit underwhelming as a defense to defiance of orders" (ODR, at 12; emphasis added), and it accuses the Staff of "play[ing] a numbers game" (id., at 11, 12). Nonetheless, the Licensing Board relies upon the new information presented by the Staff to exclude from its orders the requirement that the Staff identify the two individuals who have stated that they desire confidentiality (see ODR, at 14).

These practices have been followed historically, as they were in the instant case, and may well have created an aura and perception of confidentiality, leading an individual reasonably to believe that he would be afforded confidential treatment.^{21/}

For all of the above reasons, it is clear that the Licensing Board erred in failing to conduct an appropriate examination of the circumstances surrounding the Staff's investigation and in failing to uphold the Staff's assertion of the informer's privilege.

B. The Licensing Board Improperly Restricted the Class of Persons as to Whom the Informer's Privilege May Be Applied.

In its Order, the Licensing Board held that the "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" (ODR, at 4; see also Tr. 3049-50), and concluded that "only Mr. Atchison qualified for the informer's privilege, not the Applicant's supervisory personnel whom he identified" (id. at 4, 11).^{22/} The Licensing Board's rulings in

^{21/} In July 1982, the investigative function previously performed by the Office of Inspection and Enforcement was transferred to the newly created Office of Investigations. On July 16, 1982, that Office proposed new guidelines for use in future investigations concerning express grants of confidentiality to informants. To date, the Commission has not acted upon the proposed guidelines.

^{22/} Similarly, in its Order to Show Cause, the Licensing Board observed as follows (OSC, at 8):

It is not clear that an informer's privilege could even be claimed by those officials and employees of the Applicants whom the investigator sought out They probably had a duty to respond fully to such an official investigation without any claim to immunity. By contrast, the only individual who voluntarily went to the Staff with information (the classic definition of an informer) was Mr. Atchison.

The Licensing Board's erroneous belief that the informer's privilege belongs to the informer is discussed infra, at 22-23.

this regard are totally inconsistent with applicable Commission case law and policy.

In South Texas, ALAB-639, supra, the Appeal Board expressly upheld the Staff's assertion of the informer's privilege, not just with respect to the informants who volunteered information to the Staff, but also with respect to persons named by those informants. 13 NRC at 472. Further, the Appeal Board has recognized that the informer's privilege is important, not simply in encouraging informants voluntarily to bring initial allegations to the Commission, but also insofar as it impacts "on the ability of [NRC] inspectors to obtain full and candid expression of the views of individuals they interview during the course of an inspection." Monticello, supra, ALAB-10, 4 AEC at 395. These precedents provide sound guidance; indeed, no logical distinction can be made between an initial informant and an informant who is interviewed during the course of an ongoing investigation, for both individuals may have equal reason to fear retaliation by their employer or other persons.^{23/}

^{23/} The Licensing Board's reliance (ODR, at 4) upon Gordon v. United States, 438 F.2d 858, 875 (5th Cir.), cert. denied, 404 U.S. 828 (1971) and United States v. Oliver, 570 F.2d 397, 401 (1st Cir. 1978) is misplaced. Those decisions did not involve the informer's privilege but, rather, involved criminal proceedings in which testimony was sought to be suppressed or stricken for the Government's failure to disclose the witness' names in response to bills of particulars seeking the names of Government informants. There, a narrow definition of the term "informer" or "informant," as those terms are applied in a criminal setting, was adopted. In at least one other case, however, where the informer's privilege was at issue, the courts have employed a broader definition to encompass persons who assist or provide information to law enforcement officials in the course of an investigation. See, e.g., Black v. Sheraton Corp. of America, 564 F.2d 550, 553 (D.C. Cir. 1977), aff'g 47 F.R.D. 263, 265 (D.D.C. 1969) (hotel employee who assisted FBI in electronic eavesdropping of plaintiff's suite qualified as an "informer"); see also United States v. Koon Wah Lee, 74 F. Supp. 449, 451 (D. Haw. 1947) (in construction of Internal Revenue Code, court declined to hold that an "informer" must be the first person to provide information and must come forward voluntarily).

The Licensing Board's arbitrary distinction between "supervisory personnel" and other employees of the Applicants is similarly lacking in merit.^{24/} The case law has not differentiated between individuals desiring confidentiality on the basis of their rank and title, but has afforded protection to any such individual; similarly, the Commission's regulations provide protection for any such individual.^{25/} The rationale reflected in this policy is also quite sound -- there is no reason to believe that a supervisory title makes an individual any less susceptible to retaliation by his employer (or by other persons) than are non-supervisory personnel. Further, supervisory personnel may have access to additional information or may be able better to appreciate the significance of a defect or violation, and these persons should be afforded an opportunity to remain anonymous in order to encourage their cooperation in an NRC investigation.

^{24/} The Licensing Board's attempt to label as "supervisory personnel" all of the individuals designated by letter in Staff Exhibit 199 is somewhat flawed. Among those persons is a "Vendor Inspector" and an "NCR Coordinator" (i.e., document clerk -- see Tr. 2544, 2546-47, 2637, 3444), neither of whom can fairly be described as supervisors. Further, many of the other persons referred to in Staff Exhibit 199 are line supervisors and do not appear to be part of the Applicants' corporate management structure.

^{25/} See 10 C.F.R. § 21.2 (the identity of "anyone" reporting a known or suspected defect or failure to comply will be withheld from disclosure), and 10 C.F.R. § 50.7 (discrimination by an applicant, licensee or contractor against any employee for, inter alia, providing information to the Commission is prohibited).

