UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

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

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

Sherwin E. Turk (with whom Guy H. Cunningham, III, was on the brief) for the Nuclear Regulatory Commission staff.

Nicholas S. Reynolds and William A. Horin, Washington, D.C., filed a brief for the applicants, Texas Utilities Generating Company, et al.

Juanita Ellis, Dallas, Texas, filed a brief for the intervenor, Citizens Association for Sound Energy.

DECISION

February 24, 1983

(ALAB-714)

Opinion of the Board by Messrs. Rosenthal and Moore:

Before us is the challenge of the NRC staff to the Licensing Board's unpublished September 30, 1982 order in this operating license proceeding involving the Comanche Peak nuclear facility. That order was entered on the

D502

staff's motion for reconsideration of a prior Board directive mandating the disclosure of the identities of ten individuals referred to in an investigative report that the staff had introduced into evidence. Although denying reconsideration, in the September 30 order the Board amended the directive to require identification of only eight of those individuals.

Given the uncertainty respecting the appealability of the order, the staff filed both exceptions to it under 10 CFR 2.762(a) and, in the alternative, a petition for directed certification under 10 CFR 2.718(i).[1/] In scheduling the matter for oral argument, we determined that there was no need to resolve the appealability question. As we then saw it, the issues raised by the staff's challenge to the order below warranted our consideration, whether on the exceptions or in response to the directed certification petition. See our Order of December 30, 1982 (unpublished).

For the reasons set forth below, we have now concluded that it is neither necessary nor desirable to reach those issues here. More specifically, in the particular and unusual circumstances of this case, the Licensing Board's order is appropriately left standing irrespective of the

---

1/ See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

correctness of the bases for it assigned by the Board. Stated otherwise, the validity of the Board's approach to the disclosure question is best left for another day and another proceeding in which, unlike here, the question is presented in the framework of a true controversy.

I.

On June 16, 1980, the Licensing Board admitted a contention advanced by the intervenor Citizens Association for Sound Energy (CASE) relating to the quality assurance and quality control (QA/QC) program for the construction of the Comanche Peak facility. That contention generally asserted that deficiencies in the program raise substantial questions as to the adequacy of the construction of the facility and that, as a result, an operating license for the

plant should not issue.[2/]

Prior to the inception of the evidentiary hearing session on Contention 5 in July 1982, CASE submitted the written testimony of Charles A. Atchison, a former Brown & Root employee[3/] who had served as a quality assurance

---

2/ Denominated as Contention 5, it reads in full:

> Contention 5. The Applicants' 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 CFR 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 CFR § 50.57(a) necessary for issuance of an operating license for Comanche Peak.

3/ Brown & Root is the construction contractor for the Comanche Peak facility.

inspector at the Comanche Peak site. In that testimony, Mr. Atchison recounted his observations of improper QA/QC practices at the site. Additionally, he asserted that he was discharged by his employer when he brought these practices to its attention.[4/]

Having learned in advance of the substance of Mr. Atchison's proposed testimony, the staff presented the testimony of Robert G. Taylor (the NRC Senior Resident Inspector at the plant site) and Donald D. Driskill (an NRC investigator).[5/] In addition, the staff introduced into evidence two investigative reports that also related to Mr. Atchison's allegations. Of current concern is one of those reports: No. 82-10/82-05, admitted as Staff Exhibit 199.

In that report, Mr. Atchison was identified by the letter A, and ten other applicant or contractor employees who had been interviewed concerning his allegations were identified by letters (B through K) and job titles. In the wake of questions on CASE cross-examination of Mr. Driskill that sought to determine whether Mr. Atchison's

---

4/ Testimony of Charles A. Atchison, CASE Exhs. 650, 650A through X; Supplementary Testimony of Charles A. Atchison, CASE Exh. 656. Mr. Atchison's oral testimony commenced at Tr. 3199.

5/ Staff Exh. 197.

claims had been substantiated by the persons interviewed, the Licensing Board asked the witness to identify, inter alia, the interviewees designated by letter in Staff Exhibit 199. Tr. 2478-79, 2484. On behalf of the witness, staff counsel responded that the names of the interviewees would not be disclosed. The reasons assigned were the "informer's privilege" and "the policy of the NRC staff in conducting investigations . . . not to name all of the individuals who are interviewed as part of that investigation." Tr. 2484, 2495-96.

