May 12, 1980

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 No. 50-445 50-446
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

APPLICANTS' POST PREHEARING CONFERENCE MEMORANDUM

Texas Utilities Generating Company, et al. ("Applicants") hereby submit a memorandum setting forth their positions regarding the issues in the captioned proceeding on which the Licensing Board ("Board") granted, at the prehearing conference held in Fort Worth, Texas on April 30 and May 1, 1980, the parties' requests for leave to file post prehearing conference statements of position. See, Sections I-III, infra. The Applicants also hereby submit their response to a question raised by the Board regarding the Waste Confidence Rulemaking. See, Section IV, infra.

I. Applicants' Statement on Allens Creek ALAB-590 (April 22, 1980)

By leave of the Board, Tr. at 307, 1/ Applicants hereby submit their statement regarding the impact of ALAB-590 on the law governing the admissibility of contentions in Nuclear

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1/ Transcript of the Prehearing Conference in the Matter of Texas Utlities Generating Company (Comanche Peak), Docket No. 50-445 & 50-446; Fort Worth, Texas, April 30-May 1, 1980. (Hereinafter Tr. at __.)

Regulatory Commission ("Commission" or "NRC") proceedings. Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, __ NRC ___ (April 22, 1980). In sum, we reaffirm our view expressed at the prehearing conference that this decision does not change the applicable law governing the admissibility of contentions. Tr. at 145-147.

The Appeal Board in Allens Creek relied on their decision in Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973) as setting forth the applicable law governing the admissibility of contentions. Indeed, Applicants also cited Grand Gulf in our April 10, 1980 Statements 2/ wherein we note that Grand Gulf requires, as set forth in 10 CFR §2.714(b), that in order for a contention to be admitted it must be supported by a basis set forth with reasonable specificity. Furthermore, the Appeal Board in Allens Creek cited as support for their decision Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13 (1974), both with regard to that decision's reaffirmation of the basis and specificity requirements of Section 2.714(b) and with respect to the principle that Intervenors must supply enough information in the proposed

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2/ Applicants' Statements of Positions on Intervenors' Proposed Contentions, April 10, 1980 (Hereinafter Applicants' April 10, 1980 Statements).

contention and proferred basis so that the parties will know at least generally what they will have to support or oppose and defend against. Allens Creek, supra, slip op. at 12, n. 10. Applicants also cite Peach Bottom in their April 10, 1980, Statements for these same propositions.

Consequently, Allens Creek does not in any way alter the law governing the admission of contentions or provide any new or expanded basis upon which to admit the Intervenors' contentions in the instant proceeding. In any event, Applicants believe that there are material factual distinctions between Allens Creek and Comanche Peak. The factual situation presented in Allens Creek could reasonably warrant the admission of the single marine biomass contention brought before the Appeal Board for review. We do not believe, however, that the same factual situation presents itself in the Comanche Peak proceeding and therefore we reaffirm our positions on each of the Intervenors' proposed contentions as stated in our April 10, 1980 Statements and at the prehearing conference.

The factual posture of the Allens Creek proceeding is clearly distinguishable from Comanche Peak. Thus, the Allens Creek Appeal Board interpreted the applicable law governing admission of contentions in light of certain factors which apparently tended to influence the Appeal Board toward admitting the marine biomass contention. In the case at bar, however, a reasonable interpretation of the

law does not compel or justify admission of any contentions. The distinctions are obvious and compelling. First, the NRC Staff in Allens Creek had apparently not even considered the energy alternative of a marine biomass farm in its FES Supplement. Allens Creek, supra, slip op. at 8. Allens Creek is a construction permit proceeding where the Staff's failure to consider an alternative that was not clearly speculative obviously influenced the Appeal Board toward admitting the contention. Second, the petitioner in Allens Creek would have been denied intervenor status totally unless the biomass contention was admitted. Allens Creek, supra, slip op. at 2. For this reason also it seems that the Appeal Board was more willing to admit at least one contention of a petitioner who apparently had already satisfied the interest requirements of 10 CFR §2.714(d).

Finally, because Allens Creek is a construction permit proceeding where a hearing will be required, the Appeal Board was not governed by its admonition (as is the Licensing Board in the instant proceeding) that in deciding whether to admit a contention where a hearing is not necessary, as is the case at the operating license stage, special care must be taken to ensure that the proposed contention is clearly open to adjudication in that proceeding. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976). Each of the above

circumstances clearly weighed in favor of admitting the subject contention in Allens Creek, and equally as clearly those circumstances are not present in Comanche Peak. It is not reasonable, therefore, to conclude as the Staff apparently has, Tr. at 145, that Allens Creek altered the well-settled principles governing admission of contentions. Applicants believe that an application of the governing law, as reaffirmed in Allens Creek, to the circumstances of this case compels the conclusions set forth in our April 10, 1980 Statements regarding the admissibility of Intervenors' proposed contentions.