For all of the above reasons, the Licensing Board erred in restricting the class of persons who qualify for confidentiality.^{26/}

C. No Waiver of the Informer's Privilege Had Occurred As to Individuals B-K.

1. The Department of Labor's Involvement.

In its Order to Show Cause, the Licensing Board held that a waiver of the informer's privilege had occurred as a result of a Department of Labor (DOL) investigator's involvement in portions of the Staff's investigation (OSC, at 5-6; Tr. 2559-60, 2562-64).^{27/} The Licensing Board does not further refer to this issue in its Order Denying Reconsideration, aside from mentioning that four unexpurgated witness statements which the Staff had provided to the DOL investigator were

^{26/} The Licensing Board may have recognized its error in restricting the informer's privilege to initial informants and non-supervisory personnel. Having now been advised by the Staff (in the Staff's Response to the Order to Show Cause) that two individuals seek to remain anonymous, the Licensing Board has excluded those persons from its disclosure orders -- without questioning whether they are supervisory personnel or should be considered to fall within the Board's definition of an "informer."

^{27/} The DOL investigator (Mr. Fortman) was present at three interviews (involving individuals D, E and F in Staff Exhibit 199) conducted during the Staff's investigation of Mr. Atchison's allegation that he had been wrongfully discharged for filing non-conformance reports; in addition, the DOL investigator received unexpurgated copies of the four signed witness statements taken during that investigation, made by the individuals designated as B, E, F and G in Staff Exhibit 199 (Tr. 2551-52, 2554-56, 2559, 2562, 2571-72, 2574, 2606).

recently admitted into evidence at a DOL public hearing (ODR, at n.2).^{28/}

Contrary to the Licensing Board's conclusion, these facts do not establish that a waiver occurred, and do not alter the need for confidential treatment in this proceeding. The DOL investigator was performing an official function in the investigation of one of Mr. Atchison's allegations, which was being investigated concurrently by the Staff -- and his involvement was limited to the one allegation which involved both agencies (Tr. 2556, 2574). DOL's investigation, conducted pursuant to Section 210(a) of the Energy Reorganization Act of 1974, 42 USC § 5851 (Tr. 2555), shared a common purpose with the Staff's investigation, as when any two governmental agencies investigate conduct which comes simultaneously within their respective jurisdictions; this common purpose shared by DOL and the Commission is reflected in regulations recently adopted by the Commission at 10 C.F.R. § 50.7. Inasmuch as the privilege belongs to the Government, investigations conducted jointly by two government agencies do not result in a waiver of the informer's privilege. For these reasons, in the instant proceeding, DOL's access to aspects of the Staff's investigation did not cause a waiver of the informer's privilege.

^{28/} The four witness statements were released by the DOL investigator to Mr. Atchison's attorney pursuant to subpoena, and were then proffered and admitted into evidence at a DOL hearing during the week of August 16, 1982 -- notwithstanding the fact that the Staff's investigators understood that the statements would be treated confidentially. Indeed, the DOL investigator had stated that the four documents would be used for internal purposes only, that they would not be made publicly available, and that it was unusual for public hearings to take place in which such documents might be produced. In addition, the Staff later requested in writing that DOL preserve the confidentiality of the signed statements; however, the documents were made public by DOL without the Staff's knowledge even before the Staff's written request was transmitted. See Letter from Sherwin E. Turk, Esq., to the Licensing Board, dated August 27, 1982.

Nor are these conclusions altered by the fact that the four unexpurgated witness statements were proffered and admitted into evidence in the DOL proceeding. The disclosure by DOL was not anticipated by the Staff's investigators, and is regrettable.^{29/} Nonetheless, further disclosure at this time could compound the harm which might result from DOL's breach of confidentiality. Finally, even if an inadvertent waiver has occurred, it involved only four witness statements relating to only one of Mr. Atchison's allegations reported in Staff Exhibit 199. Such a limited waiver should not be allowed to affect the confidentiality of other persons designated by letter in Staff Exhibit 199, who provided information related to other allegations made by Mr. Atchison.

2. Identification by Applicants.

At the July hearing sessions, the Licensing Board also held that the Applicants had waived the informer's privilege by providing their own identification of the individuals in question (Tr. 3042-43, 3052, 3062). Further, the Chairman stated, "it's not the Staff's privilege. It's that of the individuals" (Tr. 3042; see also OSC, at 8).

This conclusion is patently erroneous. As the Supreme Court observed in Roviaro v. United States, 353 U.S. 53, 59 (1957), "the

^{29/} See n.28, supra. It is not clear why the DOL investigator released the four statements; subsequent to their release, DOL assured the Staff in writing that "Department of Labor procedures afford protection of confidentiality to individuals who provide information as in this case. Should any need develop requiring utilization [of] statements in public proceedings, the statements would be sanitized to protect identities." Letter from William O. Corley, Regional Administrator, DOL Office of Assistant Secretary for Administration and Management, to John T. Collins, Regional Administrator, NRC Region IV, dated September 3, 1982.

informer's privilege is in reality the Government's privilege." The Appeal Board has similarly recognized that "the informer's privilege inures only to law enforcement officials." South Texas, supra, ALAB-639, 13 NRC at 478 n.26.

Further, while an employer may waive privileges of its own which were created for its own protection, the informer's privilege does not belong to the employer. Rather, one of the central underpinnings of the informer's privilege is the recognition that employees require protection from their employers' retaliation, which might result absent confidential treatment of their identities. Id., at 474-75 and 478 n.27. By permitting the employer to waive the privilege, the Licensing Board would allow the employer to learn the employee's identity, and the underlying purpose for the privilege is thereby destroyed. Such a result is contrary to the fundamental purpose underlying the privilege.

For all of the above reasons, it is clear that the Licensing Board erred in concluding that the individuals designated by the letters B-K in Staff Exhibit 199 were not eligible for the confidential treatment afforded by the informer's privilege.

