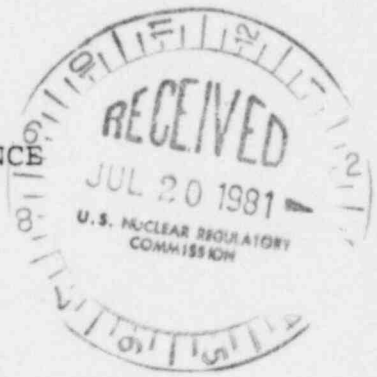
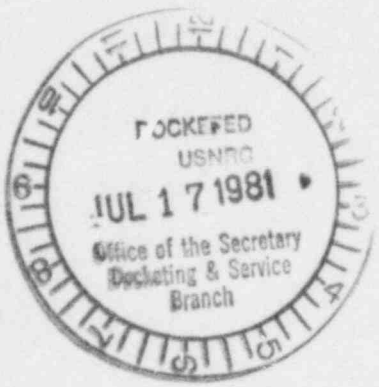
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING & POWER COMPANY, ET AL.	)	Docket Nos. 50-498 OL 50-499 OL
	)	
(South Texas Project, Units 1 and 2)	)	



APPLICANTS' BRIEF ON THE IDENTIFICATION OF INFORMANTS AND USE OF THEIR STATEMENTS AS EVIDENCE



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July 16, 1981

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Statement

The Atomic Safety and Licensing Board (Board) in this proceeding has requested the parties to brief several questions regarding the Board's authority to require the NRC Staff to disclose the identities of persons who made statements to the Staff pursuant to a pledge of confidentiality. (Tr. 4569-89; 5314-16). The questions posed by the Board are set out in the margin.*/

It is Applicants' position that the Board may order identification of the informants only in limited circumstances, and that in the present posture of this case it is not appropriate for the Board to issue such an order. Further, although

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*/ "One. May the Staff be required to identify, dash, (sic) to the parties and Board but not necessarily to the public, dash, (sic) the names of some or all individuals identified in inspection reports by letters or numbers.

In answering this question, assume that a party is seeking identification in order to present its case, that the (footnote continued)

I&E Reports have been made part of the record pursuant to stipulation of the parties, they have not been admitted for the purpose of proving the truth of the matters contained therein.*/ Should any party seek to use such reports, which rely on the statements of confidential informants to establish facts with respect to material issues a motion to strike by

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(footnote continued)
inspection report bears upon a factual matter at issue in the proceeding, that the individuals in the report have not been positively identified through other means, and that a conflict or potential conflict with other factual evidence on a significant matter is apparent.

Discuss with respect to A, participants who are not informants; B, participants who are also informants; and C, other informants.

Discuss also in terms of, one, a total pledge of confidentiality and, two, a limited pledge such as appears in at least one I&E Report.

Question 2. If not--should the I&E report be excluded or stricken from evidence insofar as its truth is concerned on motion of a party, and in what circumstances, if any, should this be done?

And 3, if admissible . . . may a Board . . . decline to accord it any weight solely because of the failure to identify some or all of the unidentified individuals."

Tr. 5314-16.

*/ The text of the stipulation is as follows: "Pursuant to 10 C.F.R. 2.753, it is hereby stipulated and agreed by and between the parties to the above captioned proceeding, by and through their respective attorneys and representatives, that the following exhibits may be stipulated and admitted into evidence, in lieu of formal proof, with respect to their admissibility and authenticity and not with respect to the truth of the matters therein stated; subject, however, to the general objection on the part of any party as to the materiality and relevancy of the said exhibits." (Stipulation dated May 14, 1981), p. 1 (emphasis added)).

Applicants would lie. Admission of such evidence without giving Applicants a meaningful opportunity to confront and cross-examine such informants would be unfair and contrary to law.

Argument

I. The Staff May Not Be Required To Identify The Name Of A Confidential Informant Unless The Testimony Of The Informant Would Be Essential To The Determination Of An Important Issue In This Proceeding.

