

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO ACORN'S RESPONSE TO NRC STAFF'S  
STATUS REPORT ON PROPOSED STIPULATIONS AND  
ACORN'S REQUEST THAT THE NRC STAFF BE ORDERED TO  
FURTHER NEGOTIATION ON ADMISSIBILITY OF PROPOSED CONTENTIONS

I. INTRODUCTION

In a pleading filed with the Atomic Safety and Licensing Board (hereafter the Licensing Board) on February 11, 1980, ACORN, an Intervenor in this proceeding,<sup>1/</sup> responded to a document filed by the NRC Staff on January 25, 1980<sup>2/</sup> and requested that the Licensing Board 1) order the Staff "to discuss and negotiate the admissibility of each of ACORN's proposed contentions", 2) further order the NRC Staff to "cease in its efforts to deny the admissibility

<sup>1/</sup> ACORN included, as an attachment to this pleading, the proposed stipulation covering ACORN's contentions and the accompanying statement of ACORN's revised contentions.

<sup>2/</sup> See "NRC STAFF'S STATUS REPORT ON PROPOSED STIPULATIONS AND REQUEST TO SCHEDULE PREHEARING CONFERENCE," dated January 25, 1980. This document was filed in response to the Licensing Board's Order dated January 10, 1980, in which the Licensing Board requested that the NRC Staff provide a realistic appraisal of the status of negotiations among the parties in this proceeding concerning the contentions of the Intervenor. In addition to apprising the Licensing Board of the status of the negotiations, the Staff also suggested that the Licensing Board schedule a prehearing conference on March 20, 1980, for the purposes of (1) hearing oral argument on contentions, if it desires to receive such presentation in addition to any written statements which may be requested by the Board (the Staff proposed that all parties file such statements by February 29, 1980) and 2) discussing further scheduling matters. As explained infra, in a letter to the Licensing Board dated February 25, 1980, the Staff proposed a revised schedule for submission of statements of position on contentions.

of the QA-QC [Quality Assurance/Quality Control] contention which appears in the Board's Order Relative To The Standing of Petitioners to Intervene", and 3) "postpone any hearing in this matter until the Staff and ACORN have completed discussions on the admissibility of proposed contentions". For the reasons set forth below, the Staff believes that ACORN's requests should be denied.

II. BACKGROUND AND CHRONOLOGY OF DISCUSSIONS AND NEGOTIATIONS  
AMONG THE PARTIES CONCERNING CONTENTIONS

On February 5, 1979, a Notice of Opportunity for Hearing with respect to the application for an operating licenses in the captioned proceeding was published in the Federal Register (44 Fed. Reg. 6995). The Notice provided that any persons whose interest might be affected could submit a petition for leave to intervene by March 5, 1979. Pursuant to that notice and the provisions of the Commission's Rules of Practice in 10 CFR §2.714, timely petitions for leave to intervene were filed by CASE (Citizens Association for Sound Energy), CFUR (Citizens for Fair Utility Regulation) and ACORN/WTLS (Texas Association of Community Organizations for Reform Now and West Texas Legal Services).

In pleadings dated March 19, 1979,<sup>3/</sup> March 23, 1979,<sup>4/</sup> and April 15, 1979,<sup>5/</sup> the Staff recommended that each petition for leave to intervene be granted. In these pleadings, the Staff noted its intention, consistent with the Commission's views as stated in the Statement of Consideration accompanying the May 26, 1978, amendment of certain sections of 10 CFR §2.714, 43 Fed. Reg.

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<sup>3/</sup> See, "NRC STAFF ANSWER TO PETITION FOR LEAVE TO INTERVENE BY CASE," (March 19, 1979).

<sup>4/</sup> See, "NRC STAFF ANSWER TO PETITION FOR LEAVE TO INTERVENE BY CFUR," (March 23, 1979).

<sup>5/</sup> See, "NRC Staff ANSWER TO JOINT PETITION FOR LEAVE TO INTERVENE BY ACORN and WTLS," (April 19, 1979).