II. THE LICENSING BOARD ERRED IN DETERMINING THAT DISCLOSURE IS NECESSARY AND WILL NOT RESULT IN HARM.

In its Order, the Licensing Board asserts that "in the circumstances of the present case, the information [as to the informants' identities] is sufficiently significant that any privilege which may exist should be overridden" (ODR, at 7). The Licensing Board does not further explain

its reasons for making this determination, stating that its "reasons for finding the information necessary have been explained both in the transcript and in the Order to Show Cause" (id., at 7-8). For the reasons set forth below, the Staff believes that the Licensing Board erred (a) in determining that disclosure of the informants' identities is necessary and (b) in failing properly to balance the need for disclosure against the harm which might result therefrom.

A. Disclosure of the Informants' Identities Is Unnecessary.

As set forth above, even in the absence of an express pledge of confidentiality, a valid informer's privilege exists with respect to the names of those individuals who confidentially provide information to the Staff in its investigations. It has long been held that the identities of such individuals should not be disclosed unless "under the circumstances, there is a necessity for production of the data" -- and even in such an instance, "the Licensing Board must weigh the detrimental effects of disclosure against the demonstrated need for production." Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 398 (1970). The continued validity of this principle was reiterated recently in the South Texas decision, where the Appeal Board held as follows:

To overcome the acknowledged importance of the need for confidential treatment of informants, the burden was on the intervenors to demonstrate the need for their disclosure.

South Texas, supra, ALAB-639, 13 NRC at 475. Further, the Appeal Board has recognized that a determination of the need for disclosure must take

into consideration the availability of the information elsewhere:

[T]he necessity for disclosure is sharply reduced where available alternatives for obtaining information are present. In the face of a proper privilege claim, the proponent for disclosure should demonstrate convincingly that information already furnished or otherwise available is not adequate under the circumstances.

Monticello, supra, ALAB-10, 4 AEC at 399.

In the instant proceeding, the Licensing Board Chairman apparently perceived a need to order the immediate disclosure of the informants' identities, on the grounds that "matters of credibility" were involved, and he was "not content to have the record rest on hearsay" (Tr. 2481). Similarly, in its Order to Show Cause, the Licensing Board asserted that "[t]he identities of the unnamed individuals are necessary so that their credibility and that of Mr. Driskill may be weighed" (OSC, at 7). These assertions, however, fail to establish a genuine need to overcome "the acknowledged importance" for confidential treatment of informers -- particularly in view of the information which has already been provided to the Licensing Board.

At the outset, it is important to recognize that the Licensing Board Chairman initially ordered the disclosures without any question of credibility or reliability having been raised by the Staff's direct testimony or cross-examination thereon (see Tr. at 2478-83). Similarly, the Licensing Board never conducted a balancing of the need for disclosure against the potential harm; rather, the Chairman summarily concluded, "I don't think there's any necessity now for secrecy" (Tr. 2479), and then asserted without any evidentiary basis that "the witnesses don't care.

Half of them are known anyway" (Tr. 2496).^{30/} These unfounded conclusions quickly became irrefutable as far as the Licensing Board was concerned, and served to color all of the subsequent orders concerning disclosure.

An examination of the developments which ensued following the issuance of the initial disclosure order reveals the lack of any genuine need for such disclosure. Both Mr. Atchison and Mr. Driskill appeared as witnesses at the July hearings. There can be no question that the credibility of these two persons was completely open for the Licensing Board to examine. While the Licensing Board suggests that it requires the identities of individuals B-K to test the credibility of Staff witness Mr. Driskill (OSC, at 6, 7; Tr. 3046-47), it is altogether unclear how the disclosure by the Staff of those identities will have any bearing whatsoever upon Mr. Driskill's credibility; indeed, at the hearing, the Licensing Board Chairman engaged in lengthy questioning of Mr. Driskill, and then stated "we've had Mr. Driskill. We know what his appearance and demeanor is" (Tr. 3065).

Further, the Licensing Board was provided with the information obtained from the letter-designated individuals, both in the Staff's reports and in the statements signed by those individuals which were expurgated to delete identifying information; the Licensing Board never used that information to test Mr. Driskill's credibility. The Licensing Board's insistence on having the Staff supply the names of those persons

^{30/} The error in this unfounded assertion that "the witnesses don't care" is readily apparent, in light of the Staff's subsequent advice that two of the individuals designated by letter in Staff Exhibit 199 do object to the disclosure of their identities. See discussion supra, at 15-16.

ignores the clear holding by the Appeal Board in South Texas (13 NRC at 477):

Not the individuals but their information is of significance to the proceeding. Had [the intervenors] demonstrated that their own informants tell a significantly different story than the one reported by the Staff, we might have a different situation. But that is not the case here.^{31/}

In essence, the Licensing Board appears to suggest that Mr. Driskill's write-up of his investigation report is inaccurate -- but there is absolutely no factual basis for such an assertion, nor has Intervenor CASE ever made such an assertion. In similar circumstances, the Appeal Board has rejected any unfounded "surmise" as to possible inaccuracies in the Staff's investigative reports. Id., at 475 n.21 and 477.

As to the credibility of the ten individuals designated by the letters B-K in Staff Exhibit 199, the Staff does not perceive that its disclosure of their identities would have any bearing on their credibility. The Staff has already provided its investigation reports, as well as the signed witness statements from which only names and identifying information were deleted. Moreover, both Mr. Atchison and Mr. Tolson (an employee of the Applicants) testified to their understanding of who the informants were in Staff Exhibits 123 and 199, in most cases with an asserted 100% certainty (Tr. 2508-13, 3442-56). Indeed, after Mr. Tolson provided his identification, the Licensing Board Chairman stated "We now have their names. The only one that doesn't seem to know them is the Staff. . . ." (Tr. 3062; emphasis added). Similarly, the Licensing Board has stated (OSC, at 6):

^{31/} Similarly, that is not the case with respect to Staff Exhibits 199 and 123 in this proceeding.

