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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 50-446
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

NRC STAFF ANSWER TO "CASE MOTION FOR RECONSIDERATION OF CERTAIN CASE CONTENTIONS DENIED OR REWORDED IN THE BOARD'S ORDER SUBSEQUENT TO THE PREHEARING CONFERENCE OF APRIL 30, 1980 OR IN THE ALTERNATIVE MOTION FOR CERTIFICATION OF CONTENTIONS DENIED IN THE BOARD'S ORDER" AND TO "SUPPLEMENT TO ITEM 1. (CASE CONTENTION 1)"

INTRODUCTION

On June 16, 1980, the Atomic Safety and Licensing Board ("Licensing Board") issued its "Order Subsequent to the Prehearing Conference of April 30, 1980" ("Order"), in which the Licensing Board ruled on the admissibility of contentions proposed by the three Intervenors in this proceeding, and formulated three "Board Questions" to be addressed by the Applicants and the NRC Staff ("Staff") in forthcoming evidentiary sessions. In its Order, the Licensing Board accepted numerous contentions advanced by the Intervenors, which it modified and/or consolidated in part, and which it then set forth in a list of 25 "Accepted Contentions".

On July 14, 1980, Intervenor Citizens Association for Sound Energy ("CASE") filed two pleadings: (1) "Motion for Reconsideration of Certain CASE Contentions Denied or Reworded in the Board's Order Subsequent to the Prehearing

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Conference of April 30, 1980 Or In the Alternative Motion For Certification of Contentions Denied In the Board's Order" ("Motion"), and (2) "Supplement to Item 1 (CASE Contention 1) of CASE Motion for Reconsideration of Certain CASE Contentions Denied or Reworded in the Board's Order subsequent to the Prehearing Conference of April 30, 1980 Or in the Alternative Motion for Certification of Contentions Denied in the Board's Order" ("Supplement").[1/] In its Motion, CASE claims that "each of its contentions should have been accepted" (Motion, at 1) and that two of its contentions have been improperly reworded by the Licensing Board (Motion at 10, 18). CASE requests, if the Licensing Board does not admit CASE's previously denied contentions, "that it certify them to the Appeal Board or, where requested, to the Commission", and that one of the reworded contentions (Accepted Contention 23) "be certified to the Commission" if the Licensing Board disagrees with CASE's interpretation of that contention (Motion, at 18).

The Staff files this Answer in response to CASE's Motion and Supplement. At the outset, we note that neither the Motion nor the Supplement appears to contain any significant new information or to raise any arguments not previously presented to the Licensing Board. For this reason, and for the reasons more fully set forth below, the Staff is of the view that CASE's

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[1/] The time in which CASE was required to file its Motion expired on June 26, 1980, pursuant to 10 CFR §§ 2.752 and 2.710. The Licensing Board granted CASE an extension of time in which to file its Motion, in its "Order Relative to Additional Time for CFUR and CASE", dated July 10, 1980, following CASE's interlocutory appeal to the Atomic Safety and Licensing Appeal Board; that appeal was summarily dismissed. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC ___ (July 3, 1980).

Motion (including the Supplement thereto) is devoid of merit. Accordingly, it is the Staff's view that CASE's Motion should be denied.

I. RECONSIDERATION OF CASE'S CONTENTIONS IS NOT WARRANTED

CASE Contention 1
The past record of the Applicant clearly demonstrates an unwillingness to voluntarily comply with procedures and regulations necessary to assure the health and safety of the public; therefore, the requirements of 10 CFR 50.40 (a, c and d), 50.57(a) (1, 2, 3 and 6), 50.57(b), 51.20 and 51.21 have not been met, and a favorable cost/benefit analysis cannot be struck.[2/]