The Board Chairman then asked staff counsel why she did not withdraw Messrs. Driskill and Taylor as witnesses. At this point, counsel for applicants advised the Board that he was prepared to present a witness who could identify the interviewees with a high degree of confidence. Tr. 2498.[6/] The Board thereupon excused the staff witnesses in favor of the applicants' tendered witness, Ronald G. Tolson.

Mr. Tolson testified that he was one of the ten interviewees, designated in Staff Exhibit 199 (at 6) as

---

6/ Applicants' counsel stated that his clients felt "very strongly" that the testimony of the staff's panel was important to demonstrate to the Board that the quality assurance program at Comanche Peak functioned properly. Tr. 2498. He also suggested that the Board resolve the disclosure matter in camera. The Board rejected that suggestion. Tr. 2498-99.

"Individual H (the site QA manager)." Tr. 2512. He further assigned a name to each of the other individuals who had been identified only by letter in the exhibit. Tr. 2510-13. In response to a question by a Licensing Board member, he stated that he was "certain" that he had correctly identified each individual. Tr. 2511.

In light of this evidence, the Board inquired as to whether the staff wished to recall its two witnesses. After consulting them, staff counsel advised the Board that the witnesses were willing to resume their testimony but that they would neither "confirm or deny" Mr. Tolson's identifications nor "answer any questions posed to them which name such individuals." Tr. 2515.

The next day, July 28, the Board Chairman expressly ordered the staff to disclose independently the identities of the ten interviewees and to produce the signed statements they had given to the NRC investigator (summarized in Staff Exhibit 199). Tr. 2729-35. Asserting the need "further [to] consult with the [s]taff on this," staff counsel did not respond immediately to this directive. Tr. 2735. But the following day, July 29, she reported to the Board that she had contacted the "highest levels of [s]taff management" (Tr. 3049) and that the staff would not turn over to the Board any of the interviewees' names and would release their statements only with the names deleted. Tr. 3041-42, 3051, 3056. The Board indicated that this was unacceptable and

again called for disclosure. Tr. 3056. Counsel thereupon asked the Board to stay its order so that the staff might seek appellate review. The Board denied the request as untimely, adding that the Board had assumed the staff was taking appropriate steps to obtain review and that, had it been requested the previous day, the Board would have granted a stay. Tr. 3072-73.

Six days later, on August 4, the Board issued a written show cause order in which it directed the staff to show cause within twenty days "why sanctions should not be imposed for its refusal to obey the Board's orders" to disclose the names of the ten letter-designated individuals in the investigative report admitted as Staff Exhibit 199.[7/] In this connection, the Board elaborated upon its oral justification for having required disclosure. The informer's privilege, the Board stated, applies only where an individual has "expressly asked [for] or been promised anonymity in coming forward with information." Show Cause Order at 7. Only Mr. Atchison could be classified as an informer; the other individuals were, in the Board's view, merely "noninformants who [had not] requested secrecy and for the most part expressly waived any anonymity." Ibid.

7/ Additionally, the Board gave the other parties the opportunity to address what sanctions, if any, might be imposed against the staff for failure to comply with the disclosure order.

Further, as "officials and employees of the [a]pplicants," these individuals probably had a duty to respond fully to the NRC investigator, "without any claim to immunity." Id. at 8. Even were these individuals arguably protected by the informer's privilege, the Board reasoned, that privilege would give way here to the Board's need to evaluate the credibility of the individuals and that of the NRC investigator so as to reach conclusions on Mr. Atchison's allegations. The Board also alluded to the "strong public policy" in favor of full disclosure. Id. at 9.