17798 (April 26, 1978), to meet with each organization in an effort to arrive at agreement on contentions to be submitted in the future.<sup>6/</sup> In accordance with this statement, the Staff arranged to meet in NRC's Region IV offices in Arlington, Texas, with Applicants' counsel and representatives and with representatives of CFUR, CASE and ACORN, on April 16, 1979,<sup>7/</sup> April 17, 1979,<sup>8/</sup> and April 18, 1979, respectively.<sup>9/</sup> Subsequently, on April 17, 18 and 19, counsel for NRC Staff and Applicants' counsel and representatives met with representatives of CASE and CFUR and counsel for ACORN to discuss contentions to be submitted by each organization. With respect to ACORN, this discussion covered the "rough draft of forty-five potential contentions "submitted by counsel for ACORN on April 11, 1979, "as a basis for our discussion ..."<sup>10/</sup> As part of the discussion with ACORN, counsel for Staff commented, in general, on the specificity and basis requirements in 10 CFR §2.714(b) regarding contentions and stated whether, in its view, the particular contentions proposed by ACORN satisfied these requirements.

In an unpublished "Order Relative To Motion For Continuance" (Order) dated May 9, 1979, the Licensing Board denied ACORN's Motion for Continuance filed on April 6, 1979, in which ACORN requested that the time for filing contentions and the first prehearing conference be continued. In this Order, the Licensing Board, noting that "the requirements for 'standing' being interest and at least one valid contention," requested that the Applicants and Staff "address in

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<sup>6/</sup> The Supplements setting forth contentions had not yet been filed.

<sup>7/</sup> See Attachment A.

<sup>8/</sup> See Attachment B.

<sup>9/</sup> See Attachment C.

<sup>10/</sup> See Attachment D (enclosure not included).

writing prior to the prehearing conference ... their position as to whether they believe there is one or more acceptable contentions for each of the petitioners." Order, pp.2-3.

On May 17, 1979, the Staff filed, in response to the Board's May 9, 1979 Order, "NRC STAFF MEMORANDUM REGARDING CONTENTIONS AND FURTHER ANSWER TO ACORN/WTLS PETITION FOR LEAVE TO INTERVENE" (Memorandum). In accordance with the Board's Order of May 9, 1979, the Staff confined its consideration of contentions in the Memorandum to assessing whether, "in our view, there is one or more acceptable contentions for each of the parties." Memorandum, p.3. The Staff stated its view "that the contentions have not been set forth with the clarity desired and are frequently intertwined with the basis given." However, the Staff perceived a "common issue which each petitioner seeks to raise, namely quality assurance/quality control." Id. The Staff believed it appropriate to consolidate the various quality assurance/quality control contentions into a single contention, and recommended acceptance of a particular single contention set forth by the Staff in lieu of the several contentions proposed by the Intervenors. Id., pp.3-4.

On May 22, 1979, the Licensing Board held a prehearing conference in Glen Rose, Texas to consider the petitions for leave to intervene filed by CASE, CFUR and ACORN. Subsequently, in an "Order Relative to Standing of Petitioners to Intervene," issued on June 27, 1979, Texas Utilities Generating Company, et al., (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-79-18, 9 NRC 728 (1979), the Licensing Board admitted CASE, CFUR and ACORN as Intervenors in this proceeding.<sup>11/</sup> The Board also determined, with respect to the proposed

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<sup>11/</sup> The Board determined that "Intervenor status is not granted for WTLS." 9 NRC at 733.

Quality Assurance/Quality Control contentions, that the following language encompasses all the contentions:

"The Applicants have failed to establish and execute a quality assurance/quality control program which adheres to the criteria in 10 CFR 50, Appendix B." 9 NRC at 733.