The Licensing Board rejected this contention on the grounds that it is "too vague and overly broad" (Order, at 9). CASE disagrees with this conclusion, and asserts that it had "very specific and verifiable concerns to which this contention is addressed" (Motion, at 2). CASE asserts that it had cited "specific instances ... including lawsuits which clearly indicate an established practice of violating laws and regulations and demonstrate that Applicants' general established operating practices will create the risk of permanent and irreparable injury to the public and the environment ...." (Id.). In addition, CASE asserts that the Licensing Board and NRC Staff have a duty to further refine this contention in order to make it admissible, as follows:

> [A] belief that the contention is "overly broad" is not, in this particular instance, adequate grounds for denying the Contention. If the contention were overly broad, the Board

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2/ The wording of this and other CASE contentions referred to in this Answer are those formulated by CASE in its "Position On Contentions By CASE (Citizens Association for Sound Energy)", dated April 10, 1980 (hereinafter referred to as "CASE Position on Contentions").

> and/or the NRC Staff should work with this citizen intervenor group to narrow the contention to ensure that the concerns which the Bases indicate are real and substantial are dealt with in these hearings (Id.).

In the view of the NRC Staff, CASE's Contention 1 was properly rejected by the Licensing Board. In support of this contention, CASE had assembled a list of prior instances in which Applicants were cited by various regulatory authorities for failing to comply with applicable air and water pollution standards.[3/] Similarly, in its Supplement, CASE provided further reference to such alleged non-compliance with environmental standards (Supplement, at 1-3). While these references appear to demonstrate prior instances of non-compliance with environmental regulations, none of them relate to the CPSES facility or to the manner in which the CPSES facility will be operated. For this reason, none of these references appear to present an issue which is capable of being litigated in this proceeding. In our view, the contention is so broad as to be incapable of being litigated.[4/]

[3/] CASE Position On Contentions, at 9-12; "Supplement to Petition for Leave to Intervene and Contentions By CASE (Citizens Association for Sound Energy)", dated May 7, 1979, at 2-5 (hereinafter referred to as "CASE Contentions").

[4/] CASE also cites the fact that one of the Applicants has advised the Texas Parks and Wildlife Department that it "is not prepared at this time to enter into a lease agreement ... covering a park site on Squaw Creek Reservoir", which CASE asserts is "significant new information" that "adds further weight" to this contention (Supplement, at 4). CASE speculates that if this statement was made because the State of Texas inserted a penalties clause in the lease agreement, "then this would also support CASE's Contention #1" (Supplement, at 5). The Staff submits that this unfounded speculation as to Applicants' intentions does not provide any support whatsoever for this contention, and fails to present an issue which is capable of being litigated in this proceeding.

The Staff wholly disagrees with CASE's assertion that the Licensing Board and/or the Staff have any legal duty to assist CASE in revising the contention to render it admissible. The Atomic Safety and Licensing Appeal Board has clearly indicated that the Licensing Board bears no such responsibility:

> Plainly, there is no duty placed upon a licensing board by the Administrative Procedure Act, or by our Act and the regulations promulgated thereunder, to recast contentions offered by one of the litigants for the purpose of making those contentions acceptable ....

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974). Similarly, no such duty rests with the NRC Staff which is, itself, an active litigant in this proceeding and which often has reason to oppose various positions taken by intervenors (as well as applicants) in this and other proceedings. The Staff recognizes, however, that it has an obligation to explain the Commission's regulations regarding contentions to intervenors and believes that the record in this proceeding indicates this obligation has been fully met.[5/]

The Staff notes that CASE has had ample opportunity to revise this contention. As the Licensing Board and the parties are well aware, the Staff and Applicants have been conferring with CASE (and the other intervenors) for more than a year, in an effort to reach an understanding of the intervenors' concerns and to arrive at a stipulation on one or more of their contentions

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5/ A history of the Staff's efforts in this regard is set forth in "NRC Staff's Report On Its Position Concerning the Admissibility of Intervenors' Contentions," dated April 10, 1980, at 27-29 (hereinafter referred to as "NRC Staff's Position on Contentions").