On August 24, the staff filed a response to the Board's August 4 order in which it included a motion for reconsideration. Attached to the response were affidavits of staff investigators stating that they had contacted the individuals in the staff's investigative reports. Of the ten individuals (apart from Mr. Atchison) referred to in Staff Exhibit 199, two had explicitly requested that their identity not be disclosed.[8/] Although the other eight apparently had indicated that they did not object to having their names revealed, the staff argued that to reveal them "might indeed compromise the confidentiality of the persons who seek to remain anonymous," and could harm the

---

8/ Affidavit of Donald D. Driskill and Richard K. Herr (Aug. 24, 1982) at 2.

Commission's investigative ability. Staff Response (Aug. 24, 1982) at 20-21.

As previously noted, in its September 30 order the Board denied the motion for reconsideration but limited the scope of the disclosure order so as to encompass only the eight individuals who had indicated they did not object to their identity being made known. The order concluded with the statement (at 14):

> If the [s]taff fails either to obey this order promptly or to seek appellate review, the Licensing Board will use its authority pursuant to 10 CFR § 2.713(c) to impose sanctions upon [s]taff counsel.

This appeal and alternative petition for directed certification ensued.

CASE supports the Licensing Board's action on the facts of this case. Applicants do not take a position on the merits of the disclosure order, but urge us to find that no party to this proceeding has been prejudiced by the staff's failure to comply with that order.

II.

A. Simply stated, the informer's privilege is

> 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.

Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 473 (1981), quoting Roviaro v. United States, 353 U.S. 53, 59 (1957). Its applicability in NRC adjudicatory proceedings is well-established;[9] indeed it is expressly embodied in Commission regulations.[10] And the function the privilege serves in the fulfillment of this agency's health and safety responsibilities is an extremely important one. There is a manifest need to encourage those with knowledge of possible safety-related deficiencies in facility construction or operation to put their information before the Commission. Particularly in the instance of employees of the utility or its contractors, there may well be a decided reluctance to take such action in the absence of an assurance that their anonymity will be preserved -- a reluctance founded in the

---

9/ South Texas, supra, 13 NRC at 473; Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, and ALAB-16, 4 AEC 435, aff'd, 4 AEC 440 (1970).

10/ 10 CFR 2.744(d), 2.790(a)(7); 21.2.

fear of reprisal of some kind.[11/]

Our initial resolve to pass upon the merits of the disagreement between the staff and the Board below respecting the applicability of the informer's privilege here was prompted largely by these considerations. In addition, we were influenced by the obvious fact that, failing our intercession at this juncture, the controversy might be mooted without the staff having had an opportunity to obtain appellate review: once the names are revealed, they cannot be "taken back." See South Texas, supra, 13 NRC at 472-73.

At the same time, however, we recognized that the ultimate determination of the dispute would necessitate coming to grips with a number of subsidiary and possibly

---

11/ As stated in Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 134 (1979), it is mere "common sense" that "a retaliatory discharge of an employee for 'whistleblowing' is likely to discourage others from coming forward with information about apparent safety discrepancies." This is so notwithstanding the statutory protection against discriminatory retaliation that is provided to employees who, without obligation to do so, supply information about possible safety-related irregularities. See Section 210 of the Energy Reorganization of 1974, 42 U.S.C. 5851 and the Commission's implementing regulations, 47 Fed. Reg. 30452 (July 14, 1982) (to be codified in scattered sections of 10 CFR). Moreover, there is no practical means of shielding employee informants from harassment at the hands of fellow employees who may have been involved in the irregularities.

novel questions, some of which having their foundation in an unclear factual record.[12/] Several examples of such issues illustrate the dimensions of the problem. (1) Are persons interviewed during the course of a staff investigation (as distinguished from the usual concept of "whistleblowers") protected by the informer's privilege? (2) If not, is there a comparable privilege with respect to the disclosure of the identity of such persons and, if so, what are its precise metes and bounds? Among other things, in the case of an interviewee, must there have been an explicit request for, and promise of, confidentiality at the time the interview took place?[13/] (3) Is the identity of a "responsible officer" who is under a statutory duty to report potential safety problems to the Commission perforce

---

12/ Because the staff's appellate challenge was directed to the denial of the motion for reconsideration, rather than to the original disclosure order, at the threshold we would have had to confront the matter of the standard governing our review of the Licensing Board's action.

