

3/18/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF MOTION FOR AN ORDER IN LIMINE
AND, IF NECESSARY, FOR PARTIAL
IN CAMERA EVIDENTIARY HEARING SESSION

I. INTRODUCTION

On March 4, 1983, the Atomic Safety and Licensing Board ("the Board") issued a "Notice of Resumed Evidentiary Hearing" ("Notice"). This notice provides that the evidentiary hearing session in this proceeding will resume Monday, April 4, 1983 in Fort Worth, Texas and will continue through April 8, 1983. The resumed hearing "will address matters in controversy that have not been completed, including both issues and evidentiary or testimonial proof previously described in our Memorandum and Order dated January 4, 1983." (Notice, at 1).^{1/} The Board intends to call as Board Witnesses at the resumed hearing fourteen named

^{1/} In that Memorandum and Order, the Board described the "remaining issues" as "including the underlying facts and evidence regarding the Atchison matter contained in CASE Exhibit 738, the Walsh/Doyle allegations, SSER No. 3, and unresolved Board Notification matters having a significant relationship to the issues in controversy." Memorandum and Order, at 8.

DESIGNATED ORIGINAL
Certified By *A. Shotts*
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individuals.^{2/} The Board stated that it has previously set forth in prior Orders its reasons for taking evidence from these Board Witnesses and its informational needs in order to resolve important factual and credibility issues. Notice, at 2. Essentially, the Board stated in those previous orders that it must reach conclusions on the serious charge that the Applicants discharged a quality control inspector because he was properly reporting nonconformances at the site and that the underlying exhibits, testimony and other evidence are relevant and necessary for a complete and adequate record on QC issues. Order to Show Cause, August 4, 1982 at 6, Memorandum and Order, January 4, 1983, at 4.

The Staff fully supports the Board's determination to develop a complete and adequate record on all issues in this proceeding. However, as more fully explained below, the posture of this proceeding requires the preservation of the integrity of the Board's September 30, 1982, Order protecting the identity of the two individuals who seek to remain

^{2/} The Board directed the Staff "to prepare and serve subpoenas for the appearance as Board Witnesses" of ten named individuals. Notice, at 1-2. In a subsequent telephonic communication from the Board's legal assistant, Staff counsel was advised that the Board requires the appearance as Board Witnesses of an additional four named individuals. During a telephone call held on March 8, 1983, between the Board and parties, Applicants' counsel suggested that since all of the named individuals were employees of the Applicants or their vendors, Applicants attempt to secure the voluntary attendance of the named individuals rather than require those persons to appear under subpoena. By letter dated March 17, 1983, from Staff and Applicants' counsels to the Board, Applicants' counsel represented that each of the fourteen prospective Board Witnesses has been contacted and has stated that he/she will voluntarily appear on April 4, 1983. The Staff understands the Board's position to be that provided the voluntary appearance at the hearing of the named individuals can be assured by commitment of counsel, subpoenas will not need to be prepared and served.

confidential and protection against any possible disclosures at the resumed evidentiary hearing which may be inconsistent with the Commission's stay order. CLI-86-6 (March 4, 1983). Accordingly, the Staff seeks an Order in limine to provide for the exclusion only of 1) any questioning of prospective Board Witnesses seeking to determine whether they are the persons designated by letter and job title in Staff Exhibit 199 or otherwise seeking to determine if the witness has requested the NRC to protect his or her confidentiality and 2) the production by the witness of their unexpurgated statements provided to the NRC. In the event that the Board determines that disclosure of the information within the scope of the Board's September 30, 1982 order or the Commission's stay order is necessary for a full and complete record in this proceeding, the Staff moves that the Board hold in camera those portions of any evidentiary hearing sessions which could result in public disclosures which may be inconsistent with the either of these orders.^{3/}

II. BACKGROUND

At an earlier stage of this proceeding, the Staff offered into evidence the written testimony of Robert G. Taylor (an NRC Senior Resident Inspector at the CPSES site and Donald D. Driskill (an Investigator working at the NRC's Region IV Office) concerning the allegations which had been made by Mr. Atchison to the NRC regarding alleged deficiencies in the quality assurance/quality control practices at the CPSES site.^{4/}

^{3/} In accordance with the Board's previous orders, the Staff has advised the other parties regarding the filing of this motion.

^{4/} "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).