It was the Licensing Board's expectation, as stated in its Order of May 9, 1979, supra, that if CASE, CFUR and ACORN were admitted as Intervenors in this proceeding, that the Applicants and Staff would meet with the Intervenors and "try to reach a stipulation on one or more other contentions." Order, p.3. Accordingly, on July 19, 1979, counsel for NRC Staff (and other NRC staff members) and counsel for Applicants and other representatives of Applicants met with ACORN's counsel in Fort Worth, Texas<sup>12/</sup> to discuss the contentions ACORN has proposed in this proceeding.<sup>13/</sup> The parties' discussions covered the thirty-three (33) "safety" contentions and seven (7) "environmental" contentions proposed by ACORN. At this meeting it was agreed that further negotiations would be conducted by telephone conference.<sup>14/</sup>

By letter dated August 21, 1979, the NRC Staff transmitted to each Intervenor, including ACORN,<sup>15/</sup> a copy of the respective Intervenor's contentions, which reflected the changes made at the meetings held by the parties in July and the positions taken by the parties at that meeting. In this letter, the Staff stated that the positions taken at those meetings were not final and are subject

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<sup>12/</sup> See Attachment E.

<sup>13/</sup> On July 17 and 18, 1979, representatives of NRC Staff and Applicants met with representatives of CFUR and CASE, respectively, to discuss the contentions proposed by those organizations.

<sup>14/</sup> In addition, at the meeting, counsel for ACORN requested a particular document containing a discussion of decommissioning, which the Staff transmitted to counsel for ACORN on July 30, 1979. (See Attachment F)

<sup>15/</sup> See Attachment G (enclosure not included).

to change. This letter also stated that a conference call to further discuss these contentions was scheduled for August 30 or 31. The purpose of these letters and attached statements of contentions (which set forth the position of the parties with respect to each contention) was to assist the parties in considering the language agreed to and positions taken at the meetings in July and to serve as a basis for the further negotiations contemplated by the parties. Subsequently, on August 31, 1979, by telephone conference, the other parties further discussed with ACORN the contentions proposed by ACORN.

By letter dated October 4, 1979, the NRC Staff transmitted to counsel for ACORN<sup>16/</sup> a draft stipulation covering ACORN's contentions. This letter also explained, in detail, the Staff's reassessment of its position regarding ACORN "safety" contention 31, relating to emergency planning, based on recent developments. To assist ACORN's counsel in understanding these developments, the Staff included in its letter, copies of certain NRC documents relating to emergency planning.

The Staff allowed a period of several months for the parties to consider these draft stipulations. The Staff received correspondence from CASE and CFUR relating to the draft stipulations and proposed contentions, in addition to telephone conversations regarding contentions. ACORN did not communicate to the Staff, with respect to the draft stipulation and attachment, any comments of substance on particular provisions in the draft stipulation or objections of the nature now filed by ACORN before the Licensing Board.

By letter dated January 25, 1980, the Staff forwarded to the Intervenors (including ACORN)<sup>17/</sup> stipulations and attachments (statements of revised contentions)

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<sup>16/</sup> See Attachment H (enclosure not included). (By letters dated October 4, 1979, the NRC Staff also transmitted to CASE and CFUR draft stipulations covering their respective contentions. By letter of October 4, 1979, copies of the draft stipulations were sent to Applicants' counsel).

<sup>17/</sup> See Attachment I (enclosure not included).

which had been executed by counsel for Staff and counsel for Applicants. This letter stated that the executed stipulation and attachment differed in some respects from the draft stipulation and statement of contentions previously forwarded to the intervenors. To assist each Intervenor in recognizing those changes, the letter described every change of substance, based on the Staff's records, which reflected the discussions among the parties during their negotiations, telephone conference and correspondence.

### III. DISCUSSION

#### A. ACORN's Request That The Licensing Board Order the Staff to Discuss and Negotiate The Admissibility of ACORN's Contentions Should Be Denied

The crux of ACORN's complaint before the Licensing Board is that there has been no "meaningful" discussion of the admissibility of ACORN's proposed contentions. To remedy the situation which ACORN claims exists, ACORN requests that the Licensing Board compel the Staff to discuss and negotiate the admissibility of ACORN's contentions.

