

03/11/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S PETITION FOR COMMISSION
REVIEW OF ALAB-714 (FEBRUARY 24, 1983)

Pursuant to 10 C.F.R. § 2.786(b), the NRC Staff ("Staff") hereby petitions for review by the Commission of the Decision issued by the Atomic Safety and Licensing Appeal Board ("Appeal Board") on February 24, 1983 (ALAB-714).^{1/} In support of this request, the Staff submits that the Appeal Board's Decision is premised upon a significant error, and that the natural effect of the Decision is to establish a fundamentally unacceptable policy involving an important matter that could significantly affect the Commission's ability to protect the public health and safety. For these reasons, as more fully set forth herein, review by the Commission is both necessary and appropriate.

^{1/} 10 C.F.R. § 2.786(b) provides that a petition for Commission review may be filed within 15 days after service of a decision by the Appeal Board under § 2.785 "other than a decision or action on a referral or certification under §§ 2.718(i) or 2.730(f)." Inasmuch as the Appeal Board did not resolve the issue of whether the Staff's appeal was properly before it as an appeal of right under 10 C.F.R. § 2.762 or upon certification under 10 C.F.R. § 2.718(i), the Staff hereby requests, in the alternative, that the Commission direct certification of the Appeal Board's Decision pursuant to 10 C.F.R. § 2.785(d) so that the Commission may review the important questions of fact, law, policy, and procedure set forth herein.

BACKGROUND

The events leading up to the Appeal Board's issuance of ALAB-714 are not in dispute, and the Staff adopts and incorporates by reference herein the Appeal Board's recitation of those events (Decision, at 3-10).^{2/} A stay of the effectiveness of the Appeal Board's Decision was granted by the Commission on March 4, 1983 (CLI-83-6). Also on March 4, 1983, the Atomic Safety and Licensing Board ("Licensing Board") scheduled additional hearing sessions in this proceeding to commence on April 4, 1983, at which time the Licensing Board intends to call as Board witnesses the 10 individuals whom Applicants' witness and Mr. Atchison believed to be the persons designated by letter and job title in the Staff's investigation report (Staff Exhibit 199).^{3/}

^{2/} As noted in the Staff's stay application filed before the Commission, in one critically material respect, the Staff disagrees with the Appeal Board's view of the events which preceded the issuance of ALAB-714. While the Appeal Board concludes that after the Staff asserted the informers' privilege, "the identify of the interviewees had become public knowledge" (Decision, at 17), the Staff does not consider those identities to have been conclusively demonstrated. See discussion infra, at 3-4.

^{3/} See "Notice of Resumed Evidentiary Hearing", issued by the Licensing Board on March 4, 1983, wherein the Licensing Board directed the Staff "to prepare and serve subpoenas for the appearance as Board Witnesses" of the ten individuals. In a telephone conference call held on March 8, 1983, the Licensing Board acquiesced to Applicant counsel's suggestion that the Applicants secure the voluntary attendance of the named individuals rather than require those persons to appear under subpoena, provided that their voluntary attendance can be obtained. The Staff intends promptly to file with the Licensing Board appropriate motions to protect against any possible disclosures which may be inconsistent with the Commission's stay order.

DISCUSSION

Pursuant to 10 C.F.R. § 2.786(b)(4), Commission review of an Appeal Board decision is within the discretion of the Commission and may be granted, inter alia, where the petitioner demonstrates that the case involves an important matter that could significantly affect the public health and safety, involves an important procedural issue, or otherwise raises important questions of public policy. Consistent with this standard, the Staff submits that the instant Decision warrants Commission review for the following reasons.

A. The Decision Contains Significant Errors Affecting the Public Health and Safety.

The Appeal Board's Decision is premised upon its finding that the names of the ten individuals are publicly known, having been identified in this proceeding and elsewhere (Decision, at 17-18). This finding stands as the sole support for the Appeal Board's conclusion that the Staff's privilege claim is "moot" and its appeal "merely academic" (id., at 15, 19). Notwithstanding the Appeal Board's finding in this regard, until the Staff itself discloses or confirms the identities of its informants, at the very least there exists a certain measure of uncertainty as to their identities. Were this not the case, the question must be asked as to what basis there can be for the Licensing Board's orders compelling Staff disclosure (and the Appeal Board's action in upholding those orders), and for the Licensing Board's order of September 30, 1982 exempting from disclosure the names of two individuals who expressly

