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June 5, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CASE's Proposal Regarding The
Use Of Confidential Information

The use of confidential information in this hearing has been a procedural thorn in the side of both the parties and the Board. It is clear to CASE's counsel that each of the parties have struggled with the problem of how to balance the responsibility of continuing disclosure of relevant information required under 10 C.F.R. 2.740(e), with commitments to those persons who provide such information in confidence (as protected by the provisions of 10 C.F.R. 2.740(2)(c)).

Our proposal starts with a basic administrative due process premise upon which we believe all parties agree -- that the decision-maker should not rely in its evaluation process on any information on which the parties have not had an opportunity to present their respective cases.[1]

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[1] Applicants articulated in a May 10, 1984 Motion To Obtain Access To Information Regarding Investigations At Comanche Peak Or For Alternative Relief their concerns on the matter of the Board's ex parte access to information from the Office of

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We believe that there is substantial merit to Applicants' concerns (Motion, supra), and do not disagree with the initial response taken by the Board in its May 17, 1984 Order which prohibited the Office of Investigations from providing information to the Board "unless it provides all the same information, either publicly or subject to a protective order, to each of the parties to this case." Although we agree in principle with the current posture of this procedure, we believe that some significant questions remain which must be confronted at the very onset of the harassment and intimidation proceeding.

Those questions are:

(1) How do the parties balance their legitimate discovery needs and responsibilities with their need to be able to provide a promise of confidentiality to those persons who provide information, voluntarily or at the request of a party, about conditions or problems at the Comanche Peak construction site?

(2) How does the Board deal with information, unknown to the parties, but deemed relevant to the proceeding by an office of the Commission?

Our proposal provides an approach to both of those dilemmas. We recognize that an insoluable debate over a particular witness or incident may remain. However, we believe that our proposal, if followed in good faith, will reduce those to the smallest possible number.

Investigations (OI) pursuant to the August 10, 1983 Statement of Policy "Investigations and Adjudicatory Proceedings".

PROPOSAL

There is no argument with the requirement for a full administrative hearing on the harassament and intimidation issue.[2] Further, there is no acceptable argument for holding a hearing on any issue which does not address relevant information in the possession of any or all of the parties. On this matter we strenuously object to the suggestions in Applicant's May 10, 1984 Motion (supra) which suggested the exclusion of relevant information entirely. (Motion, at 11).

In our opinion, all the parties and the Board are on equal footing in this dilemma. It is, however, the ability of the Board to render an accurate and fair decision which should be the greatest concern of the parties. Our discussion of a proposal is premised on the belief that each party has relevant information, gleaned from persons who desire confidentiality for some reason unique to that individual, and that those persons do not wish to

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2 As the Commission stated:

> We long ago reminded liensing boards of their duty not only to resolve contested issues but to 'articulate in reasonable detail the basis' for the course of action chosen. [citation omitted] We, as well as the parties, should be able 'readily to apprehend the foundation for the [Board's] ruling' [citation omitted]. For it is a well-accepted principle of administrative law that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.' [citations omitted]. A board must do more than reach conclusions; it must 'confront the facts'. [citations omitted]." P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 41 (1977), affirmed, CLI-78-1, 7 NRC 1 (1978), affirmed sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

participate voluntarily in the hearing process. Those reasons, whether fear of further harassment and intimidation well-founded, a lack of sophistication about the litigation process, or concerns about the impact of testifying on their career, are significant factors to each individual. Those individual concerns cannot realistically be waived away by either counsel or the Board in pursuit of the full disclosure obligation for the benefit of a full hearing record, when the cost could be the failure of the Applicants, Staff or some other check and balance system set up to ensure a safe nuclear plant.

In fact, CASE is acutely aware that the inability of any or all parties to accept information, in confidence, about the quality of construction or incidents of harassment and intimidation could seriously impact the successful implementation of any such program which attempts to open the door to the work force about problems.