Most of the uncertainty as to the identities of the individuals interviewed was eliminated when Ronald G. Tolson, a high-ranking employee of the Applicants, testified to the identity of these alphabetical individuals. Mr. Tolson's identification of A through K was corroborated by the testimony of Mr. Atchison. These identifications are undenied on the present record.^{32/}

The lack of any real need for disclosure is further demonstrated by the fact that seven of the persons named by Messrs. Atchison and Tolson appeared as witnesses in the proceeding, and the Licensing Board never attempted to question them as to the accuracy of or bases for statements which might be attributed to them in the Staff's investigation report.^{33/} Further, the Licensing Board Chairman never required the attendance of these or other persons named by Messrs. Atchison and Tolson; rather, he merely suggested that the Applicants might wish to call them as witnesses (Tr. 2586-87, 2705-06), deferred ruling on CASE's request for such a directive (Tr. 3068-69), and never once indicated that their presence was required for a "fair determination of the cause."^{34/}

^{32/} During the course of the July hearing session, the Licensing Board clearly indicated that it was satisfied it knew the identities of the persons in question (Tr. 2494, 2513, 3042-43, 3045, 3062).

^{33/} The seven individuals are Messrs. Atchison, Boren, Brandt, Chapman, Purdy, Smith and Tolson.

^{34/} The lack of any genuine need for disclosure is further demonstrated by the Licensing Board's recent action excluding from its disclosure orders the two individuals who stated that they desire anonymity (ODR, at 12). If a genuine need for disclosure indeed exists, the Licensing Board could have insisted that those names, as well, be disclosed upon a proper balancing of the need for disclosure against the potential harm. The Licensing Board's action in this regard appears to indicate either a lack of need or a recognition that the harm from disclosure may outweigh the need therefor.

In addition, the Licensing Board recently requested the parties to brief the question of what additional information is necessary to close the record in this proceeding ("Memorandum and Order," dated September 22, 1982) -- and not one of the parties included in their briefs any indication that they believe disclosure of the informants' identities is necessary.

Finally, the Staff wishes to note that it is fully cognizant of the fact that the Licensing Board is the Commission's primary finder of fact in an adjudicatory proceeding, and great deference is ordinarily given to its determination that certain information is required for it to be able to assess a witness' credibility or reach a fair determination of the issues. However, this principle is not absolute, and the Staff believes that it should not be allowed to override the Staff's obligation and good faith attempt to preserve the efficacy of the Commission's investigative powers before appellate review has been obtained. See, e.g., South Texas, supra, 13 NRC at 478.^{35/} In this regard, the Licensing Board Chairman has altogether misconstrued the Staff's actions in declining to waive the informer's privilege. It has never been the Staff's intention to "judge" the Licensing Board's needs or to require "justif[ications]" of Licensing Board orders; nor has the Staff intended "to engage in interminable debate" with the Licensing Board, "to dictate to the Board what matters it may or may not consider," or to "interfere with the Licensing Board in the performance of its adjudicatory duties" (See ODR, at 5, 6). Rather, the Staff's actions have been motivated solely by its serious concern over the effect a disclosure of its informants' identities might have upon the Commission's ability to investigate future allegations of matters affecting the public health and safety.

^{35/} The Staff has previously noted its recognition of the deference given to the Licensing Board in such matters. See Staff's Response, at 17 n.21; Tr. 3053-54.

B. Disclosure Could Result in Substantial Injury to the Commission's Ability to Investigate Allegations of Matters Affecting the Public Health and Safety.

The Licensing Board's Order does not address the issue of whether harm may result from its disclosure orders and, indeed, the Licensing Board has never adequately addressed this issue; the only consideration ever given to this issue appears to have been the Chairman's unsupported conclusion that "the witnesses don't care. Half of them are known anyway" (Tr. 2496).^{36/} Contrary to the Licensing Board's conclusion, the Staff believes that the ordered disclosures may cause great detriment to the Commission's future ability to obtain safety-related information from persons who would otherwise communicate that information in confidence to the Commission's investigative Staff. Further, the Staff believes that a balancing of "the detrimental effects of disclosure against the demonstrated need for production" -- as required by the Appeal Board in Monticello, ALAB-10, supra, 4 AEC at 398 -- leads to the inescapable conclusion that any need for disclosure is outweighed by the potential detriment which may result therefrom.

It is axiomatic that the Commission's need to obtain information concerning the safety of nuclear power plants is of great importance; "the need to protect confidential informants is not an academic concern to the NRC." South Texas, supra, 13 NRC at 474. Indeed, the Commission's safety inspectors "must depend" upon the information provided by construction employees and others who supply "information about apparent safety discrepancies." Id., at 475, quoting Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 134 (1979). In rejecting

^{36/} See discussion supra, at 15-16.

even the suggestion that such information could safely be disclosed subject to a protective order, the Appeal Board has stated as follows (id., at 477-78):

Clairvoyance is not needed to appreciate that word of the breach of confidentiality would spread and the likelihood of informants coming forward with safety-related information in future cases be diminished.

It is very easy when focusing on the immediate concerns of the case at bar to take the short view and err on the side of disclosing confidential sources of information. But this is neither the sole reactor under construction nor the only one in which informers may play an important role in bringing potentially dangerous situations to the Commission's attention. The informer's privilege, as it has been developed and refined by the courts over the years, is an attempt to balance the government's recognized need for information over the long range with the necessities of a fair ^{37/} hearing and a full record in a particular case.