13/ In this connection, staff witness Driskill was unable to recollect whether confidentiality had been requested by any of the ten interviewees referred to in Staff Exhibit 199. Tr. 2480. Given its assertion of a claim of informer's privilege, should not the staff have had that information at hand? If so, was the Licensing Board entitled to rule as it did based upon the record before it?

not within the scope of an informer's privilege (or its equivalent)[14/] and, if so, did any of the interviewees involved fall within that classification? (4) Does the fact that eight of the interviewees eventually indicated that they had no objection to the disclosure of their identities constitute a waiver of any privilege against the release of their names? If not, was the reason assigned by the staff for continuing to resist disclosure of their identities legally and factually valid? (5) Assuming the existence of a privilege ab initio, was it waived when the staff introduced into evidence, for the truth of the matter asserted therein, the investigative report containing summaries of the statements of the unidentified interviewees? If not, what factors should the Licensing Board have considered in determining whether, on balance, disclosure was appropriate?

B. Questions such as those just outlined normally will receive our attention only if presented in the context of a live controversy. To be sure, as we have had previous occasion to observe, the restrictions placed upon the federal judiciary by the "case or controversy" clause in

---

14/ See Section 206 of the Energy Reorganization Act of 1974, 42 U.S.C. 5846 and the Commission's implementing regulations, 10 CFR Part 21.

Article III of the United States Constitution do not govern our jurisdiction. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979). In that same decision, however, we went on to make clear our disinclination to render advisory opinions absent the most compelling cause to do so. Ibid. See also Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 463 (1978).

Our first impression of this dispute was that it remained a real one -- i.e., that it was a matter of true current significance whether the staff was required to disclose the identity of the interviewees. Once again, it was that belief (coupled with our concern that the informer's privilege be given due recognition where applicable) that undergirded our decision to entertain the staff's challenge. Now after briefing and oral argument, we have concluded that the staff's privilege assertion is, in actuality, moot in the present posture of this case.

When the staff initially advanced the informer's privilege claim, there was no substantial evidence of record as to the identity of the ten interviewees mentioned in Staff Exhibit 199. At that time, then, the question whether

their identity should be publicly revealed was genuine. But, as we have seen, in an apparent endeavor to break the impasse between the staff and the Licensing Board, the applicants put on a witness of their own -- Mr. Tolson, the site QA supervisor in the employ of the lead applicant. He not only identified each of the interviewees by name, but also stated that he was certain of the correctness of each identification.

It is worthy of at least passing note that, notwithstanding its professed interest in preserving the anonymity of the interviewees, the record reflects the staff made no effort to preclude this testimony or to have it received in camera.[15/] And neither before the Licensing Board nor in its appellate briefs and argument did the staff assert that the witness was not in a position to know who the interviewees were. Moreover, any such insistence would have been baseless. After all, in Staff Exhibit 199 each interviewee was referred to by both letter designation and job title. In light of his own assignment on the Comanche Peak site, Mr. Tolson necessarily would have known who occupied such roles as "the B&R [i.e., Brown & Root] QA manager" (Individual F); "the TUGCO [i.e., lead applicant]

15/ The single suggestion of an in camera hearing session emanated from applicants' counsel. See fn. 6, supra.

QA manager" (Individual I); and "the TUGCO QA vendor compliance supervisor" (Individual J).

We need not speculate here on why, in these circumstances, the staff elected to persist in its informer's privilege claim. Whatever may have been the motivation, the cold reality was that the factual foundation for the claim had disappeared. Albeit not initially out of the mouth of the staff, the identity of the interviewees had become public knowledge through the unequivocal testimony of a highly reliable applicants' witness. It might be added in this connection that, assuming the necessity for corroboration of that testimony, it was later supplied in large measure by Mr. Atchison, the original informant. Tr. 3442-53.[16/] Further, whether inadvertently or not, even before the Atchison confirmation staff witnesses Taylor and Driskill referred to three of the letter-designated interviewees by name (in line with the Tolson identification

---

16/ Indeed, Mr. Atchison assigned names to all of the interviewees except the one identified in the report as "H." As earlier noted, Mr. Tolson had testified that he was "H." See pp. 6-7, supra.