Question 1

We propose the following in regards to discovery:

(1) All parties make a genuine effort to encourage any person who has relevant information to voluntarily participate in the hearing process, either publicly or in camera.[3]

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[3] We request that the Board consider the full use of an Affidavit of Non-Disclosure (Attachment 1) by which the number of those individuals who have knowledge of a confidential witness is limited to the minimum necessary for discovery purposes. This procedure has been used, apparently successfully, in both the Byron and Catawba proceeding. (We note that the number of utility employees in the Catawba proceeding who had signed the affidavit and therefore were privy to the identities and concerned the in camera witnesses exceeded 70, a number which

We acknowledge that the parties' attempts to convince all persons who have knowledge about harassment and intimidation will probably fail to secure 100% disclosure, for those remaining few witnesses we propose to deal with their information in the following manner:

(2) All parties disclose to each other, through an informal process, those procedures used to determine what information is deemed "confidential," and upon what basis persons are granted "confidentiality";

(3) For each witness who refuses to participate in the hearing process, regardless of the protections offered, the counsel should be required to submit an affidavit explaining what the prohibiting concerns of that witness are and to detail his attempts to persuade the witness to participate in this hearing.[4]

(4) After a review of those procedures the parties should attempt to reach a stipulation through which the use of "confidentiality" (to protect the identities of certain persons) in the normal course of each other's business will be honored by each

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defeats the purpose of the affidavit.)

[4] CASE is legitimately concerned that the process it proposes could be easily abused by any party who is not sincerely committed to the full disclosure of the incidents and evidence available to it regarding all aspects of harassment and intimidation. As the Board and parties are acutely aware, the failure of the Staff to disclose information (names and sources who did not request confidentiality in the first place) under the guise of confidentiality is exactly the type of behavior which would undermine the implementation of this procedure to the point of making it a charade. If similar conduct was employed CASE would urge the Board to take swift and immediate action to foreclose such abuse.

party.[5] If the parties fail to reach a stipulation the procedures will be submitted to the Board with a request to establish an acceptable method of preserving the use of "confidentiality" by each party.

(5) That all parties identify fully the substance of each witness' information in its entirety, except for obviously identifying information;

(6) That a uniform coding system, following the lead of the NRC Staff's witness coding system, for confidential witnesses be developed and followed so that all parties and the Board have a clear understanding of how to address or discuss either in camera or confidential sources of information; and

(7) Any or all anonymous relevant information, where the identity of the source is unknown even to the party, be disclosed in its entirety.

Question 2

With regard to the information which is relevant to this proceeding but protected under the ambit of official ongoing NRC investigations (see, Statement of Policy, supra) we ask the Board to modify its May 17, 1984 Order in the following manner:

(1) Request that the Office of Investigations prepare a

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5 It has become apparent through the discovery already engaged in that Applicant, as well as the NRC Staff, have a practice or procedure of protecting the identity of individuals who provide information to it. Almost all of the documents received to date from Applicant are in an expurgated form -- removing names, dates, specific areas of problems, etc. CASE's counsel has already asked for an explanation of the procedures employed by either the Applicant or his counsel in determining what information is disclosed and what is not.

briefing for the Board and the parties (to be held in camera, but not ex parte) in which it identifies all ongoing investigations that are relevant to harassment and intimidation.[6] (We acknowledge that in order to not compromise the investigation such a briefing may be, of necessity, somewhat shallow.)[7]

(2) That such briefings should be held periodically throughout the course of this litigation with the scope of such briefings limited to an overview of any relevant information about incidents of harassment and intimidation.

Further, with regard to the issue of relevant information:

(3) At the conclusion of any relevant investigations by any party the Board and the parties are immediately provided with copies of the investigation report or inspection.

(4) If the hearings are concluded without the benefit of any relevant OI investigation reports an ex parte briefing of the relevant portions of the ongoing investigation will be given.