Applicants also note that the Appeal Board's statements in Allens Creek regarding the stage at which "petitioners for intervention must establish the existence of some factual support" for their contentions and purported bases, Allens Creek, supra, slip op. at 16 (emphasis added), do not relieve a petitioner from complying with the basis and specificity requirements of 10 CFR §2.714. Both Grand Gulf, supra at 426, and Peach Bottom, supra at 20, distinguish between 'detailing the evidence' and a presentation of the basis for each contention with reasonable specificity. As discussed above, both the Applicants and the Allens Creek Appeal Board have also recognized that distinction. Thus, the Allens Creek Appeal Board did not intend to require any less from petitioners as bases for their contentions

than what Applicants have detailed in their April 10, 1980 Statements as being required. The Board in the instant proceeding may not alter those well-settled standards governing admission of contentions.

Finally, Applicants note that the Appeal Board decision in Allens Creek addressed only the basis and specificity requirements of 10 CFR §2.714. Regardless of the interpretation of that decision, it obviously does not affect the validity of other reasons for denying admission of contentions. While Applicants believe that the Intervenors have not set forth adequate bases for their contentions, we note that in most instances those contentions are inadmissable for other reasons as well (e.g., challenges to NRC Regulations or beyond the jurisdiction of this Board), and we would urge the Board to examine those independent grounds for dismissal mindful of the considerations set forth by the Appeal Board in the Zimmer proceeding. See, Zimmer, ALAB-305, supra at 12. Applicants urge, therefore, that each of the Intervenors' contentions be denied not only for a lack of basis, but where applicable for those additional grounds for dismissal we set forth in our April 10, 1980 Statements and at the prehearing conference.

II. Applicants Statement Regarding CASE Position On Contentions (April 10, 1980)

At the outset, we wish to state our view that the process of negotiation between the parties on the wording

and admissibility of contentions was not intended to result in substantive amendments to the contentions, as the Board seems to imply, Tr. 164, 429. Applicants did not waive any rights under 10 CFR §2.714 as to the timing and manner for amending contentions. Had we any notion that the negotiations would be interpreted as freely permitting such amendments we would never have even opened them with Intervenors. In sum, we object to the Board's apparent approval of the amendment of contentions during negotiations without compliance with 10 CFR §2.714.

By leave of the Board, Tr. at 430, the Applicants hereby set forth those instances where CASE's Position on Contentions, filed April 10, 1980, appears to have substantially amended CASE's contentions and/or bases for contentions as originally set forth in its Supplement to Petition for Leave to Intervene of May 7, 1979 (CASE Supplement of May 7, 1979). At the outset, Applicant would like to again note, see Tr. at 422, that we object to CASE's untimely rewording and recasting of contentions in its April 10, 1980 document. Such disorderly pleading practices are proscribed by Commission regulations and should not be permitted in this proceeding.

The first instance where CASE has substantially amended its contentions is by including within the scope of certain contentions a "concern", phrased so as to be related to the

particular contention, regarding the probability and consequences of a Class 9 or less severe accident. See, CASE's April 10, 1980 Position on Contentions at pp. 12, 19, 24-25, 29-30 and 47. These amendments clearly broaden the scope of each of those contentions and should be denied as untimely amendments to contentions for which good cause has not been shown for their admission pursuant to 10 CFR §2.714(a). In any event, consideration of the consequences of Class 9 accidents in individual reactor licensing proceedings is generally proscribed, and Applicants rest on their response to CASE's proposed Contention 8 as providing an adequate discussion of the reasons for dismissal of these amended portions of CASE contentions.