of those individuals). Tr. 2573, 2584, 2593, 2698.[17/]

In short, we have been invited by the staff to decide difficult (and possibly close) questions in a wholly academic setting. Far from the existence of compelling warrant to do so, there is every reason to reject this invitation and the similar one of our dissenting colleague to take on the role of legislator and decree far-reaching answers to these questions. Our reluctance to embark upon the rendition of advisory opinions has its roots in more than simply the husbanding of resources. Beyond that factor is the consideration that moot controversies (where no concrete interests remain at stake) are very poor vehicles for adjudicatory pronouncements of likely precedential significance. Cf. United States v. Fruehauf, 365 U.S. 146, 157, reh'g denied, 365 U.S. 875 (1961). In this instance, there will be time enough for the staff to present anew the

---

17/ Still further, the names of several of the interviewees appeared in Mr. Atchison's prefiled testimony. See fn. 4, supra. And five of them were identified in the December 3, 1982 recommended decision of a Department of Labor administrative law judge in a proceeding involving Mr. Atchison's claim that he had been wrongfully discharged by his employer because of the information he had provided the NRC. In the Matter of Charles A. Atchison v. Brown and Root, Inc., Case No. 82-ERA-9, Attachment 1 to CASE's Brief in Opposition to NRC Staff Exceptions (Dec. 21, 1982).

It should be noted that there was no disagreement among the several independent identification sources respecting what name went with what letter.

thorny questions left open here when, and if, their resolution becomes a necessity rather than a mere academic exercise grounded in the staff's desire to obtain vindication on a matter of perceived principle.

III.

The foregoing disposes of the staff's appeal and petition for directed certification. There is, however, a collateral matter that we must address because of its importance to the proper functioning of the Commission's adjudicatory process.

A. As we have seen, on July 28 the Licensing Board explicitly directed the staff to disclose the identity of the ten interviewees. The following day, July 29, staff counsel orally requested the Board to stay the order to enable it to seek appellate review. The Board denied the request. At that juncture, the staff's duty was plain: either comply with the order forthwith or move before us with dispatch for a stay pending the filing and disposition of an appeal and/or petition for directed

certification.[18/] But the staff followed neither course: it simply did nothing.

Confronted with this situation, on August 4 the Board entered its order requiring the staff to show cause within twenty days why sanctions should not be imposed upon it for its refusal to obey the disclosure order. Even this development did not induce the staff to obey the disclosure

---

18/ The fact that the staff believed that the Licensing Board had erroneously rejected its claim of an informer's privilege did not provide it with yet another alternative. As the Supreme Court has stressed:

> If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. The orderly and expeditious administration of justice by the courts requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." This principle is especially applicable to orders issued during trial. Such orders must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial with issues collateral to the central questions in litigation.

Maness v. Meyers, 419 U.S. 449, 458-59 (1975) (citations omitted). Although NRC adjudicatory tribunals have not been clothed with the contempt power possessed by the courts, these principles are no less applicable to our proceedings. And there can be no question here that the Licensing Board had the requisite jurisdiction over both the subject matter of the controversy and the staff.

order or to endeavor to obtain a stay from us. Rather, the staff allowed another full twenty days to elapse with the order remaining both in effect and disregarded. Then, on August 24, it filed its motion with the Board for reconsideration in conjunction with the response to the show cause order that was due on that date.

B. Our preliminary review of the record brought these facts to light. We recognized, of course, that, in denying the motion for reconsideration in the September 30 order, the Licensing Board had withheld the imposition of sanctions against the staff. Instead, it gave the staff a fresh opportunity to avoid that result by promptly complying with the disclosure order or, alternatively, seeking appellate review. This generous forbearance on the Board's part did not, however, lessen our concern over the implications of what clearly appeared to be a serious staff misapprehension respecting its obligation to obey an order of an NRC adjudicatory tribunal unless the effectiveness of that order has been deferred or stayed. Accordingly, in scheduling oral argument on the issues raised by the staff's appeal from the September 30 order, we indicated that staff counsel should be prepared "to address the obligation of the staff to comply with a directive of a Licensing Board in the absence of a stay of the directive either by that Board or higher authority." Order of December 30, 1982 at 3 fn. 2.