(see note 5, supra). CASE has long been aware that the Staff considered this contention to be inadmissible; and CASE has had more than enough time to reformulate this contention in a manner which might render it admissible. CASE should not now be heard to complain that it needs assistance in revising this contention. It is well established that the burden of setting forth admissible contentions under 10 CFR §2.714 rests with the intervenor, and neither the Staff nor the Licensing Board may relieve an intervenor of that responsibility. Zion, supra, 8 AEC at 406.

Finally, the Staff disagrees with CASE's apparent belief that we support the admission of a more narrow contention along the lines indicated in our Position on Contentions (Motion, at 3-4). What we stated there was that the references provided by CASE would "at best" support a more narrow contention, and that a reformulation of the contention along the lines we suggested "would alleviate the Staff's concerns over the vagueness of the contention as presently worded" (NRC Staff's Position on Contentions, at 31). However, our objection to CASE's Contention was not limited to its vagueness; rather, we objected to it "on the grounds that it fails to satisfy the basis and specificity requirements of 10 CFR §2.714 and is so overbroad as to be incapable of being litigated ...." (Id., at 3). Thus, while the reformulation which we suggested would be less vague than the present contention, we believe that it fails to meet the basis requirements of 10 CFR §2.714 and that it is so unbounded as to be incapable of being litigated. The Staff did not state or mean to imply earlier that the wording to which it referred did in fact constitute an admissible contention; as the Staff noted, the bases set forth by CASE would "at best" support such a limited contention --

and there is reason to believe that even such a limited contention is not adequately supported by the bases set forth by CASE.[6/] The Staff believes that CASE Contention 1 was properly rejected by the Licensing Board. Accordingly, the Staff submits that CASE's Motion (including its Supplement thereto) with respect to this contention should be denied.

CASE Contention 3

Requirements of the National Environmental Policy Act (NEPA) and 10 CFR 50 and 51 have not been met and a favorable cost/benefit analysis cannot be made, because:

(a) The Environmental Report (ER) is inaccurate in that actual and projected figures for the Applicant's capabilities, demands and reserves, are inaccurate and incomplete;

(b) The ER is incomplete in that Applicant has failed to consider significant factors which must be included in order to make an accurate cost/benefit analysis; and

(c) If the changes indicated in (a) and (b) above are made, so that the ER is accurate and complete, a cost/benefit analysis favorable to the operation of Comanche Peak nuclear plant cannot be made.

The Licensing Board rejected this contention, noting that it "has two main thrusts -- there is no need for the power from the facility and alternatives are available" -- issues which were considered at the CPSES Construction Permit proceeding (Order, at 9). The Licensing Board observed that "no significant new information has been presented for these issues" sufficient

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6/ The Staff disagrees with CASE's assertion that the more limited wording referred to by the Staff is "very similar" to the wording of CASE's Contention (Motion, at 2); in the event that the Licensing Board determines that CASE should be allowed to reword its contention, the Staff recommends that the parties be permitted to provide their written views as to what might constitute an acceptable reformulation of this contention.

for them to be addressed again at the Operating License proceeding and, accordingly, the Licensing Board denied the contention (Id.).

CASE objects to the Licensing Board's rejection of this contention on the grounds that (a) the Licensing Board "completely ignored that portion of the contention which regards inaccuracies and incompleteness in the Environmental Report (ER)" (Motion, at 4); (b) CASE had demonstrated "that the use of energy has changed dramatically" (Id., at 5); (c) Applicants' reserve margins are "almost 3 1/2 times" what Applicants had projected, indicating "that the projections had to either have been made in bad faith or based on inaccurate information" (Id.); and (d) CASE had pointed to "certain specific alternatives ... which were not available at the time of the construction hearings but which are now available" (Id., at 6). CASE argues that the rejection of this contention "will amount to an unwritten decision by this Board to ignore altogether the need criteria .... [in] violation of this Board's obligations and responsibilities under the regulations" (Id., at 6).