CASE has also attempted to broaden the scope of its proposed Contention 6 regarding nuclear waste disposal. CASE now claims this contention concerns, in part, on-site storage of nuclear waste for the duration of the license. See, CASE's April 10, 1980, Position on Contentions at pp. 22 and 23; Tr. at 477. CASE's original Contention 6 dealt only with "future waste storage," storage at a separate "waste storage facility" and the "costs or availability of waste disposal solutions." See, CASE Supplement to Petition for Leave to Intervene of May 7, 1979, Contention 6, item 5, pp. 26-27. It seems clear CASE is now attempting to fashion this contention so as to place it within the scope of those

issues not proscribed from consideration in this proceeding by the Waste Confidence Rulemaking. Accordingly, the amended portions of this contention should be denied as a late filed contention for which no showing of good cause as required by 10 CFR §2.714(a) has been made. With respect to the remainder of the contention, Applicants rest on our position, as set forth in Applicants' Statement of Positions on Proposed CASE Contentions (April 10, 1980) at p. 10, that the Waste Confidence Rulemaking precludes consideration of all issues originally raised by CASE proposed Contention 6 with regard to long term storage and/or disposal of nuclear waste. In any event, CASE provides no adequate basis to support any aspect of the contention.

Furthermore, CASE appears to have substantially broadened the scope of proposed Contention 7, regarding accidents at the spent fuel pool ("SFP"). In its April 10, 1980 pleading, CASE alleges (1) that Applicants must have an emergency plan to provide for SFP cooling in the event of an accident at the SFP, and (2) that the breaking of the dam at the plant could cause a loss of coolant accident at the SFP. See, CASE's April 10, 1980 Position on Contentions at pp. 27-28. Neither of these contentions were included in CASE's original Statement of Proposed Contention 7. See, CASE Supplement of May 7, 1979 at pp. 28-30. These allegations should, therefore, be dismissed solely on the grounds that they are late filed contentions or amendments to contentions for which "good

cause" for their untimeliness has not been demonstrated pursuant to 10 CFR §2.714(a).

In the event the Board does not dismiss these allegations as being untimely filed, there are independent reasons for denying admission of these portions of the contentions. CASE does not allege that Applicants will not comply with all Commission regulations regarding the safe storage of spent fuel at the SFP, and CASE fails to cite any regulations that would require the "emergency planning" for the SFP as it would have the Applicants provide. Apparently, CASE contends that Commission regulations do not adequately provide for the safe storage of spent fuel in the SFP. Accordingly, this portion of CASE's amended Contention 7 should be denied as an attack on Commission regulations. Philadelphia Electric Co., et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-11 (1974). Also, CASE's allegations regarding the possibility of the breakage of the dam causing a loss of coolant accident at the SFP is without any supporting basis and should be denied pursuant to 10 CFR §2.714(b).

In addition, CASE has amended its proposed Contention 9 regarding the health effects of low-level radiation to provide that if the Board defers ruling on the contention it should do so pending resolution of the Part 20 rulemaking proceeding. 45 Fed.Reg. 18023 (March 20, 1980). CASE's April 10, 1980 Position on Contentions at p. 39. Applicants

note that this contention deals with the health effects of routine low-leve. radioactive releases, which health effects are considered in 10 CFR Part 50, Appendix I (which embodies the ALARA (As Low As Reasonably Achievable) concept), and not in 10 CFR Part 20. Applicants oppose admission of this contention on the grounds set forth in our April 10, 1980 Statement of Position on Proposed CASE Contentions, at p. 17. However, in the event the Board defers rulng on the admissibility of proposed CASE Contention 9, we urge that the Board only do so pending the Commission's decision on the Appendix I certified question in the Black Fox proceeding, see, Applicants' April 10, 1980, Statement of Positions on Proposed CASE Contentions at pp. 17-18, and not pending the outcome of the Part 20 rulemaking.

Finally, Applicants would like to restate our objections to the untimely amendment of CASE proposed Contention 16. CASE states that when they raised the issue of the Applicants' financial qualifications to "construct" Comanche Peak in their Supplement of May 7, 1979, at p. 43, they intended to say "operate". See, CASE's April 10, 1980, Position on Contentions, at p. 45. CASE claims this wording was "obviously simply a typographical error." Applicants disagree. As we stated at the prehearing conference, CASE only changed the wording of proposed Contention 16 when the Staff informed them that, as originally worded, the contention was beyond the jurisdiction of this Board. Tr. at

518-19. The contention is a late filed contention for which no "good cause" has been shown for admission pursuant to 10 CFR §2.714(a). And in any event, we again note that even as reworded there is no supporting basis for the contention. Tr. at 519. Accordingly, CASE proposed Contention 16 should be denied.