C. As presaged by the scheduling order, a substantial portion of our colloquy with staff counsel at argument was devoted to the staff's failure either to have complied promptly with the disclosure order or to have sought and obtained an appellate stay.[19/] Although acknowledging that the disclosure order issued on July 28 (and reaffirmed on July 29) was in terms immediately effective, counsel emphatically disclaimed any staff intent to flout that order.[20/] Reduced to its essentials, his explanation of the staff's conduct in the face of the disclosure order was as follows (App. Tr. 5-8). The staff had apprised the Licensing Board of its intention to seek immediate appellate review of the disclosure order. Despite its recognition of that intent, the Board issued its show cause order three "business days" after the hearing had concluded on July 30[21/] -- "before the [s]taff had an opportunity to seek

---

19/ It should be noted that the lawyer appearing for the staff at oral argument was not the same lawyer that had represented it before the Licensing Board.

20/ App. Tr. 6.

21/ July 30 was a Friday. August 4 (the date of the issuance of the show cause order) was the following Wednesday.

an appeal from the Appeal Board." Moreover, as the staff read it, the show cause order relieved the staff of any pressing need to pursue appellate remedies. Rather, so the argument continued, the show cause order in effect gave the staff license to move for reconsideration of the disclosure order -- which, if successful, might obviate an appeal. In this connection, counsel cited one of our decisions in the Allens Creek proceeding[22/] for the proposition that it is not permissible to seek simultaneously both Licensing Board reconsideration and appellate relief.

D. We find the staff's explanation unsatisfactory in each particular. First of all, it is of no moment that the staff intended to take an immediate appeal and had so informed the Licensing Board. Even had it followed through on that objective, the staff still would have been confronted with the need to obtain a stay of the disclosure order pendente lite. As is beyond doubt, our Rules of Practice (in common with those governing federal judicial practice) do not provide for an automatic stay of an order upon the filing of a notice of appeal.

Second, we cannot endorse the assertion that the staff lacked an opportunity to seek any appellate relief in the

---

22/ Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84 (1981).

six-day interval between Thursday, July 29 (when the Licensing Board denied the stay request made of it) and Wednesday, August 4 (when the order to show cause issued). Indeed, we see no good reason why a motion for a stay could not have been presented to us as early as Friday, July 30. True, the evidentiary hearing (being held in Fort Worth, Texas) was still in progress on that date and, thus, the lawyer representing the staff at that hearing might not then have been in a position herself to prepare and file the stay papers. We can take official notice, however, that the Hearing Division of the Office of the Executive Legal Director (based in Bethesda, Maryland, where the Appeal Panel is also located) is staffed with numerous lawyers. It is most improbable that they were all then either on out-of-town assignments of their own or engaged in other pursuits that could not be briefly put aside. Moreover, the record reflects that staff counsel in Fort Worth was in direct telephonic communication with her superiors during the confrontation with the Board;[23/] presumably, therefore, the Hearing Division had ready access to whatever information might be needed for inclusion in a request for a stay. All this being so, it is fair to conclude that no

---

23/ See Tr. 3049, 3072.

insuperable obstacles stood in the path of the filing of a stay motion by the close of business on July 30.

Be that as it may, it would appear that assigned staff trial counsel was free to return to Washington on July 30 (the hearing having recessed shortly after 1:00 p.m. that afternoon).[24/] Consequently, had there been some imperative necessity to await her return before turning to the matter of seeking an appellate stay, the papers could have been prepared over the weekend and filed with us on Monday morning, August 2.[25/] The concept of "business" days (to which appellate counsel alluded both in his brief and at oral argument) may well have legitimacy as applied to the conduct of litigation in ordinary circumstances. But it has no meaning where, as here, one's client is faced with an immediately effective order requiring prompt action that is

---

24/ Tr. 3563. At oral argument, staff appellate counsel stated that the staff participants in the hearing had "returned that weekend" but did not indicate whether it was immediately following the conclusion of the July 30 session. App. Tr. 5-6. There was no suggestion, however, that trial counsel had further official business to transact in Fort Worth.