In the Staff's view, the sequence of events described above shows that ACORN's claim that there has been no "meaningful discussion" is completely lacking in merit. As the Licensing Board's "Order Requesting a Status Report on Proposed Stipulations," dated January 10, 1980, recognizes, considerable time has elapsed since the May 22, 1979, prehearing conference considering the petitions for leave to intervene filed in this proceeding. As the Licensing Board is aware, and as described above, during this time the parties have been meeting and corresponding in an effort to reach a stipulation on the contentions proposed by the intervenors. Moreover, as stated above, in April (before the prehearing conference was held), the Staff and Applicants met with ACORN, CASE and CFUR in an effort to assist each organization in setting forth proposed contentions

to be litigated in this proceeding. At this meeting, the Staff explained those principles, which in its view, govern the admissibility of contentions under 10 CFR §2.714, in general, and, with respect to ACORN, stated how these principles applied to the forty-five proposed contentions ACORN sent to the Staff five days before the meeting. The parties' further efforts to reach a stipulation on contentions included another meeting with ACORN in July, correspondence (see Attachments), and a telephone conference. Although ACORN's filing before the Licensing Board suggests that the efforts of the parties to reach a stipulation on contentions consisted of no more than a one day meeting and a telephone conference, the sequence of events described above and the attached correspondence between the Staff and ACORN shows that ACORN's description of these efforts has no factual basis.

The Staff believes that it has negotiated with ACORN (and the other Intervenor(s)) in good faith, in an effort to reach a stipulation on contentions. Although ACORN's filing before the Licensing Board indicates that the discussion of ACORN's contentions may not have reached the result that ACORN may have wished, at no time since the first meeting in April up until the filing of ACORN's February 11, 1980, pleading, did ACORN state to the Staff that it was not satisfied with the efforts of the Staff to reach a stipulation on ACORN's proposed contentions. ACORN has been a participant in these negotiations, through counsel, and could have undertaken to change the course or nature of these negotiations if it was so motivated. ACORN did not do so, and waited until almost one year had elapsed to state that, in its judgment, these negotiations have not been "meaningful."

The remedy suggested by ACORN is for the Licensing Board to order the Staff to further negotiate with ACORN on ACORN's proposed contentions. In the Staff's view, there is no legal basis for such an order and in addition, no practical

need for one. As the Staff's letter to the Licensing Board of February 25, 1980,<sup>18/</sup> indicates, the Staff continues to be hopeful that it will be possible for the parties to reach a stipulation on contentions. The Staff recognizes that further negotiations and discussions will be necessary in an effort to reach such a stipulation. However, the Staff believes that ACORN's request of the Licensing Board shows a misunderstanding on the part of ACORN's counsel as to the nature and purpose of negotiations among parties to NRC adjudicatory proceedings. In the first instance, the Staff notes that there is no provision in NRC Rules of Practice in 10 CFR Part 2 requiring such negotiations. However, such negotiations are consistent with the Commission's views, as stated in the Statement of Consideration, supra, accompanying the May 26, 1978, amendment of certain sections of 10 CFR §2.714.<sup>19/</sup> In the Statement of Consideration, the Commission recognized that:

"It has become common practice for parties and petitioners in nuclear power plant licensing proceedings to discuss informally the framing of contentions until just before the special prehearing conference which is held some months or more after expiration of the 30-day period for timely petitions pursuant to §2.751a. During this period the contentions are frequently revised based on the discussions among the parties and petitioners. Often the petitioners and parties will be able to present the presiding atomic safety and licensing board with an agreed upon set of contentions at the special prehearing conference. This practice reduces unnecessary controversy and litigation and should be encouraged. Accordingly, the rules are amended to permit the filing of contentions until shortly before the special prehearing conference." 43 Fed. Reg. at 17799 (emphasis added).