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6 We believe that the requirement of disclosure under 10 C.F.R. Part 21 is relevant to all matters which the Staff, the Applicant, and others investigate, including an ongoing investigation by the Government Accountability Project (GAP). As the Board knows, GAP has indicated that all of its information will be disclosed to OI (see Request filed March 16, 1984 pursuant to 10 C.F.R. 2.206, and submitted to the Board attached to a Limited Appearance Statement dated March 20, 1984).

7 CASE is particularly concerned with providing a structured acceptable method of exchanging relevant information, or the existence of such information, with OI is because (1) witnesses have expressed a willingness to provide information to or cooperate with OI investigators while balking at undertaking similar risks with regional staff; and (2) since harassment and intimidation is a violation of the Energy Reorganization Act and also, in some cases, a criminal violation, it will be OI which is the recipient of the bulk of information relevant to these proceedings.

Following this ex parte briefing the Board will make a simple decision of whether or not the information contained in the investigation (1) would substantially enhance the record in some manner and therefore require a hearing, or (2) that the information is either cumulative of what is already on the record, or the Board does not believe that the information is necessary to its decision.[8]

If the Board decides that the information should be dealt with in the hearing process it will become necessary for the Office of Investigations to precisely define the nature of the problem which is preventing the matter from being made public.[9]

It would be speculative to attempt to project beyond the possibilities outlined here. CASE acknowledges, however, the very real potential that it may be impossible to close the record on this issue at the conclusion of the hearing because of information known only to the Office of Investigations deemed to be relevant to this issue.

In such a case, given the Byron decision, we believe that

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8 The Board in this case has already been faced with an analogous situation in which it exercised judgment similar to the type of judgment it would be faced with if CASE's proposal is adopted. See Memorandum and Order of the Board (Quality Assurance for Design), December 28, 1983, footnote 35, in which the Board rejected the need for applicant to reply to information on a technical issue provided by CASE in response to post-hearing submittals by the Staff because the matters were fully covered in previous testimony.

9 The current confidentiality policy of the Staff is attached as Attachment 2. It should be noted that the confidentiality statement makes a special provision for the possible need to disclose the identification of a confidential witness under "orders or subpoenas issued by courts of law, hearing boards, or similar legal entities."

all the parties have no choice but to wait until completion of the investigation or be faced with an appeals board decision to remand the matter for further hearings. (See, generally, Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, ___ NRC ___, slip opinion, May 7, 1984).

CONCLUSION

We submit that our proposal is a reasonable way to balance the parties requirements of full disclosure with their legitimate need to make and keep commitments of confidentiality. Further, it provides a methodology which should narrow down to very specific matters or witnesses such insoluable problems as might develop.[10]

Further it requires all of the parties to explain to all of their potential witnesses the hearing procedures (including available protections), the scope of the issue, and the importance of presenting a full and complete record on the issue

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10 These types of problems have arisen before, if not before hearing boards, then between the Staff, the Applicant and witnesses who desired confidentiality and protection but were anxious to have their concerns known to those persons who could take corrective action. For informational purposes only I have attached a letter from the Government Accountability Project (Attachment 3) of the efforts another utility company has undertaken in order to have the concerns of an alleger identified. Although the alleger mentioned in this correspondence ultimately revealed significant hardware defects to the staff and utility management the fears of identification and industry "black balling" expressed by the alleger and the lengths to which all parties were required to go in order to convince the witness to disclose his specific concerns may be similar to the types of situations which will remain to be solved by the parties in this proceeding.

of harassment and intimidation to this Board.

CASE respectfully requests the Board adopt the proposal for dealing with confidential information outlined on pages 4 to 9 of this motion.

Respectfully submitted,

Anthony Z. Roisman BG

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Washington, D.C. 20036
(202) 463-8600

June 5, 1984

AFFIDAVIT OF NON-DISCLOSURE

I, __ _____, being duly sworn, state:

1. As used in this Affidavit of Non-Disclosure,

(a) "protected information" is (1) information revealed in connection with in camera hearings in the Catawba operating license proceeding, including particularly the names of and identifying facts about in camera witnesses, and any other related information, particularly documents, specifically designated by the Licensing Board; or (2) any information obtained by virtue of these proceedings which is not otherwise a matter of public record and which deals with the in camera hearings.