In ALAB-639 the Appeal Board decided that CCANP had not met its burden of establishing the need for disclosure of the identities of the NRC Staff's confidential informants. In addressing the issue, the Appeal Board adopted the test stated in Roviaro v. United States, 353 U.S. 53 (1957).

> The privilege to withhold the names of confidential informants is not absolute; it must yield where the informer's identity 'is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.' Roviaro, supra, 353 U.S. at 60-61. In the matter before us the Power Company, not Citizens, is the "accused;" we must therefore focus on the second prong of the test.

Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-639, 13 NRC ___, slip op. at 7 (May 8, 1981) (footnote omitted).*/

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*/ The Appeal Board held in ALAB-639 that blanket disclosure of the identities of all of the informants relied upon in I&E Report 79-19 was not justified on the record then before it. That record has not changed markedly. Thus, clearly, blanket disclosure is not warranted. Rather, we believe, any requirement for disclosure of the identities of the informants should be determined on a case by case basis, with due regard for the particular matter at issue and the status of the party requesting disclosure.

The question posed by the Board now is whether the Roviaro test is met under hypothetical circumstances where (1) a party is seeking identification in order to present its case; (2) the inspection report bears upon a factual matter at issue in the proceeding; (3) the individuals have not been positively identified through other means; and (4) a conflict or potential conflict with other factual evidence on a significant matter is apparent.*/

The answer to the Board's hypothetical question turns on one's view of the case -- specifically the issues which must be decided in order to assure a "fair determination of the cause" -- the second prong of the Roviaro test.

As Applicants view the record after presentation of much of their principal case, the primary focus of concern with respect to confidential informants has been related to "examples" designated "a" through "p" at pages 2-5 of the April 28, 1980, Notice of Violation (Appendix A to Staff Exhibit 46) (See Tr. 1410-34, 4183-86, 5286).

In light of these examples, the staff found "that some civil quality control inspectors are: (a) subjected to production pressures, (b) not always supported by the QC

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*/ Applicants would note that several of these circumstances do not yet exist. There is no pending request of a party for identification of the informants and there is not a conflict with factual evidence in the record on a significant matter at issue in the proceeding. It should also be noted that the Board has not postulated which party is seeking identification. ALAB-639 specifically draws a distinction between the rights of Applicants and the rights of other parties, namely Applicants' rights under the first prong of the Roviaro test. At this time Applicants do not invoke those additional rights.

management, (c) harassed, (d) intimidated, and (e) threatened." (Staff Exh. 46, App. A at 2). Applicants' response to the Notice of Violation (Staff Exh. 47) stated that "[i]t is not possible to affirm or deny statements of fact in the absence of information which would identify persons, places and dates involved. However, our own review suggests that such incidents probably did occur." (Staff Exh. 47, Attachment to letter of May 23, 1981, at 1). Applicants' response confirmed that "problems arose out of perceived production pressures and perceived lack of support of QA/QC personnel by quality management." (Id.) Applicants thus did not take issue with the Staff's ultimate conclusions in its Notice of Violation, and Applicants do not take issue with those Staff conclusions before this Board.*/

The Board need not and should not make findings regarding each of the examples "a" through "p". In taking this position we neither concede nor deny that each example is accurately described in Staff Exh. 46. Rather, we believe that the ultimate issues before the Board can be decided without any

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*/ It should be noted that the NRC Staff accepted Applicants' response and did not order a hearing regarding the 16 examples.

specific findings regarding the Staff's 16 examples.*/ If we are correct in this regard then, since the information is not essential to a "fair determination of the cause," it is unnecessary to reveal the identities of the informants whose statements form the basis for these examples.