III. Proposed Statement of QA/QC Contention For All Intervenors

By leave of the Board, Tr. at 281, Applicants hereby submit proposed language for the Intervenors' Quality Assurance/Quality Control (QA/QC) Contention. Applicants have reviewed the proposed QA/QC contention of each Intervenor and the purported bases therefore as expressed in their filings of May 7, 1980. We submit that the language proposed by the Applicants at the prehearing conference, Tr. at 208, satisfactorily incorporates the contentions of each Intervenor for which there is adequate supporting basis. This proposed wording is as follows:

> The Applicants failed to adhere to the quality assurance/ quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2 and the requirements of Appendix B of 10 CFR Part 50 in that the construction practices employed, specifically in regard to concrete work, welding, inspection, materials used and craft labor qualifications, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 CFR §50.75(a)(1) necessary for issuance of an operating license for Comanche Peak.

To the extent that Intervenors may seek to include other topics in the QA/QC contention, Applicants believe

that the Intervenors have not set forth their concerns with sufficient specificity and supporting basis as required by 10 CFR §2.714 to permit the inclusion of such topics within the scope of the QA/QC Contention. Accordingly, Applicants request that the Board adopt the wording of the QA/QC Contention as we have proposed above.

IV. Issues Precluded From Consideration In Individual Licensing Proceedings By the Waste Confidence Rulemaking

During the discussion of proposed ACORN Contention 29 at the prehearing conference, the question arose as to whether the Waste Confidence Rulemaking, see 44 Fed.Reg. 61372 (October 25, 1979), will consider both high and low-level radioactive waste storage and disposal. The Applicants committed to provide the Board with the answer to this question. Tr. at 400.

Although not expressly stated in the notice of proposed rulemaking, the Presiding Officer in the Waste Confidence Rulemaking ruled that the proceeding "is concerned only with the management of high-level waste." Waste Confidence Rulemaking PR-50, 51, (44 Fed.Reg. 61372), First Prehearing Conference Order (February 1, 1980), p. 10. Accordingly, it appears that issues concerning the storage and/or disposal of low-level radioactive waste are not precluded from consideration in individual licensing proceedings by the Waste Confidence Rulemaking. Nevertheless, before being admissable in individual proceedings contentions on such

topics must satisfy the basis and specificity requirements of 10 CFR §2.714 and must not be precluded from consideration for any other reason.

With regard to proposed ACORN Contention 29, we note that ACORN stated that proposed Contention 29 does not distinguish between types of nuclear waste. Tr. at 399. As such, the contention is clearly inadmissable because it is unreasonably vague. In addition, ACORN now contends that Contention 29 concerns on-site storage and ultimate disposal of all types of nuclear waste. Tr. at 397, 399. To the extent ACORN intends to include within the scope of this contention concerns regarding on-site storage of low-level waste, Applicants note that ACORN's position is self-contradictory. As Applicants stated at the prehearing conference, Tr. at 399-400, low-level wastes generally are not stored at reactor sites for any appreciable length of time. Also, ACORN has failed to provide any basis for or to specify its concerns with respect to consideration of the environmental effects of the disposal of low-level waste. ACORN Contention 29 should be denied, therefore, to the extent that it includes low-level waste within the scope of its concerns. In any event, whether ACORN's concern is with on-site storage or disposal of high or low-level radioactive waste, Contention 29 is unsupported by any basis or is clearly precluded from consideration in this proceeding by the Waste Confidence Rulemaking. See, Applicants' Statement of

Positions on ACORN's Proposed Contentions (April 10, 1980) at pp. 31-33. Accordingly, proposed ACORN Contention 29 should be denied.

With respect to the admissibility of CASE's proposed contention on nuclear waste storage and disposal, Applicants have addressed that issue above in the discussion of CASE's April 10, 1980 Position on Contentions. See, Section II.

Respectfully submitted,

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Date: May 12, 1980

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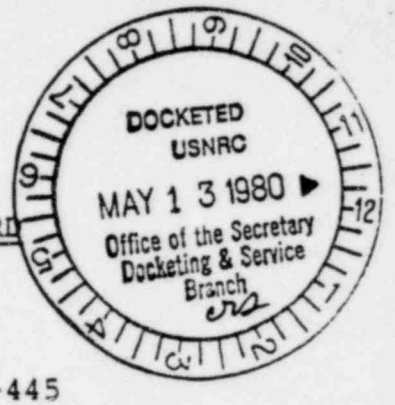

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TEXAS UTILITIES GENERATING COMPANY, et al.	)	Docket No. 50-445 50-446
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(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "APPLICANTS' POST PREHEARING CONFERENCE MEMORANDUM," in the captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid this 12th day of May, 1980:

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