The informal meetings between NRC Staff, Applicants and ACORN were undertaken in an effort to have the parties reach an understanding of and agreement on the

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<sup>18/</sup> See Attachment J.

<sup>19/</sup> These amendments, inter alia, extended the time period for filing of contentions until shortly before the special prehearing conference.

language of the contentions ACCRN seeks to have admitted as issues in controversy in this proceeding. Examination of the contentions originally filed by ACORN and those set forth in the statement of contentions attached to the stipulation shows that the language of ACORN's contentions has been revised, based on the discussions between ACORN and the other parties. A further goal of these discussions was to reach a stipulation on the admissibility of the contentions. At no time has the Staff refused to discuss any aspect of ACORN's proposed contentions, although the emphasis was on reaching an understanding of and agreement on the language of the proposed contentions.

ACORN's pleading before the Licensing Board implies that negotiations must be conducted until there is agreement, at least between the Staff and Intervenors, as to the admissibility of contentions. While such agreement may sometimes be possible, it is not always a result of negotiations. The purpose of the prehearing conference which the Staff suggested that the Licensing Board schedule, is to allow all parties to present their views, both orally and in writing if desired, as to the admissibility of those proposed contentions upon which agreement among all parties as to both language and admissibility cannot be reached. It is not the Staff's goal to keep from ACORN or any other Intervenor, its position regarding the admissibility of contentions. The question of admissibility of contentions was discussed during the course of negotiations, to the extent practicable. However, since it is the Licensing Board, and not the Staff, that has the authority to rule upon the admissibility of contentions, it is appropriate that the views of all the parties regarding the admissibility of contentions be presented to the Licensing Board. To assist the Licensing Board at the prehearing conference, the Staff suggested in its Status Report that all the parties submit statements of position on the proposed contentions, in writing

by February 29, 1980. In the Staff's view, filing such statements on that date would allow for their receipt and meaningful consideration by the Licensing Board and parties before the suggested March 20, 1980 prehearing conference. This schedule was proposed by the Staff with the expectation that the stipulations which were executed by counsel for NRC Staff and counsel for Applicants, and transmitted to Intervenors (including ACORN) on January 25, 1980 would be executed shortly. Since the stipulations have not been executed, and in view of the Licensing Board's proposal not to schedule a prehearing conference until April 30, 1980, the Staff proposed, in its letter dated February 25, 1980, a revised schedule for submitting written statements of position on contentions. The Staff stated in this letter that in the event the parties reach a stipulation on contentions, it is the Staff's intention that the stipulation provide that the parties will file statements of position on contentions no later than twenty (20) days prior to the holding of a prehearing conference. As the Staff further stated, if it is not possible to reach a stipulation even on the language of proposed contentions, the Staff, nonetheless, will file written statements of position on the contentions as originally proposed in the petitions to intervene (or as amended) no later than twenty (20) days before the prehearing conference. It is still the Staff's intent to file such statements in accordance with this time frame set forth in the Staff's letter. In addition, since the Staff is still hopeful that it will be possible to reach a stipulation on contentions before the prehearing conference, the Staff contemplates further discussions among a' the parties in an effort to reach stipulations on contentions.

Based on the foregoing, it is apparent that no purpose would be served by granting ACORN's request that the Licensing Board compel the Staff to "discuss and negotiate the admissibility of ACORN's contentions or reveal to Intervenors

reasons for refusing to agree to admissibility" of contentions. The Staff has undertaken, on a voluntary basis, such discussions (whether in writing or orally) and intends to continue such discussions, consistent with the schedule proposed by the Staff in its letter of February 25, 1980. Although, in the Staff's view there is no reason why such discussions cannot cover as in the past, an explanation of the position of the Staff with respect to the admissibility of ACORN's contentions, the Staff contemplates that all parties set forth a full discussion of their position on contentions upon which agreement among all parties as to both language and admissibility cannot be reached, either in the written statements which the Staff proposed all parties file prior to a prehearing conference or at the prehearing conference. The Staff believes that such statements will facilitate consideration by the Licensing Board and the parties of the proposed contentions as to which agreement as to both language and admissibility cannot be reached.