Proceeding from this view of the case, Applicants submitted prefiled testimony dealing with the issues set out in the Board's December 2, 1980, Second Prehearing Conference Order, but not specifically addressed to examples "a" through "p", nor even with each violation listed in Staff Exh. 46. If the 16 examples become contested issues in this proceeding, a substantial expansion of the hearing will be required and it is virtually certain that applicants will need to know the

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*/ It must be recognized that this is not an enforcement proceeding where the Notice of Violation and its conclusions are in dispute. If it were, then the details of each and every violation might be central to the required determination (e.g., whether or not a fine should be imposed and the magnitude therefore, whether other enforcement action should be taken, etc.). In this proceeding, however, where the basic issue is the general one of HL&P's competence and character, it is sufficient for the Board's purpose that the Staff's ultimate conclusions in its Notice of Violation are undisputed. Of course, if a party were to convince the Board that some past events (regardless of whether or not they are among the 16 examples) bear so significantly on HL&P's character and competence that they must be examined thoroughly, and if the factual determination on such events turned on the out-of-court statements of unidentified informants, the situation would be akin to that in an enforcement proceeding.

identities of the informants who were interviewed regarding those examples.*/ However, unless it becomes apparent that these events are in issue, Applicants have no need for the identities of the informants and accordingly do not now request disclosure.**/

II. Where Reliance On Statements Of Confidential Informants Would Constitute A Denial Of Due Process The Board Should Grant A Motion By Applicants To Strike From Evidence Reports That Rely On Such Statements.

The second question posed by the Board concerns whether to strike, on motion, reports based on statements of unidentified confidential informants. Applicants' view of this question is that although government records are generally admissible evidence, there are exceptions which, if applicable, would require that motions be granted to strike all or parts of I&E Reports relying on statements of confidential informants. Whether these exceptions need be invoked with respect to the I&E Reports thus far placed into evidence will, as noted above, depend on the purposes for which the individual Reports are admitted and the Board's view regarding the issues in this proceeding.

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*/ Any such disclosure of identities to the Applicants should not be limited by terms such as those contained in the protective order previously entered in this proceeding since such limitations would not permit Applicants to conduct a proper investigation, prepare appropriate rebuttal or properly cross-examine such informants.

**/ Similarly, unless an attempt is made to use such material to impeach a witness for Applicants, we cannot and do not seek identification of the informants who provided information upon which such material is based.

Reports relying on statements of confidential informants in essence contain out-of-hearing testimony that cannot be tested by cross-examination of the declarant, or in some cases, where details of the circumstances described in the Reports are lacking, cannot be contested by rebuttal evidence. To admit those I&E Reports into evidence for the purpose of proving the truth of the statements of the confidential informants would deny Applicants the fair hearing they are guaranteed by the Commission's Rules of Practice (E.g., 10 C.F.R. § 2.743 (1980)), the Atomic Energy Act of 1954 (E.g., 42 U.S.C. § 2231 (Supp. III 1979) (as amended 1980)), the Administrative Procedure Act (5 U.S.C. § 556 (Supp. III 1979)) and the Due Process Clause of Fifth Amendment of the United States Constitution.

The courts have long interpreted the Fifth Amendment to require that when the Government considers action adverse to property or liberty interests it must afford an opportunity to confront and cross-examine the Government's witnesses. This fairness requirement underlies the holding in the principal case relied upon by the Appeal Board in ALAB-639, Roviaro v. United States, 353 U.S. 53 (1957), and is amplified in a long line of cases concerning administrative actions. In Greene v. McElroy, 360 U.S. 474 (1959) the Supreme Court held that an employee of a defense contractor could not be denied a security clearance (and thus his job) without being afforded an opportunity to confront and cross-examine his accusers.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures

> an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, [citations omitted] but also in all types of cases where administrative and regulatory actions were under scrutiny [citations omitted].