requested confidentiality. While the Licensing Board, itself, initially found that it had learned the ten individuals' names (Tr. 3062), it has continued to insist on Staff disclosure. One possible reason for this continued insistence on such disclosure may be found in the Licensing Board's Order to Show Cause, where the Board concluded that "[m]ost of the uncertainty as to the identities of the individuals interviewed was eliminated" by the testimony of Messrs. Tolson and Atchison. (Order to Show Cause, at 6; emphasis added). Similarly, the two individuals who expressly requested confidentiality appear to believe that at least some uncertainty as to their identities exists, as reflected by the fact that they requested confidentiality even after they were advised that their names "may have been disclosed at the July hearings" (App. Tr. 34). In our view, these facts demonstrate that the Appeal Board erred in finding to a certainty that the ten individuals' names had become public knowledge, and in relying upon that finding for its conclusion that the merits of the Staff's appeal need not be addressed.

Further, the effect of the Appeal Board's Decision is to require the Staff to disclose the names of eight of its informants -- notwithstanding the fact that, in our view, at least a measure of uncertainty exists as to the identities of those individuals. As set forth in the Affidavit of John T. Collins, Regional Administrator of NRC Region IV, filed before the Licensing Board on August 24, 1982 (at 2-3), if the Staff divulges the identities of the eight individuals who do not object to their names being disclosed, there is a great risk that the names of the two individuals who seek to remain confidential will be readily ascertainable; that

result could seriously jeopardize the Commission's ability to gather information from confidential sources in investigations of applicant and licensee misconduct in this and other proceedings. Such disclosure, further, would be contrary to Commission precedent. As the Appeal Board, itself, recognizes, the informers' privilege which precludes Staff disclosure of its informants' identities in a public hearing is "well established", and its function "in the fulfillment of this agency's health and safety responsibilities is an extremely important one" (Decision, at 11). Numerous decisions similarly have recognized the importance of protecting informants' identities and have amply set forth the legal basis for doing so. See, e.g., Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, Commission review denied, 14 NRC 933 (1981); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-16, 4 AEC 435, aff'd by the Commission, 4 AEC 440 (1970); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390 (1970).^{4/}

^{4/} The Licensing Board's disclosure orders, which were allowed to stand by the Appeal Board, were replete with fundamental errors of law and fact and reflected serious abuses of discretion. Those matters are referred to in the Staff's brief filed before the Appeal Board. See "NRC Staff's Brief in Support of Its Exceptions to Atomic Safety and Licensing Board's Order Denying Reconsideration of September 30, 1982", filed on November 17, 1982. The Appeal Board declined to review those matters, having perceived no need to do so, and resolved that "the Licensing Board's order is appropriately left standing irrespective of the 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. . . ." (Decision, at 2-3; emphasis added). While the errors left untouched by the Appeal Board are too numerous to recite herein, those matters will be briefed by the Staff at the Commission's request, in the event that the Commission grants the instant petition.

In light of these precedents, the Appeal Board's action in upholding the Licensing Board's disclosure orders, where some uncertainty, at least, remained as to the identities of the Staff's informants, constitutes a serious error. The Staff submits that these facts demonstrate that review by the Commission is both warranted and appropriate.

B. The Decision Establishes An Unacceptable Policy and Procedural Precedent.

If allowed to stand, the Appeal Board's Decision will have a totally unacceptable precedential effect which could seriously erode the Commission's well-established policy favoring informant confidentiality. In effect, the Appeal Board has allowed to stand various orders compelling disclosure, where the Licensing Board (1) refused to receive the informants' names in camera (Tr. 2498-99), contrary to the procedure established by Commission regulations; (2) permitted other witnesses to provide their own assessment as to the identities of the informants;^{5/} and (3) with that information in hand, insisted upon confirmatory identification to be made by the Staff. The Appeal Board's action in upholding these disclosure orders, on the grounds that the information had been obtained already from other witnesses, will serve to emasculate the Staff's ability effectively to invoke the informer's privilege in this and all

^{5/} As the Staff previously informed the Appeal Board, certain identities were revealed in a Department of Labor proceeding (Appeal Brief, at 20-22); in addition, after asserting the informers' privilege, Staff witnesses inadvertently disclosed the identities of three individuals in response to questioning before the Licensing Board (id., at 8 n.14). These facts have been noted by the Appeal Board. See Decision, at 17-18.

future proceedings. The Appeal Board's Decision instructs that the Licensing Boards may disregard this agency's need for informant confidentiality -- as protected in a judicial proceeding by the Staff's assertion of the informers' privilege -- simply by obtaining tentative identification from other sources and by then demanding confirmation or disclosure by the Staff.