In the view of the NRC Staff, this contention was properly rejected by the Licensing Board. As the Licensing Board noted in rejecting "need for power" contentions presented by Intervenor Association of Community Organizations for Reform Now (ACORN), in order to present an issue for litigation in an Operating License proceeding, there must be "'significant new information developed after the Construction Permit review'" (Order, at 7) (citing Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 86 (1979)); and "'inherent in any forecast of future demands is a substantial margin of uncertainty'" (Id.) (citing Niagara Mohawk Power Corp.

(Nine Mile Point, Unit 2), ALAB-264, 1 NRC 347 (1975). As to the issue of alternative sources of power, the Licensing Board similarly noted that "the criteria of significant new information must be met to make the issue ... acceptable at the Operating License proceeding" (Order, at 9).

Rather than presenting "significant new information" as to the need for power, CASE has done little more than assert that the Applicants' forecast of the need for power was inaccurate when made, as demonstrated by the presently experienced actual demand for power (Motion, at 5).[7/] CASE has not asserted or provided any information which would indicate that there is an absence of long-term demand for the power to be generated by the CPSES facility, nor has CASE recognized that the Applicants' projection of the need for power is just that -- a prediction of future conditions not known to a degree of certainty when made. It is not "significant" that the Applicants' prediction now appears to be out of line with actual present conditions for, as the Appeal Board noted, "inherent in any forecast of future demands is a substantial margin of uncertainty". Nine Mile Point, supra.

Similarly, as to alternative sources of power, CASE has not provided significant information which was not available at the time of the Construction Permit proceeding. CASE has pointed to three specific alternative sources of power -- existing capacity, lignite, and natural gas (CASE Position on Contentions, at 16-17). However, both lignite and natural gas were considered during the Construction Permit proceeding and were found not to be a

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7/ See CASE Contentions, at 12-16.

viable alternative to the CPSES facility;[8] CASE has not provided significant new information which would render that finding incorrect at this time. As to using existing capacity as an alternative to the CPSES facility, CASE has not presented any information in support of such an alternative other than near-term reserve figures; such information can hardly be considered to be "significant" with respect to the 40-year term of the operating license which is the subject of this proceeding. Accordingly, the Staff submits that CASE's Motion with regard to this contention should be denied.

> <u>CASE Contentions 6(b) and (e)</u>
> The requirements of 10 CFR 51.20, 51.21 and 50.57 (a)(3 and 6) have not been met, and a favorable cost/benefit analysis cannot be struck because the following have not been adequately considered: ... (b) commitment of suppliers to fulfill contracts; ... (e) transportation of waste ....

The Licensing Board rejected these contentions on the grounds that "Contention 6(b) is ... too speculative for litigating while 6(e) is considered a challenge to Commission Regulations (Summary Table S-4, 10 CFR 51)" (Order, at 9-10). CASE does not appear seriously to challenge the Licensing Board's conclusion, and asserts (in a one-sentence statement) only that they "are valid contentions" (Motion, at 18).

In our view, these contentions were properly rejected by the Licensing Board. As to Contention 6(b), there is no doubt that the intentions of

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[8] <u>Texas Utilities Generating Co</u>. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-74-75, 8 AEC 673, 689-90 (1974).

suppliers to fulfill their contracts is incapable of being litigated in this proceeding.[9/] As to Contention 6(e), CASE had asserted only that

> Applicant has failed to show the full effects of the transportation of waste upon the health, safety and lives of the persons residing along transportation routes and living in the general vicinity of the plant. Thus, 10 CFR 50.57(a)(3) and (6) have not been complied with.[10/]

CASE has not asserted that Applicants will fail to comply with the Commission's regulations concerning the transportation of waste, as set out in Table S-4 of 10 CFR Part 51, which is expressly made applicable to environmental reports such as was submitted by the Applicants. 10 CFR §51.20(g)(1). In addition, the contention does not indicate in what way the Applicants have failed to adequately consider the transportation of waste, and the contention therefore fails to satisfy the basis and specificity requirements set forth in 10 CFR §2.714. Accordingly, the Staff submits that CASE's Motion with respect to this contention should be denied.