An application of these principles to the instant proceeding demonstrates that disclosure was improvidently required. While the Licensing Board has a unique perspective as a finder of fact, which may have led it to give primary consideration to its own desire to have a full record upon which to make a decision, the determination as to

^{37/} For these reasons, the Appeal Board found that the speculative need for disclosure in the South Texas proceeding was outweighed by the Commission's long-term need for confidential treatment of informers:

Intervention in one Commission proceeding does not entitle [the intervenors] to privileged information that, if disclosed, might jeopardize the NRC's likelihood of receiving similar reports in future cases involving other plants. It is the NRC's continuing need for confidential informants that made the Licensing Board's failure to recognize the importance of the privilege both shortsighted and arbitrary.

South Texas, supra, 13 NRC at 478 n.26.

whether the informer's privilege should be waived is not within the province of the Licensing Board alone. Rather, the Appeal Board has held long ago that the views of the Commission's investigative Staff should be given "great weight" in this area:

The Director of Regulation is the official most aware of the adverse impact disclosure of privileged information might have on the Commission's regulatory program. It follows, therefore, that a Licensing Board should give great weight to the position of the Director of Regulation.^{38/}

Monticello, supra, ALAB-10, 4 AEC at 399.^{39/} In the instant proceeding, the Commission's investigative Staff acted consistently with these precedents in determining that disclosure by the Staff of its informers' identities may cause detriment to the Commission's ability to protect the

^{38/} Following the reorganization of the AEC in 1974, the investigative function previously performed by the AEC's Director of Regulation was vested in the NRC's Director of the Office of Inspection and Enforcement. In July 1982, the Office of Investigations was created, and the Commission's investigative function with regard to these types of matters was transferred to that Office. See n.21, supra.

^{39/} The Monticello decision appears to have been issued at a time when 10 C.F.R. § 2.744 required "great weight" to be afforded to the Staff's determination as to the need for confidentiality in producing materials during discovery. See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701, 704 (1971). While that regulation has since been revised, the general principle that the views of the Commission's Staff should be accorded close attention should not be discarded altogether. As the Commission has observed:

To be sure, the Staff is a party to the proceedings before us. But it is also an arm of the Commission and is the primary instrumentality through which we carry out our statutory responsibilities. It would be contrary to the facts of the administrative process to pretend that the Staff is always merely a party whose submissions are to be given no more weight than those of any other party.

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976).

public health and safety and, for this reason, the Staff declined to comply with the Licensing Board's orders compelling such disclosure until appellate review was obtained (Tr. 2484-87). Rather than giving the Staff's determination "great weight", the Licensing Board simply swept it aside, giving it little or no consideration.^{40/} In this respect, the Licensing Board acted arbitrarily and in disregard of established precedent.^{41/}

For all the above reasons, the Licensing Board erred in failing to recognize the harm which may result from its ordered disclosure, and in failing properly to balance the need for disclosure against that potential harm.

III. THE LICENSING BOARD ERRED IN ORDERING THE DISCLOSURE OF CERTAIN IDENTITIES WHERE THAT DISCLOSURE COULD COMPROMISE THE CONFIDENTIALITY OF OTHER IDENTITIES.

As discussed supra, at 15-16, after the Licensing Board ordered disclosure of the identities of all ten informants designated by the

^{40/} Similarly, the Licensing Board swept aside the Staff's determination that disclosure of some of the identities could compromise the anonymity of other informants, also resulting in harm to the Commission's investigative abilities. See discussion infra, at 34-37.

^{41/} The Licensing Board could have used its in camera powers to obtain the information it sought had that information not been available elsewhere, pursuant to 10 C.F.R. §§ 2.744(c) and 2.790(b). The Chairman declined to do so when that procedure was suggested, stating as follows (Tr. 2498-99):

These are public hearings. We think the public has a vital interest to it. . . . We don't want to know something in camera. . . . We want full disclosure.

In light of the circumstances present in this proceeding, the Staff believes that in camera proceedings were not necessary, since (1) sufficient information was available elsewhere, (2) the Licensing Board did not need the Staff to disclose or confirm its informants' identities and (3) potential harm could be caused thereby to the Commission's investigative powers. Accord, South Texas, supra, 13 NRC at 477. Nonetheless, an in camera proceeding certainly would have been less harmful than the public disclosure ordered (and partially obtained) by the Licensing Board.

letters B-K in Staff Exhibit 199, the Staff had an opportunity to contact each of those individuals. Two of those persons specifically requested that their names not be disclosed or confirmed by the NRC Staff, while the other persons stated they do not object to the Staff's disclosure.^{42/} The Staff brought this new information to the Licensing Board's attention,^{43/} and further indicated that disclosure of the identities of the eight non-objecting individuals (a) could compromise the identities of the two individuals who seek to remain anonymous and (b) could cause harm to the Commission's ability to protect the public health and safety.^{44/} While the Licensing Board then exempted from its disclosure order the identities of the two individuals seeking to remain anonymous (ODR, at 14), it concluded that the other eight individuals' identities should be disclosed:

[T]his 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.

(Id., at 5; emphasis in original). The Licensing Board erred in ordering the disclosure of the eight identities, for the following reasons.

^{42/} Also as discussed supra, at 15-16, the Staff contacted the individuals designated by letter in Staff Exhibit 123 and six of the individuals designated by letter in Staff Exhibit 178; one of the individuals referred to in Staff Exhibit 123, and all six of the persons contacted who are referred to in Staff Exhibit 178, requested that their identities be withheld by the Staff.

^{43/} Staff's Response, at 20; Driskill/Herr Affidavit, at 2.

^{44/} Staff's Response at 20-21; Collins Affidavit, at 2-3.