(b) An "authorized person" is a person who, at the invitation of the Atomic Safety and Licensing Board ("Licensing Board"), has executed a copy of this Affidavit.

2. I shall not disclose protected information to anyone except an authorized person, unless that information has previously been disclosed in the public record of this proceeding. I will safeguard protected information in written form (including any portions of transcripts of in camera hearings, filed testimony or any other documents that contain such information), so that it remains at all times under the control of an authorized person and is not disclosed to anyone else.

3. I will not reproduce any protected information by any means without the Licensing Board's express approval or direction. So long as I possess protected information, I shall continue to take these

precautions until further order of the Licensing Board.

4. I shall similarly safeguard and hold in confidence any data, notes, or copies of protected information and all other papers which contain any protected information by means of the following:

(a) My use of the protected information will be made at a place approved by the Board.

(b) I will keep and safeguard all such material in a locked facility approved by the Board.

(c) Any secretarial work performed at my request or under my supervision will be performed at the above location by one secretary of my designation. I shall furnish the Board and parties an appropriate resume of the secretary's background and experience.

(d) All mailings by me involving protected information shall be made by me directly to the United States Postal Service or by personal delivery.

5. If I prepare papers containing protected information in order to participate in further proceedings in this case, I will assure that any secretary or other individual who must receive protected information in order to help me prepare those papers has executed an affidavit like this one and has agreed to abide by its terms. Copies of any such affidavit will be filled with and accepted by the Licensing Board before I reveal any protected information to any such person.

6. I shall use protected information only for the purpose of preparation, including any investigations which may be necessary, for

this proceeding or any further proceedings in this case dealing with quality assurance and quality control issues, and for no other purpose.

7. I will avoid disclosure of protected information to the best of my ability. However, it must be recognized that in the course of conducting investigations in connection with this proceeding, certain protected information may be independently discerned incident to that investigation which might result in the inadvertent disclosure of protected information.

8. I shall keep a record of all protected information in my possession, including any copies of that information made by or for me. At the conclusion of this proceeding, I shall account to the Licensing Board or to a Commission employee designated by that Board for all the papers or other materials containing protected information in my possession and deliver them as provided herein. When I have finished using the protected information they contain, but in no event later than the conclusion of this proceeding, I shall deliver those papers and materials to the Licensing Board (or to a Commission employee designated by the Board), together with all notes and data which contain protected information for safekeeping until further order of the Board.

_____

Subscribed and sworn to before me

this ____ day of _____ 1983.

_____

Notary Public

OFFICE OF INVESTIGATIONS

INVESTIGATIVE PROCEDURE MEMORANDUM NO. 82-008

SUBJECT: CONFIDENTIALITY OF INFORMANTS/WITNESSES

OBJECTIVES

(1) To provide the NRC with the broadest possible latitude in making use of information from informants and witnesses while still providing those individuals with adequate assurances that their identities will be protected as fully as possible.

(2) To minimize the possibility of subsequent claims that individuals were offered confidentiality, when it was not granted either as a matter of policy or because it was not specifically requested.

GENERAL POLICY

Investigators will not routinely offer confidentiality to individuals making allegations or otherwise providing information during the course of an NRC investigation. The subject of confidentiality, i.e., the protection of the identity of an informant or witness, normally should not be raised initially by the investigator during an NRC interview. If an individual requests anonymity, or if in the opinion of the investigator the information will not otherwise be forthcoming, the investigator may then grant confidentiality.