9/ CASE identified these "suppliers" primarily as "Westinghouse, the supplier of the Comanche Peak reactors". CASE Contentions, at 23, 24-25.

10/ CASE Contentions, at 56; CASE Position on Contentions, at 20.

CASE Contention 8

The ER fails to analyze the probability of the occurrence of a Class 9 accident and the potential costs in terms of health and dollars, which failure results in: (1) violation of the requirements of 10 CFR 51.22 and 51.23, violation of the requirements of the National Environmental Policy Act (NEPA) in general and specifically the guidelines set down by the President's Council on Environmental Quality (CEQ), and violation of the requirements of the Atomic Energy Act; and (2) preventing the completion of a valid or accurate cost/benefit analysis as required by 10 CFR 51.20 and 51.21.

The Licensing Board rejected this contention on the grounds that the Commission's "Statement of Interim Policy"[11/] precludes its consideration, "since the ER was issued prior to July 1, 1980" (Order, at 4).[12/] CASE does not dispute the Licensing Board's determination that the Statement of Interim Policy precludes consideration of its contention; rather, it argues (a) that the Commission's new Class 9 policy is only an "'interim policy' and not a final policy" (Motion, at 7), and (b) that the Commission's establishment of the July 1, 1980 cut-off date is "arbitrary" and denies CASE's members "equal protection under the law" (Motion, at 8-9). CASE asserts that a "more rational approach" would be to require that all environmental reports include a consideration of Class 9 accidents, "for every existing operating nuclear power plant" as well as for all plants "in the licensing stage (both construction and operating)" (Motion, at 8).

11/ U.S. Nuclear Regulatory Commission, "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969", Statement of Interim Policy, dated June 9, 1980. 45 Fed. Reg. 40101 (June 13, 1980).

12/ The Licensing Board observed that prior to the Commission's issuance of its Statement of Interim Policy, this contention "would have been denied as a matter of Commission policy" (Order, at 3).

In the view of the NRC Staff, the Licensing Board correctly construed and applied the Commission's Statement of Interim Policy, and no reconsideration of this contention is warranted. The Commission has stated explicitly that the newly directed Class 9 accident consideration is to be undertaken by the Staff, in its Environmental Impact Statements. As stated by the Commission:

> It is the Commission's position that its Environmental Impact Statements shall include considerations of the site-specific environmental impacts attributable to accident sequences that lead to releases of radiation and/or radioactive materials, including sequences that can result in inadequate cooling of reactor fuel and to meeting of the reactor core ....

(Statement of Interim Policy, at 1). The Commission outlined the considerations which are to be undertaken by the Staff (Id., at 7-10), and placed only the following responsibility upon applicants for construction permits and operating licenses:

> Environmental Reports submitted by applicants for construction permits and for operating licenses on or after July 1, 1980 should include a discussion of the environmental risks associated with accidents that follows the guidance given herein.

(Id., at 10). No requirement was placed upon applicants whose environmental reports were submitted prior to July 1, 1980, and the Commission's intent clearly was to exempt such environmental reports from complying with this new requirement.

The contention filed by CASE does not seek to include a consideration of Class 9 accidents in this proceeding -- had that been the focus of CASE's contention, there is every reason to believe that it would have been admitted for litigation in the proceeding as were the Class 9 contentions formulated by ACORN and CFUR, the two other Intervenors (see Accepted Contention 4). Rather, CASE seeks to impose a reporting requirement upon the Applicants

beyond that which has been imposed by the Commission. The admission of such a contention would not only exceed the Licensing Board's authority, but would also require the litigation of matters which are the subject of current or forthcoming rulemaking proceedings (Statement of Interim Policy, at 10-12).

