UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION

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November 17, 1982

/ DESIGNATED ORIGINAL /

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INTRODUCTION

On August 4, 1982, the Atomic Safety and Licensing Board ("Licensing Board") issued an "Order to Show Cause" ("OSC") in which it directed the NRC Staff ("Staff") to show cause "why sanctions should not be imposed for its refusal to obey the Board's Orders" at the hearing sessions held during the week of July 26-30, 1982, to identify by name ten (10) individuals who were designated by letter in NRC Inspection Report 82-10/82-05 (Staff Exhibit 199), and to produce unexpurgated signed witness statements taken by the Staff during that investigation (OSC, at 2 and 10).

The Staff filed its response to the Order to Show Cause on August 24, 1982, as directed by the Licensing Board,[1/] and included therein a motion for reconsideration based, in part, upon significant

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

new information which was gathered by the Staff after returning from the July hearing sessions.[2/]

On September 30, 1982, the Licensing Board issued its "Order Denying Reconsideration" ("Order" or "ODR") in which it ruled that "the Staff has not shown good cause and sanctions will be imposed unless the orders are obeyed forthwith." (ODR, at 2). The Licensing Board again directed the Staff to make the disclosures which the Licensing Board had previously ordered,[3/] and indicated 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., at 14; emphasis added). On October 8, 1982, the Staff timely filed its exceptions to the Licensing Board's Order;[4/] the

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

3/ Exempted from the Licensing Board's order of September 30, 1982, were the identities of "two individuals who asked for confidentiality" (ODR, at 14). The Licensing Board's ruling in this regard was premised solely upon the new information set out in the Staff's Response, filed on August 24, 1982.

4/ "NRC Staff's Exceptions to the Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982," filed on October 8, 1982.

Staff's brief in support of its exceptions is being filed simultaneously herewith.[5/]

As set forth in detail in the Staff's Appeal Brief, the Licensing Board's Order is premised upon an erroneous interpretation of Commission decisional law governing the disclosure of confidential information. In addition, the Licensing Board ordered disclosure without a proper finding of need or a proper balancing of the benefit of disclosure against the harm which might result therefrom, contrary to the guidance provided by the Appeal Board and Commission. Further, the Licensing Board's Order threatens to have an irreparable and immediate serious adverse impact upon the Commission's ability to obtain confidential information in future investigations of matters affecting the public health and safety, upon the public's perception of the Commission and its Staff, and upon the standing and reputation of Staff counsel. Accordingly, in the event that the Appeal Board determines that an appeal as of right from the Licensing Board's Order is premature at this time, the Staff requests

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5/ "NRC Staff's Brief in Support of Its Exceptions to the Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982" ("Appeal Brief"), filed on November 17, 1982.

The Staff's Exceptions and Appeal Brief are filed pursuant to the "collateral order" doctrine enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). Under that doctrine, orders are immediately reviewable on appeal where they "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); accord, Abney v. United States, 431 U.S. 651, 658 (1977). The Staff recognizes, as stated by the Appeal Board, that "whether a disclosure order of the kind in question" qualifies under the collateral order doctrine "is an issue about which the federal courts are themselves divided." Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 472 (1981) (footnote omitted).

that the Appeal Board take directed certification and vacate the Licensing Board's rulings compelling disclosure and its Order Denying Reconsideration, consistent with the Appeal Board's taking of directed certification in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 472-73 (1981).

BACKGROUND

A discussion of the events leading to the issuance of the Licensing Board's Order is set forth in the Staff's Appeal Brief, filed simultaneously herewith (Appeal Brief, at 1-10), and is incorporated by reference herein.

DISCUSSION

Pursuant to 10 C.F.R. § 2.718(i), questions may be certified to the Commission in the discretion of the presiding officer or upon the direction of the Commission; the Commission's authority to direct certification has been delegated to the Appeal Board pursuant to 10 C.F.R. § 2.785(b)(1). Directed certification has been held to be appropriate "where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in pervasive or unusual manner." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnote omitted). Accord, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1),

ALAB-663, 14 NRC 1140, 1162 (1981).[6/] Similarly, the Appeal Board has held that directed certification is appropriate where the ruling "must be reviewed now or not at all." Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408, 413 (1976) (review of an order denying protective order and compelling disclosure of proprietary information).

In the instant proceeding, the Staff has determined -- in consultations involving the Executive Director for Operations, the Director of the Office of Inspection and Enforcement, the Regional Administrator of NRC Region IV, and the Executive Legal Director -- that the disclosure of its informants' identities in compliance with the Licensing Board's orders could cause substantial harm to the Commission's ability to obtain information in future investigations of safety-related matters, thereby injuring irreparably the Commission's ability to protect the public health and safety.[7/] This serious adverse impact upon the Commission's primary goal of protecting the health and safety of the public falls precisely within the standards applicable to directed certification, and

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6/ The Appeal Board has further instructed that directed certification is reserved for cases involving "exceptional circumstances", Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977); and directed certification is granted "most sparingly." Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697, 698 (1978).