360 U.S. at 496-97 (footnote omitted).

Similarly, this principle was applied in Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), in which an applicant for admission to the bar was found to have been denied due process of law because he had not been granted an opportunity to confront his accusers. Other cases in this line include Goldberg v. Kelly, 397 U.S. 254 (1970) (right to confront and cross-examine accusers with respect to termination of welfare benefits); Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961) (right to confront and cross-examine accusers prior to dishonorable discharge from Navy Reserves); McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973) (right to confront and cross-examine accusers prior to termination from Government employment); Robbins v. U.S.R.R. Retirement Board, 594 F.2d 448 (5th Cir. 1979) (right to fair hearing regarding termination

of disability payments); and Doe v. United States Civil Service Comm'n, 483 F.Supp. 539 (S.D.N.Y. 1980) (right to confront and question sources of negative character information prior to denial of application for White Houst fellowship).

The right to confront and cross-examine informants does not bar the use of hearsay under appropriate circumstances. In the federal courts there is a public records exception to the hearsay rule (Fed. R. Evid. 803(8); Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978), cert. denied, 441 U.S. 933 (1979)), which we believe would be generally applicable to I&E Reports.*/ However, hearsay is admitted in administrative proceedings on the premise that there is a fair opportunity for the parties to rebut the evidence or to subpoena the declarants. Thus in Richardson v. Perales, 402 U.S. 389 (1971), the leading case on use of hearsay in administrative proceedings, the Court emphasized that the out-of-hearing declarants were known to the parties in advance of hearing and the applicant could have requested a subpoena for them. This same principle was recognized by the Appeal Board

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*/ Although government records are generally admissible evidence, courts do exclude them when they are not trustworthy, Fraley v. Rockwell International Corp., 470 F.Supp. 1264 (S.D.Ohio 1979); E.E.O.C. v. Sears, Roebuck & Co., 504 F.Supp. 241, 253 (N.D.Ill. 1980). A court may exclude a report if it contains "double hearsay," John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632 (3rd Cir. 1977); Colvin v. United States, 479 F.2d 998 (9th Cir. 1973); or when there would be no way for the other party to test the accuracy or reliability of the Government's data, United States v. 478.34 Acres of Land, Tract No. 400, 578 F.2d 156 (6th Cir. 1978).

in Arkansas Power & Light Co. (Arkansas Nuclear One, Unit 2), ALAB-94, 6 AEC 25 (1973). There the Appeal Board found it error to admit an ACRS letter for the truth of any of the statements therein because the Commission had ruled that ACRS members could not be compelled to testify in Licensing Board proceedings.*/

This rule is simply a part of the broader requirement of due process or fairness, which the Court in Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281 (1974), described as follows:

> A party is entitled, of course, to know the issues on which the decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

Id. at 288, n. 4 (emphasis added). See also Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292 (1937) (agency was in error in using, without opportunity for rebuttal, statistics on price levels to calculate values of company assets for years subsequent to those considered at hearing); Reilly v. Pinkus, 338 U.S. 269 (1949) (undue restrictions on cross-examination); and Beaumont Broadcasting Corp. v. F.C.C., 202 F.2d 306 (D.C. Cir. 1952) (undue restriction on cross-examination).

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*/ Accord, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 340 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-217, 8 AEC 61, 75 (1974).

This requirement of fairness in administrative proceedings is applicable whether or not the Government has promised confidentiality. In Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir. 1963) the Secretary of Labor had conducted a hearing to determine the prevailing minimum wage in the electrical motors and generators industry pursuant to the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45. In the hearing before the agency, the Government had introduced, over objection, a table based on confidential answers to a survey of employers. The Baldor Court found that reliance on this table without revealing the underlying survey responses constituted a denial of a fair hearing.

> Indeed, cases such as Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957); and Communist Party of the United States v. Subversive Activities Control Board, 102 U.S.App.D.C. 395, 254 F.2d 314 (1958), suggest strongly that ordinarily the Government cannot take action adverse to a citizen, in an administrative decision aimed directly at him or his group, without disclosing the evidence on which it relies.
>
> It does not follow, however, that courts will generally force the Government to reveal information it seeks to keep confidential. The Government, in situations of the present sort, has an option: it can hold back confidential material, and take the risk of not being able to prove its case, or it can produce the material and allow it to be the subject of direct and cross-examination. There are, of course, occasions when a court will order the Government to break its pledge of confidentiality and produce its files for inspection.