As discussed above, the importance of preserving the anonymity of individuals who confidentially provide information to the Commission's investigative Staff is well established. While that anonymity often may be protected merely by withholding the informant's name, there may be instances in which the disclosure of other information could reveal that individual's identity. The Commission's investigative Staff has determined that such an instance exists here:

Since all of these people are presently, or have at one time, been employed by either the utility or its constructor, it would be possible, by the process of elimination, to discover the identities of those persons who seek to remain anonymous, if the identity of the other persons were disclosed. For those persons who do not seek to remain anonymous, it may be possible to coincide them with their tentative identification which has been made or may be made by other parties in this hearing and from this make a reasonable assumption that those not identified coincide with the tentative identification.

(Collins Affidavit, at 2).^{45/} The Staff concluded that such a breach of confidentiality could result in harm to the Commission's ability to obtain confidential information in the future, both in this and in other proceedings (*id.*, at 3); accordingly, the Staff determined that it could not properly identify any of the eight individuals.

^{45/} The Staff's determination that disclosure of the eight non-objecting individuals' identities would be improper was based upon a case-specific analysis. The Staff recognized that "in some instances, the disclosure or confirmation of the names of those persons who waive confidentiality would not inadvertently compromise the identity of those persons who seek to maintain their anonymity." Staff's Response, at 20; footnote omitted.

The appropriateness of withholding information which tends to disclose confidential information has been upheld by the courts under the "jigsaw puzzle" doctrine applicable to requests for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(3). In cases involving such requests, it has been held repeatedly that information, although not confidential in itself, may be withheld where it "can reasonably be expected to lead to unauthorized disclosure" See, e.g., Halperin v. CIA, 629 F.2d 144, 147 (D.C. Cir. 1980). As the Court of Appeals recognized in that proceeding, the relationship of the information to the whole picture must be considered:

We must take into account, however, that each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.

Id., at 150. Accord, Gardels v. CIA, No. 81-1567, slip op. at 9 (D.C. Cir., Sept. 28, 1982); Taylor v. Department of the Army, 684 F.2d 99, 104 (D.C. Cir. 1982).

In its Order, the Licensing Board distinguished such decisions as being applicable only to "specific statutory exemptions from disclosure" involving national security matters, and as being inapplicable to common law privileges (ODR at 5 n.4). However, the Licensing Board's distinction fails to take account of the principle embodied in the jigsaw puzzle doctrine, whereby the importance of avoiding a breach of confidentiality -- whether it occurs by direct or indirect disclosure -- is emphasized; that principle has equal force whether the disclosure affects the national security or the public health and safety. Where, as here, an official involved with the Staff's investigative function has determined

that a partial disclosure could result in a breach of confidentiality and may cause harm to the Commission's ability to protect the public health and safety -- and in the absence of any evidence to the contrary -- the Licensing Board's insistence upon the disclosure of the identities of the eight non-objecting individuals constitutes an abuse of discretion.

IV. THE LICENSING BOARD ERRED IN HOLDING THAT THE STAFF FAILED TO SHOW GOOD CAUSE AND IN CONCLUDING THAT SANCTIONS ARE APPROPRIATE.

In its Order, the Licensing Board concluded that "the Staff has not shown good cause and sanctions will be imposed unless the [Board's] orders are obeyed forthwith" (ODR, at 2). For the following reasons, the Staff believes that this conclusion ignores pertinent facts and established precedent, and should be set aside.

A. The Staff Acted in Good Faith and Sought to Preserve the Commission's Ability to Protect the Public Health and Safety.

The determination as to whether sanctions should be imposed must turn upon a case-by-case analysis of the events which are asserted to give rise to the need for such action, taking into consideration "a 1 of the circumstances". See generally, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). The imposition of sanctions may result where a party acted in disregard of its legal obligations:

Fairness to all involved in the Commission's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations.

CLI-81-8, supra, 13 NRC at 454.

The Staff submits that in the instant proceeding, its conduct was lawful and reasonable in light of the Commission's long-standing policy favoring the protection of informants' identities, as set forth in the Monticello and South Texas decisions. In addition, in the absence of any demonstrated need for disclosure and in view of the potential detriment resulting therefrom, the Staff submits it was fully justified in declining to comply with the Licensing Board's orders until appellate review was obtained. Indeed, the propriety of the Staff's actions in this regard appears to have been recognized, at least in part, by the Licensing Board, in its recent decision upholding the Staff's action in not disclosing the identities of two of the ten individuals in question (ODR, at 14).

Further, the Staff indicated at the hearing that it intended promptly to seek appellate review of the Licensing Board's orders (Tr. 3072). In so doing, the Staff acted in accordance with the Appeal Board's guidance that rulings of this nature should be referred to it by the Licensing Boards for resolution:

[I]n light of the arguable ambiguity as between 10 C.F.R. Part 2 and 10 C.F.R. Part 9 and of the nature of the matters involved, a Licensing Board should, prior to compelling disclosure, refer the following types of rulings to us for our review:

- (1) A ruling that an item is not privileged when the Director of Regulation claims that it is privileged.
- (2) A ruling that the proponents of disclosure have demonstrated a need for items of information which are properly privileged.

Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 399 (1970). While the Staff cited this directive to

the Licensing Board (Staff's Response, at 8 n.10), the Licensing Board concluded that it is inapplicable here and does not require a referral of its rulings to the Appeal Board. The Licensing Board's conclusion, however, ignores the important policy considerations embodied in the Monticello decision which disfavor the disclosure of confidential information, which considerations apply regardless of the context in which a Licensing Board's disclosure order arises.

In essence, the Staff here declined to subordinate the important Commission goal of protecting confidential informants to the Licensing Board's goal of compelling full disclosure -- a course of conduct approved by the Appeal Board in South Texas, supra, 13 NRC at 478. The Staff's action in withholding its informants' names until appellate review could be obtained is consistent with the Commission's primary goal of protecting the public health and safety -- particularly where the need for disclosure is lacking and, in any event, any need for disclosure may be outweighed by the harm which could result therefrom. In these circumstances, the Staff believes that it has, indeed, demonstrated "good cause" for not complying with the disclosure orders and that the imposition of sanctions would be altogether inappropriate.