25/ Had this been done, the Licensing Board doubtless would have withheld the issuance of the show cause order to await our action on the stay motion. In any event, the high probability is that we would have granted an interim ex parte stay to allow time for responses to the staff papers and our fuller consideration of the matter.

is totally unwilling to take. In that unusual circumstance, there is no such thing as a non-business day -- the steps looking to the obtaining of appropriate stay relief must be initiated without differentiation between one day of the week and another.

Third, we have been directed to nothing in the terms of the August 4 show cause order that justifiably could have been construed by the staff as an invitation not merely to move for reconsideration of the disclosure order but, as well, to eschew compliance with the latter order until such time as the Licensing Board received and acted on the motion. This is not to say, of course, that the staff was precluded from seeking reconsideration without an express invitation from the Board. But such a step, just as an appeal, does not have the effect of automatically staying the effectiveness of the order or decision under attack.[26/] Further, in the totality of circumstances, it would have been reasonable to expect that the staff would have had its reconsideration motion (whether invited or not) on file appreciably earlier than August 24 -- a full 27 days

---

26/ Allens Creek, supra, does not prohibit seeking a stay from us while a motion for reconsideration is pending before the Licensing Board. Rather, that decision dealt only with the simultaneous filing of both a motion for reconsideration and an appeal. (Of course, in situations such as that at bar, appellate stay relief appropriately could be sought only if a stay had been denied by the Licensing Board.)

after it was first directed to make disclosure of the interviewees' identity.27/

E. Interrelated reasons have constrained us to dwell upon this subject at some length. To begin with, even with the benefit of time to reflect at leisure upon its course of action last summer, the staff apparently still does not apprehend the shortcomings of that course. Rather, as we have seen, at oral argument it attempted (albeit on patently insubstantial grounds) to justify its failure to comply with the disclosure order. Consequently, what transpired here might well be repeated.

Any such recurrence would be intolerable. Accepting counsel's assurance at oral argument that the staff had acted in good faith and without the purpose of flouting the Licensing Board's disclosure order and authority, the fact nevertheless remains that it did disobey that order over a

---

27/ In this regard, the twenty-day period prescribed in the show cause order was for responding to that order and not for seeking reconsideration.

protracted period of time and without cause.[28/] The disregard by a party of an order of an adjudicatory tribunal is a serious matter in any circumstance. But when that party is the staff of the agency conducting the adjudication, the situation is all the more troublesome.

If its own staff does not manifest a sensitive regard for the integrity of the agency's adjudicatory process -- and most particularly the vindication of the authority of

---

28/ At our direction, the staff filed a post-argument brief addressed to two questions raised by us at the argument bearing upon the merits of the disclosure controversy. At the conclusion of the brief (p. 6), the staff sought to "clarify" its position on whether its disregard of the disclosure order extended to September 30. According to the staff, once it had filed its response to the show cause order on August 24, it was relieved of any further obligation to comply with the disclosure order (or seek an appellate stay of it) until such time as the Licensing Board acted upon the response. This is said to be so because the response was accompanied by a renewal of its previously rejected oral request for a Licensing Board stay.

This line of reasoning is as conspicuously devoid of substance as the claims advanced by the staff at oral argument. What it ignores is that a party cannot put off its duty to comply with an immediately effective order by the simple expedient of calling upon the tribunal to consider anew whether a stay (once denied by it) should be granted. In any event, the post hoc rationalization does not assist the staff insofar as its inaction over a period of almost a month (between July 29 and August 24) is concerned. And, in the final analysis, whether the staff is deemed to have been in disobedience of the disclosure order for one instead of two months is inconsequential. The staff may think that August 24 was "relatively soon" after the hearing session ended on July 30. Staff Post-argument Brief (Jan. 26, 1983) at 7. But in the context of seeking stay relief, that view is untenable.