337 F.2d at 528 (footnotes omitted). See also Powhatan Mining Co. v. Ickes, 118 F.2d 105 (6th Cir. 1941) (failure to disclose

confidential information, frustrating cross-examination of agency report); Grimm v. Brown, 291 F.Supp. 1011 (N.D.Cal. 1968), aff'd, 449 F.2d 654 (9th Cir. 1971) (failure to provide specification of charges and identification of witnesses, thus preventing preparation of defense).

Thus, where objection is made, the Government has a choice between offering the report into evidence and divulging the identity of the sources or not offering the report at all. This principle is no stranger to the law. (E.g. United States v. Andolschek, 142 F.2d 503, 506 (2nd Cir. 1944); United States v. Coplon, 185 F.2d 629, 638 (2nd Cir. 1950).)*/

As discussed in Section I, supra, based on our understanding of the issues and the purpose for which these I&E Reports are offered, Applicants have not objected to their introduction for limited purposes. As discussed above, we do not believe that the specifics of examples "a" through "p" or the Staff's characterization thereof are in issue in this proceeding. Accordingly, an objection as to those particular matters would arise only if the Board's view of the issues in the proceeding or the Staff's purpose in introducing the I&E Report differs from Applicants' present understanding.

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*/ We need not deal here with the question of whether the I&E Reports would be admissible if the identities of informants were disclosed. In that case there might still be a question as to whether such double or triple hearsay is reliable and probative.

At any time that material relying on unidentified confidential informants is sought to be introduced for the truth thereof with respect to a matter at issue in this proceeding, a motion to strike by Applicants*/ would have to be granted. At present we perceive no reason to make such a motion.

III. In Determining The Evidentiary Weight To Be Accorded I&E Reports The Board Should Consider The Fact That Certain Statements Have Not Been Subject To The Test Of Cross-examination And Rebuttal.

The third question raised by the Board is, if I&E Reports relying on statements of confidential informants are admissible, may the Board decline to accord them any weight solely because of the failure to identify some or all of the unidentified individuals. In Applicants' view the NRC Rules of Practice permit the admission of evidence only if it is "relevant, material, and reliable . . . [and] not unduly repetitious", 10 C.F.R. § 2.743(c) (1980). Accordingly all evidence properly

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*/ The foregoing discussion is predicated in large part on the Applicants' protected rights under the Fifth Amendment. We express no view regarding the rights of other parties.

In addition we should note that there may be an additional basis for a motion by Applicants to strike information provided by confidential informants. If Applicants were to request the name of such an informant and the Board were to find that such name is not "relevant or helpful to the defense of Applicants" under the Roviaro test, it would appear to follow almost inevitably that the information is not relevant or material and is thus inadmissible under 10 C.F.R. § 2.743(c) (1980).

admitted would presumably be entitled to some weight.*/ However, there are inherent questions about the reliability of the portion of an I&E Report that depends upon statements of confidential informants and the Board should take those uncertainties into account when weighing such evidence. The cases indicate a number of factors that bear on the weight to be accorded hearsay evidence. Two cases that are particularly instructive are School Board of Broward County v. H.E.W., 525 F.2d 900 (5th Cir. 1976); and U.S. Pipe & Foundry Co. v. Webb, 595 F.2d 264 (5th Cir. 1979).