In addition to the written testimony of Messrs. Taylor and Driskill, the Staff submitted, inter alia, an NRC Investigation Report which related to Mr. Atchison's allegations - Investigation Report 82-10/82-05 (admitted into evidence as Staff Exhibit 199).^{5/} In this report, the Staff reported the findings of its investigation 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.

During the hearing sessions at which Staff Exhibit 199 was introduced, the Board ordered the Staff to disclose the identities of all the individuals designated by letter in Staff Exhibit 199. (Tr. 2735). 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 investigator's notes from which names and other identifying information had been deleted. (Tr. 2965, 3041, 3159; see Tr. 2750, 3042). Subsequently, on August 4, 1982, the Board 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 witness statements taken by the Staff during that investigation. OSC, at 2 and 10. On August 24, 1982, the Staff filed a response to the Board's August 4 order in which it included a

^{5/} See Tr. 2461.

motion for reconsideration.^{6/} Attached to the response were affidavits of Staff investigators stating that they had contacted the individuals in the Staff's investigative reports and that two of the individuals referred to in Staff Exhibit 199 had explicitly requested that their identity not be disclosed. The Board subsequently issued its "Order Denying Reconsideration ("ODR") dated September 30, 1982, in which it denied the Staff's motion for reconsideration but limited the scope of the disclosure order so as not to encompass the two individuals who had asked for confidentiality. ODR at 14. The Staff subsequently appealed the Licensing Board's September 30, 1982 Order, and in the alternative filed a petition for directed certification under 10 C.F.R. § 2.718(i).^{7/} On February 24, 1983, the Appeal Board, in ALAB-714, sustained this Board's directive to disclose the identities of eight informants interviewed during the course of the investigation and identified only by letters and job titles in the Staff's investigation report and to produce the signed witness statements of those individuals. The Appeal Board later denied, in ALAB-716, the Staff's motion for a stay of the effectiveness of ALAB-714.

^{6/} "NRC Staff's Response to Order to Show Cause and Motion for Reconsideration," filed on August 24, 1982.

^{7/} The Staff's appeal was lodged by the filing on October 8, 1982 of the "NRC Staff's Exceptions to the Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982," and the filing on November 17, 1982, of the "NRC Staff's Brief in Support of its Exceptions to Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982."

On March 4, 1983, the Commission granted the Staff's request for a stay of the effectiveness of ALAB-714,^{8/} pending the filing and disposition of its petition for review.^{9/} On March 4, 1983, the Board issued a notice providing for the resumption of evidentiary hearings during the week of April 4-8, 1983. The Board stated therein its intention to take evidence from named individuals which it has designated as prospective Board Witnesses. The Board summarized the purpose of taking this testimony as follows: "the circumstances surrounding the investigation and testimony of an NRC investigation that allegations of the wrongful discharge of a QC inspector were not substantiated (Staff Exhibits 197-199) should 'be fully aired and resolved'...." Notice, at 3.

III. DISCUSSION

A. The Board Should Issue an Order in Limine To Avoid Any Possible Disclosures Which Would Be Inconsistent With The Board's September 30, 1982 Order And The Commission's Stay Order

The Staff fully supports the development of a complete record on all issues in this proceeding, including the allegation that a quality control inspector was wrongfully discharged. The Staff does not question here the Board's determination to take evidence from the fourteen named individuals designated as Board Witnesses in order to resolve important factual and credibility issues. Questioning of the fourteen individuals designated as Board witnesses to ascertain the facts surrounding Mr. Atchison's

^{8/} See "NRC Staff's Application For A Stay of The Effectiveness of ALAB-714 (February 24, 1982)", March 1, 1983.

^{9/} See "Order" (CLI-83-6), March 4, 1983. On March 11, 1983, the Staff filed "NRC Staff's Petition for Commission Review of ALAB-714 (February 24, 1983)."

discharge is clearly consistent with the development of a complete record. However, the Staff remains concerned that unrestricted questioning of these Board Witnesses by the parties, whether through inadvertence or otherwise, could lead to the identification of the individuals who seek confidentiality, a result clearly inconsistent with the Licensing Board's September 30, 1982 Order or the Commission's stay order.