This result is abhorrent to the Commission's undisputed need to maintain the confidentiality of its informants in order to encourage individuals to provide the Commission's investigators with information important for the protection of the public health and safety. As suggested by Dr. Johnson in his dissent from the Appeal Board's denial of our stay application (ALAB-716, March 1, 1983), absent Commission review of the Appeal Board's Decision, this agency will be "sending forth the message to potential informants that the NRC cannot be relied upon to protect their confidentiality," thereby potentially causing a "serious and lasting influence on the agency's effectiveness" (*id.*, dissent by Dr. Johnson, at 7). The natural consequences of a public perception that the identities of persons who provide information on safety problems to the NRC will be disclosed, will be either (1) that persons with such information will remain silent, or (2) that there will be an increase in the already disturbingly large number of instances in which such information is presented in confidence to others (such as intervenors, public interest groups, and congressional staffers) who reveal the substance of the concerns but refuse to provide access to the informant. Either of these results could cause irreparable harm to the Commission's ability

to protect the public health and safety.^{6/} These issues demand review by the Commission before the Staff is compelled to make the required disclosures in this proceeding.

C. The Commission Should Review This Decision Upon Concluding Its Generic Review of Informant Confidentiality Issues.

The Commission is now engaged in a review, on a generic basis, of the issue of informant confidentiality. This review is being conducted both within the Commission^{7/} and by the recently created "Advisory Committee for Review of Office of Investigation Policy on Rights of Licensee Employees under Investigation."^{8/} In seeking Commission review of the instant Decision, the Staff proposes that the Commission adopt the following procedures: (1) accept review of ALAB-714, (2) toll the requirement for briefing until there has been a generic resolution of the informant confidentiality issues, and (3) apply the generic outcome

^{6/} In this regard, see the discussion concerning the impact of media reporting on Staff disclosures set forth in the Staff's Stay Application, at 6-8.

^{7/} The Commission recently took action in this regard, by adopting (with certain exceptions) various investigative policies recommended by the Office of Investigations. See Memorandum to Ben B. Hayes, Director, Office of Investigations, from Samuel J. Chilk, Secretary, dated March 4, 1983. One of the policies adopted by the Commission (Policy 7) involves certain aspects of the informant confidentiality issue.

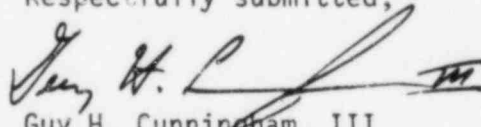
^{8/} 48 Fed. Reg. 5827 (Feb. 8, 1983). The Staff has been informed by the Office of the General Counsel that the advisory committee will be asked to address, *inter alia*, the issue of confidentiality for persons interviewed in the course of an investigation.

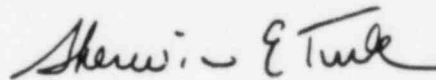
to the facts of the instant case after receiving whatever briefs from the parties that the Commission considers necessary. Such a course of action is appropriate in order to avert a disclosure of informant identities in this proceeding which could later prove to have been improvident and inconsistent with the results of the Commission's generic review.

CONCLUSION

For all of the above reasons, the Appeal Board's Decision contains significant errors and establishes an unacceptable policy and procedural precedent. Accordingly, the Staff's petition for Commission review should be granted.

Respectfully submitted,


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Dated at Bethesda, Maryland
this 11th day of March, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S PETITION FOR COMMISSION REVIEW OF ALAB-714 (FEBRUARY 24, 1983)" 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 11th day of March, 1983.

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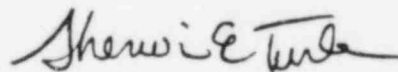
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