The Broward County case was a review of an H.E.W. determination, after hearing, regarding eligibility under the Emergency School Assistance Program, Pub. L. 91-380, 84 Stat. 804 (1970). The agency determination rested on hearsay evidence and the court found that while certain of that evidence was entitled to "little weight," other hearsay evidence bore special indicia of probative value and trustworthiness. The court stated that the proper procedure is to subject the hearsay to

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*/ Of course, as discussed above, evidence may be received for only limited purposes, and it is our understanding that the portions of I&E Reports containing statements of confidential informants are being offered and admitted for purposes other than proving the truth of such statements. Thus, the material in examples "a" through "p" of Staff Exh. 46, is admissible for the purpose of establishing the rationale, as perceived by the reporting investigators/ inspectors, for the conclusions regarding impairment of the independence of the quality control inspection and lack of management support for it but not for the purpose of establishing the accuracy of the information upon which those perceptions are based.

analysis to determine the probative weight to be accorded. Factors mentioned by the court included:

(1) An out-of-court declarant who was an agent of the School Board could be trusted regarding a statement against the interest of the School Board, since the agent was available to the School Board as a witness and could have been called to explain the statement. (525 F.2d at 906);

(2) A witness who testified to hearsay gave reliable testimony because she was disinterested in the controversy and her testimony was corroborated by documentary evidence. In this case the out-of-court statement was by a school official concerning school policy and the court did not even address the possibility that it might be unreliable. (Id. at 907);

(3) No direct evidence was available to H.E.W. because it did not have subpoena power. This inability to procure direct evidence led the court to "be more flexible." (Id.);

(4) The hearsay evidence was uncontradicted in the record. (Id.).

While each of these factors could be usefully applied in evaluating the probative value of the I&E Reports, the first should receive special attention.*/ An out-of-hearing declarant

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*/ Application of the other three factors would also tend to decrease the weight to be accorded to a portion of an I&E Report based on information from a confidential informant. Since the informant is unidentified neither the Applicants nor the Board can assess whether the informant is disinterested; since the NRC Staff could obtain a subpoena, it could have supplied direct evidence and, if the information is contradicted, the direct evidence to the contrary (presumably non-hearsay) should be given more weight, while, if the I&E Report is uncontradicted it is likely that such situation arises because Applicants have insufficient information concerning the material from confidential sources to be able to contradict it.

who is unknown to the Board and the parties other than the Staff, is for all practical purposes unavailable to anyone but the Staff. This factor of availability (with opportunity to fully investigate, cross-examine and rebut) was important to the Broward County court, and was also emphasized by the Supreme Court in Richardson v. Perales, which is discussed in section II of this brief.

In U.S. Pipe & Foundry Co. v. Webb, supra, written medical reports were held to be reliable and probative evidence, citing the Perales case.

> Several factors assured the reliability and probative value of the three doctors' reports challenged by U.S. Pipe. Doctors Goodman, Cole and Bristol were neither biased nor interested in the outcome of the case; claimants obtained the reports from the records of the Department of Labor. Under the regulations, U.S. Pipe was entitled to a copy of medical reports and evidence before the hearing. See 20 C.F.R. §§ 725.151, 725.153, 725.435, 725.440 (1978). Prospective witnesses may also be subpoenaed and deposed. 20 C.F.R. §§ 725.403, 725.463 (1978). The reports were not substantially inconsistent on their face and were standard routine evaluations by trained physicians working within their areas of competence. The doctors based their diagnoses on accepted medical tests and procedures and on personal observations of either Webb himself or his x-rays. See Richardson v. Perales, 402 U.S. at 403, 404, 91 S.Ct. 1420.

595 F.2d at 270.

Obviously, the tests applied by the courts in U.S. Pipe and Broward County require some knowledge about the declarants that would be unavailable if they were unidentified confidential informants. When a declarant is not identified, the Board has no ability to examine his trustworthiness or to

determine whether he has an interest in the proceeding, bears a grudge that motivates his statement or is otherwise influenced by inappropriate factors. This lack of information about the declarant should be an overriding factor in the Board's weighing of the evidence, especially where a conflict exists.

IV. Other Matters Raised By The First Board Question.

A. Only the Identities of Informants Need be Kept Confidential.

The Board requested the parties to address the issue of whether the limitations on identification of informants also applies to "participants" and to individuals who are both participants and informants. We think it clear that the privilege applies only to disclosure of the names of informants who provided information pursuant to a pledge or a reasonable expectation of confidentiality. The fact that an individual is referred to as a "participant" in an event should not be taken to vitiate any pledge of confidentiality given to him, although it may, as discussed below, bear on the balance struck under the Roviaro test.