In the Board's September 30, 1982 Order, it ruled that:

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

While the Staff acknowledges the need to develop a complete record, it submits that the need to preserve the integrity of the Board's September 30, 1982 Order is also important. As quoted above, that order exempted the two individuals who requested confidentiality from the Board's previous orders requiring the Staff to identify the individuals designated by letter in Staff Exhibit 199. Unrestricted questions could result in inadvertent disclosure of the identity of these two individuals.

Moreover, in its stay order, the Commission stated that the status quo should be preserved "pending filing and resolution of their [the Staff's] appeal...." Order, at 3. As the Commission noted:

...the Appeal Board decision now before the Commission under 10 C.F.R. 2.786(a) left intact the Licensing Board's September 30, 1982 order requiring the staff to identify certain individuals and to produce the signed statements of those individuals. Yet, it is these very disclosures that are, in part, the basis for any possible review by the Commission. Thus, absent a stay pending appeal, the status quo will be irreparably altered: once official NRC disclosure is made it cannot be withdrawn from the public record. This being so, a

stay is justified to preserve the Commission's ability to consider, if appropriate, the merits of this case" [citations omitted]. Order, at 1-2.

Accordingly, the Staff moves that the Board to issue an Order in limine to avoid any possible disclosures at the resumed hearing which may be inconsistent with the Board's September 30, 1982, Order or with the Commission's stay order. Such an order would place very minor restrictions on the questioning of the Board Witnesses and would only exclude 1) any questioning of prospective Board Witnesses seeking to determine whether they are the persons designated by letter and job title in Staff Exhibit 199 or otherwise seeking to determine if the witness has requested the NRC to protect his or her confidentiality and 2) the production by the witnesses of their unexpurgated statements provided to the NRC.

Federal courts and many state courts have held that a trial judge may, at least in certain circumstances, grant a preliminary motion to secure the exclusion from trial of anticipated prejudicial matter. United States v. Costa, 425 F.2d 950 (2d Cir. 1969), cert. denied, 398 US 938 (1970); United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), cert. denied, 394 US 947 (1969); United States v. Fishel, 324 F.Supp. 429 (S.D.N.Y. 1971); Parmelee Transportation Co. v. Keeshin, 3 F.R. Serv. 2d 16.261, Case 1 (N.D.Ill. 1960).^{10/} The use of a motion in limine is authorized for federal courts,^{11/} although its allowance by the trial

^{10/} The law of Texas similarly recognizes the propriety of such motions. Bell Aerospace Corp. v. Anderson, 478 SW2d 191 (Tex. Civ. App. 1972); Gulf States Abrasive Mfg., Inc. v. Oertel, 489 SW2d 184 (Tex. Civ. App. 1972).

^{11/} The Atomic Safety and Licensing Appeal Board ("Appeal Board") has stated that it is "guided by the rules and practices of the Federal Courts," although it does not follow the Federal Rules completely. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568 n.13 (1977); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411-412 (1976).

court is purely discretionary, and is generally confined to very specific evidentiary issues of an extremely prejudicial nature. U.S. v. Certain Land Situated In City of Detroit, Wayne County, State of Michigan, 547 F.Supp. 680 (E.D. Mich. 1982), citing Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975), cert. denied, 423 US 987 (1975).^{12/} Such a motion is entirely proper here. The Staff seeks to restrict very narrowly the scope of examination of the Board Witnesses so as to only exclude specific evidence, not broad categories of evidence. The two restrictions described above are sought to preserve the integrity of the Board's September 30, 1982 order and to preserve the status quo consistent with the Commission's stay order. For these reasons, the Board should issue an Order in limine as specified above.

B. The Board Should Hold In Camera Any Evidentiary Hearing Session Which Could Result In Disclosures Inconsistent With the Board's September 30, 1982 Order or the Commission Stay Order

The Staff acknowledges the possibility that during the evidentiary hearing, the Board may determine that some probing of the two areas of inquiry restricted by an Order in limine is necessary for the development of a full and complete record. In such circumstances, the Staff moves that the Board hold in camera those portions of any evidentiary sessions likely to result in disclosures inconsistent with the Board's September 30, 1982, order or with the Commission's stay order. The Commission's regulations in 10 C.F.R. § 2.790(b)(6) explicitly authorize holding in camera sessions of hearings, and in camera sessions have been held in a number

^{12/} A motion to exclude broad categories of evidence should be rarely employed. Sperberg, supra, 519 F2d at 712. See also, U.S. v. Denton, 547 F.Supp. 16 (E.D. Tenn. 1982).

of proceedings. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227, 231 (1980); Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), ALAB-228, 8 AEC 420, 423 (1974); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34B, 15 NRC 918, 927 (1982); Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 2), Docket Nos. 50-266-01A/50-301-01A, Tr. 496-497 (October 29, 1981). In the circumstances discussed above, an in camera evidentiary hearing session would be appropriate and in accordance with the Commission's Rules of Practice.