CASE's argument that the Commission's establishment of a July 1, 1980 cut-off date is "arbitrary" and denies it "equal protection under the law" is incorrect. Clearly, the Commission must be able to revise existing policy and to specify when the new policy is to be effective. To hold otherwise would result in requiring that every new enactment or revision of any law or regulation ever promulgated by governmental authorities must be made retroactive to some point in time long since passed. In any event, no denial of due process is present here; the Licensing Board has admitted the Class 9 contentions formulated by other Intervenors in this proceeding, and CASE's members will be protected by the consideration of those contentions.[13/] Accordingly, the Staff is of the view that CASE's Motion with regard to this contention should be denied.

13/ CASE's argument that the Commission's Statement of Interim Policy is only "interim" and is not "a final policy" is similarly misplaced. The Commission has stated explicitly that it "intends the interim policy guidance contained herein to be immediately effective", notwithstanding the fact that the public comment period extends until September 11, 1980 (Statement of Interim Policy, at 2).

CASE Contention 10

Neither the Applicant nor the Staff has adequately considered the economic effects of accidents occurring in light water reactors located elsewhere in the United States which are similar in design to those of CPSES; therefore, the requirements of 10 CFR 50.57(a) (2, 3, 6), 51.20, and 51.21 have not been met.

The Licensing Board rejected this contention as lacking "adequate basis and as being too speculative for litigation" (Order, at 10). CASE does not appear seriously to challenge the Licensing Board's conclusion, and asserts (in a one-sentence statement made with respect to several contentions) only that the contention is "valid" (Motion, at 18).

In the view of the NRC Staff, this contention was properly rejected by the Licensing Board. The basis offered in support of this contention by CASE consisted solely of the following statement:

> The recent accident at Three Mile Island has indicated that an accident in one plant has potentially serious economic repercussions not only for the plant affected but also for all other reactors constructed by the same company or pursuant to the same or similar design criteria so that the possibility and probability of an accident in any Westinghouse reactor and the economic consequences of such an accident in terms of downtime of CPSES as a result must be taken into account in any cost/benefit analysis for CPSES.

(CASE Contentions, at 38). In our view, this contention is totally speculative, in that it hypothesizes an unlimited number of unspecified accidents whose parameters are unknown, and seeks to include the unknown costs of those unidentified accidents in this proceeding.[14/] We submit that this

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[14/] CASE itself appears to recognize this deficiency in its contention. Thus, CASE has denied that it assumes these costs to be "the same as those resulting from an accident at a Babcock and Wilcox reactor such as TMI-2", and CASE asserts it "does not claim to know the exact costs and consequences of such accidents" (CASE Position on Contentions, at 41) (emphasis in original).

contention is incapable of being litigated. Accordingly, the Staff submits that CASE's Motion with respect to this contention should be denied.

II. THE ACCEPTED CONTENTIONS SHOULD NOT BE REWORDED

CASE's pending motion requests that the Licensing Board reconsider the wording of Accepted Contentions 5 and 23. The NRC Staff opposes CASE's Motion with respect to this issue and recommends that it be denied.

> Accepted Contention 5
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> The Applicants' failure 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, and the construction practices employed, specifically in regard to concrete work, mortal blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC), and training and organization of QA/QC personnel, 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 §50.57(a) necessary for issuance of an operating license for Comanche Peak.

The Licensing Board arrived at this reformulation of the Intervenors' quality assurance/quality control (QA/QC) contentions in its Order of June 16, 1980, upon the recommendation of the Staff, in an effort to narrow the QA/QC contentions to one which was more amenable to litigation while, at the same time, assuring that each of CASE's concerns (as well as those of the other Intervenors) would be properly addressed. In the view of the NRC Staff, the present reformulation encompasses all of the QA/QC contentions which have been advanced by the Intervenors in this proceeding. Indeed, a reading of

the presently accepted QA/QC contention demonstrates that each of CASE's QA/QC contentions is encompassed therein -- and CASE fails to point out in what manner this reformulation does not reflect its own QA/QC contentions.[15/] Indeed, CASE asserts only that:

> [I]t's hard to tell whether all of our concerns can be contained in the wording. We're concerned (1) whether or not some of our contentions fit in there; and (2) regarding violations which indicate a pattern.