Of course, an individual who is alleged to be a participant and is not a confidential informant would not be covered by the informant's privilege and his identity could be revealed upon proper request.*/ It is only when an unidentified

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*/ To our knowledge no such request has been made.

participant also happens to be a confidential informant that the informant's privilege would be applicable. Once a request is made, presumably during cross-examination of Staff witnesses, the burden will be on the Staff to determine, in the first instance, whether it will assert the privilege.

The balancing test described in Roviaro and ALAB-639 weighs the likelihood that disclosure of the informant's identity would lead to production of meaningful evidence against the government's interest in keeping open the channel of communication from informants. One factor that must be considered is whether there is any reason to believe that the informant would be a competent witness on an issue of importance to the proceeding. (Pena v. LeFerve, 419 F.Supp. 112 (E.D.N.Y. 1976); Wirtz v. Continental Finance & Loan Co., 326 F.2d 561 (5th Cir. 1964); Black v. Sheraton Corp., 564 F.2d 531 (D.C. Cir. 1977); Howard v. Allgood, 272 F.Supp. 381 (E.D.La. 1967), aff'd, 402 F.2d 795 (5th Cir. 1968)). Obviously if an alleged past event is an important issue in the proceeding, then an alleged participant in that event would be an important witness and disclosure of his identity may be necessary. (Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955)). Similarly, disclosure of the identity of any other eyewitness to an important event might be required. (United States v. Silva, 580 F.2d 144 (5th Cir. 1978); United States v. Skeens, 449 F.2d 1066 (D.C. Cir. 1971); Johnson v. Wyrick, 501 F.Supp. 174, 176 (E.D.Mo. 1980)). The question in such cases is not

the active or passive nature of the informant's role in the alleged event, but the importance and probative nature of the informant's testimony if called as a witness.

B. The Informant's Privilege Depends on the Informant's Reasonable Expectation of Confidential Treatment.

The Board requested the parties to address the question of whether the informant's privilege would apply where the pledge made by the Government was limited. It is obviously difficult to address this question without knowing the specific limitations in the pledge. To determine whether the privilege applies, the Board should consider whether it was reasonable for the informant to expect confidentiality and whether disclosure would affect the Staff's ability to obtain information in the future.

> [A] showing that there was an explicit understanding that information was being given in confidence is not an absolute prerequisite for this nondisclosure consideration to apply. For example, the surrounding circumstances, when viewed in the light of an historical pattern of non-disclosure, may support a determination that it was entirely reasonable for the party giving the information to assume that it was being given in confidence. In this connection, consideration here should be given to the possible adverse effect any such disclosure might have on the ability of AEC inspectors to obtain full and candid expression of the views of individuals they interview during the course of an inspection.

Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390, 395 (1970).

In the Monticello case the Appeal Board found that the privilege applied "only as respects those persons (other than public officials) who made statements to compliance inspectors

outside of general meetings." Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-16, 4 AEC 435, 436 (1970). Accordingly the circumstances in which each confidential statement is given must be scrutinized to determine whether the privilege applies.

V. Conclusion.

Based on the current state of the record disclosure of the names of confidential informants is not warranted. If I&E Reports relying on the statements of confidential informants are used to establish facts with respect to material issues a motion to strike by Applicants would lie. In the unlikely event that any statement of a confidential informant is offered into evidence for the truth thereof and so admitted by the Board it should be given little weight.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING AND POWER COMPANY, ET AL.	)	Docket Nos. 50-498 OL 50-499 OL
	)	
(South Texas Project, Units 1 and 2)	)	July 16, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicants' Brief on the Identification of Informants and the Use of Their Statements as Evidence has been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid, or by hand delivery as indicated by an asterisk, on this 16th day of July, 1981.

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