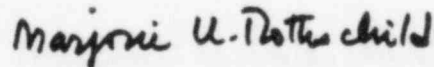
III. CONCLUSION

For the reasons set forth above, the Board should issue an Order in limine as described herein. Further, in the event it is necessary for development of a full and complete record to probe those areas restricted by the Order, the Board should hold in camera those portions of the evidentiary hearing sessions.

Respectfully submitted,



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Dated at Bethesda, Maryland
this 18th day of March, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING 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 "NRC STAFF MOTION FOR AN ORDER IN LIMINE AND, IF NECESSARY, FOR PARTIAL IN CAMERA EVIDENTIARY HEARING SESSION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, through deposit in the Nuclear Regulatory Commission's internal mail system (*), by hand delivery (**), or by Federal Express Mail(***), this 18th day of March, 1983.

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COMANCHE PEAK BOARD NOTIFICATIONS
PROVIDED TO THE BOARD BY THE STAFF

BOARD NOTIFICATIONS

BN 81-06 (May 8, 1982)	Board Notification - Thermal Shock to PWR Reactor Pressure Vessel
BN 82-04 (Jan. 20, 1982)	Information Item - Recent Information with Regard to Pressurized Thermal Shock
BN 82-59 (June 22, 1982)	Board Notification - Steam Generator Tube Rupture
BN 82-75 (August 9, 1982)	Board Notification - Accident Sequence Precursor Program Report
BN 82-81 (August 16, 1982)	Board Notification - Control Rod Drive Guide Tube Support Pin Failures at Westinghouse Plants
BN 82-90 (Sept. 8, 1982)	Board Notification - Welds in Main Control Panels
BN 82-90A (Oct. 22, 1982)	Board Notification Regarding Welds in Main Control Panels
BN 82-93 (Sept. 24, 1982)	Board Notification - Semiscale Test Results
BN 82-105 (Nov. 24, 1982)	Board Notification - Alleged Design Deficiency
BN 82-107 (Nov. 10, 1982)	Board Notification - Semiscale Test Results
BN 82-116 (Nov. 4, 1982)	Board Notification - Welds in Main Control Panels at Comanche Peak
BN 82-122A (Dec. 30, 1982)	Board Notification - USGS Position on the Charleston Earthquake
BN 82-123 (Jan. 17, 1983)	Board Notification - USGS Open File Report on "Probabilistic Estimates of Maximum Acceleration and Velocity in Rock in the U.S."
BN 82-124 (Dec. 14, 1982)	Board Notification - Semiscale S-UT-8 Test Results
BN 82-125, 125A (Dec. 14, 1983)	Board Notification - ACRS Evaluation of PWR Flow Blockage

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BN 83-02 (Jan. 7, 1983)	Information Item - Apparent Deficiencies in Midland-Ross "Superstrut" Material Used for Class 1E Cable Tray and Conduit Support
BN 83-11 (Feb. 3, 1983)	Board Notification - Preheater Type Steam Generator at Comanche Peak Electric Station, Units 1 and 2
BN 83-13 (Feb. 17, 1983)	Board Notification - EG&G Draft Report on Identification and Ranking of Nuclear Plant Structures, Systems, and Components, and Graded Quality Assurance Guidelines
BN 83-14 (Feb. 18, 1983)	Follow-Up Information on Apparent Deficiencies in Midland-Ross "Superstrut" Material
BN 83-17 (Feb. 18, 1983)	Board Notification - Allegations Relative to Unresolved Safety Issue A-17
BN 83-26 (March 3, 1983)	Board Notification - Failure of Reactor Trip Breakers to Open in Trip Signal
BN 83-27 (March 4, 1983)	Board Notification - Additional Relap-5 Calculation for Semiscale S-SR-2 Test
BN 83-29 (March 2, 1983)	Information from Construction Appraisal Team (CAT) Inspection of Comanche Peak, Units 1 and 2