(Motion, at 10).[16/] CASE contends that "the primary intent of the rewording of the contention is to limit discovery" (Id., at 11), and that, in discovery, CASE "should be allowed to pursue additional violations" which have not yet been identified in I&E Inspection Reports or which may be revealed as part of a pattern of QA/QC violations (Id.).

The Staff disagrees with CASE's assertion that the QA/QC contention was reworded with the intent of limiting discovery. Rather, the contention was reworded in line with the Licensing Board's desire to refine the language which the Licensing Board, itself, had previously formulated in its "Order Relative to Standing of Petitioners for Leave to Intervene", dated June 27, 1979 (p.11). In the view of the NRC Staff, to the extent that the reformulated contention fails to encompass any of the matters previously identified

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15/ An examination of the bases provided by CASE in support of its original QA/QC contention (CASE Contention 19) reveals that CASE's contention related entirely to concrete work, expansion joints, welding, craft labor qualifications, working conditions (as they may affect QA/QC), and placement of the reactor vessel for Unit 2. See CASE Contentions, at 50-55; CASE Position on Contentions, at 47. All of these topics are specifically referred to in the presently accepted QA/QC contention.

16/ While CASE asserts that it "can (and will, if the Board desires) provide specific instances of I&E Reports which concern problems not covered by the present wording of this contention" (Motion, at 12), no such identification is provided in CASE's Motion.

by CASE, any such matters should and may be litigated in this proceeding. Further, to the extent that additional QA/QC violations or problems may be revealed during discovery that were not within the Intervenors' prior knowledge, the Intervenors may move to amend their contentions for good cause shown. Accordingly, the Staff believes that there is no reason for the Licensing Board to revise the presently accepted QA/QC contention and the Staff recommends that CASE's Motion with respect to this contention should be denied.

Accepted Contention 23

Neither the Applicants nor the Staff has adequately considered the health effects of low-level radiation on the population surrounding CPSES in as much that the CPSES design does not assure that radioactive emissions will be as low as is reasonably achievable.

In accepting this contention, the Licensing Board consolidated and modified, in part, CASE's Contention 9 and ACORN's Contention 25. CASE now objects to the present formulation of this contention on the grounds that "certain parts of the contention as submitted by CASE might be lost or limited by the revised wording" (Motion, at 13). CASE asserts that the present wording excludes from litigation two issues -- (1) that the Applicants have failed to consider recent "increased knowledge" regarding the health effects of radiation, and (2) that the Applicants "simply have not done the things necessary to adequately consider the health effects of low level radiation on the population surrounding CPSES" (Motion, at 17).

The Staff is of the view that CASE's argument is devoid of merit, and that its new attempt to categorize this contention into three segments (Motion,

at 13-17) is incomprehensible. Further, to the extent that CASE seeks to impose requirements upon the Applicants with respect to any "increased knowledge" concerning health effects, beyond the requirement that Applicants comply with the ALARA standards, the Staff submits that the contention would constitute a challenge to the Commission's ALARA regulations governing the release of radiation and/or radioactive materials, as set forth in 10 CFR §50.34a and Appendix I to 10 CFR Part 50. Accordingly, the Staff submits that CASE's Motion with respect to this contention should be denied.

III. NO REASON EXISTS FOR THE CERTIFICATION OF THESE CONTENTIONS

CASE has requested that each and every one of its contentions, to the extent that they are not reconsidered and admitted by the Licensing Board, be certified "to the Appeal Board or, where requested, to the Commission" (Motion, at 18). Also, CASE has requested that "if the Board's decision on the second aspect of Contention 23 is unfavorable, ... that it be certified to the Commission" (Id.). The NRC Staff opposes CASE's Motion with respect to the requested certification, and recommends that it be denied.

