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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKING & SERVICE
BRANCH

Before Administrative Judges:

Peter B. Bloch, Chairman
Herbert Grossman, Esq.
Mr. Walter H. Jordan

SERVED SEP 18 1984

In the Matter of
TEXAS UTILITIES GENERATING COMPANY,
et al.
(Comanche Peak Steam Electric
Station, Units 1 and 2)

Docket Nos. 50-445-OL-2
50-446-OL-2

(ASLBP No. 84-497-04 OL)

September 17, 1984

MEMORANDUM AND ORDER
(Directing Release of OI Reports)

On August 28, 1984, the Nuclear Regulatory Commission Staff (Staff) issued Board Notification 84-149 listing Office of Investigation (OI) reports as important documents related to Comanche Peak Steam Electric Station not previously submitted to this Board. The Staff indicated its intent to transmit to the Board for review in camera ex parte any reports the Board deems pertinent to this proceeding. By this Order, the Board directs OI to release to the Board and parties (under protective agreement) all OI reports listed in Board Notification 84-149.

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Board Notification 84-149 lists 22 OI reports on Comanche Peak which have not previously been released to this Board. See Board Notification 84-149 at Enclosure 1. Without reviewing the text of these reports, the Board cannot make an intelligent evaluation of their relevance to issues pending before it and cannot decide whether the record in this proceeding is adequately developed and can be closed. Based upon a review of the subject of the reports as listed by the Staff, we find all of these reports to be potentially relevant to matters pending before the Board. Therefore, we direct OI to release under protective agreement copies of all 22 reports to the Board and parties for review.

The Board will not review these reports ex parte as suggested by the NRC Staff, unless ordered to do so by the Commission. The Board agrees that ex parte review of investigation reports could be prejudicial to the rights of the Applicants and other parties. The Applicants have in the past objected to ex parte review by the Board of OI reports.¹ Ex parte information in the context of this formal adjudication would violate fundamental principles of administrative due process.²

¹ See "Applicants' Motion to Obtain Access to Information Regarding Investigations at Comanche Peak or for Alternative Relief" (May 10, 1984).

² See our May 17, 1984 "Memorandum and Order (Secret Communications from Office of Investigations)".

Ex parte contacts between interested parties and agency decision makers have consistently been held to be improper in administrative proceedings. See, e.g., Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959). Secret exchanges of information are inconsistent with reasoned decision making based upon a public record. Home Box Office Inc. v. FCC, 567 F.2d 9, 54-56 (D.C. Cir. 1977). The problem is exacerbated in a situation such as this where a formal adjudicatory hearing is underway. National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345, 350 (D.C. Cir. 1978). The hearing requirements of the Atomic Energy Act and due process mandate that all parties be afforded a full, fair, expeditious, and open hearing.

Where OI reports have been prepared and made available to this Licensing Board, they must also be made available to all parties. Ex parte, extra-judicial information will not be relied upon in any manner by the Board. To do so would reduce the hearing to something less than the adversary proceeding required by the Atomic Energy Act. Fundamental principles of fairness require that all parties be aware of the content of information presented to the Board be given the opportunity to test its reliability or truthfulness, and be given the opportunity to present rebuttal testimony if deemed necessary. Green v. McElroy, 360 U.S. 474, 495-96 (1959).

Ex parte communications are no less troublesome because they come to the Board from the agency staff, in this case OI. See 10 C.F.R. § 2.780; see also United States v. B&O Southeastern Railroad Co., et al., 226 U.S. 14, 20 (1912). Even if OI alone is given the opportunity to present ex parte information which may form a basis for the Board's ultimate decision, the public's perception of the Board's independence would be lost.

The Commission has issued a Policy Statement to provide guidance to Licensing Boards and the Staff for cases in which pending investigations are related to matters in controversy and there is a conflict between the need for disclosure to the Board and parties and the need to protect an inspection or investigation.³ The Commission suggests that in cases where unrestricted investigation could compromise the investigation, the Staff should provide information to the Board in camera ex parte. Id. at 36033-34. However, the Commission has emphasized that "As a general rule [it] favors full disclosure to the boards and parties" and that its Policy Statement does not abrogate the well-established principle of administrative law that a licensing board may not use ex parte information presented in camera in making its decision. Id. at 36033.

³ "Statement of Policy; Investigations, Inspections and Adjudicatory Proceedings," 49 Fed. Reg. 36032 (September 13, 1984).

The Board believes that a protective order could be used in order to avoid the need for ex parte examination while providing some assurance that necessary confidentiality is not compromised. Through such protective agreements, all parties to NRC proceedings have been given access to such sensitive information as the security plans for power reactors, when issues have been raised in connection with those plans. Pacific Gas & Electric Co. (Diablo Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775 (1980). There is little reason to believe that the information here is more important than security plans that have been previously disclosed. The Board is willing to limit those included in the protective order to two legal representatives for each party in an effort to maintain a strict level of confidentiality. Alternatively, the Board proposes that OI set forth a protective order which it feels will meet the needs and purposes of its investigation program.

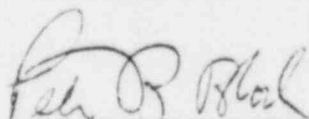
In this case, the parties have vigorously litigated issues which may well be the subject of the OI investigations, and they are entitled to a prompt decision by this Board on those issues. Applicants are coming close to the date on which they will be ready to load fuel. For this proceeding to be held in abeyance because another arm of the agency is unwilling to share what could be relevant information is fundamentally unfair to the parties and makes it difficult for this Board to do its job. Accordingly, the Board believes that the rights of the parties to a fair hearing on issues relating to intimidation could be prejudiced without disclosure of the reports to the parties as well as the Board.

We are therefore directing that the 22 enumerated OI reports be released under a protective agreement to the parties in this proceeding.

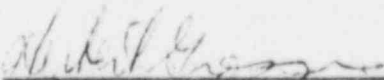
If the Office of Investigation is unwilling to comply with this Order, the Board urges OI to explain to the Board and parties those important considerations which prevent it from carrying out this Order and the Board requests that OI suggest a course of action which will provide an acceptable means of meeting the needs of the Board, OI, and the parties.

IT IS SO ORDERED.

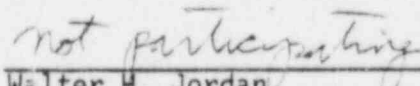
FOR THE ATOMIC SAFETY AND LICENSING BOARD



Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE



Herbert Grossman
ADMINISTRATIVE JUDGE



Walter H. Jordan
ADMINISTRATIVE JUDGE

Bethesda, Maryland,
September 17, 1984.