B. The Staff Pursued A Proper Course of Action Before the Licensing Board.

The Licensing Board contends that "[t]he Staff is not relieved of its duty to obey an order because the Staff believes the order invalid" (ODR, at 12). Further, the Licensing Board rejects the Staff's assertion that Staff counsel acted in accordance with the professional code of ethics in representing her client's position, on the grounds that "[t]his interesting theory of the professional duty of lawyers being limited to

avoiding unethical conduct is too coarse a standard for NRC proceedings" (id., at 13). Having so concluded, the Licensing Board asserts that sanctions against Staff counsel are appropriate (ODR, at 12-14). In these respects, the Staff believes the Licensing Board acted contrary to established legal precedent.

1. The Staff Followed Proper Procedures in Declining to Disclose Its Informants' Identities Prior to Seeking Appellate Review.

In the instant proceeding, the Staff was required either to disclose its informants' identities -- an action which would have irreversible consequences^{46/} -- or to stand in default of the Licensing Board's orders. In such circumstances, a party's only practical alternative is to refuse to comply with the disclosure order and to seek appellate review. See, e.g., South Texas, supra, ALAB-639, 13 NRC at 472-73. Here, the Staff elected to pursue this latter course of action, and promptly sought a stay of the Licensing Board's rulings in order to permit the Staff to file an appeal (Tr. 3072). The Licensing Board, however, arbitrarily denied the stay request as untimely (Tr. 3072-73),^{47/} and just three business days after the parties and Board had returned from the July hearing sessions -- and before the Staff had had an opportunity to file an appeal -- the Licensing Board issued its Order to Show Cause.

^{46/} See, e.g., Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 413 (1976); accord, In re United States, 565 F.2d 19, 24 (2d Cir. 1977), cert. denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978).

^{47/} 10 C.F.R. § 2.788 provides that stay applications may be filed within ten days after service of a decision or action. The Licensing Board's denial of the Staff's application for a stay as "untimely", which application was made just one day after the Licensing Board entered its order compelling disclosure, is clearly erroneous.

In timely filing a response to the Licensing Board's Order to Show Cause, the Staff provided substantial justification for its actions, as well as significant new information concerning its informants' desire for confidentiality; the Staff believed that its response demonstrated that the Licensing Board should reasonably reconsider and vacate its disclosure orders (Staff's Response, at 23-24) -- thereby obviating any need to file an appeal. Further, the Staff had clearly indicated that it intended promptly to seek appellate review, and the Licensing Board was cognizant of this fact (Tr. 3466-67, 3559-60); the Licensing Board's own action in issuing its Order to Show Cause before an appeal could be filed served to deter the Staff from filing that appeal as long as reconsideration by the Licensing Board appeared to be possible.^{48/} These events demonstrate that the Staff did not simply "flout" the Licensing Board's disclosure orders (ODR, at 12) but, rather, that the Staff pursued a reasonable and proper course of action in an effort to obtain relief from those orders.^{49/} Accordingly, notwithstanding the fact that the Staff failed to comply with the Licensing Board's orders, the imposition of sanctions would be inappropriate.

2. Staff Counsel's Actions Before the Licensing Board Were Proper.

At the heart of the Licensing Board's Order is its displeasure with the conduct of Staff counsel during the July hearing sessions. The

^{48/} In filing its response to the Order to Show Cause, the Staff again requested a stay of the Board's orders and of any future orders concerning confidentiality (Staff's Response, at 24), but this request was never ruled upon expressly by the Licensing Board.

^{49/} In this regard, the Staff notes that the Appeal Board "disapprove[s] of the practice of simultaneously seeking Licensing Board reconsideration of interlocutory rulings and appellate review of the same rulings." Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-630, 13 NRC 84, 85 (1981).

Licensing Board asserts that "Staff counsel have steadfastly refused to obey a lawful Board order" (ODR, at 9; emphasis added), consistent with the Chairman's accusation during the hearing that "the position taken is taken solely by the NRC legal staff in this proceeding" and his assertion that "this Board is . . . not dominated in any way by the legal staff. Not now. Not ever" (Tr. 3053). In addition, the Chairman now expresses displeasure with Staff counsel for not having already sought an appeal from his July rulings, and for filing a response to his Order to Show Cause -- as that order directed -- which the Chairman asserts "merely amounts to a continuing argument with the Board, but it does not constitute either compliance with our Orders or a seasonable appeal therefrom. If this were a court of law, such conduct would probably be deemed to be contumacious, and a likely contempt of court. . . ." (ODR, at 9-10; footnote omitted).^{50/}

The Licensing Board's threat to impose sanctions upon Staff counsel ignores the fact that counsel was defending an important evidentiary privilege, in accordance with the express instructions of her

^{50/} The Licensing Board's Order also criticizes Staff counsel for at one point having directed a Staff witness not to answer a question propounded by the Licensing Board Chairman (ODR, at 10, 15). An examination of the record discloses that during the evening session (see Tr. 2597) held on July 27, 1982, Staff counsel interrupted Mr. Driskill's response to a question propounded by the Chairman stating, "[e]xcuse me, Mr. Chairman. I would like to direct that Mr. Driskill not answer these questions" (Tr. 2635). The Chairman "overruled" Staff counsel's request (*id.*) and continued to conduct lengthy questioning of the witness (Tr. 2635-89) -- in which Staff counsel voiced objections on only three occasions (Tr. 2663, 2665, 2667) and never again directed the witness not to answer the Chairman. The next morning, the Chairman rebuked Staff counsel for having "stated that she wanted to direct Mr. Driskill not to answer certain questions" (Tr. 2735), at which point Staff counsel apologized to the Chairman (Tr. 2736).