those bodies charged with the administration of that process -- how can such regard be fairly expected of private parties to our proceedings?[29/] Beyond that consideration, the staff enjoys a unique position insofar as the imposition of sanctions against it is concerned. Although a licensing board does not have contempt authority, there are remedial measures available to it in the instance of the failure of an applicant or intervenor to comply with its orders. For example, the applicant may be confronted with a denial of its application; the intervenor may find itself dismissed from the proceeding. The staff, however, does not have the same direct personal stake in the outcome of the adjudication as do the applicants and most intervening parties. Rather, its role in the proceeding is that of a protector of a broad public interest. Thus, assuming that the removal of the staff as a party would be a fit remedy for its disobedience of a board order (a question we need not decide here),[30/] in a real sense the consequences

---

29/ Assuredly, private parties are entitled to assume that there is not a double standard in this respect: a strict obligation of compliance on their part and a more relaxed obligation in the case of the staff.

30/ As we have seen, the Licensing Board's September 30 order mooted the sanctions issue on the condition that there be no future disregard of its directives. See p. 10, supra.

would not be visited upon those responsible for the dereliction.31/

In short, unlike other parties to a licensing proceeding, the staff puts itself at little, if any, risk when it refuses to comply with a board order. Accordingly, such a refusal is readily susceptible of the interpretation that the staff has no hesitancy to disobey orders with which it strongly disagrees because, as a practical matter, it can do so with impunity. Once again, we accept the staff's oral representation that no such thinking undergirded its actions in this case. At the same time, however, it is of obvious importance, not only to it but to this agency as a whole, that in the future the staff take the utmost care to ensure that it does not again open itself to that perception.

31/ We have not overlooked the authority of a licensing board to discipline counsel "who shall refuse to comply with its directions." 10 CFR 2.713(c). The imposition against staff counsel of one of the sanctions provided for in Section 2.713(c) likely would be appropriate only in circumstances where the disobedience was not in fulfillment of the instructions of higher authority within the agency. Although this matter similarly need not be reached here, it is reasonable to assume that staff counsel below declined to comply with the disclosure order at the direction of either her superiors in the Office of the Executive Legal Director or a ranking official of the NRC office in charge of the investigation of which the interviews were a part. See Tr. 3053-54.

The staff's appeal is dismissed for want of a genuine controversy; on the same ground, our grant of the petition for directed certification is withdrawn.[32/]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

[The dissenting opinion of Dr. Johnson follows.]

32/ This result does not alter the fact that the staff did seek appellate review and, thus, under the terms of the Licensing Board's September 30 order is not subject to the imposition of sanctions (providing there is no further disregard of its disclosure order).

Dissenting Opinion of Dr. Johnson:

As my colleagues explicitly recognize (pp. 11-12, supra), the informer's privilege serves an important function in assisting this agency to fulfill its safety responsibilities: it enhances the staff's ability to obtain information from persons who might otherwise be unwilling to aid a staff investigation. But the benefits of the privilege can scarcely be realized to the fullest if fundamental questions concerning its applicability in our hearings are left unresolved. My colleagues agree that such thorny questions exist. See pp. 13-14, supra (particularly questions 1, 2, 3 and 5). Rather than taking advantage of the opportunity to address those questions here, they decide instead to walk away from them to await their litigation another day when concrete interests are at stake.

I cannot agree with this action. To be sure, these questions are not easy to resolve but that is not a valid reason for avoiding them. Nor is the fact that the information sought to be protected by exercise of the privilege is already known. For by my colleagues' own admission (pp. 14-15, supra), mootness is not a legal bar to our addressing them. The questions raised here relate in a very fundamental and generic way to the use of the informer's privilege as a valuable tool in NRC investigations. It is likely that some or all of these questions will arise in virtually every case in which a

staff investigative report is introduced for use in a hearing. In this case, we saw that the parties and the Licensing Board did not respond very effectively when faced with these questions. In the next case, this sort of confusion may well be repeated, but with the added result of disclosure of information under circumstances that would endanger the well-being of individuals. See p. 12 fn. 11, supra.

To me, a staff investigator's ability to make a credible offer of anonymity to individuals who may be potential sources of safety-related information is a matter of major importance and should not be clouded by unresolved questions. Short of resolving them ourselves, I would have advised the staff to seek policy guidance from the Commission on the questions cited above.