EXTENT OF CONFIDENTIALITY AVAILABLE

Before confidentiality has been granted, the individual should be informed that, although the pledge is not absolute, it is NRC policy not to divulge to others the identity of people granted confidentiality, either during or subsequent to the investigation; further, the individual should be told that his/her name will not normally appear in the publicly released report of investigation. It should be pointed out, however, that the nature of the allegations or the limited number of individuals privy to the subject information may provide a basis for guessing his/her identity. Such "guesses" will not be confirmed or otherwise responded to by NRC.

Finally, the individual should be made aware that, if the results of the investigation form the basis for an enforcement action, either civil or criminal, and a hearing ensues, it may not be possible to maintain his/her anonymity. The individual should be informed that the information may be given to Congress and/or other Federal agencies. He/she should also be advised of the protection afforded by section 210 of the Energy Reorganization Act of 1974 to employees who may be discharged or otherwise discriminated against for providing information or assistance to the NRC.

CONFIDENTIALITY AGREEMENT

When an individual accepts the offer of confidentiality, a "Confidentiality Agreement" (attachment 1) must be executed. This form outlines the scope of the agreement and the responsibilities of each party. Investigators are not authorized to grant confidentiality to anyone who refuses to sign an agreement

in substantially the same form. The form provides a space for "other conditions" which may be used to address particular needs; however, investigators may not allow such conditions to alter the general scope of confidentiality authorized. After the form is signed by both the individual and the investigator, the original copy should be provided to the individual; the investigator should retain either a photocopy of the executed agreement or a duplicate original of the agreement. The NRC copy will be retained in the OI Field Office file for the investigation.

(Original to source of ir mation, NRC to retain signed py of duplicate original)

I have information that I wish to provide in confidence to the U. S. Nuclear Regulatory Commission (NRC). I request an express pledge of confidentiality as a condition of providing this information to the NRC. I will not provide this information voluntarily to the NRC without such confidentiality being extended to me.

It is my understanding, consistent with its legal obligations, the NRC, by agreeing to this confidentiality, will adhere to the following conditions:

(1) The NRC will not identify me by name or personal identifier in any NRC initiated document, conversation, or communication released to the public which relates directly to the information provided by me. I understand the term "public release" to encompass any distribution outside of the NRC with the exception of other public agencies which may require this information in futherance of their responsibilities under law or public trust.

(2) The NRC will disclose my identity within the NRC only to the extent required for the conduct of NRC related activities.

(3) During the course of the inquiry or investigation the NRC will also make every effort consistent with the investigative needs of the Commission to avoid actions which would clearly be expected to result in the disclosure of my identity to persons subsequently contacted by the NRC. At a later stage I understand that even though the NRC will make every reasonable effort to protect my identity, my identification could be compelled by orders or subpoenas issued by courts of law, hearing boards, or similar legal entities. In such cases, the basis for granting this promise of confidentiality and any other relevant facts will be communicated to the authority ordering the disclosure in an effort to maintain my confidentiality. If this effort proves unsuccessful, a representative of the NRC will attempt to inform me of any such action before disclosing my identity.

I also understand that the NRC will consider me to have waived my right to confidentiality if I take any action that may be reasonably expected to disclose my identity. I further understand that the NRC will consider me to have waived my rights to confidentiality if I provide (or have previously provided) information to any other party that contradicts the information that I provided to the NRC or if circumstances indicate that I am intentionally providing false information to the NRC.

Other Conditions: (if any)

I have read and fully understand the contents of this agreement. I agree with its provisions.

Date

Signature of source of information
Typed or Printed Name and Address

Agreed to on behalf of the US Nuclear Regulatory Commission.

Date

Signature
Typed or Printed Name and Title

GOVERNMENT ACCOUNTABILITY PROJECT
Institute for Policy Studies
1901 Que Street, N.W., Washington, D.C. 20009
(202) 234-9382

March 9, 1983

Mr. James E. Brunner
Consumers Power Company
P.O. Box 1593
Midland, Michigan 48640

Dear Mr. Brunner:

This letter is in response to your February 24, 1983 letter to me regarding the criteria under which an individual ("Individual A") who has provided a confidential affidavit to GAP will be able to visit the Midland jobsite.