client -- including the Executive Director of Operations, the Director of the Office of Inspection and Enforcement and the Regional Administrator of Region IV, as well as the Executive Legal Director (Tr. 3053-54). Staff counsel made these facts quite clear to the Licensing Board, and emphasized that "[t]he legal staff is representing its client. This position does not represent solely the position of the legal staff" (Tr. 3053).^{51/}

In essence, the Licensing Board has now focused on Staff counsel, who merely carried out her duty to represent her client's views and acted in accordance with her client's explicit instructions.^{52/} The imposition of sanctions in such circumstances would contravene the Appeal Board's recent recognition -- in reviewing a decision by this very Licensing Board Chairman -- that an attorney has the right and, indeed, duty to assert his or her client's privileges where such privileges are reasonably perceived to exist. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC _____, slip op. (Sept. 9, 1982). In that proceeding (involving the attorney work product privilege), the Appeal Board recognized that the Commission "generally follows the ABA

^{51/} Staff counsel noted that she had consulted with her "office in Bethesda and the highest levels of Staff management" (Tr. 3049); the Licensing Board Chairman replied, "Well I live in Bethesda too. I'm glad you went to the Mountain. Mohammed has spoken, but he has spoken to about half of it" (id.).

^{52/} Apparently, the Licensing Board has now discarded as inappropriate its earlier thoughts of imposing sanctions against the Staff as a party to the proceeding (OSC, at 2, 10), such as by striking Staff testimony (Tr. 2482, 2495, 3069). The Staff has pointed out that the sanction of striking Staff testimony would serve no useful purpose and would frustrate the Licensing Board's desire to develop a full and probative record upon which to base a decision in this proceeding. See Staff's Response, at 23 n.27. The Applicants have expressed similar views and have opposed the striking of the Staff's testimony (Tr. 2498).

Code [of Professional Responsibility] in judging lawyer conduct in NRC proceedings" (id., at 32). The Appeal Board then expressly applied the ABA Code's Canon 7 to NRC proceedings, and concluded that "the Licensing Board's condemnation of Consumers Power's counsel for asserting the work product privilege . . . was unjustified" (id., at 33). The Appeal Board continued as follows:

Canon 7 requires a lawyer to represent his or her client "zealously within the bounds of the law." These bounds are not always easy to ascertain. . . . They include, however, "urg[ing] any permissible construction of the law favorable to [a lawyer's] client, without regard to his [or her] professional opinion as to the likelihood that the construction will ultimately prevail. . . . A "permissible" argument is any nonfrivolous position supported by the law or by a good faith argument for extension, modification, or reversal of existing law.

Id.; emphasis in original.^{53/}

In the instant proceeding, Staff counsel's assertion of privilege on her client's behalf (and in accordance with her client's instructions) falls precisely within the bounds of proper conduct established by the American Bar Association and approved by the Appeal Board. As set forth in detail above, the Staff's assertion of privilege was reasonably founded

^{53/} The Licensing Board Chairman's rejection of the ABA Code as providing "too coarse a standard for NRC proceedings" (ODR, at 13), flies in the face of the Appeal Board's decision in Midland. Further, while the Chairman cites the decision in Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193 (9th Cir. 1979), that decision is inapposite. That decision involved a trial attorney's repeated refusal to submit, in the way of a pre-trial brief, a narrative outline of what her witnesses were expected to state in their testimony; no assertion of privilege was involved, and no construction of the law -- "permissible" or otherwise -- was even attempted to be advanced by the attorney there.

upon established Commission precedent and policy favoring the non-disclosure of confidential sources of information. The Staff's reliance upon Commission precedent, and Staff counsel's expression of the Staff's views on this subject, render the threatened imposition of sanctions upon Staff counsel altogether inappropriate.

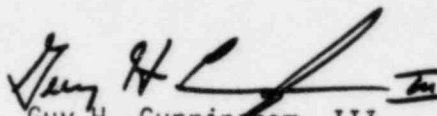
Finally, the Staff wishes to note that at all times, Staff counsel acted with respect for the Licensing Board members (see, e.g., Tr. 3050-51, 3053-54, 3056), and conducted herself with the "honor, dignity, and decorum" required for practice before the Commission. 10 C.F.R. § 2.713(a). As noted by the Appeal Board in Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1416 (1982), the Licensing Board is required "to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance." In this proceeding, no harm whatsoever has been caused by the Staff's having declined to disclose the names of its informers. Further, in view of the fact that Staff counsel acted in accordance with the professional code of ethics in representing her client's position before the Licensing Board and acted with due respect for the Licensing Board members, sanctions against Staff counsel are altogether inappropriate.

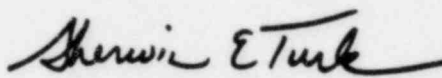
CONCLUSION

For all of the reasons set forth above, the Staff submits that the Licensing Board erred (a) in directing the Staff to disclose the identities of its informants and to produce unexpurgated signed witness statements

and (b) in determining that sanctions against the Staff and/or Staff counsel are appropriate. Accordingly, the Staff urges that the Licensing Board's orders compelling disclosure be vacated and that its Order Denying Reconsideration be reversed.

Respectfully submitted,


Guy H. Cunningham, III
Executive Legal Director


Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 17th day of November, 1982.

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)

}
Docket Nos. 50-445
50-446

CERTIFICATE OF SERVICE

I hereby certify that copies of (1) "NRC STAFF'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO ATOMIC SAFETY AND LICENSING BOARD'S ORDER DENYING RECONSIDERATION OF SEPTEMBER 30, 1982"; (2) "NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION"; and (3) "NOTICE OF APPEARANCE" for GUY H. CUNNINGHAM, III, 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 17th day of November, 1982.

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