As we indicated in our Answer to ACORN's motion for reconsideration,[17/] a motion for certification must demonstrate (a) that certification is necessary to avoid detriment to the public interest or (b) that failure to certify the issue will result in unusual delay or expense to be incurred by

17/ "NRC Staff's Answer to 'ACORN's Motion for Reconsideration Or in the Alternative Motion for Certification of Contentions Denied in the Board's Order Subsequent to the Prehearing Conference of April 30, 1980 and Motion for Reconsideration of the Wording of Certain Accepted Contentions Along With An Offer of Proof'", dated July 21, 1980, at 18.

a party to the proceeding.[18/] While Commission regulations do not specifically set out the requirements for motions for certification to the Appeal Board, this issue has been discussed in numerous Appeal Board decisions. E.g., Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, reconsid. denied, ALAB-330, 3 NRC 613, rev'd in part sub nom. USERDA (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67 (1976). As a general matter, interlocutory appeals are disfavored and will not be permitted. 10 CFR §2.730(f). Thus, while appeals are permitted from an order which denies all of a petitioner's contentions, an appeal may not be taken where some of the petitioner's contentions have been accepted. 10 CFR §2.714(a) and (b); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC ___ (slip op., July 3, 1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-339, 4 NRC 20 (1976).

The pending motion filed by CASE altogether fails to demonstrate that the issues therein raise a question which, absent certification, would result

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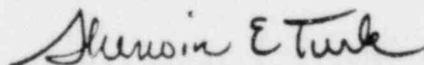
[18/] Pursuant to 10 CFR §2.730(f), only "[w]hen in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission . . . ." Also, while the Appeal Board has the power to direct certification pursuant to 10 CFR §2.718(i), it generally will do so only where the party requesting such directed certification has shown that without certification, (a) the public interest will suffer or (b) unusual delay and expense will be experienced. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975). Accord, Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975).

in detriment to the public interest or in unusual delay and expense to a party to this proceeding. In sum, no reason is presented which would indicate that certification of CASE's contention to the Appeal Board or the Commission is appropriate. All that appears in CASE's motion is an attempt to circumvent Commission regulations by seeking to have the Licensing Board "certify" an interlocutory appeal to the Appeal Board -- an appeal which the Appeal Board has rejected once already. Comanche Peak, supra. In the view of the NRC Staff, CASE's motion for certification is baseless and should be denied.

IV. CONCLUSION

For the foregoing reasons, the NRC Staff respectfully submits that CASE's "Motion for Reconsideration of Certain CASE Contentions Denied or Reworded In the Board's Order Subsequent to the Prehearing Conference of April 30, 1980 Or In the Alternative Motion for Certification of Contentions Denied In the Board's Order" (including CASE's "Supplement" thereto) is totally without merit in all respects. Accordingly, the Staff opposes CASE's Motion and urges that it be denied.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of August, 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 Nos. 50-445
	)	50-446
(Comanche Peak Steam Electric Station,	)	
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO "CASE MOTION FOR RECONSIDERATION OF CERTAIN CASE CONTENTIONS DENIED OR REWORDED IN THE BOARD'S ORDER SUBSEQUENT TO THE PREHEARING CONFERENCE OF APRIL 30, 1980 OR IN THE ALTERNATIVE MOTION FOR CERTIFICATION OF CONTENTIONS DENIED IN THE BOARD'S ORDER" AND TO "SUBSEQUENT TO ITEM 1. (CASE CONTENTION 1)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of August, 1980:

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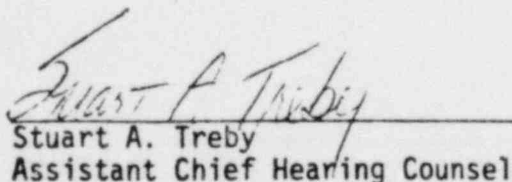

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