We appreciate the efforts that you have gone through to extend the opportunity to our client to visit the site and identify and explain his allegations to the Nuclear Regulatory Commission inspectors/investigators. As I indicated in my December letter, as well as throughout our conversations, both GAP and Individual A are anxious to have the problems on the site identified and resolved.

The major criteria that we have agreed upon are summarized below:

(1) A site tour will be provided for Individual A during non-regular work hours (i.e., weekends, evenings, etc.).

(2) Another individual, preferably a current or former plant employee, or union representative, will be allowed to accompany the individual on the site tour.

(3) The Company and contractor Bechtel will "not disclose Individual A's identity to the media or general public." We understand that in fact Individual A's identity will not be disclosed beyond the control group identified in your February 24, 1983 letter.

(4) The Company will not refer to the fact that Individual A had supplied information, which was transmitted to the NRC, in any job reference or any other communication which the Company provides.

(5) That any reference to Individual A's allegations or to Individual A in company documents will be limited to the control

group as identified in your February 24, 1983 letter. (We strongly suggest that any reference to the individual, including company internal documents, be done with discretion. Both the NRC and GAP use an alphabetical identification system in-house as well as in any external communication. We believe following that procedure would eliminate the possibility of an internal leak.)

(6) That the individual will not have to sign the usual site procedural sign-in book, since he will be accompanied at all times by both NRC and company officials. (This has been done at both LaSalle and Zimmer.)

(7) That the issue of depositions and confidentiality within the ASLB hearing process will be dealt with at some future time through the ASLB under such protective measures as are guaranteed by the Board.

(8) That Individual A will not be subjected to any questioning by company officials attempting to challenge the validity of his/her allegations, or by technical consultants or employees. The purpose of the site tour is to facilitate the NRC inspection effort. Subsequent to the NRC effort we assume Consumers will take the appropriate corrective action.

We further wish to clarify the points raised in your February 24, 1983 letter, paragraph 3.

> "Despite the above protective measures, the affiant's identity might be guessed or inferred by a co-worker or other person outside the 'control group' as a result of the identification, tagging (if necessary), or correction of the identified hardware, or because of the required QA documentation pinpointing the problem. Certain persons may already have guessed or been told by the affiant of his identity. Obviously, neither CPCo nor Bechtel is in a position to guarantee that further disclosures have not or will not be made by such persons, or that they have or will abide by the terms described below."

We assume that Consumers Power Company and your contractor, the Bechtel Corporation, are responsible for the actions of your employees. On an issue as sensitive as this one it would seem appropriate that extra precautions would be taken to ensure that (1) the individual's identity is not released, and (2) that even if his/her identity were guessed or inferred by a co-worker or other person outside the "control group," that person would be aware of and familiar with the agreement made between your company and us on behalf of the protected witness. We can conceive of only a very unusual circumstance where the knowledge of Individual A's

identity on the part of any of your employees would be beyond your control if the conditions agreed to are faithfully followed and since the on-site tour itself will be "secret" and unannounced. We would certainly expect that in the event an employee guessed or inferred the identity, such a guess or inference would not be verified or discussed by the company or contractor or its employees.

Finally, we wish to clarify your comments during our conversation in Midland about the number of people who would know the identity of the affiant. You originally stated, and your December 28, 1983 letter to James Keppler indicated that "not more than two or three persons" would know. However, in the February 24, 1983 letter and via the NRC, it appears that number may be expanding. We wish to underscore that our agreement is predicated upon the promise that the smallest possible number of individuals know our client's identity.

Sincerely,

Billie Pirner Garde
Director, Citizens Clinic

BPG/ea

cc: SLewis, Region III
WPaton, OELD
MIMiller, IL&B
MHearny
OL/OM Service List
JWCook, Consumers
DBMiller, Consumers
RAWells, Consumers
JRutgers, Bechtel