7/ In addition, compliance with the Licensing Board's Order would eliminate forever any ability to preserve the anonymity of the two individuals who have expressly requested that their identities be withheld from disclosure. See Appeal Brief, at 15-16, 33-37. As the Court of Appeals for the Second Circuit has observed, "the identification of informants, once made, will be irreversible on appeal from the final judgment." 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).

demands appellate review at this time.[8/]

The Appeal Board, itself, has recognized that orders compelling the Staff to disclose its informants' identities could have serious and irreparable adverse impacts, and the Appeal Board has taken directed certification in a similar case in reviewing an order which had compelled the Staff to disclose its informants' identities subject to a protective order:

> 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.

Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 477 (1981). As stated by the Appeal Board in South Texas, "the disclosure order is of sufficient general importance in the scheme of Commission operations to merit review on certification under our decisions, particularly because it must be examined now or not at all." Id., at 473, citing Wolf Creek, supra, 3 NRC at 413, and Toledo Edison Co. (Davis-Besse Station), ALAB-300, 2 NRC 752, 759 (1975).

Further, the Licensing Board's Order describes in the most disparaging terms the Staff's refusal to comply with its rulings, notwithstanding the fact that the Staff acted in accordance with Appeal Board and Commission precedent in withholding its informants' identities. For instance, the Licensing Board describes the Staff's conduct as "intransigen[t]" (Order, at 3), "contumacious" (id., at 10), and "disingenuous" (id., at 11); and it accuses the Staff of "desir[ing]

8/ See Appeal Brief, at 7-8.

to conceal the underlying bases of its investigator's conclusions" (id., at 5), of "play[ing] a numbers game" (id., at 11), and of "flout[ing]" the Licensing Board's orders (id., at 12).[9/] Such descriptions of the Commission's legal Staff were unwarranted and, unless vacated, may cause damage to the public's respect for and perception of the integrity of the Staff and, indeed, of the Commission itself.[10/] Accordingly, the Licensing Board's Order should be vacated by the Appeal Board.

Finally, the Licensing Board's threat to impose sanctions upon Staff counsel, for merely having represented her client's views before the Licensing Board in accordance with her client's explicit instructions and in accordance with her duty to assert privileges which are reasonably perceived to exist,[11/] may cause irreparable injury to the reputation and standing of Staff counsel. One example of such injury is that an attorney who applies for membership in the Bar of another jurisdiction may be asked to state in his or her application whether he or she has ever been subjected to "sanctions" by a court or quasi-judicial

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9/ The Licensing Board Chairman's characterizations of the Staff's conduct and its treatment of Staff counsel at the public hearing were similarly demeaning. For instance, the Chairman accused the Staff of "playing games" with the public (Tr. 2734, 3061, 3062), and of being "arrogant" (Tr. 3052), "uncooperative" (Tr. 3071) and not "candid" (id.); further he apologized to the Intervenor and the public for "this conduct by the Staff" (Tr. 3054), and warned the other parties that he would not allow "this infection [to] spread" (Tr. 3056).

10/ The Commission has observed that the Staff is "an arm of the Commission and is the primary instrumentality through which we carry out our statutory responsibilities." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 462 (1976). Any remarks which are disparaging to the Commission's Staff necessarily will have an adverse, albeit unintended, impact upon the way the public views the Commission.

11/ See Appeal Brief, at 40-45.

panel;[12/] if the Licensing Board is permitted to carry out its threat to impose sanctions upon Staff counsel, even if such action were later vacated upon an appeal from a decision on the merits, an irreversible impact nonetheless may result.[13/]

CONCLUSION

For all of the reasons set forth above, in the event the Appeal Board determines that an appeal as of right is premature at this time, the Staff urges that the Appeal Board take directed certification and vacate the Licensing Board's rulings compelling disclosure and reverse the Order Denying Reconsideration.

Respectfully submitted,

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Executive Legal Director

Sherwin E. Turk
Counsel for NRC Staff

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

12/ For instance, an attorney seeking admission on motion to the Bar of the District of Columbia Court of Appeals is required to state whether he or she has "ever been disbarred, suspended, reprimanded, censured or otherwise disciplined or disqualified as an attorney," pursuant to the application required by Rule 46(i)(c) of the Rules of the District of Columbia Court of Appeals. Cf. Rules of the U.S. District Court for the District of Columbia, Rule 4-1, "Admission to the Bar".

13/ The Appeal Board has previously taken directed certification to review an order involving the potential disqualification of an attorney from participation in an NRC proceeding. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-332, 3 NRC 785, 791 (1976). Orders which disqualify attorneys have been reviewed by the courts under the "collateral order" doctrine. See, e.g., United States v. Flanagan, 679 F.2d 1072, 1073 (3d Cir. 1982).