It is the Commission's policy, as set forth in 43 Fed. Reg. 17798 supra, to encourage informal discussions in which the parties attempt to reach an understanding of and agreement on the language of proposed contentions. In the Staff's view, this policy would not be served by ordering further negotiations, which the Staff intends to continue, on a voluntary basis. In addition, to the extent that ACORN requests that the Licensing Board "order the Staff to cease in its efforts to deny the admissibility of the QA/QC [quality assurance/quality control] contention", it is the Staff's position, as originally stated in its "Memorandum" of May 17, 1979, that the subject matter covered in the various QA/QC contentions is appropriate for consideration in this proceeding. However, the Staff is not aware of any prohibition upon the parties from including this contention among those being discussed to see if any clarification of the language is possible so that the parties all have a common understanding of the issue to be litigated.

B. Acorn's Request That The Licensing Board Postpone The Prehearing Conference Beyond April 30, 1980, Should Be Denied

In its pleading, ACORN also requests that the Licensing Board "postpone any hearing in this matter until the Staff and ACORN have completed discussions on admissibility of proposed contentions." The Staff is not aware of any date suggested or set by the Licensing Board for an evidentiary hearing in this proceeding. In its January 25, 1980 status report, the Staff suggested a date for a prehearing conference and the Staff understands that the Licensing Board has, by telephone, contacted the parties regarding a prehearing conference proposed by the Licensing Board for April 30, 1980. It is the Staff's belief, as evidenced in its Status Report and letter of February 25, 1980, that a prehearing conference in the near future is desirable to consider all the contentions proposed in this proceeding. The Licensing Board recognizes that a considerable period of time has elapsed since the first prehearing conference in May 1979 and that during this period the parties have engaged in discussions in an effort to reach a stipulation on contentions. Although the Staff believed when it filed its Status Report on January 25, 1980, that these discussions had concluded in January, at the time the executed stipulations were transmitted to Intervenor for signature, it is now apparent that a further period of negotiations can be undertaken. The Staff does not know what ACORN means in its request that the Licensing Board postpone a hearing "until the Staff and ACORN have completed discussions." There has been a reasonable and rather lengthy period of negotiations already. To postpone a prehearing conference beyond the date suggested by the Board, (April 30, 1980) would not, in the Staff's view, serve any useful purpose. In fact, it appears that the only purpose would be simply to delay further what may be a protracted proceeding. In this regard, the Staff notes that the Licensing Board denied ACORN's earlier motion for continuance, supra, p.3, based, inter alia, on the recognition that there were

then, as there are now, "matters ripe for consideration at the prehearing conference." The prehearing conference subsequently conducted by the Board considered, at the Board's request, only whether the petitioner organizations had 1) demonstrated the requisite "interest" to satisfy the requirements of 10 CFR §2.714, and 2) stated at least one or more acceptable contentions. There are further open matters which are now ripe for consideration, namely, the contentions which Intervenors seek to have admitted as issues in controversy in this proceeding. The Staff believes that this matter alone "would warrant proceeding with a prehearing conference since this is a fundamental matter which must be resolved by the Board and will be further aided by a discussion of the issue ..."

May 9, 1979, Order at 2. To the extent that ACORN seeks to have the second prehearing conference postponed beyond any date contemplated by the Board, ACORN's request should be denied. Of course, in denying this request, the Staff does not believe that the Licensing Board will in any way preclude the further negotiations contemplated by the Staff, consistent with the schedule set forth by the Staff in its letter of February 25, 1980.

#### IV. CONCLUSION

For the reasons set forth above, the Staff urges that ACORN's requests be denied.

Respectfully submitted,

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Dated at Bethesda, Maryland  
this 10th day of March, 1980